

Difficult to Believe

The assessment of
asylum claims in Ireland

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With a foreword by Professor Siobhán Mullally



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Foreword

Demonstrating credibility is one of the most difficult tasks faced by an asylum applicant. These difficulties are particularly acute in the refugee context given that, as the Hon Justice Thomas Cooke has noted, many asylum seekers do not have the opportunity to gather material evidence to support their claims. UNHCR guidelines explicitly recognise this challenge that arises both for asylum applicants and for asylum adjudicators. Recognising the particular context within which asylum applications are made, the benefit of the doubt is due to the applicant. The duty to evaluate and to ascertain all relevant information is a shared one between the applicant and the adjudicator. The asylum adjudication process is to be inquisitorial, not adversarial. In practice, however, as this Report reveals, asylum adjudication remains a highly adversarial process.

The research presented here highlights the challenges that persist within the asylum adjudication process for those seeking protection in Ireland. It fills a significant gap in current legal research and provides a much needed analysis of the day to day practice of asylum law. It is greatly to the credit of the Irish Refugee Council that this body of primary research has been completed and that analysis of credibility assessments by both the Refugee Applications Commissioner and the Appeals Tribunal is now publicly available. Building on its strong track record of highlighting inequities, failings of due process and human rights violations, the Irish Refugee Council has again brought critically important information on the asylum process into the public domain.

As is widely known, the majority of asylum claims fail because of negative credibility assessments. A matter of particular concern in Ireland has been the low recognition rates for asylum applications, significantly lower than the European average. In 2011, only 5% of the asylum applications determined either by the Office of the Refugee Applications Commissioner or the Refugee Appeals Tribunal were successful. The average recognition rate across the EU in 2011 was 11.6%. A concern to assess why these recognition rates vary so greatly motivated the Irish Refugee Council to undertake the empirical research set out here in this Report. The

Report and the analysis of decisions by both the Office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal are an important contribution to understanding why recognition rates for asylum claims are so low in Ireland and the challenges faced by asylum applicants in demonstrating their credibility. Reporting a traumatic experience in an unfamiliar context requires a leap of faith on the part of the asylum applicant. It requires a safe, non-judgmental environment, in which there is a possibility of trust and a realistic potential of protection. This can be difficult to secure in the asylum context, where adjudicators may be preoccupied with factual details concerning country of origin information, travel routes, or internal relocation alternatives.

Before an assessment of the core claim to protection is made, the applicant must overcome initial check-lists concerning routes of travel, documentation of identity and status, and 'fit' with complex legal categories. Given that many asylum claims touch on intimate and traumatic experiences, the obstacles to disclosure, to consistent and coherent narratives, are many. Yet, this Report suggests that these obstacles, although familiar in the asylum context, are often not recognised or acknowledged by adjudicators.

The information presented in this Report is often deeply troubling, suggesting considerable potential for error. In one case, for example, a Refugee Appeals Tribunal member is reported as having dismissed an applicant's account of rape as a 'fabrication' intended to enhance the asylum claim. In dismissing the credibility of the applicant's claim, the Tribunal Member commented that the account of rape had not been included in her questionnaire and was not credible. The Report notes, however, that a review of the applicant's questionnaire and screening interview reveals that these events had been recounted by the applicant and moreover were accurately summarised in the ORAC decision. It is 'difficult to believe' that such an oversight could occur in the asylum process and that an applicant's testimony of a traumatic experience could be so summarily dismissed.

Failures to provide reasons for not accepting or questioning the authenticity of documentation are reported here. Inconsistencies in the treatment of

medico-legal reports and certificates are also reported, with limited opportunities given to applicants to clarify or challenge the conclusions reached. These failures do not comply with the requirements of UNHCR guidelines for good practice in determining asylum claims.

A recurring problem in the asylum process and one that is noted again in this Report, has been the lack of legal advice and assistance received by applicants prior to the completion of an asylum questionnaire. This difficulty frequently complicates the interview process, creating additional and unnecessary hurdles and delays for applicants and adjudicators. This is a gap that should be filled, to the benefit of both the fairness and the efficiency of the asylum process.

As this Report recognises, many of the challenges that are now faced by asylum applicants bubble beneath the surface, less likely to raise the grand conceptual debates that for so long preoccupied asylum adjudicators. Instead, it is the day to day assessments of credibility or availability of protection that function as the primary gatekeepers in asylum adjudication. Assessing credibility requires adjudicators to cross many barriers - cultural, socio-economic, religious, and geographical. The adjudicator is required to position herself or himself in the place of an asylum applicant, with whom very little of life's experiences are shared.

The challenges of assessing credibility in the asylum context cannot be underestimated. For an adjudicator, assessing what is reasonable is particularly difficult when required to place oneself in the position of those of 'different nationalities, educations, trades, experience, creeds and temperaments' (to summarise the late Lord Bingham MR). Yet, as this Report reveals, the decision of whether or not to believe the applicant's testimony will be critical, usually decisive, to recognising the asylum applicant's claim to protection.

The consequences of an error in the asylum adjudication process may threaten the liberty, security and even the life of an asylum applicant. It is to be hoped that this Report will lead to urgent and much needed reforms within the asylum process. A first step, and one that will be critical to sustaining reform, will be greater transparency and public scrutiny of the asylum process at all levels. Such transparency and scrutiny has been

lacking to date, and it is a gap that raises serious questions of accountability in the asylum process. It is also a gap that undermines the quality of decision-making and may significantly increase the potential for error.

Siobhán Mullally, Professor of Law, University College Cork
October 1st 2012

Glossary of Terms

Asylum applicant: A person who is seeking to be recognised as a refugee. If they are granted this recognition, they are declared a refugee.

CEAS: Common European Asylum System, a legislative framework between the 27 member states of the European Union with the purpose of bringing common standards to asylum systems across the EU. This includes the Qualification Directive, the Asylum Procedures Directive and the Dublin II Regulation.

COI: Country of Origin Information, information obtained by ORAC, the RAT or submitted by the asylum applicant, concerning the applicant's country of origin. It can relate to both general matters and specific issues going to the core of the applicant's claim. COI is available from inter-governmental, governmental and non-governmental sources.

Direct Provision: Government accommodation for asylum applicants. Full board with a weekly allowance of €19.10 per adult and €9.60 per child.

First safe country: a concept that has developed separate to the Refugee Convention and sometimes taken to be the country that an asylum applicant should have claimed asylum in as the country they first arrive in after they have left their country of origin.

ORAC: Office of the Refugee Applications Commissioner, responsible for considering asylum applications at first instance and recommending to the Minister for Justice that the person applying is or is not entitled to a declaration that they are a refugee.

Persecution: Persecution may equate to a threat to life or liberty, i.e. subjecting someone to severe human rights violations.

RAT: Refugee Appeals Tribunal, composed of a Chairperson and several Tribunal Members that consider appeals from ORAC either through an oral hearing or through paper submissions, known as an appeal 'on the papers'. The Tribunal Member will either uphold the ORAC's recommendation refusing the application or substitute their recommendation to the Minister that a declaration should be granted.

Refugee: A refugee is 'any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside of the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.' These 'reasons' are known as 'Convention reasons.'

Refugee Status Determination: Identifying who is a refugee.

RIA: Reception and Integration Agency, part of the Department of Justice. Responsible for the oversight of system of 'Direct Provision'.

RLS: Refugee Legal Service, a specialist part of the independent Legal Aid Board. Applicants for asylum can register and be allocated a solicitor who works with a caseworker on their file.

Separated children: Separated children are defined as children under 18 years of age who are outside their country of origin and separated from both parents, or their previous legal/customary primary caregiver.

Subsidiary Protection: A form of protection afforded to applicants that are deemed not to have a well-founded fear of persecution for a Convention reason but face 'serious harm' if returned to their home country. 'Serious harm' includes the death penalty, torture or inhuman and degrading treatment and where there is 'internal armed conflict' in the applicant's country of origin. This is a status under the Qualification Directive, part of the Common European Asylum System (see above).

Well-founded fear: An applicant's fear must be "well-founded" based on an assessment of the situation in their country.

UNHCR: the UN High Commissioner for Refugees, the UN Refugee Agency.

Recommendations

- Training for decision-makers to see the questionnaire as part of a process of gathering information in which they share responsibility to obtain all of the relevant information before making a decision and reaching conclusions.
- Special procedures at all levels for the identification, support and consideration of claims from victims of torture and other trauma.
- Training to provide decision-makers with a better understanding of the difficulties facing applicants in obtaining evidence and the way in which an oral testimony can in fact be the basis of a positive decision without documentary evidence particular to the claim.
- Training on the application of the standard and burden of proof.
- The availability of legal advice and assistance at the earliest stage of the process primarily to assist the applicant to present their claim but also to ensure that the decision-maker is better able to make a fully informed decision on the key issues.
- Facilities for assessing the validity of documents presented in support of a claim.
- The consideration of country information from a wider variety of sources: inter-governmental, governmental and non-governmental.
- A procedure for requiring decision-makers to put any evidence considered against the applicant to them for their comment.
- Open procedures for the appointment of Tribunal Members.
- New procedures for the allocation of cases to members of the Tribunal and an end to the discretion of the Chair for this responsibility.
- Public hearings as a norm before the Tribunal unless the applicant is a child or other special considerations apply.
- The publication of all Tribunal decisions in redacted form for access outside of those closely involved in the asylum appeal process.
- The requirement for the Chair of the Tribunal to appear before the Justice Committee to answer questions about the RAT's annual report.
- A review of section 11B of the Refugee Act 1996 as amended to bring it into line with the Refugee Convention.

1. Introduction

1.1 Refugee status in international and Irish domestic law

The definition of a refugee is found in Article 1A of the UN Convention on the Status of Refugees 1951¹ which reads:

"...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

The 'Refugee Convention', as it is more commonly known, also contains a commitment not to return a refugee to the borders of a country where they face persecution. The commitment is contained in Article 33, which reads:

"No Contracting State shall expel or return ("refoule") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

Refugee Status is a form of international protection which, as the definition indicates, is given when it is accepted that a person with a well-founded fear of persecution for a 'Convention reason'² cannot avail of the protection of the authorities in their own country. In assessing whether a person is a refugee or not, the decision maker must look to the future and decide if there is a risk of persecution on return to their country. But the fact that they have been persecuted in the past is clearly a relevant factor.

As a Member State of the European Union, Ireland adopted an order in October 2006 to give effect to the 'Qualification Directive'³ which is part of the Common European Asylum System. Regulation 5 of the European Commission (Eligibility for Protection) Regulations 2006⁴, headed 'Assessment of facts and circumstances', gives

guidance to decision makers on, for example, assessing past persecution and the circumstances in which aspects of statements which are unsupported by documentary evidence should be relied upon.

Ireland became a signatory to the Refugee Convention in 1956 and incorporated the definition of a refugee from Article 1A into Irish law. It is contained in section 2 of the Refugee Act 1996 which came into force in November 2000 following further amendments. The Act established two independent bodies, the Office of the Refugee Applications Commissioner (ORAC) and the Refugee Appeals Tribunal (RAT). It is the exercise of the powers of those two bodies which is the focus of this report.

1.2 The current situation in Ireland

In 2011, 135 people were accepted as refugees in Ireland after going through the asylum process. This was 5% of the applications that were decided that year either by the Office of the Refugee Applications Commissioner or the Refugee Appeals Tribunal. This was less than half the average in the European Union.⁵ By contrast, the number accepted in the UK for the same year was just over 1 in 5 of the applications decided that year or 22.7%, more than four times the average in Ireland.

The low acceptance rate in Ireland has led some to question the way in which the Irish system operates and to the assertion that there is a "culture of disbelief" amongst decision makers.

The Irish Refugee Council therefore wanted to carry out a systematic review of the key documents which form the basis of what is known as the 'Refugee Status Determination' procedure in Ireland in order to get a better understanding of why the majority of applications for refugee status are refused. In addition, to examine whether that process itself was working in a way which was more likely to lead to a refusal than to an acceptance of the application. One of the main issues that the research was intended to examine was the way in which 'credibility' was assessed. This is on the understanding that the majority of asylum claims in Ireland are refused on the grounds that the application is lacking in credibility.

One of the significant features of the system in Ireland is the delay in the process, particularly after the initial decision from the Office of the Refugee Applications Commissioner. Out of the files included in this study, the average delay between an asylum application and a decision from the Refugee Appeals Tribunal was one year and seven months.

1.3 The approach adopted in this study

Between June and September 2012, the Irish Refugee Council examined the files of 86 individuals who had claimed asylum in Ireland. Nearly all of the files were held by four firms of solicitors which specialise in asylum work and who obtained clients' consent for researchers to examine the files on the understanding that their individual identity would not be disclosed.⁶ All of them had been refused by the Office of the Refugee Applications Commissioner after full consideration of their asylum claim.⁷ In most cases, the claims had then proceeded on appeal to the Refugee Appeals Tribunal.⁸

After an initial assessment of 20 files using a pro forma questionnaire, research assistants, primarily post-graduates with law qualifications, were recruited and trained to use the questionnaire⁹ to review an asylum file. The researchers looked at five key documents (where available) on each file: the screening interview record (section 8 interview or ASYI), the self-completion questionnaire (or its translation), the main asylum interview (section 11 investigation), the ORAC decision (section 13 recommendation) and the decision of the Refugee Appeals Tribunal. It was considered essential that the whole claim, from beginning to end, should be examined as it was then possible to assess if, and therefore how, one element had a bearing upon the other.

The criteria for inclusion in the study were that the file must have been active at some stage in either 2011 or 2012. In addition, that the file must, wherever possible, contain a complete set of key documents so that the whole process before ORAC and the RAT could be fully examined. 'Active' meant that there must have been some work conducted on the file during that period but that did not necessarily mean that the asylum claim was still being pursued before ORAC or the RAT. In some cases, people were challenging a decision of the Tribunal in the High Court, others were waiting for a decision

on an application for subsidiary protection¹⁰ or leave to remain whilst others were challenging a deportation decision, applying for family reunification or citizenship. The asylum claim itself therefore may have been completed several years previously.

In all cases, the anonymity of the person who had claimed asylum was preserved. No names were recorded and no documents were copied. The IRC's questionnaire remains the only record of the files which form part of this research. It contains the official reference for each individual case. Some personal details were taken such as nationality or country of origin, age at the time of application for asylum, language and gender. The information taken from the questionnaires and referred to or quoted in this report has been examined by the solicitors responsible for the cases to ensure that anonymity has been maintained.

Brief information about the profile of applicants is set out below and a complete breakdown of the nationality of those whose cases were considered in this report is attached.¹¹ The information recorded on the questionnaire also included the date of application, the number and date of interviews through to the final decision of the Refugee Appeals Tribunal if known. The information collected in this way sheds light on the delays and therefore the length of the asylum process in Ireland¹² which can be considered to be crucial factors in the proper assessment of an asylum claim.

1.4 Profile of applicants included in the research

A total of 31 nationalities were represented among the 86 files considered. 54% of the applications were from just six countries: the Democratic Republic of Congo (14% of the cases considered), Somalia (13%), Sudan (8%), Iran (7%), Nigeria (6%) and Pakistan (6%).

Just under 60% of applicants were male and therefore 40% were applications from women or girls. The biggest age group represented was that between 21 and 30¹³ (just under 40%) with the next largest age group being 31-40 (just under 30%). Just under 13% of applications were from children, more than half of whom were separated children. Three applications were from children born in Ireland.¹⁴

27 different languages were spoken in total by the group, including English, some applicants speaking more than one language.

A small number of the applications considered did not appear, on the face of the documents, to give rise to any obligation under the UN Convention on the Status of Refugees. That did not mean that there were no serious issues to consider but that they were more relevant to other international conventions including the European Convention of Human Rights (for example, the right to family life).

1.5 The role of the credibility assessment in an asylum claim

The Honourable Mr. Justice Cooke, in reviewing the case law on matters to be considered by a decision maker, stated:

"In most forms of adversarial dispute the case of the credibility or oral testimony is one of the most difficult challenges faced by the decision maker. The difficulty is particularly acute in asylum cases because, almost by definition, a genuine refugee will be someone who has fled home in circumstances of stress, urgency and even terror and will have arrived in a place which is wholly strange to them, whose language they do not speak and whose culture may be incomprehensible. Inevitably many will have fled without belongings or documentation from areas in a state of anarchy or from the regimes responsible for their persecution so that obtaining any administrative evidence of their status and even identity may be impractical, if not impossible."¹⁵

It is tempting for decision makers to confuse a finding on the credibility of statements made in support of an application with the credibility of the person themselves. It is of course possible to find that some statements of a person claiming asylum are untrue or to have doubt over their veracity whilst still concluding that the central elements of the claim are true and capable of giving rise to a fear of persecution.

The UN Refugee Agency, the UN High Commissioner for Refugees (UNHCR), in its Handbook intended to assist states determine claims for refugee status¹⁶ states:

"Untrue statements by themselves are not a reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case."¹⁷

The decision maker is faced with the task of deciding if the account presented to them is intrinsically true but also if it is capable of being consistent with what is known about the applicant's country.

One of the temptations in asylum claims is for the decision maker to conclude that the account presented to them is simply not plausible according to their knowledge or understanding of events which occur in countries which have, for example, very different cultures, political systems and social structure. The issue was considered by the Court of Appeal of England and Wales in *Y v. Secretary of State*¹⁸ in which Lord Justice Keene made the following observation:

*"There seems to me to be very little dispute between the parties as to the legal principles applicable to the approach which an adjudicator, now known as an immigration judge, should adopt towards issues of credibility. The fundamental one is that he should be cautious before finding an account to be inherently incredible, because there is a considerable risk that he will be over influenced by his own views on what is or is not plausible, and those views will have inevitably been influenced by his own background in this country and by the customs and ways of our own society. It is therefore important that he should seek to view an appellant's account of events, as Mr Singh rightly argues, in the context of conditions in the country from which the appellant comes. The dangers were well described in an article by Sir Thomas Bingham, as he then was, in 1985 in a passage quoted by the IAT in *Kasolo v SSHD 13190*, the passage being taken from an article in *Current Legal Problems*. Sir Thomas Bingham said this:*

"An English judge may have, or think that he has, a shrewd idea of how a Lloyds Broker or a Bristol wholesaler, or a Norfolk farmer, might react in some situation which is canvassed in the course of a case but he may, and I think should, feel very much more uncertain about the reactions of a Nigerian merchant, or an Indian ships' engineer, or a Yugoslav banker. Or even, to take a more homely example, a Sikh shopkeeper trading in Bradford. No judge worth his

salt could possibly assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he might think he would have done or even - which may be quite different - in accordance with his concept of what a reasonable man would have done."

Since 2003, both ORAC and the RAT have been required to take into account particular factors as weighing against the credibility of the person claiming asylum.¹⁹ Section 11B requires the decision maker, whether ORAC or the RAT, to have regard to a list of matters including the possession of identity documents, failure to apply in the 'first safe country' or on arrival in Ireland and an account of their journey to Ireland.²⁰

A similar process exists in the UK whereby the impact of certain behaviour should be considered as a negative factor in the assessment of credibility.²¹ The Asylum and Immigration Tribunal considered the way in which facts and credibility should be assessed and referred to the role that specific issues, as laid out in legislation, should play in that assessment:

"In our judgment, although section 8 of the 2004 Act has the undeniably novel feature of requiring the deciding authority to treat certain aspects of the evidence in a particular way, it is not intended to, and does not, otherwise affect the general process of deriving facts from evidence. It is the task of the fact-finder, whether official or judge, to look at all the evidence in the round, to try and grasp it as a whole and to see how it fits together and whether it is sufficient to discharge the burden of proof. Some aspects of the evidence may themselves contain the seeds of doubt. Some aspects of the evidence may cause doubt to be cast on other parts of the evidence... Some parts of the evidence may shine with the light of credibility. The fact-finder must consider all these points together; and ... although some matters may go against and some matters count in favour of credibility, it is for the fact-finder to decide which are the important, and which are the less important features of the evidence, and to reach his view as a whole on the evidence as a whole."²²

1.6 The burden and standard of proof in refugee claims

It is an accepted principle that the burden of establishing a claim to refugee status rests with the refugee applicant themselves. In addition, that they should do whatever they can to assist in establishing their claim not only by co-operating with the decision maker but also by furnishing as much information as possible to support their claim.

But it is also recognised that assistance should be given, including by the decision maker themselves, in helping to establish the facts of the case so that an informed decision can be taken. According to UNHCR, this is a process of shared responsibility between the applicant and the person deciding their claim.²³

The UNHCR Guidelines on Burden and Standard of Proof in Refugee Claims note that in "examining refugee claims, the particular situation of asylum-seekers should be kept in mind."²⁴ In addition, that the determination of refugee status is not a matter of certainty, but rather of a sufficient degree of likelihood.²⁵ The guidelines not only set out a standard of proof, but without shifting the burden of proof, they suggest a re-distribution such that the decision maker has an obligation to be aware of the objective situation in the country of origin.

In the 'likelihood' test suggested by UNHCR, the particular circumstances of refugees must be taken into account in assessing likelihood. Traumatic experiences may inhibit the applicant from speaking freely or may cause a degree of memory loss or confusion. Due to the circumstances of the applicant's flight from the country of origin, it may not be possible to provide documentary evidence to support oral statements.

The UK courts have tended towards a reasonable likelihood test. In *R v. Secretary of State for the Home Department ex p. Sivakumaran*,²⁶ the House of Lords called for a test based on a "reasonable degree of likelihood" given the gravity of the consequences of an erroneous decision. The US Supreme Court in *INS v Cardoza-Fonseca*²⁷ held that satisfying the requirement for a well-founded fear of persecution "does not require an alien to show that it is more likely than not that he will be persecuted." The Supreme Court referred to "reasonable possibility"²⁸

In light of the applicant's disadvantages in relation to resources and environment, the decision maker shares the duty of adducing and evaluating relevant evidence. This duty is discharged where the decision maker is well versed in up-to-date information on the objective situation in the country of origin and other relevant matters, and adequately verifies facts alleged. Further, it is incumbent on the decision maker to guide the applicant as to what information is required.²⁹

1.7 Outline of the report

Section 2 of this report provides a detailed introduction to the Irish asylum system, its practices and procedures, from the point at which a person applies for asylum until their claim has been considered on appeal.

Section 3 looks at the guidance that has been given by judges, academics and other professionals when approaching an examination of oral testimonies and the lessons learnt from other fields about memory, recall and consistency in oral accounts.

Sections 4 and 5 look at the examination of claims by ORAC and at the review of claims by the RAT, taking the information obtained through the examination of files in this study as the starting point. It includes information from the questionnaires which asylum applicants submit, the main asylum interview, the decision of ORAC and the Tribunal's decision.

Sections 6 looks at the approach to documentary evidence by ORAC and the RAT in the form of documents submitted by the applicant which are particular to their claim, medico-legal reports, linguistic analysis and country information.

Section 7 reviews the findings of the study and identifies the key elements which require change both at an administrative and legislative level.

¹As amended by the 1967 Protocol which withdrew the geographical and time limitation of the original Convention.

²The persecution must be on the grounds of race (which includes ethnicity), nationality, religion (which includes atheism or refusal to abide by religious traditions), political opinion (which is not the same as but may be related to political activity) and membership of a particular social group (for example, a trade unionist).

³Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons otherwise in need of international protection and the content of the protection granted.

⁴S.I. No. 518 of 2006.

⁵The average rate was 11.6% in the EU. Figures taken from Eurostat, the statistics database of the European Union.

⁶The individual files are only referred to within the report with a reference from Q1 to Q86. A few files were those of individuals assisted by the Information and Referral Service of the IRC and again they were examined with consent.

⁷The 'Dublin II Regulation' (Council Regulation (EC) No 343/2003), part of the Common European Asylum System, allows a country to return someone claiming asylum to another EU country without considering the substance of their asylum claim. 'Dublin II' cases were not included in this research although some of those whose cases were considered had been in other European countries and this was a factor taken into account when the asylum claim was determined.

⁸In almost all cases, this was after a hearing but a small minority were decided 'on the papers' and therefore without a hearing.

⁹The questionnaire used can be found at Appendix 2.

¹⁰See the Glossary for a brief explanation of key terms or acronyms.

¹¹Appendix 1.

¹²which can be considered to be crucial factors in the proper assessment of an asylum claim.

¹³This report only deals with the asylum stage of a claim for international protection. There is a separate procedure in Ireland to apply for subsidiary protection. That process does not commence until the asylum claim has gone through the stages outlined in this report, including the High Court in some cases.

¹⁴At the date of application.

¹⁵IR v The Minister of Justice Equality and Law Reform and the Refugee Appeals Tribunal [2009] IEHC 353 (hereafter 'IR v MJELR and RAT'), at p 353. The guiding principles of the law set out by Mr. Justice Cooke in this judgment are quoted in section 3 of this report.

¹⁶UN High Commissioner for Refugees (hereafter 'UNHCR'), (December, 2011), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Reissued Geneva: UNHCR. The handbook is not binding but it is considered to be persuasive.

¹⁷Ibid, para 199.

¹⁸[2006] EWCA Civ. 1223.

¹⁹Section 11B of the Refugee Act 1996 as amended by the Immigration Act 2003.

²⁰The Information Leaflets given to applicants contains a description of some of the issues that will be taken into account when their credibility is assessed.

²¹Asylum and Immigration (Treatment of Claimants etc.) Act 2004, s 8.

²²Deputy President Ockleton, SM (Section 8: Judge's Process) Iran [2005] UKAIT 00116.

²³UNHCR Handbook para 196.

²⁴UNHCR, (December, 1998), *Note on Burden and Standard of Proof in Refugee Claims*, Geneva: UNHCR, para 2.

²⁵Ibid.

²⁶[1998] AC 958.

²⁷[1987] 480 US 421.

²⁸See also INS v Stevic (1984) 467 US 407.

²⁹UNHCR Guidelines

2. The Asylum Process in Ireland

2.1 The appointment of independent bodies

The Refugee Act 1996 as amended established ORAC and the RAT. They are both independent bodies which have a responsibility to make recommendations to the Minister for Justice, Equality and Defence as to whether or not someone applying for asylum should be issued with a declaration that they are a refugee. The process is that an application is first considered by ORAC and, if rejected, it normally proceeds on appeal to the RAT. The purpose of this section is to explain in more detail the system as it has been set up and as it operates in Ireland, not least because it is useful to know where the documents considered in this research fit in to the process. It also outlines the factors which must, as a matter of law, be taken into account by both ORAC and the RAT in determining applications for asylum.

2.2 Applications for subsidiary protection

It is important to note that applications for asylum are distinct in Ireland from what are known as applications for subsidiary protection which cannot be made until the asylum process has been completely exhausted and the Minister has issued a letter notifying the person of their liability to deportation.³⁰ There is currently no system for a person who has a fear of serious harm but who does not meet the definition of a refugee to make an application for subsidiary protection immediately instead of applying for asylum. They have to go through the asylum process first, with any negative implications that may have if their application is rejected, before they can make what might be a more appropriate application.³¹

Ireland is part of the Common European Asylum System (CEAS), a legislative framework amongst the 27 European Union (EU) countries which seeks to bring common standards to asylum systems across the EU. One of the directives in CEAS is the Qualification Directive which sets out the definition of a refugee and related matters. It also provides for those who do not

qualify as refugees to be considered for subsidiary protection on the grounds that they face "serious harm" if returned to their country. The definition of "serious harm" includes the death penalty, torture or inhuman and degrading treatment and where the person is from a country where there is "internal armed conflict". Although there is a regulation in Ireland transposing the directive into Irish law, the legislation has never been changed to enable either ORAC or the RAT to consider whether a person qualifies for subsidiary protection even if they do not qualify for refugee status.

Another element of CEAS is the Asylum Procedures Directive³² which includes provisions for the examination of applications, interviews and legal assistance.³³ The directive was criticised³⁴ for not providing proper protection or assistance to applicants through the asylum process and it has been recast and, for example the recast directive includes greater legal assistance at an earlier stage in the process. However, Ireland has chosen to opt-out of the recast directive.

In addition, although the European Convention on Human Rights Act was passed in 2003, allowing courts to take 'due regard' of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights, neither ORAC nor the RAT have any power to make a finding under the Convention.

2.3 The application to ORAC

Regardless of where the application for asylum is made – at the port or after entry to Ireland, whilst detained, after detection for illegal entry in the country – the responsibility for consideration of asylum claims rests, in the first instance, with ORAC. Applications are made in person to the ORAC office in Dublin unless the person is detained in which case the Prison Service will notify ORAC that the person wishes to claim asylum.

The right to apply for asylum is contained in section 8 of the Refugee Act 1996 as amended. Although in theory it is an option to apply, the practice in Ireland is that if one member of a family applies, all adult members must make their own applications. Children have the right to apply independently but, if they are accompanied by a parent, they can be considered as a dependant on their parent's claim. Children born in Ireland after an asylum

claim has been made by their mother are required to apply for asylum or risk losing financial support and accommodation for the child.³⁵

2.3.1 The screening process

The first interview is a section 8 interview and form ASY1 is completed. The interview takes place in a room where other people are waiting and being interviewed with the officer behind a screen. If an interpreter is needed and available, one will be used. This is when they formally confirm their decision to seek a declaration that they are a refugee.

The screening process includes fingerprinting and an interview to establish identity, details of the journey taken to Ireland (including countries that they passed through and may have claimed asylum in), any assistance given with their journey, the method of entry (including legally or otherwise) and brief details about why they have claimed asylum. It is also used to identify what language(s) the person speaks or prefers to be interviewed in. The interview normally takes place on the day that the person attends ORAC to apply for asylum but there are occasions where that is not possible. If the person is detained, this interview may have to take place in the prison.

At the end of the interview, the person will be given detailed information about the asylum process³⁶ and a questionnaire to complete and submit within a specified time limit. This is usually ten working days but can be shorter.³⁷

2.3.2 Evidence submitted to or obtained by ORAC

The information taken at the screening interview enables ORAC to ascertain if the person applying for asylum has, for example, submitted an application for asylum in another EU country, been present for any other reason in another EU country or even applied at any stage for a visa for another country whether or not they ever travelled there. This is primarily because fingerprints are taken at this early stage.³⁸ Any evidence obtained may be used to challenge a person's account of when they left their country or where they have lived before arriving in Ireland and could lead to a decision that the person

will be sent to another EU country for their asylum claim to be considered.³⁹ Even if it does not lead to that outcome, it may be evidence that is taken into account in reaching a decision on their application.

Evidence submitted by a person applying for asylum at this stage is often very limited as they are unlikely to have brought such evidence with them, it may not be available in any event, it may be in a language other than English or there are practical limitations on their ability to get documents sent to them.⁴⁰ If a person is in need of specialist support, such as from an organisation which deals with victims of torture, such evidence is unlikely to be available until much later after the case has become clearer to those working to assist the applicant, including the assistance that a medico-legal report may provide to their case.

2.3.3 Accommodation and support

At the screening interview, the person or family will also be informed that, if they cannot provide for themselves, they can register with the Reception and Integration Agency (RIA), part of the Department of Justice. If they register with RIA, they will be accommodated in a reception centre in Dublin before being dispersed to another centre elsewhere in the country.⁴¹ In addition to this full board accommodation, they are given an allowance of €19.10 per adult per week and €9.60 per week for each child.⁴²

2.3.4 Legal Representation

A person applying for asylum will also be told that they can register with the Refugee Legal Service (RLS), a specialist part of the Legal Aid Board, an independent body. If they register, they will be allocated a solicitor who works with a caseworker on their file. Due to financial restrictions on the service, the RLS normally limits its legal advice and assistance to the appeals stage, that is, after a person has been refused by ORAC.⁴³ But the person will be seen by a caseworker during the ORAC stage who will provide legal information which complements the information that they are given by ORAC in the information leaflet.

2.3.5 The questionnaire

The questionnaire is available in 24 languages and therefore if the person reads and writes in one of those languages they will be able to both read and complete it in a language familiar to them. It is given to a person claiming asylum after they have had their screening interview.

The notes which accompany the questionnaire state:⁴⁴

"The questionnaire seeks relevant information from you as an applicant for a declaration as a refugee in Ireland. This information will form the basis of the investigation at your interview."

With reference to documentation, the notes stress the importance of submission of documents at the earliest opportunity:

"If you wish to lodge documentation in support of your application, it should be obtained and submitted immediately. If you intend to seek documentation from your country or origin, you should do so immediately. Any medical evidence in support of your claim should be submitted without delay."⁴⁵

Applicants are also reminded that:

"Providing false or misleading information at ANY stage may affect your credibility and disadvantage your claim".

Part 1 of the questionnaire (questions 1 – 19) requests 'Biographical information' including personal information, education, work history and family details.

Part 2 (one question) is about 'Documentation' and reminds the applicant to submit any documentation immediately and adds:

"If you have no documents, please explain why not"

Part 3 (questions 21 – 30) is about the 'Basis of your application for refugee status'. In the notes which precede the section, they advise the applicant:

"You should tell us if you think any of the events you refer to occurred because of your race, religion, nationality, membership of a particular social group, political opinion or for any other reasons."

"You should tell us if you have ever been imprisoned, interrogated, tortured or mistreated in your country of origin and give full details."

"It is important that you provide FULL answers to these questions. BE COMPLETELY TRUTHFUL IN THE INFORMATION YOU PROVIDE. Providing false and misleading information at ANY stage may affect your credibility and disadvantage your claim."

After the initial question about why the person left their country or origin, subsequent questions ask the applicant to specify the grounds on which they have a fear of persecution,⁴⁶ membership of any political, religious or other organisation, participation in military organisations or service, fear of the authorities, steps taken to seek the protection of the authorities or move to another part of the country, arrest, imprisonment and what may have happened to relatives. It finally asks for details of what the person fears if they return to their country.

Part 4 (questions 31a – 44) is about 'Travel details', including any previous trip or residence abroad from their country for any reason, applications for visas for any country, documents used to enter Ireland, assistance with the journey and any previous applications for asylum.

Finally, Part 5 (questions 45 – 48) asks for information about completion of the questionnaire and any assistance given.

As outlined above, the questionnaire must be submitted within 10 working days at the most. In addition, it is usually completed by the person without any assistance and, in particular, without any legal advice even if they are registered with the RLS. If the questionnaire is not in English, ORAC submit it for translation.

After submission of the questionnaire, the applicant is notified that they are required to attend an interview at the ORAC office in Dublin as part of the investigation of their application.

2.3.6 The main asylum interview

The Information Leaflet which applicants are given on application provides the following information about the interview:

"The purpose of your interview is to establish the full details of your claim for a declaration as a refugee."

A legal representative can attend the interview to observe but this rarely happens.⁴⁷ For most people this is the main opportunity to explain directly to someone why they have claimed asylum and cannot return home. ORAC provides an interpreter in the language preferred by the person to be interviewed where there is an interpreter available.⁴⁸

The officer conducting the interview will make a record of the information given during the interview and that information is read back to the person being interviewed before the interview is concluded. There is no system for independent recording of the interviews, even when a legal representative is not present.

In some circumstances, more than one interview is required. Second or subsequent interviews tend to focus in on particular aspects of a claim, sometimes following research carried out by the interviewing officer. The official record of the interview remains the possession of ORAC and a copy is not given to the person interviewed or their legal representative (if one is on record) unless and until the person is refused by ORAC and appeals against that decision.

The ORAC Information Leaflet continues:

*"You should explain **clearly and precisely** why you are seeking a declaration as a refugee and provide all the information and details relevant to your particular circumstances."*

In practice, those being interviewed are heavily dependent upon the person conducting the interview who will decide not only what issues to focus upon but also what to exclude and the tone of the interview. In doing so, the interviewer will have regard to factors that they are required to take into account as a matter of Irish law.

The Information Leaflet sets out these factors in the following way:

"In assessing your credibility in connection with your application for refugee status, the Commissioner or the Refugee Appeals Tribunal shall consider the following:

- Whether you have identity documents or give a reasonable explanation for not having them,
- Whether you give a reasonable explanation for any claim that Ireland is the first safe country in which you arrived after leaving your own country,
- Whether you have provided a full and true explanation of how you travelled to and arrived in Ireland,
- If you did not apply immediately on arriving at a point of entry into Ireland, whether you give reasonable explanation for that,
- If you have forged, destroyed or disposed of identity or other documents, whether you give reasonable explanation for that,
- Whether you have given manifestly false evidence or have made false statements,
- Whether, without reasonable cause, you reapply having previously withdrawn,
- Whether you have applied for asylum following commencement of the deportation process,
- Whether you have complied with the duty to co-operate in the investigation of your case, to provide relevant information at the earliest possible opportunity, to not leave the state without the consent of the Minister, to keep the Commissioner informed of your address or to comply with any requirement to live at a particular place or to report regularly to a named person,
- Whether on appeal you bring forward new information which could have been but was not given to the Commissioner."

Most people claiming asylum either do not speak English or do not have sufficient knowledge of the language to be interviewed in English and so require an interpreter. The Information Leaflet states:

"If you require an interpreter, every reasonable effort will be made to provide one."

The interview therefore is a crucial part of the examination process and immediately precedes the decision by ORAC as to whether or not a recommendation will be made to the Minister that a person should or should not receive a declaration that they are a refugee. It should be the opportunity for them to elaborate upon or explain the information that they have given thus far and answer the questions put to them by the interviewing officer responsible for the decision on their claim. It is also the occasion when their statements are or should be tested and when they and the interviewing officer work to ensure that all the relevant information is elicited in order for an informed decision to be taken on their claim.

In most cases, the applicant attends the interview alone, without receiving any legal advice and without a legal representative being present.⁴⁹

The interviewing officer will have access to the notes from the screening interview (the ASYI), the questionnaire (or its translation if relevant), and documents submitted by the applicant or obtained by ORAC. Those documents may include travel documents, visa applications, information from other EU countries and/or information about the applicant's country.

2.4 The ORAC decision

Following the interview and within a relatively short period, the person will receive ORAC's decision which will inform them either that ORAC is recommending that they should be issued with a declaration that they are a refugee or that their recommendation is against such a declaration being issued. A negative decision normally refers back to the documents that the decision maker has considered including statements made by the person in the questionnaire or at interviews, and will set out why ORAC does not accept that the person is a refugee. This is called a section 13 recommendation. It attracts a right of appeal which, at its height, is a full oral hearing before the Tribunal. The deadline for submission of the appeal depends upon the nationality of the applicant or the nature of the decision. If it is an unrestricted appeal, the deadline will be 15 working days to submit the appeal to the Tribunal. There are no limits on the period, after submission of the appeal, before the hearing must take place before the Tribunal.

2.5 The appeal to the Refugee Appeals Tribunal

2.5.1 The format of the Tribunal

The RAT or Tribunal is comprised of a Chairperson and part-time Tribunal Members appointed by the Minister for Justice. The Chairperson is appointed through an open competition per the Civil Service Commissioners Act 1956, for a term of five years that may be renewable for a second or subsequent term. Tribunal Members are practising barristers or solicitors with not less than 5 years' experience before his or her appointment.⁵⁰ There is no open application procedure. Tribunal Members are paid per case:⁵¹ €575 for an oral hearing, €300 for an appeal on the papers,⁵² €165 for cases deemed withdrawn.⁵³

2.5.2 The role and responsibilities of the Chairperson

Cases are allocated to individual Tribunal Members at the discretion of the Chairperson. This is not simply individual cases but also classes of cases such as appeals from separated children. The Chairperson can also re-assign cases. There are no guidelines for the allocation or re-assignment of cases. The Chairperson has power to issue guidance notes or guidelines on the practical application and operation of the provisions of the Refugee Act 1996 and on development of the law relating to refugees.⁵⁴ There is no obligation to produce any such guidelines and any guidelines issued are not published. The Chairperson also has discretion to decide not to publish a decision of the Tribunal which in his or her opinion is not of legal importance although access to the Tribunal's Decisions' Archive is available to legal representatives who are registered users of the Archive but only in the context of a pending appeal. The Chairperson is required to submit to the Minister an annual report on the activities of the RAT not later than three months after the end of the year.

2.5.3 The appeal hearing

Beyond the requirement for ORAC to provide a copy of the documents which inform their decision (including the interview records), there are no guidelines for

the submission of other documents by either side. Documents can be submitted after the hearing or the Tribunal Member may conduct their own research after the hearing has concluded but all parties must be given an opportunity to comment upon any such submissions or evidence.

The appeal takes place in private. There is no opportunity for anyone unconnected to the appeal to attend, not even at the request of the applicant themselves. Any witness called by the applicant is only allowed to be present for the duration of their evidence.

The applicant is usually represented, either directly by a solicitor with the RLS, a solicitor or barrister instructed by the RLS (from their panel of private practitioners) or a private solicitor instructed by the person themselves. With the exception of the consultation with the solicitor or barrister before the appeal is submitted, the opportunity for meeting the person who will represent them at the appeal is on the day of the hearing itself. The Refugee Applications Commissioner is also represented by a Presenting Officer.

The Tribunal Member will make their own record of the hearing, some of which will be summarised in their written determination. They may also engage in the proceedings by asking questions or putting matters to the applicant directly or requesting that they be put through their legal representative.

The Tribunal will allocate an interpreter to the hearing in the language and dialect of the applicant if available.

On occasions, it is necessary for there to be more than one hearing in a case but these separate hearings do not have to take place within a specified period.⁵⁵

2.5.4 The Tribunal's determinations

The Tribunal Member has responsibility to determine whether he or she will approve ORAC's recommendation to the Minister that refugee status should not be granted or overturn that decision and issue their own positive recommendation. The decision will be sent by the RAT administration to the applicant and their legal representative. There is no statutory obligation to issue a determination within a specified period after the hearing has taken place.

2.5.5 Challenging a negative decision of the Tribunal

In the event that the appeal is dismissed by the Tribunal Member, the only way to challenge that decision is by way of an application for Judicial Review in the High Court. Due to severe restrictions on the RLS,⁵⁶ the RLS requires applicants to attempt to obtain the services of a private solicitor and only if they are unable to do so, will they then consider the merits of the case and make an application for funding if there is considered to be merit.

An application for Judicial Review must be submitted within 14 days of the Tribunal's decision being issued. The applicant's affidavit, a key document in the application, must have been read to them in their own language by an interpreter in order to show that they confirm the contents and evidence of that must be submitted with the affidavit.

In Judicial Review applications in asylum claims, solicitors representing the state must be put on notice and any application, even at the 'leave' or 'permission' stage, must be a hearing with both sides represented.⁵⁷

⁵⁰ There has been draft legislation known as the Immigration, Residence and Protection Bill, which has been before the Oireachtas in different formats for more than ten years. The Bill contains the framework for a 'single protection procedure' whereby asylum and subsidiary protection claims will be considered together at the outset of the procedure. At the time this report is being prepared, it is expected that a revised version of the Bill may be brought back before the Oireachtas in the Autumn of 2012.

⁵¹ For further information, see B. Barrington BL (2009), *Single Protection Procedure – A Chance for Change*, Irish Refugee Council.

⁵² Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status.

⁵³ Ireland was taken to the Court of Justice of the European Union for failing to implement the directive into Irish law within the time required. In response, two statutory instruments were passed in February 2011 (SI Nos 50 and 51 of 2011).

⁵⁴ For example, see the position of the European Council on Refugees and Exiles (ECRE) at <http://www.ecre.org/topics/areas-of-work/protection-in-europe/37-asylum-procedures.html>. [Accessed 28 September 2012].

⁵⁵ Asylum seekers are accommodated in a system which has become known as Direct Provision where they receive full board and lodging and an allowance of €9.60 per week for a child. In addition, a mother of a baby would receive additional items such as nappies.

⁵⁶ This is available in 24 different languages.

⁵⁷ Section 12 of the Refugee Act 1996 gives the Minister the power to prioritise applications e.g. on the grounds of nationality or because, on the face of it, the application is "manifestly unfounded". Prioritisation means that an application and any subsequent appeal is subject to shorter time constraints and the appeal will be decided without a hearing.

⁵⁸ This enables enquiries to be made about whether the person has applied for asylum elsewhere in the EU through Eurodac, a database of fingerprints for asylum seekers or those found living illegally in the EU.

³⁹ This is under the Dublin II Regulation, part of CEAS, which determines which EU member state is responsible for determining a claim for refugee status.

⁴⁰ SPIRASI is an NGO based in Dublin which works with asylum seekers, refugees and other migrants and has a special concern for survivors of torture.

⁴¹ Transfer does not usually take place until after the person has had their main asylum interview.

⁴² There have been various reports about the system of accommodation and support in Ireland, known as Direct Provision, including 'One size doesn't fit all' (FLAC, 2010) and 'State sanctioned child poverty and exclusion' (IRC, 2012).

⁴³ There are exceptions, for example, separated children.

⁴⁴ Any emphasis in quotes from the Information Leaflet is in the original

⁴⁵ Section 6 of this report deals with the way in which documentary evidence is used by both ORAC and the RAT.

⁴⁶ This is known as the 'Convention reason' or 'Convention nexus': a person can have a well-founded fear of persecution but unless it is on the grounds of race, religion, nationality, political opinion or membership of a particular social group, they will not be a refugee within the meaning of the Refugee Convention.

⁴⁷ In November 2011, the IRC opened an independent law centre with four staff, two of who are solicitors. One of the main priorities of the law centre has been to provide legal advice and assistance to people at the earliest stage of the asylum process, including preparation of a detailed statement, collation of evidence in support of their claim including country evidence and attendance at the interview. The lessons learnt from that will be published at a later date.

⁴⁸ ORAC does not allow independent interpreters to attend. There is no formal qualification for interpreters in Ireland and the quality of interpreters is an issue that is raised on occasions by those seeking asylum.

⁴⁹ In the case of children, they are likely to be accompanied by their social worker or another responsible adult.

⁵⁰ There is no requirement to have expertise in refugee law.

⁵¹ These figures were correct as at August 2012.

⁵² Certain appeal rights are restricted e.g. if a case is considered manifestly unfounded and such cases are dealt with on the papers and without a hearing.

⁵³ A case can be deemed withdrawn if the person fails, within three days of a hearing, to provide a reasonable explanation for their non-attendance.

⁵⁴ Refugee Act 1996, s 17.

⁵⁵ They can therefore, for example, be 12 months apart.

⁵⁶ The restrictions include availability of solicitors available and funds.

⁵⁷ Leave applications for Judicial Review in all other areas of law are 'ex parte' meaning that they proceed with only the applicant being represented whose task is to persuade the judge that there is an arguable case that should be allowed to proceed to a full hearing.

3. Determining 'Well-Founded Fear' in Oral Testimonies

"Since it is not in the nature of repressive regimes and societies to behave reasonably, the strange and the unusual cannot be dismissed as incredible or impossible, particularly if there is supporting material of similar accounts in the relevant human rights literature, and decision makers should constantly be on their guard to avoid implicitly re-characterising the nature of risk based on their perceptions of reasonability."

The difficulty in deciding if an account can be relied upon, unsupported by documentary evidence, is widely acknowledged. This section therefore looks at the guidance provided by judges, academics and other professionals on the approach that should be taken to an applicant's oral testimony or the lessons learnt from other disciplines and the caution that is required in reaching decisions of such importance.

3.1 Statute and case law

As previously stated, section 11B of the Refugee Act 1996 as amended gives guidelines to both ORAC and the Tribunal on the factors relevant to assessing an applicant's credibility. In addition, guidance is provided in Regulation 5 of the European Commission (Eligibility for Protection) Regulations 2006.

In *RKS v. RAT and MJELR*⁵⁹ Mr. Justice Peart stated:

"It seems clear on the authorities and according to the UNHCR Handbook that a negative credibility finding in relation to one fact, cannot be used as a basis for denying credibility generally. It is the cumulative effect of all facts which must be considered, even though some facts may be stronger than others and perhaps more credible than others".

"It is very easy I suspect to come to a conclusion in the light of the questionnaire answers and the interview, and possibly the oral hearing on the appeal, that the story as told is simply not believable. In everyday life, one is so used to simply having a feeling that all we are told is not exactly as someone would have us believe. One's experience of life hones the instincts, and there comes a point where we can feel that the truth can, if it exists,

be smelt. But reliance on what one firmly believes is a correct instinct or gut feeling that the truth is not being told is an insufficient tool for use by an administrative body such as the Refugee Appeals Tribunal. Conclusions must be based on correct findings of fact."

Mr Justice Cooke in *IR v. MJELR and RAT* gave a useful summation of the rules from the case law on how credibility is to be assessed:

"4) The assessment of credibility must be made by reference to the full picture that emerges from available evidence and information taken as a whole, when rationally analysed and fairly weighed. It must not be based on a perceived correct instinct or gut feeling as to whether the truth is or is not being told.

"5) A finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation and the reasons drawn from such facts must be cogent and bear a legitimate connection to the adverse finding.

"6) The reasons must relate to the substantive basis of the claim made and not to minor matters or to facts which are merely incidental in the account given.

"7) A mistake as to one or even more facts will not necessarily vitiate a conclusion as to lack of credibility provided the conclusion is tenably sustained by other correct facts. Nevertheless, an adverse finding based on a single fact will not necessarily justify a denial of credibility generally to the claim."⁶⁰

3.2 Subjectivity and the decision maker

Lawyers and judges are well-practised in evaluating what is reasonable. However, the familiar concept of the 'reasonable man' breaks down in the case of asylum seekers where the decision-maker has only his or her own perspective from which to assess the actions of the applicant. The Independent Asylum Commission in the UK recommended that judges use "common sense and experience in judging asylum cases."⁶¹ A number of authors have criticised this approach as open to the subjective view of the decision-maker. Graycar concludes that judges generally approach the analysis from their own experience or that of people they know, so the question is bluntly: "what would I, or people I know, do in this situation?"⁶² This ignores the extraordinary

circumstances from which asylum seekers have fled or fear to return to and the cultural differences between the applicant and the decision-maker.

The UNCHR Handbook states:

"An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no strong convictions. One person may make an impulsive decision to escape; another may carefully plan his departure."⁶³

The test then is not the standard of objective reasonableness, but rather a highly subjective analysis based on the personal, experiential and cultural circumstances of the person applying for refugee status. In addition, the fear must be reasonable to the particular applicant. Macdonald's Immigration Law and Practice states:

"The use of the term 'fear' was intended to emphasise the forward-looking nature of the test, and not to ground refugee status in the assessment of the claimant's state of mind."⁶⁴

Furthermore, the experiences which the individual has undergone, some of which may be extraordinary and far removed from that of the decision-maker, must be assessed in their proper context. For example, trauma provokes different reactions, with some people becoming detached from the experience as a method of coping, while others become overwhelmed by emotion.

Herlihy, Gleeson and Turner, in reviewing studies about what assumptions underlie decisions in asylum cases, refer to the tendency in decision-makers to judge someone who expresses "appropriate" levels of emotion as more likely to be credible.⁶⁵

The experiences need not be those personal to the applicant but knowledge of the treatment of friends, family, neighbours, or other members of the same or similar social or political group⁶⁶ which may create a well-founded fear that the applicant is at risk of similar treatment.⁶⁷

3.3 Cultural considerations

The account must be considered in its cultural context. The applicant may have lived for years, or indeed, for their whole life under an oppressive regime, or one in which authority is to be feared. Interaction with figures of authority in the country of origin may have left the applicant wary of speaking freely.⁶⁸ The UNCHR Handbook advises decision-makers that: "...it may be necessary for an examiner to clarify apparent inconsistencies and to resolve any contradictions in a further interview and find an explanation for any misrepresentation or concealment of facts."⁶⁹ Thus where inconsistencies appear within the applicant's account, they must be teased out by the decision-maker as part of his or her investigative function.⁷⁰ Inaccurate or untrue statements by themselves are not a reason for refusing status but must be evaluated in light of the whole circumstances.⁷¹

In addition, the UNHCR guidelines on gender avert to the danger of making generalisations about women or men.⁷² It may be common for women, and indeed children, to be deferential, thus they would not necessarily be aware of the activities or question the actions of the senior male figure in the family.

3.4 Fear of authority

For anyone with experience of working with refugees and asylum seekers, fear of figures of authority and a genuine belief that their persecutors have wide networks in other countries can explain a delay in claiming asylum or why the applicant did not believe the nearest country was indeed a 'safe' country.

As set out in Macdonald's Immigration Law and Practice:

"...there are many varied reasons why people do not make their asylum claim immediately on arrival: lack of knowledge of the procedures, arrival in a confused and frightened state, language difficulties or fear of officialdom may all be insuperable barriers to making any kind of approach to the authorities at the port of entry. Delay in making an application does not necessarily reflect the absence of fear!"⁷³

3.5 Assessing the demeanour of applicants

In his article on the judicial determination of factual issues, having considered the value of demeanour, Lord Bingham states:

... however little insight a judge may gain from the demeanour of a witness of his own nationality, he must gain even less when [t]he witness belongs to some other nationality and is giving evidence either in English as his second or third language, or through an interpreter. Such matters as inflexion become wholly irrelevant; delivery and hesitancy scarcely less so If a Turk shows signs of anger when accused of lying, is that to be interpreted as the bluster of a man caught in a deceit of the reaction of an honest man to insult? If a Greek, similarly challenged, becomes rhetorical and voluble and offers to swear to the truth of what he has said on the lives of his children, what (if any) significance should be attached to that? If a Japanese witness, accused of forging a document, becomes sullen, resentful and hostile, does this suggest that he has done so or that he has not? I can only ask these questions. I cannot answer them. And if the answer given that it all depends on the impression made by the particular witness in the particular case that is in my view no answer. The enigma usually remains. To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm."

⁷⁴

As previously stated, Lord Bingham concludes:

*"No judge worth his salt could possibly assume that men of different nationalities, educations, trades, experiences, creeds and temperaments would act as he might think he would have done – which may be quite different – in accordance with his concept of what a reasonable man would have done."*⁷⁵

3.6 Speculation, Conjecture and Assumptions

In his discussion on probability, Lord Bingham states that a judge must always bear in mind that the improbable account may nonetheless be the true

account. He defines the improbable as "*that which may happen, and obvious injustice would result if a story told in evidence were too readily rejected simply because it was bizarre, surprising or unprecedented.*"⁷⁶ By way of illustration, he cites an American case in which a woman claimed the head of her dead husband had rolled down the steps into her kitchen and had been snatched by a devil in a black cloak. It transpired that the 'devil' was a scientist who was making a study of the heads of criminals, and had dropped the head in question while transporting it from the gaol situated on the hill above her house. As the removal of the head was not strictly lawful, the scientist had concealed his identity with a large black cloak.⁷⁷ The extraordinary or unthinkable is possible, especially in situations of high stress or conflict.⁷⁸

3.7 Consistency, memory and trauma

Consistency is frequently taken to be the hallmark of a true account and the asylum process works on the principle that liars will eventually 'slip up'.⁷⁹ Cohen notes that witnesses in Britain are given their statements to read before going into court and swearing them on oath. This is done to reflect the experience of the legal system that it is impossible for a witness to maintain absolute consistency in their testimony especially if it has been a long time since the events in question occurred.⁸⁰

3.7.1 Memory, Recall and Trauma

Research into memory and recall suggests that no two autobiographical accounts can be the same and details will inevitably be added or omitted in subsequent recalls,⁸¹ even where the account is of a highly significant or emotive nature.⁸² In the case of asylum seekers, trauma and the natural disorientation which one feels on engaging with an administrative or legal system in a foreign culture can cause confusion or limit recall at first, with greater details emerging over time, either with the assistance of trauma counselling or simply a greater sense of safety or encouragement to give a more detailed account.

The phenomenon of Post-Traumatic Stress Disorder has been recognised since World War I. Events which occur in situations of high stress have been shown to be the most difficult to recall, but can be retrieved with time.⁸³ The

level of memory loss experienced by victims of trauma varies and there is growing evidence that recall tends to be inconsistent and inaccurate.⁸⁴ Psychological research shows significant variations between individuals. Cohen states that: "[m]emory stability is known to be affected by the nature of the event being recalled and the level of associated emotion with it."⁸⁵ This is frequently seen in cases where the applicant has been raped and may be either too ashamed to recount the event or may have blocked out details.

3.7.2 The impact of repeated interviews on recall

Research on hypernesia indicates that people remember further details in repeated interviews, especially in autobiographical accounts. However, in repeated recalls spaced over a period of time there is a tendency to produce confabulated or false responses.⁸⁶ In one study, it was found that on repeated recalls some new details were added, while details given in previous interviews were omitted.⁸⁷ Cohen concludes that no two autobiographical accounts of even everyday events can be absolutely identical. Therefore in the case of asylum seekers she states:

*"The fact that such marked variability occurs in the recall of everyday experiences that are not traumatic indicates that it is misguided to expect the successive recall of asylum seekers to be perfectly consistent. It was formerly considered that so-called 'flashbulb' memories for dramatic, highly important and emotionally charged events remain fixed. This view is challenged by recent research."*⁸⁸

Anderson, Cohen and Taylor have also studied the tendency in repeat interviews for people to assume that the original account was inadequate or unsatisfactory and to try to rectify this with additional and different details.⁸⁹

⁵⁸ I MacDonald and R Tool, (November 2010), *Macdonald's Immigration Law and Practice*, 8th ed, LexisNexis Butterworths (hereafter 'MacDonald'), p 985, para 12.172.

⁵⁹ [2004] IEHC 436

⁶⁰ *IR v MJELR and RAT* (n 15).

Independent Asylum Commission, (2008), *Fit for purpose yet? The Independent Asylum Commission's Interim Findings*, London, p 34.

⁶¹ R Graycar (hereafter 'Graycar'), (1995), 'The Gender of Judgments: An Introduction', in Thornton, M., (ed.) *Public and Private: Feminist Legal Debates*, Melbourne: Oxford University Press, p 262-282.

⁶³ UNHCR (n 16), para 40.

⁶⁴ Macdonald (n 58), p 827

⁶⁵ K Gleeson, J Herlihy and S Turner (hereafter 'Gleeson'), (2010), 'What Assumptions about Human Behaviour Underlie Asylum Judgments', *International Journal of Refugee Law*, 22(3), pp 351-366, at p 354.

⁶⁶ Ibid, at p 12.

⁶⁷ *Zgnat'ev v Minister for Justice, Equality and Law Reform* [2002] 2 IR 135.

⁶⁸ Ibid, para 39.

⁶⁹ Ibid.

⁷⁰ See *AH v Refugee Appeals Tribunal* [2002] 4 IR 387, on the Tribunal's entitlement to pursue an investigative or inquisitive approach.

⁷¹ Ibid.

⁷² UNHCR, (May, 2002), *Guidelines on International Protection No.*

⁷³ *1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, Geneva: UNHCR, para 7.

⁷⁴ Macdonald (n 58), para 176 at page 989.

⁷⁵ T Bingham, (2000), *The Business of Judging: Selected Essays and Speeches*, Oxford: Oxford University Press, p 11.

⁷⁶ Ibid, p 14.

⁷⁷ Ibid, p 13.

⁷⁸ JH Wigmore, (1937), *The Science of Judicial Proof: As given by logic, psychology and general experience and illustrated in judicial trials*, 3rd ed, Boston: Little, Brown and Co, pp 443-5.

⁷⁹ A tragic example of the effects of conflict on human behaviour can be seen throughout the testimonies to the International Criminal Tribunal for Rwanda, see Steiner and Alston (2000), *International Human Rights in Context: Law, Politics, Morals*, 2nd ed, Oxford: Oxford University Press, p 1178.

⁸⁰ See Gleeson (n 67), p 362.

⁸¹ J Cohen (hereafter 'Cohen'), (2001), 'Errors of Recall and Credibility: Can Omissions and Discrepancies in Successive Statements Reasonably be Said to Undermine Credibility of Testimony', *Medico-Legal Journal*, 69(1), pp 25-34, at p 11.

⁸² Ibid. See also S Anderson, G Cohen, and S Taylor (hereafter 'Anderson'), (2000), 'Rewriting the Past: some factors affecting the variability of personal memories', *Applied Cognitive Psychology*, 14(5), pp 435-54; FC Bartlett, (1932), *Remembering: A Study in Experimental and Social Psychology*, Cambridge: Cambridge University Press. S Bluck, LJ Levine, and TM Laulhere (hereafter 'Bluck'), (1999), 'Autobiographical Remembering and Hypernesia: a comparison of older and younger adults', *Psychology and Aging*, 14(4), pp 671-82.

⁸³ See S Christianson, (1989), 'Flashbulb memories: special but not so special', *Memory and Cognition*, 17(4), pp 435-443; and N Harsch and U Neisser (hereafter 'Harsch'), (1992), 'Phantom Flashbulbs: False Recollections of Hearing the News about Challenger' in U Neisser and E Winograd (eds.), *Affect and Accuracy in Recall: Studies of Flashbulb Memories*, Cambridge: Cambridge University Press.

⁸⁴ Cohen (n 80), p 7.

⁸⁵ Gleeson (n 67), p 364.

⁸⁶ Cohen (n 82), p 29. See also RH Logie and VE Wynn, (1998), 'The Veracity of Long-term Memories – did Bartlett get it right?', *Applied Cognitive Psychology*, 12(1), pp 1-20.

⁸⁷ Cohen (n 80), pp 4 - 5.

⁸⁸ Bluck (n 81).

⁸⁹ Cohen (n 80), p 5. See also S Christianson, H Hoffman, E Loftus and R Loftus, (1991), 'Eye Fixations and Memory for Emotional Events', *Journal of Experimental Psychology, Learning, Memory and Cognition*, 17(4), pp 693-701; and Harsch (n 82).

⁹⁰ Anderson (n 81). See also J Edwards and D Potter, (1992), 'The Chancellor's memory: Rhetoric and truth in discursive remembering', *Applied Cognitive Psychology*, 6(3), pp 187-215

4. Examination of Claims by ORAC

"It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. His application should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs."

The initial obligation to assess the claim lies with ORAC. This section therefore looks in detail at the practices in ORAC as evidenced in the files examined.

4.1 The Questionnaire

Of the files examined in this research, 91% of the questionnaires had been completed without any professional⁹¹ assistance. Most were completed in the applicant's native language and then translated for ORAC. Some were completed in English even though the applicant did not read or write in that language or indeed in any language. The questionnaire is the same for every applicant regardless of age, literacy or any account being taken of ability to complete it.⁹²

This section looks at some of the issues which were evident from an examination of the questionnaires, either alone or in conjunction with the subsequent interviews or decisions.

4.1.1 Apparent errors, contradictions or misunderstandings

When asked whether he could have gone to live in another part of his country and be safe there, an applicant answered both 'yes' and 'no' without explanation.⁹³ The same confusion appears in a questionnaire in answer to the question about membership of any political, religious or other group in the country of origin.⁹³ A man whose claim was based on his sexuality had identified that the basis of

his claim was 'religion'.⁹⁴ In another case, an applicant answered 'yes' to the question about whether he was arrested, detained or imprisoned but gave no further information even though the question also asked "please state by whom?"⁹⁶ In one account, an applicant had given information about abduction and imprisonment but in answer to the specific question about whether she had ever been detained, arrested or imprisoned, had answered "no".⁹⁷ Another applicant gave an address for his deceased parents even though the question indicated that such details were only required if the relative "is living".⁹⁸

For an applicant whose claim was based upon involvement with a named political party, in answer to the question as to whether either he or his family were affiliated to any political organisation, the answer written was "no". The same misunderstanding occurred when a woman, whose claim was based on her membership of a particular church and who indicated that her claim was based on religion, answered "no" to the question whether she was a member of any religious group or organisation.⁹⁹

One applicant failed to give any answer to questions about mode of transport, the countries that he had travelled through en route, instead giving names of cities. His answer about whether he had reported incidents to the authorities in his country was contradictory as was his answer to the question about whether any family member belonged to an organisation or group.¹⁰⁰

4.1.2 Lack of clarity or detail

One woman gave information in her questionnaire about twice being abducted and subjected to interrogation and torture. She gave additional information in her interview about being electrocuted and, as a result, suffering migraines. The interviewer drew her attention to the fact that she had not given this information before.¹⁰¹ In another, a woman had given clear but short answers to the questions and at interview had elaborated upon the information. This led the interviewing officer to say: "You didn't mention any of this in your questionnaire, you just mentioned the death of your father and the robbery at your house." In answer the applicant, whose first language was not English but for whom there was no questionnaire in her language, said: "I have a problem expressing myself in English" and "I've been here a long

time. It's difficult to remember dates."¹⁰² The applicant had also said that she was trying to put painful events behind her, an explanation that was not accepted. In the ORAC decision, the officer wrote: "It is not considered credible that the circumstances surrounding her father's death would not be indelibly marked on her memory."

In another case, a man whose claim was based on clear political grounds failed to give a clear answer as to why he left his country. He also talked about being shot at and abducted but it was not clear by whom.¹⁰³ In another, an applicant gave a very detailed account in his questionnaire but it was all about a particular incident and there was no context for it which would have enabled a better understanding of his claim.¹⁰⁴ Although these may be issues that are covered in the interview (or appeal), the failure to mention them at the earliest opportunity can lead to a finding that the applicant is lacking in credibility.

4.1.3 Inability to understand or articulate properly

Linguistic skills and age can be a factor that undermines ability to give a full and accurate account at the earliest opportunity.

In one case, the translator had inserted additional words or suggestions in brackets in an apparent attempt to make sense of the information in the questionnaire. This was particularly clear in the section about why the applicant had left their country.¹⁰⁵ In a separate case, the translator had written "poor French" in the section about why the applicant had left their country.¹⁰⁶

In a claim from a young person who had been in the care of the Health Service Executive (HSE) as a separated child and about whom "serious child protection" issues had been raised, basic questions in the questionnaire had been understood but not the more substantive ones.¹⁰⁷ There were five pages in answer to the question about why she had left her country but most of the information was about her life in Ireland. When asked if she had reported the incidents to the authorities in her country, she refers to the HSE in Ireland, not her home country.

In another claim from a young person, the translator comments that certain words were illegible, boxes had been scribbled out and sentences did not make sense. The applicant stated that he did not read or write very

well and that he had not attended school for very long.¹⁰⁸ In another case, the translator had written that the applicant displayed very poor language skills throughout. One woman, whose questionnaire was completed in English even though she did not speak, read, write or understand the language, had the following recorded for her in answer to the question about why she did not complete it "I did not know how to write".¹⁰⁹

4.2 The ORAC interview

Just under 70% of applicants in this study had just one interview, over 20% of the applicants were required to attend two interviews and just under 10% had three interviews. The average delay between first and second interviews was 4 months and the average delay between first and third interview was just over six months.

The following themes were identified in interviews examined and will be expanded upon in the subsections below:

- Emphasis on issues which are deemed to undermine credibility, in particular:
 - Failure to present identity documents
 - The account of the journey to Ireland
 - Failure to claim asylum in the 'first safe country' or on arrival
- A failure to pursue a relevant line of enquiry (sometimes the central issue) or follow up an answer with a further exploratory question;
- An assumption about the way in which questions will be answered;
- Comments about the implications if the applicant fails to submit documentary evidence;
- Statements, rather than questions, which clearly indicate that the officer does not accept the account that the applicant is giving;
- Questions from the officer which requires speculation on the part of the applicant and/or which they cannot reasonably have been expected to know the answer to.

4.2.1 Emphasis on issues which undermine credibility¹¹⁰

4.2.1.1 Documents

In one case, the officer at interview reminded the applicant that she was told when she applied that she should try to get documentation before the interview. The applicant informed the officer that phone

connections in her country were a problem and that she herself had to use a pay phone and had no email address for communication.

In a case where the documents to prove identity were held by the Department of Justice, ORAC did not request sight of them but instead wanted additional documentation:

*"The applicant's solicitor submitted copies of Iranian birth certificate and national ID card, indicating that the originals are with the [Garda National Immigration Bureau].... In any event, without the applicant's own valid passport, his nationality cannot be established with any degree of certainty. All that can be said is that the applicant has not managed to establish his identity and nationality."*¹¹¹

4.2.1.2 Journey to Ireland

In a second interview, it was put to a woman applying that the officer did not accept that a Christian pastor who did not know her very well would pay for her journey to Ireland, that it was not credible that she was not personally questioned by immigration officials in either South Africa or the Netherlands or that the applicant only learnt when in the Netherlands that her destination was Ireland. She was advised that this "reduces" her credibility.¹²²

A Palestinian, who had evidence of persecution in Iraq, was questioned as to why he had not contacted the Palestinian Mission to Ireland (of which he had no knowledge).¹¹³

An applicant's level of education (whatever it is assumed or known to be) was referred to in a case of man who travelled to Ireland from Iran, where the interviewing officer stated:

*"Given your level of education, the fact that you only speak Farsi and Azeri and that you claim that you never left Iran before this, I find it difficult to believe that you could have undertaken this journey on your own."*¹¹⁴

In a case where a woman was considered to be "well-educated" the interviewing officer puts it to her that it makes no sense that she would *"blindly follow the instructions of a stranger"* in her journey to Ireland.¹¹⁵

4.2.1.3 Failure to apply for asylum before reaching or immediately on arrival in Ireland

The following dialogue took place in one interview:

"Did you seek asylum in France?"

"No."

"Why not?"

"Firstly I asked the agent could I claim asylum in France. The agent said no and when I asked why he told me he knows Europe better than me.

"You can seek asylum in France as you can in any European country so I don't understand why the agent would tell you this. You can speak French. I cannot understand why you would travel through France without applying for asylum there?"

*"... He told me that he knows Europe better than me and was bringing me somewhere else."*¹¹⁶

In the ORAC decision, the officer stated that the applicant's explanation for not claiming asylum in France was not accepted as reasonable. It was a factor that undermined the credibility of his claim.

The failure to apply for asylum en route is apparently not only a matter that undermines credibility but also the ability of a person to be genuinely in need of protection as evidenced in the following interview:

*"Genuine asylum seekers are expected to seek asylum in the first safe country they land in, why did you not seek asylum in the country you transited through?"*¹¹⁷

The first eight pages of one interview (70 questions) were devoted to questions about why the woman came to Ireland, why she did not apply for asylum in Congo (Brazzaville) or France or seek to move elsewhere in her country to avoid the problem. In relation to the latter, known as "internal relocation", the woman – a journalist and human rights activist – was told:

*"It is difficult to believe that in a country of 55 million people that internal relocation would not be a viable option."*¹¹⁸

4.2.2 Failure to pursue a line of enquiry or follow up an answer

In October 2011, a Syrian national applied for asylum. At the interview, the focus was upon his journey to Ireland. Only one question was about why he feared to return to Syria.¹¹⁹ In her initial screening interview, an applicant stated that she was wanted as a result of helping women who were raped. She was interviewed three times by ORAC after her questionnaire was submitted. It was only in the third interview that she was asked for the first time about what she did to help the women. There was no follow up to her relatively short answer. In the same interview the officer indicates that, during the read back, the applicant said that she had something to add and asks what it is. The woman names the movement that was raping women. There were no follow up questions.¹²⁰

A man whose claim was based on ill treatment in the form of kidnapping and slavery was not asked any questions about this in his interview. The emphasis was on how he got money for his journey and his knowledge of his country.¹²¹

A man whose claim was based on his involvement with a movement seeking independence for a region in his country and whose father and brother were killed for supporting the fight for independence, was not asked any questions about their deaths.¹¹²

In another case, a man was not asked details about his cousin's arrest, extra judicial killings of members of his party, the role of a particular unit in attacks upon his party or his assertion that false charges had been brought against him.¹²³

The interview was not necessarily seen by the interviewing officer as the applicant's opportunity to give all the information that he considered to have a bearing on his case:

"Are you satisfied that the information recorded in this interview is as stated by you?"

"Yes but I didn't get the chance to explain things in more details."

"But you completed a very detailed questionnaire so there was no need to go over all that information again."

"But even in the questionnaire I couldn't explain what the people in the group did."

"In your questionnaire you gave examples of what work you did for this organisation and that is the most important thing."

*"Okay."*¹²⁴

In a similar situation, the following dialogue was recorded:

"Is there anything you would like to add?"

"If you would like to hear I can tell you how I was mistreated in prison."

"I think there is enough information."

The application was refused on the grounds of the man's lack of knowledge of his political party and the coalition parties they were associated with. There was no mention of his account of arrests and ill-treatment in detention.¹²⁵

4.2.3 Failure to answer questions in an expected manner

One officer asked an applicant the same question three times about whether he could have voluntarily left the military unit he was a member of. The applicant attempted to give an explanation of the unit (to give a context for his answer) but each time he was interrupted and the same question repeated. Apparently frustrated by the applicant not giving a one word answer to the question, the officer asks: *"If you choose to leave the [military unit] can you do so - YES or NO?"* The answer was "yes"¹²⁶

The application was partly refused on the grounds that the applicant could have voluntarily left the unit. This was also a factor which influenced the Tribunal Member's decision who considered not only the fact that he could have left but also the way in which he had answered the question at the interview:

"When asked a straightforward question about whether it was possible to leave the organisation, the applicant continually evaded answering the question despite being asked on at least four separate occasions. This is reasonably typical of the evasive and tendentious nature of the applicant's testimony which was replicated during the appeal hearing."

In another case, the applicant was asked how long her husband had been in the army. She stated that he was in the army when they married which was followed by the officer making the following statement:

*"I would like you to please answer the questions I ask you in a direct manner. If you are unable to answer the questions it may go against you in terms of credibility."*¹²⁷

4.2.4 The stated implications if no evidence is submitted

In a case where the applicant submitted a copy of his military card to ORAC, the officer commented:

*"You don't have any evidence you were a member of the [military unit], you don't have any evidence that you were wanted by the authorities in [your country], and you don't have any evidence of the deaths of fellow members of [your military unit] who you escaped with. Do you understand the difficulty that this presents?"*¹²⁷

In the following case, the applicant had submitted seven internet articles in which his brothers (who he stated had been arrested) were named. At interview, the officer stated:

*"You have failed to provide me with any document to support any aspect of your claim. No evidence to support the arrest of two of your brothers or to support the death of your [name]. While you have given me internet articles, there is no evidence that you are related to either of these men."*¹²⁹

Another article named his friend who had been killed. The officer also commented that although the article about the friend did indeed mention his friend's death, it did not mention any connection between the applicant and the man who had been killed.

In another case where an applicant was interviewed three times, the officer asked the woman being interviewed in the third interview:

"You mentioned in your last interview doctor's report regarding alleged injuries. Have you brought in any of these?"

"You didn't order me to bring that"

This is followed by a series of comments by the officer until the woman "admits" that she was told to submit all documents that are relevant to her claim. From an examination of the second interview, when the issue of medical reports was discussed, the applicant advised the officer that she did not have reports with her but she was not told or advised to submit them.¹³⁰

4.2.5 Statements in interview that directly challenge the validity of the applicant's account

In one interview, the officer started five questions with the statement "*I find it difficult to believe...*" and two questions with "*Could you not have...?*". In the same interview, he stated that it was "*hard to believe*" that a Christian Pastor whom the applicant did not know very well would pay for her to leave the country and travel to Ireland.¹³¹

In another, the officer stated, replying on the applicant's level of education, "*I find it difficult to believe that an educated intelligent man paying \$9500 USD did not have a say in where he travelled to.*"¹³²

In a claim based upon the death of an applicant's mother because of her ethnicity, the interviewing officer used leading questions about how the applicant would be identified as being from the same ethnic group as his mother. The questions included:

"Would you agree that your nose is not particularly long? Your complexion is not particularly dark, do you agree?"

In this particular case, the applicant had agreed with those statements but indicated that his mother's ethnicity was well known and that he was known to be her son. In the ORAC decision, this was referred to in the following way:

*"The applicant then agreed that he did not have a particularly long nose or dark complexion and conceded that he did not know why people would say he was Mulenge.... Since he agrees that he does not look like a Mulenge it is difficult to understand why his mother could so easily be identified as a Mulenge if she looks like him."*¹³³

A man whose claim was based on hiding his cousin from the authorities was questioned as to why he could put his own life at risk. The officer stated that "*it is a credibility concern that you would put your life at risk.*"¹³⁴

In a case of a man from Pakistan, it was put to him that he could safely relocate to another part of Pakistan. The officer put it to him that if Osama bin Laden could live there for years then "*for someone like you, with a much*

*lower profile than Osama bin Laden, it would be much harder to find you. It is hard to accept that you would be found..."*¹³⁵

In one case, an applicant was asked both why the smuggler had brought him to Ireland when he travelled through other EU countries and also why he was not arrested with his colleagues.¹³⁶

In another, the officer says that it "seems unlikely that a cement building would fall down like that. Why do you think it happened?"¹³⁷

In an unrelated case, a woman was asked to give the address of the house where she was held when she was kidnapped¹³⁸ and, in a similar vein, a man was asked why his kidnappers would take a man who had leukaemia¹³⁹ and another was asked why his kidnappers had "allowed" him to escape and had not killed him.¹⁴⁰

4.3 The role of the interpreter

In the files examined, 86% of applicants had been provided with an interpreter at their main asylum interview and, in the majority of cases, this was in their first language or dialect of choice. It is difficult from a written record alone, and therefore without any audio record of an interview, to ascertain how often the interpreter may in fact fail to interpret properly. That is not to question their integrity but anecdotal evidence suggests that the ability of interpreters varies greatly. From the interviews examined, it was nevertheless possible to identify a number of cases where an interview proceeded without there apparently being a complete understanding between the parties.

In one interview, the first four hours were taken up with queries about the dialect of the interpreter, the applicant expressing his fear that his account would not be properly translated. When he was asked repeatedly if he was willing to continue with the interview, he said no but the officer insisted that the interpreter was "highly trained", refused to change the interpreter or re-schedule the interview and advised the applicant that his fears may be taken as evidence that he was refusing to co-operate.¹⁴¹

In a case where a woman was interviewed three times over 3 months, the first two interviews were conducted in Swahili although the applicant had requested a Lingala interpreter. In the second interview, the following dialogue was recorded by the interviewing officer:

"Can you remember the name on the fraudulent passport?"

"Belgium."

"Where in DR Congo did you take your flight from to Dublin?"

"Burundi."¹⁴²

In another case, the applicant was asked at the beginning of the interview if he understood the interpreter, to which he answered "mostly". The officer acknowledged that there was a difference in the dialect but stated "*I am happy that the interview can continue using this interpreter*". At the end of the interview, the applicant was asked "*Do you fully understand the interpreter?*" to which he answers "*Yes approximately*". There is no follow up question for clarification.¹⁴³

4.4 The ORAC recommendation

In 56% of cases included in this research, the conclusion was reached that the interview was, generally speaking, a genuine attempt to establish the facts and that lines of enquiry had been appropriate. Nevertheless, there were a number of trends in ORAC decisions which are outlined below which might suggest an inability or unwillingness to accept the information or explanations given by an applicant as true.

4.5.1 Decisions based on preconceptions or speculation

In a claim based upon the grounds of alleged desertion from the armed forces, the officer did not accept the applicant's explanation for his conduct whilst serving in the military and gave his own opinion as to how an "elite unit" would conduct themselves during a conflict. He also questioned the applicant's statements about going Absent Without Leave (AWOL). He then refers to the UNHCR Handbook which sets out that an applicant should be given the benefit of the doubt where his account does not run contrary to "generally known facts". In this case, the officer concluded that because the

claim lacked credibility, it was "not appropriate" to give the applicant the benefit of the doubt. In this particular case, the "generally known facts" appear not to have been taken from objective evidence but from the officer's own speculation about how a military unit and a serving soldier would behave during a conflict.¹⁴⁴

In a case involving a minor, the officer stated:

*"It is difficult to believe that the applicant would not have been harmed on this occasion (the murder of her family) given the alleged murderers' apparent ruthlessness."*¹⁴⁵

Even the assumed behaviour of children at school has been used to question a woman's account – based upon inter-racial marriage and the attack on a farm in Zimbabwe by War Veterans – and conclude that it was lacking in credibility although there was no apparent evidence for the officer's assertions:

*"...it is usual for school children to swap gossip and stories whether true or false, and in this context it is considered that the applicant would be made aware by her son [who attended primary school] of at least some of the farmers in the area and of activities in the area."*¹⁴⁶

Officers have also given their opinion on how terrorist organisations operate:

*"Since the group the applicant claimed abducted him is an experienced and ruthless terrorist organisation and they had gone to the trouble of abducting the applicant, his account of his escaping by the help of an old man does not appear credible."*¹⁴⁷

4.5.2 Unable to accept account of journey to Ireland

In a case involving a minor who stated that she was brought to Ireland by a woman claiming to be a relative, the officer disputed the account that the girl had passed through immigration control in Ireland without herself presenting a passport. His conclusion was based on her age and the rules against trafficking.¹⁴⁸

In another decision, the officer recorded:

*"The applicant has not submitted any identification documents with his application. Neither did he submit any travel tickets or plane boarding pass. There is no evidence to substantiate the detail of his alleged travel to Ireland..."*¹⁴⁹

A woman who travelled on a French passport with a picture that closely resembled her was informed in her decision:

*"It is not accepted that the applicant would have passed through immigration control without further questioning."*¹⁵⁰

4.5.3 Failure to apply for asylum before or immediately upon arrival in Ireland

When a Zimbabwean woman claimed that she had not claimed asylum in Belfast on the grounds that she had been told by the agent that there were Zanu PF informers in Belfast, the officer stated that this explanation was "*scarcely credible*" and "*not plausible*".

It was not clear from the decision if the officer was referring to the statements about the agent or the existence of informers.

One applicant delayed 20 days after arrival before he claimed asylum on the grounds that it was a difficult decision to make. This explanation was not accepted. Neither was his statement that he did not know anything about claiming asylum in Frankfurt.¹⁵⁰

Similarly, a Somali woman's explanation for not claiming asylum in Kenya, the first 'safe' country, her failure to seek assistance in transit through another European country and the fact that she did not know which country had issued the European passport she travelled on, were all considered to undermine her credibility.¹⁵²

A man who made it clear that his plan was always to travel to Ireland to claim asylum because his girlfriend and baby were already in the country, was told in the decision on his claim that this was "*difficult to accept*", the assertion being that he would have claimed asylum in Holland *"given the situation he claims to be fleeing from."*¹⁵³

In some cases, officers have apparently confused an assessment of the person's fear of returning to their country with the failure to claim en route to Ireland:

"The question of subjective fear is raised when a person passes through a number of unknown countries without making a claim of asylum. The applicant stated that he did not seek asylum in the UK as "it's a new thing for me. I just followed the priest. I didn't know anything about asylum or anything.... The applicant

speaks English and French fluently, he has a third level education, family living in Europe and was aware before he left the DRC that he was going to Europe to seek asylum.... As such, his explanation for failing to seek asylum in the UK is not acceptable.”¹⁵⁴

4.5.4 The benefit of the doubt

Some ORAC officers appear to consider that the benefit of the doubt is something that has to be 'earned' by applicants. For example, one decision stated:

*“The applicant’s claim is based entirely on unsourced and uncorroborated statements. Assessing his statements and the points raised I find that he has failed to provide a coherent and plausible account of the events which he alleges prompted him to leave Iran. **He has not earned entitlement to the benefit of the doubt.**”¹⁵⁵*

4.5.5 Failure to properly determine a central issue

4.5.5.1 Nationality or ethnicity

The claim of a woman based on membership of a minority group was refused on the grounds that she had no identity documents, her lack of geographical knowledge of her country, a failure to provide dates for her sons' deaths and her lack of knowledge of the passport she used to travel to Ireland.¹⁵⁶

A man's claim based on his ethnic origins and political opposition was refused on the grounds that he would not have continued his activities after a death threat, the authorities would not have behaved or failed to behave in the way he describes and his lack of technical knowledge of website administration.¹⁵⁷

A claim based on membership of a minority clan supported by a medical report from an expert in the examination of torture victims was refused on the grounds that the doctor relied on an account that was disputed, his inability to answer all questions correctly about his clan,¹⁵⁸ a dispute about the nature of the clan's economic activity, his failure to properly describe jewellery and a language analysis which concluded that he was from the north of his country, Somalia, not the capital.¹⁵⁹

A Syrian national claimed asylum after the outbreak of hostilities in 2011. There was no dispute over his nationality. His claim was refused on the grounds that he had no evidence that he had previously returned from Ireland to Syria, no evidence of conscription of returning Syrians, his failure to claim asylum en route to Ireland (where he had previously been lawfully resident), delay in claiming after arrival (two months), lack of proof of his journey to Ireland and that he had attempted to obtain a false PPS number.¹⁶⁰

4.5.5.2 Religion or political affiliation

In a claim based on support for a rebel movement, the decision to refuse was based on lack of supporting documents, the account of the journey to Ireland, the fee and currency in which the agent was paid and lack of persecution before departure. It was not determined if, from his account and country information, he could in fact be a supporter of a rebel movement wanted by the authorities.¹⁶¹

A woman whose claim was based on support for an independence movement was refused on the grounds that the account of her escape was lacking in credibility, that she could return to a neighbouring country and inability to accept her account of a secret meeting.¹⁶² There was no direct finding as to whether she was a member of a rebel movement.

The claim of a man based on his religion was refused on the grounds that he had delayed in making his application for asylum, lack of knowledge of the possibility of claiming asylum in another EU country, the fact that his family remained in his country and on the grounds that he was found to be lacking in his knowledge of his religion.¹⁶³ Documents confirming his religious faith were not referred to.

A claim based on religious persecution from a militant Islamic group was refused on the grounds that the man had failed to identify his attackers, had no evidence of the medical treatment he had received in his home country, had no passport, had failed to apply en route to Ireland and because his family members were still resident in his country.¹⁶⁴

4.5.5.3 Membership of a particular social group

A man whose claim was based upon his sexual orientation was refused on the grounds that he had wanted to report the threats from his family to the police, that he did not seek asylum immediately, that he had lied about a trip to another EU country and that he could live in another part of his country (even though homosexuality was criminalised there).¹⁶⁵ There was no direct finding regarding or indeed disputing his sexual orientation.

A woman whose claim was partly based on her own rape and the death of her mother was refused on the grounds that she gave different accounts of her nationality and date of birth, did not know the route of her journey to Ireland or the name on the false passport she had used. In the ORAC decision, she was described as a "victim of circumstance".¹⁶⁶ Her allegations of rape were not addressed directly.

A woman whose claim was based on being forced into prostitution and assaulted by her boyfriend (about which there were no questions at interview), was refused on the grounds that her sister could not have looked after her as a young child herself, her inability to remember the given name of the woman who looked after them when their parents died, her failure to spell out the fear of persecution for her son (a defendant on her claim) and the fact that, in a country of 15 million people, she could go and live in another part of the country.¹⁶⁷ There was no direct finding on whether she had been forced into prostitution or assaulted.

⁹⁰ UNHCR (n 16), para. 190.

⁹¹ 'Professional' includes not only qualified lawyers but also paralegal caseworkers and other professionals such as social workers, the latter generally being involved with applicants under the age of 18 who are separated children.

⁹² In Q26, the applicant was born in Ireland and was six weeks old at the time of application.

⁹³ Q1.

⁹⁴ Q84. The same applicant had answered "I don't know" to the question seeking information as to whether he had any dependent children.

⁹⁵ Q15.

⁹⁶ Q85.

⁹⁷ Q82.

⁹⁸ Q79.

⁹⁹ Q36.

¹⁰⁰ Q14. He answered "no" but he had named the political party of which his brother was a member.

¹⁰¹ Q2.

¹⁰² Q86. There were also severe delays in the processing of the claim with a gap of more than two years between the first and second ORAC

interviews and a further delay of 10 months before the appeal was heard. In total, from the date of application to the RAT decision, there was a delay of over four years.

¹⁰³ Q51.

¹⁰⁴ Q43. There were several instances of this e.g. Q42 and Q30

¹⁰⁵ Q23.

¹⁰⁶ Q20.

¹⁰⁷ Q22.

¹⁰⁸ Q38.

¹⁰⁹ Q34.

¹¹⁰ As set out in section 11B of the Refugee Act 1996 as amended and summarised in the ORAC Information Leaflet.

¹¹¹ Q43.

¹¹² Q13.

¹¹³ Q12.

¹¹⁴ Q43.

¹¹⁵ Q31.

¹¹⁶ Q20.

¹¹⁷ Q82.

¹¹⁸ Q31.

¹¹⁹ Q66. It should be noted that his nationality was not disputed.

¹²⁰ Q53.

¹²¹ Q71.

¹²² Q12.

¹²³ Q45.

¹²⁴ Q60.

¹²⁵ Q35.

¹²⁶ Q54.

¹²⁷ Q57.

¹²⁸ Q54.

¹²⁹ Q74.

¹³⁰ Q53.

¹³¹ Q14.

¹³² Q12.

¹³³ Q79, (emphasis added).

¹³⁴ Q40.

¹³⁵ Q42.

¹³⁶ Q10.

¹³⁷ Q12.

¹³⁸ Q14.

¹³⁹ Q17.

¹⁴⁰ Q44.

¹⁴¹ Q50.

¹⁴² Q53.

¹⁴³ Q54.

¹⁴⁴ Q77.

¹⁴⁵ Q75.

¹⁴⁶ Q80.

¹⁴⁷ Q44.

¹⁴⁸ Q76.

¹⁴⁹ Q79.

¹⁵⁰ Q31.

¹⁵¹ Q7.

¹⁵² Q48.

¹⁵³ Q47.

¹⁵⁴ Q84.

¹⁵⁵ Q43, (emphasis added).

¹⁵⁶ Q10.

¹⁵⁷ Q85. The applicant's political activities were based around a website that he helped administer.

¹⁵⁸ For example, he had failed to name the Superior Chief of the clan in the capital city.

¹⁵⁹ The man's nationality was not disputed.

¹⁶⁰ Q66.

¹⁶¹ Q19.

¹⁶² Q11.

¹⁶³ Q7. The man had submitted baptismal certificates and a letter from his church in his home country.

¹⁶⁴ Q3.

¹⁶⁵ Q15.

¹⁶⁶ Q62.

¹⁶⁷ Q67.

5. The Review of Claims by the Tribunal

"The Mission Statement and Mandate of the Refugee Appeals Tribunal is to investigate appeal applications from persons seeking a declaration of refugee status, and to issue appropriate recommendations to the Minister for Justice and Equality. The primary function of the Tribunal is to affirm or set aside a recommendation made by the Refugee Applications Commissioner with regard to a declaration of a person as a refugee. In so doing it will do so:-

- **fairly, in accordance with the law;**
- **with respect for and sensitivity towards the dignity of the people we meet during the process;**
- **quickly;**
- **with the highest standard of professional competence;**
- **in a spirit of openness to change in how the appeals process is managed."**¹⁶⁸

This section looks specifically as to how the Tribunal carries out that task of reviewing refusals by ORAC and draws on the information gathered from the files examined in this study to identify features which are particular to the Tribunal but which may also be similar to ORAC's approach.

5.1 Duties of the Tribunal

The Tribunal is tasked with the duty of reviewing the ORAC decision and either affirming that decision or setting it aside. The Tribunal is, like ORAC, an independent body, separate to the Department of Justice. The Tribunal Members who hear the appeals that come before them are all qualified lawyers. The Chairperson of the Tribunal has the responsibility to allocate the cases to individual Tribunal Members.¹⁶⁹ It is the individual Tribunal Member who has the responsibility for determining the procedure of the appeal hearing and for writing the appeal decision which is then issued by the administration at the Tribunal.

5.2 Allocation and determination of cases

In the cases examined within this study, all but 11 had an oral hearing.¹⁷⁰ In a small number of cases, there was

more than one Tribunal determination on file after the case had either been remitted by the High Court or the Tribunal itself, after an application to the High Court, had agreed that the Tribunal Member's determination should be set aside.

The decisions of 20 different Tribunal Members were examined. Out of those, eight of them only decided one case each. 50% of the cases were decided by just five Tribunal Members. Out of those, a total of 15 Tribunal decisions examined, almost one in five (18%), were all decided by one particular Tribunal Member. Nine were determined by another (11%) whilst three Members determined six cases each (7%).

In view of the dominance of five particular Tribunal Members, the analysis of the individual decisions in this section is concentrated on those individuals and highlights the issues arising from their decisions.

5.3 The content and quality of the determinations

All of the 42 decisions considered by these five Tribunal Members were dismissed. In all but three cases, the claims were held to be lacking in credibility.¹⁷¹ In some, there were very direct remarks about the presentation, conduct and/or character of the individuals.

One of the decisions had been successfully challenged by way of Judicial Review and allowed on the second occasion by a different Tribunal Member (not one of these five). Another case was also remitted by the High Court but dismissed by one of these five Tribunal Members on a second occasion. In a third case, the appeal had been remitted by the High Court and a second Tribunal hearing was awaited.¹⁷² In a number of cases, applications for Judicial Review were pending against the Tribunal's decision or subsequent applications were themselves pending or had been determined (some with leave to remain being granted and others with the issue of a deportation order). On very few occasions was there any reference to Country of Origin Information and when it was referred to, it was usually against the applicant rather than in their favour.¹⁷³

All five Tribunal Members displayed distinctive styles which were evident in their decisions. In most cases, the comments made suggest a negative and sometimes

quite hostile attitude towards those whose appeal they considered, notwithstanding the significant differences between the countries of origin, the grounds of application, the personal background of the applicant, etc. For that reason, when analysing their specific decisions, the information below identifies where decisions are made by the same Tribunal Member.

5.4 The treatment of medical evidence

5.4.1 Failure to have regard to evidence

In a claim supported with evidence which stated that the applicant was "severely mentally traumatised" (which ORAC had not referred to) the Tribunal Member stated that the report did not assist as it did not say how the injuries were sustained.¹⁷⁴

By contrast, the same Tribunal Member dismissed the apparent distress of a woman giving evidence before her due to the absence of a report:

"The hearing was difficult in that the applicant cried throughout and made many pleas to be allowed to be let remain in Ireland.

*"I observed the applicant acutely throughout in what was a difficult appeal and I am satisfied on the basis of the applicant's behaviour throughout her appeal that she was being obstructive, her emotional responses throughout and her expressed trauma have not been supported by any psychological reports."*¹⁷⁵

In a case decided by another Tribunal Member, there was a report from a hospital in Sligo that the young man had been self-harming and talking of suicide. In addition, there was a medical report which referred to the applicant's "anxiety, neurosis, reactive depression". There was no reference in the Tribunal's decision (or indeed that of ORAC) to the medical evidence. Instead the Tribunal Member wrote:

*"Some of his evidence just ran contrary to common sense and was implausible and on other occasions his evidence was contradictory."*¹⁷⁶

In a case which came before the same Tribunal Member, the applicant submitted a letter from her GP stating that she suffered from "anxiety, low mood and poor appetite" together with a letter from SPIRASI's Centre

for the Care of Survivors of Torture stating that she was receiving psychotherapy. There was no reference to either document by the Tribunal Member (neither had there been by ORAC).¹⁷⁷

5.4.2 Where the evidence is supportive

The highest statement that a medical expert can make about injuries sustained by a person who claims to have been tortured is that they are "highly consistent" with the account given.¹⁷⁸ It is difficult in such circumstances for a decision maker to go behind that finding. But there is evidence that this does happen.

In a case where the medical report supported the account of ill-treatment, the Tribunal Member accepted that the lesions could have been caused by whippings but poses the question "*who exactly inflicted the trauma?*" and he goes on to speculate with two alternative scenarios, the first of which is:

"They may ... have been inflicted by a vigilante mob for petty criminal activity on the appellant's part."

The Tribunal Member comments that they only have the applicant's contentions and statements about how the injuries were inflicted and they are "*not to be trusted*".¹⁷⁹ There was no evidence before the Tribunal Member of any criminal activity by the applicant in any country or any suggestion that the injuries were sustained in any way other than that described by the applicant.

In an appeal decided by the same Tribunal Member, he dismissed the medical document provided by the applicant stating she had suffered a miscarriage because it did not state the cause of the miscarriage. The Tribunal Member noted that miscarriages can occur for any number of reasons.¹⁸⁰

The same Tribunal Member also declined to rely on a letter from a social worker with a Rape Crisis Centre in which the diagnosis had been made that the applicant suffered from Post -Traumatic Stress Disorder (PTSD). He had apparently not received a response to his request for information about the qualifications of the author to make such a diagnosis.¹⁸¹

In a case where the medical report stated that the applicant suffered from depression, the same Tribunal

Member said that the doctor's letter was "*singularly uninformative and merely states that the appellant is engaged in ongoing counselling work*"¹⁸²

In a case where the applicant had failed to produce a medical report from his country of origin, the Tribunal Member held that the failure to produce a report undermined the applicant's credibility.

The same pattern is evident in the decisions of other Tribunal Members when faced with reports that support the applicant's account. For example, in a case where the applicant's testimony had already been dismissed as not credible before the medico-legal report was referred to, the Tribunal Member stated:¹⁸³

*"Examination was to the effect that the bruises and scars on the Applicant's body would be consistent with the injuries she reported sustaining, this report has to be considered in the light of the Applicant's overall testimony."*¹⁸⁴

The same Tribunal Member noted in an unrelated case that the SPIRASI report stated that the applicant exhibited areas of hyper-pigmentation under both eyes which are consistent with her history of traumatic beating with blunt objects to that area:

*"This is the lower end of the Istanbul Protocol. While medical practitioners are capable of giving a report of the sequelae as narrated to them by an applicant, they are in the same position as that of the Tribunal in that they cannot say how such sequelae came about. The report has to be considered in the light of the Applicant's overall account."*¹⁸⁵

5.5 Allegations of inconsistency or contradictions in evidence

In the cases considered, more than one involved a claim that the applicant had been raped. In at least one of the cases, that claim was not made until the appeal hearing. The Tribunal Member held that failure to mention the rape until the appeal undermined the applicant's credibility. He did not accept her explanation that she felt deeply uncomfortable in disclosing it as he noted that she had no problem doing so at the hearing.¹⁸⁶

Failure to mention traumatic events at an earlier stage have been held against applicants in a number of cases. In one decision, a Tribunal Member recorded evidence given by an applicant that her home had been attacked by soldiers on 12 January 2007, that her husband had been killed and she had been attacked. When referring to the account, he stated:

"The applicant's failure to mention the above in her questionnaire and her reason for not doing so is not credible and undermines her credibility. I believe that the applicant has fabricated this account to enhance her claim for refugee status."

*"If she was raped as she alleges the applicant would have recollected this traumatic experience when completing her questionnaire... I don't believe the applicant was raped as she alleges and has also fabricated this story to enhance her claim for refugee status."*¹⁸⁷

Notwithstanding the evidence that traumatic events are not easy to disclose,¹⁸⁸ an examination of not only the questionnaire but also the screening interview in this case indicated that the account was mentioned in both. Furthermore, the ORAC decision had summarised the claim accurately. Nevertheless the Tribunal Member alleged fabrication on the part of the applicant and he also concluded that her demeanour was "*evasive and contradictory*". The Tribunal Member made no reference to the documentary evidence submitted in support of the appeal, only to the lack of a medical report.

In another case, a different Tribunal Member stated that the applicant gave conflicting evidence as to whether she was a "*supporter*" or a "*member*" of a political party. He stated that as she was an educated woman, she should know the difference between the two.¹⁸⁹ In the same case, the Tribunal Member also drew a negative inference from an inconsistent account of the applicant's age at the time of her father's disappearance. At interview she had said that she was 21 or 22 whereas at the appeal hearing she gave her age as 19. The Tribunal Member stated that as this was such a huge event in the applicant's life and because she was well-educated, she should remember the exact age she was at the time.¹⁹⁰

In a case where country evidence was relied upon, it was to support a view of the applicant as someone who was lacking in all credibility. The woman had been challenged at her ORAC interview that she had given a wrong date for a bombing in her home country. The dialogue in the interview is as follows:

Interviewing Officer: *"You stated that Hayo was bombed for the first and last time on 18 January 2007. However I've read a report that Hayo was bombed for the first time this year on 8 January 2007...I haven't as yet found a report of Hayo being bombed on 18 January 2007."*

Applicant: *"Raajnte Hayo was bombed on 8 January 2007. It is even smaller than Hayo and it is about 20 minutes away from Hayo. Hayo was bombed on 18 January 2007."*

When dealing with this aspect of the case, the Tribunal Member stated:

*"Even allowing for the Applicant's claim that she is illiterate, she did not satisfactorily or at all explain to the Tribunal the inconsistencies relating to the date of the bombing. The applicant ... was literally making it up as she went along."*¹⁹¹

In the case of a man who gave information at his appeal which he had not given before, the Tribunal Member drew his attention to the fact that he had omitted it on previous occasions. The man's explanation was that he did not write everything in his questionnaire and that he was not asked about it in his interview. The Tribunal Member commented that his testimony was lacking in credibility.¹⁹²

In the same case, the Tribunal Member noted the fact that the man had completed his own questionnaire, therefore drawing inference that he had complete control over what information he was giving:

"The applicant completed his own questionnaire without assistance as he also stated at his interview that the contents of his questionnaire are true and accurate."

5.6 Failure to claim asylum en route to or on arrival in Ireland

In a case where the applicant stated that he had been advised by the agent to enter on a false passport or face deportation from the airport, the Tribunal Member stated: *"His action in only making [an asylum] application when arrested in possession of a false [...] passport is not indicative of a person genuinely fleeing persecution."*¹⁹³

The applicant in the above case had arrived in Ireland with his wife and both claimed asylum at the airport after they were stopped trying to enter on false passports. At the wife's hearing of the wife, the Tribunal Member relied upon the long political history of the applicant's family to undermine the credibility of her statement that she did not know about claiming asylum:

*"Her contention that she wasn't aware of the asylum process prior to arriving in this state is not credible in light, inter alia, of her evidence that her parents, sisters and other members of her family were political activists, some of whom allegedly had been killed for their political dissidence and that she was acutely conscious whilst in [her country] of the dangers associated with her sister's alleged political dissidence."*¹⁹⁴

It is not clear from the Tribunal Member's reasoning why he makes a connection between a history of family involvement in political dissidence with knowledge of the asylum procedures in Ireland.

The same Tribunal Member stated in another case that the applicant's failure to apply in Kenya was not indicative of a person with a well-founded fear of persecution and *"is more indicative of an economic migrant."*¹⁹⁵

In another case he referred to the applicant's failure to apply in Turkey or any other country and stated:

*"...his failure to seek protection at the earliest opportunity are not the actions of a person genuinely fleeing persecution."*¹⁹⁶

Six of the decisions of the same Tribunal Member contained statements about failure to apply en route or on arrival in Ireland.

In another case, a different Tribunal Member went further:

*"I am very satisfied from the facts before me that the appellant's failure to seek asylum in any other country than Ireland [sic], is not consistent with a person seeking to flee his pursuers and, therefore, it is important to seek help at the first safe venue if one is in the grip of fear and thereby eradicate his fear when the opportunity arises, and his reasons for not doing so is disingenuous and wholly lacking in credibility."*¹⁹⁷

In another case, the failure by an Afghan boy (a minor on arrival in Ireland) to volunteer information that he had been in France led the Tribunal to say that "... doubt is cast over the remainder of the Applicant's testimony which cannot be verified".¹⁹⁸

5.7 Immigration controls and international travel

There is evidence that Tribunal Members are very much of the view that travel across international boundaries with false passports is simply not possible and therefore that anyone who makes such a claim is lacking in credibility.

One Tribunal Member in this study used the apparent impossibility of travelling with false passports against applicants in three cases, recording the following in one of them:

*"The appellant's contention that he passed through immigration controls on a false passport without encountering any difficulties with trained immigration officials is implausible"*¹⁹⁹

In a similar sentiment, another Tribunal Member states that an applicant's claim to have only shown her false passport twice en route *"is simply not capable of being believed"*.²⁰⁰

She expresses the same view in another case:

"The agent who accompanied the applicant and her children at all points of immigration said that they were his family. The appellant showed her own passport at Dublin and the agent held the passports for the other two children. The applicant's account in this regard in the light of the situation that exists at all international

*points of entry and in particular the situation in relation to child trafficking concerns is simply implausible and not capable of being believed."*²⁰¹

5.8 The demeanour or inability to accept lack of knowledge by applicants

The way in which an applicant gives evidence before the Tribunal has an impact on occasions about the conclusions of Tribunal Members about their credibility.

In one case the Tribunal Member wrote:

*"His hesitancy and evasiveness in answering basic questions coupled with his general demeanour left me in no doubt concerning his credibility."*²⁰²

The same Tribunal Member concluded in a separate case:

*"In regard to the evidence provided by the applicant and assessing the manner by which the said evidence was delivered and witnessing his overall demeanour, I am satisfied that the applicant's subjective fear of persecution is not objectively well founded."*²⁰³

In another case, a Tribunal Member dismissed an account by describing it as a "fantastic tale":

*"Whilst one must, of course, apply the benefit of the doubt to the appellant, that does not equate to applying the willing suspension of disbelief, to paraphrase Samuel Taylor Coleridge. The appellant managed to infuse "a human interest and a semblance of truth" (Coleridge) into an otherwise fantastic tale but that still has not managed to convince the Tribunal to suspend judgment concerning the implausibility of the narrative presented."*²⁰⁴

The same Tribunal Member, when dealing with a claim from a Palestinian from Gaza with a PhD in Political Science, determined that this education gave him access to information that, when the applicant denied such knowledge, was held against him:

*"Despite being a PhD candidate in political science [he] was unaware that there was a Palestinian Mission in Dublin yet was aware that there is a north and a Republic in Ireland."*²⁰⁵

The applicant had chosen to apply for asylum in Ireland because his wife was already in the country. As far as the Tribunal Member was concerned, he should have applied for asylum in France, through which he travelled en route to Ireland, despite the presence of his wife in Ireland. He referred again to the PhD when he said that it was not reasonable that the applicant would not know that if he sought asylum in France he could later join his wife in the European Union.

¹⁶⁸ Refugee Appeals Tribunal, (2011), *Refugee Appeals Tribunal Strategy Statement 2011-2013*.

¹⁶⁹ The basis for the allocation is not published.

¹⁷⁰ Some cases are decided without a hearing, for example if ORAC decides that the case is "manifestly unfounded".

¹⁷¹ The three cases where credibility was not challenged were all cases of young women who had been trafficked and where the Tribunal Member concluded that it was safe to return, not least because of the efforts undertaken by government and NGOs in their country against trafficking and in support of trafficked victims. These were all decisions of Tribunal Member 5. In one other of her decisions, she also dismissed the case on the grounds that there was sufficient protection in the applicant's country.

¹⁷² Q39 (Tribunal Member 4). The applicant was a minor on arrival in February 2006. Her first two appeals were dismissed but successfully challenged in the High Court. Her third appeal was also dismissed. More than six and half years later she is awaiting a decision on a leave to remain application.

¹⁷³ In Q21, Tribunal Member 2 used country evidence to dismiss the applicant's claim of her fears of Hamas as a result of her association with Fatah in Gaza. The Tribunal Member referred to a reconciliation agreement signed in May 2011. Country evidence is considered in more detail in section 6.

¹⁷⁴ Q57 (Tribunal Member 2).

¹⁷⁵ Q63 (Tribunal Member 2). The woman had been stabbed and her daughter had been raped. The decision was challenged in the High Court and the case remitted and subsequently allowed by a different Tribunal Member.

¹⁷⁶ Q59 (Tribunal Member 1). The same Tribunal Member has used exactly the same phrase in unrelated cases (Q2, Q6, Q60).

¹⁷⁷ Q55.

¹⁷⁸ See section 6 on the 'Istanbul Protocol' for more information.

¹⁷⁹ Q71 (Tribunal Member 1). In each case before this Tribunal Member where there was a medico-legal report that supported the account of the applicant to have been tortured or ill-treated, the evidence was discounted on the grounds that the way in which the injuries were sustained could not be confirmed and, because the applicant's credibility was doubted, the report could not assist (Q4, Q5, Q6, Q85).

¹⁸⁰ Q6.

¹⁸¹ Q5.

¹⁸² Q30.

¹⁸³ Q2. (Tribunal Member 2). The applicant had informed the Tribunal that he would have to be physically present in his country to get such a report.

¹⁸⁴ Q34.

¹⁸⁵ Q78.

¹⁸⁶ Q6 (Tribunal Member 1).

¹⁸⁷ Q64 (Tribunal Member 3).

¹⁸⁸ For further information about the impact of trauma on memory or recall, see section 3.

¹⁸⁹ Q5 (Tribunal Member 4, first RAT decision).

¹⁹⁰ The Tribunal's decision was challenged in the High Court and remitted for consideration by a different Tribunal Member who also dismissed it (Tribunal Member 1).

¹⁹¹ Q34 (Tribunal Member 2). In circumstances where the information given by an applicant is consistent with the country evidence, it is not unusual for a decision maker to dismiss the consistency on the grounds that the information could have been learnt because it is in the public domain.

¹⁹² Q29 (Tribunal Member 3).

¹⁹³ Q54 (Tribunal Member 1).

¹⁹⁴ Q55 (Tribunal Member 1).

¹⁹⁵ Q5 (second Tribunal decision).

¹⁹⁶ Q4.

¹⁹⁷ Q29 (Tribunal Member 3).

¹⁹⁸ Q23.

¹⁹⁹ Q71. A similar phrase is used in Q12 and Q46.

²⁰⁰ Q47 (Tribunal Member 2).

²⁰¹ Q78.

²⁰² Q79 (Tribunal Member 4). The appeal was dismissed for on the grounds of implausibility. In three of the six cases determined by this Tribunal Member and included in this study, three of them were dismissed on the grounds that the applicant, his/her family or the authorities would not have behaved in the way described by the applicant.

²⁰³ Q61.

²⁰⁴ Q71 (Tribunal Member 1).

²⁰⁵ Q12 (Tribunal Member 1).

6. The Use of Documentary Evidence

6.1 The applicant's statements as 'evidence'

The account given by the applicant is invariably the most crucial evidence and should be afforded as much weight as possible without attempts to undermine it. However, as will be seen from section 3 in particular, decision makers are reluctant to see the account given by the applicant as evidence in itself and, where they do, it is not unusual for them to undermine it for example by relying on factors which count against credibility.

The purpose of this section is to look in more detail at the way in which both ORAC and the Tribunal deal with documentary evidence when it is either submitted on behalf of the applicant or obtained by the decision makers themselves.

6.2. Documentary evidence and the burden and standard of proof

It is often extremely difficult for applicants to obtain any sort of documentary evidence to support their testimony. Their countries of origin are frequently war-torn or otherwise unstable, with dysfunctional communication services and therefore limited access to documentation. If they fear persecution by the government, obtaining documents may come at the risk of governmental surveillance and implications for family members in the country of origin. Other obstacles in the way of obtaining evidence after arrival in Ireland include limited finances and the time scale in which documents sometimes have to be submitted. These issues are reflected in the UNHCR guidelines that state:

"...cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule..."

"Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, 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..."²⁰⁶

Nevertheless, the submission of documentary evidence to support an asylum application is in practice encouraged and the failure to submit any can, as has already been seen, have negative implications for applicants.

In one case, the applicant was held by the Tribunal member to have failed to provide a reasonable explanation for the lack of identification documents. Yet, the same Tribunal member accepted she was from Somalia, where no such documents are issued.²⁰⁷

In another case, the applicant was held by ORAC to have failed to provide a reasonable explanation for the lack of documentary evidence of his service in the Iraqi National Guard. However, when the interviewing officer asked the applicant why he did not submit his military booklet, the applicant had replied such documents are not used in Iraq. Moreover, the applicant explained his mother had destroyed his military ID in order to protect him and instead he was able to provide ORAC with photographs portraying the applicant in service with the National Guard.²⁰⁸

6.3. General treatment of personal documents submitted by the Applicant

"Where, as here, documentary evidence of manifest relevance and of potential probative force is adduced and relied upon, the Tribunal member is under a duty in law to consider it and if it is discounted or rejected as unauthentic or unreliable or otherwise lacking probative value, there is a duty to state the reason for that finding."²⁰⁹

6.3.1 Unable to verify authenticity

In 67% of ORAC applications²¹⁰ and 11% of Tribunal cases²¹¹ where the applicant submitted documentary evidence particular to the claim, the decision-maker was 'unable to verify the authenticity' in relation to at least some of that evidence. Usually, neither ORAC nor the Tribunal gave reasons for their inability to verify documents. This was both in relation to less 'formal' documents, such as letters from relatives²¹² and photographs,²¹³ and formal documents, such as reference letters,²¹⁴ membership or identity cards²¹⁵ and passports.²¹⁶

One Tribunal Member was confident enough of his own conclusions about the validity of documents that he did not consider it necessary to have recourse to a professional examination of them:

*"When the originals were examined, it became clear that they had been photocopied and that copying blemishes were identical in both forms... These features... which are highly indicative of them being 'mock ups' are so stark and obvious that the Tribunal is of the view that one can safely reach this conclusion without being or hearing the input of a forensic document expert."*²¹⁷

In a different case, ORAC stated it was unable to verify the authenticity of a military card, yet relied on an incorrect translation of that card to undermine the applicant's statements.²¹⁸ In correspondence to the applicant's solicitor the translation agency stated:

*"The error occurred because the original document we sent to [the translator], which was what the company had received from ORAC, was very illegible... The date on the original document was difficult to read."*²¹⁹

In another case, ORAC refused the application on the basis the applicant failed to prove he was a Coptic Christian, yet made no reference to his, his wife's or his son's baptismal certificates.²²⁰

6.3.2 Documentary evidence held against the Applicant

Although ORAC and the Tribunal expect the highest degree of consistency from applicants, they seem to use documentary evidence submitted by applicants selectively and inconsistently. In several decisions, ORAC and the Tribunal only referred to documentary evidence in order to question the applicant's account and undermine his or her credibility. This gave rise to situations where applicants were disbelieved whether they submitted a certain document or not.

One issue concerned the use of passports for the purpose of travel to Ireland. The UNHCR guidelines state:

"Possession of a passport cannot... always be considered as evidence of loyalty on the part of the holder, or as an indication of the absence of fear. A passport may even be issued to a person who is undesired in his country of

*origin, with the sole purpose of securing his departure, and there may also be cases where a passport has been obtained surreptitiously... therefore, the mere possession of a valid passport is no bar to refugee status."*²²¹

However, in one case, the Tribunal member did not believe the applicant feared persecution from the state authorities because he used his own name in his passport when he travelled to Ireland.²²² Conversely, in several other decisions, Tribunal members found it implausible that the applicants could pass *"through immigration controls on a false passport without encountering any difficulties"*. No further explanation was given for these findings.²²³

In a different case, one Tribunal member held the applicant's possession of a valid passport to undermine the claim that his family faced problems obtaining identification documents. The Tribunal member dismissed the applicant's explanation that he had only been able to obtain the passport by paying a bribe to an official and that he would face problems with the authorities if he used the same document to return.²²⁴

Similar issues are seen in relation to other forms of identification documents submitted by applicants. For example, while one applicant's foreign birth certificate was sufficient to establish her identity,²²⁵ ORAC was 'unable to verify the authenticity' of another applicant's Irish birth certificate.²²⁶ Neither decision gave further explanations as to why the documents could or could not be verified.

A further issue concerns documents requested by the decision-maker. One Tribunal member asked an applicant to submit copies of emails he claimed were evidence of his political activities. After the applicant submitted 26 copies, the Tribunal member noted:

*"...it is a relatively easy and commonplace task to generate printouts of emails containing spurious date and time markers... to contend that these printouts constitute conclusive (or 'unequivocal' as his solicitor put it) evidence of the Applicant's past activities is somewhat naive."*²²⁷

The same Tribunal member then referred to a video recording of a demonstration, stating that it was difficult to identify if the applicant was present at the demonstration.²²⁸ The video recording was not in fact submitted by the applicant in this case and was therefore unrelated.

6.4 Medico-legal Reports

Where an applicant has suffered some form of trauma, whether physical or psychological, medico-legal reports are likely to be an important part of the applicant's documentary evidence. In addition to evaluating whether an applicant is able to give a full and coherent testimony, such reports may support an applicant's claims of torture and other forms of ill treatment. A medico-legal report was submitted in 10 % of all ORAC applications, and in 32 % of all RAT appeals.

6.4.1 Legal Background

In 2000, the UN Commission on Human Rights²²⁹ and the UN General Assembly²³⁰ adopted the 1999 Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²³¹ This protocol was developed by a substantial number of legal and medical professionals to provide guidance on the documentation of torture, ill-treatment and trauma for the purpose of being used as evidence in court. The Protocol specifically notes:

*"...the documentation methods contained in this manual are also applicable to other contexts, including... political asylum evaluations..."*²³²

Although the principles contained in Annex I of the Protocol are not legally binding, the European Court of Human Rights, whose case law is of persuasive authority in Ireland, adopted them in 2004.²³³ Moreover, Hemme Battjes notes:

*"[It is] certainly arguable that as means of interpretation of Article 13 ECHR [European Convention on Human Rights], the Istanbul Principles do affect the obligations of European states towards applicants for asylum."*²³⁴

SPIRASI, through its Centre for the Care of Survivors of Torture, is one of the main organisations in Ireland

specialising in training medical professionals to prepare medico-legal reports. Paragraph 187 of the Istanbul Protocol explains the terms generally used in these reports:

"(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 other way than that described."

6.4.2 No material value

ORAC and the Tribunal have referred to the regard in which they hold the work of SPIRASI's Centre for the Care of Survivors of Torture and that appears evident in the statements they make about the veracity of the conclusions reached by the authors of the medico-legal reports. However, in the cases examined in this study, they have not accepted the conclusions of the reports as having any material value to their decisions with the exception of one case where the doctor found that the injuries were not consistent with the applicant's account (although the report was supportive of psychological trauma). In several decisions, both ORAC and the Tribunal note that the reports do not assist because they either do not say how the injuries were sustained or are mainly based on the testimony of the applicant. Nevertheless, the applicant is assured that his or her claims are given full and careful consideration.

Where an applicant had submitted a medical report relating to his daughter, one Tribunal Member stated:

*"The medical report is merely consistent with what has been said by the applicant. It does not assist the Tribunal or, indeed, link any of the ailments to the matter alleged by the applicant."*²³⁵

In another decision, the Tribunal Member accepted the applicant's injuries could have been caused by whippings, however, he questioned who inflicted the trauma.²³⁶ Similarly, a different Tribunal Member argued, rather than being raped in prison, the trauma an applicant suffered to his anal canal could have been caused by severe constipation.²³⁷

In another case, one Tribunal member accepted the injuries displayed by the applicant were consistent with that of a motor crash, however stated:

*"...the applicant cannot prove these injuries are linked to the bus crash in question... [and the medical reports] do not support how such a motor accident arose or the circumstances surrounding it."*²³⁸

In relation to a medical report confirming an applicant's claim that she had been raped, ORAC merely noted:

*"[The report's] probative value... is diminished by the obvious fact that it has had to rely for background information on the anecdotal testimony of the applicant."*²³⁹

Similarly, another Tribunal member claims doctors are ill suited to make judgements concerning applicants' credibility because their reports will accept the accounts at face value.²⁴⁰ This clearly overlooks paragraph 162 of the Istanbul Protocol, which states:

"A medical evaluation for legal purposes should be conducted with objectivity and impartiality. The evaluation should be based on the physician's clinical expertise and professional experience. The ethical obligation of beneficence demands uncompromising accuracy and impartiality in order to establish and maintain professional credibility".

The same Tribunal member even goes on to undermine the doctor's finding that the injuries were highly consistent with the applicant's account of being tortured, stating:

*"If all the doctor does is say that the scarring/injury is "highly consistent" with the claimed history without also addressing the relative likelihood of the few other possible causes, the report will clearly be of less potential value than if it does."*²⁴¹

6.4.3 Psychological trauma

In a similar vein, reports containing findings of psychological trauma are frequently dismissed as being of no probative value. Arguably, this tendency is encouraged by the often less visible symptoms of psychological trauma.

In one decision, the Tribunal member dismissed the applicant's claim to be depressed on the basis it was not backed up with evidence.

In another decision, where a medico-legal report stated the applicant showed signs of post-traumatic stress disorder, the Tribunal member accepted the applicant was depressed yet claimed there was no evidence linking the depression to trauma and therefore the report had no bearing on the decision.²⁴² In a different case, however, a report that clearly stated the applicant suffered from depression and was "*severely mentally traumatised*", was given no reference by ORAC and dismissed by a Tribunal member who claimed it did not explain how the mental trauma was sustained.²⁴³

6.4.4 Statements to doctor used to undermine credibility

An interview with a doctor, which is usually conducted in a much more relaxed atmosphere compared to formal interviews or appeals, may elicit information that is new or expressed in a different way. However, the applicant will have no opportunity to know whether the doctor has properly recorded what is said. Yet, where medico-legal reports were given further consideration, this was frequently to point out inconsistencies in the applicant's statements to the doctor and the statements given throughout the asylum process.

In one decision, the Tribunal Member notes:

*"The Applicant's account of the treatment meted out to him during his alleged detention in his questionnaire, to Dr. Leonard and at his appeal were contradictory. His allegation that perhaps Dr. Leonard did not understand him or he did not know how his answers were translated... is disingenuous and wholly lacking in credibility."*²⁴⁴

In another decision, a different Tribunal member stated the applicant gave different versions of his family situation in the medico-legal report, the questionnaire and at the interview.²⁴⁵ This was taken to undermine his credibility without giving the applicant an opportunity to explain the apparent inconsistencies.

6.5 Language analysis for the determination of origin

A language analysis is used when an applicant's claim as to his or her ethnic or geographic background is disputed. The analysis is carried out under contract to ORAC by private organisations, either before the ORAC decision or at the request of the Tribunal. The applicant is interviewed over telephone by a language analyst, who may or may not be a qualified linguistic. The applicant's knowledge of the claimed language is tested and his or her speech is analysed in order to assess whether he or she can be placed in a particular area or community.²⁴⁶ There were four cases where such analyses were conducted in the research for this report, all of which were produced by the company, SprakAB, and related to applicants claiming to be from Somalia.

6.5.1 Reliability of Language Analysis Generally

There are many causes for concern when relying on a language analysis in the circumstances of an asylum application. In particular, Helen Fraser notes:

*"[Asylum applicants] ...often come from regions characterised by complex multilingualism, creolisation or diglossia, which have had little attention from linguistic science. In many cases populations have been disrupted and displaced by war or disaster, with people living in mixed refugee camps for extended periods, bringing the likelihood of further dialect mixing."*²⁴⁸

Moreover, although the Language and National Origin Group, a group of international linguistics, developed Guidelines²⁴⁹ for the use of language analysis, these are non-binding and the profession therefore remains largely unregulated.

6.5.2 Reliability of SprakAB

SprakAB is a privately owned company located in Stockholm, Sweden, that has conducted 'language analysis reports' at the request of governments since 2000. According to the organisation's website, the reports are derived from a 'linguistic analysis' and a 'local area knowledge check' that is *"based on the individual's responses to questions that relate to a geographical location where the individual allegedly comes from."*²⁵⁰ The applicants' raised serious concerns in relation to the reliability of SprakAB's analyses. One applicant that claimed to be a Bajuni Somali told the officer at his section 11 interview:

*"Because the person who was taking the [language analysis] interview, he was a man who himself doesn't speak Bajuni, he speaks Swahili, he knows that I was in Nairobi for over 6 months and said I was speaking Swahili from Kenya. In the report there are some things he added which I did not say."*²⁵¹

A further issue, raised by the Language Analysis Guidelines, is the fact that:

*"...it is common for people to accommodate to the interviewer's way of speaking, whether consciously or sub-consciously. This means that interviewees will attempt to speak the standard dialect, in which they may not necessarily have good proficiency. This accommodation... may make it difficult for interviewees to participate fully in the interview."*²⁵²

It is noteworthy that of the four language analyses included in the research for this report three concluded that the applicants spoke a form of Swahili *"with certainty found in Kenya"*.²⁵³ To make a finding 'with certainty' overlooks paragraph 4 of the Language Analysis Guidelines, which stress, *"it is rarely possible to be 100% certain of conclusions based on linguistic evidence alone"*, and states the preferred terms as, *'it is possible, likely, highly likely, highly unlikely'*.

Moreover, despite relying on language analysis to undermine the credibility of the applicants' claims, ORAC and the Tribunal did not necessarily make determinations as to the applicants' origins. In one case, where the applicant claimed to be from Somalia and the language analysis pointed towards the applicant having a Kenyan

background, ORAC seemed satisfied to undermine both and relied on the discovery of a Tanzanian passport to simply dismiss Somalia as the country of origin.²⁵⁴ In another decision, the Tribunal made no determination as to whether the applicant was from Kenya or Somalia.²⁵⁵

6.5.3 Unfair procedures

Where the language analysis is used to undermine an applicant's credibility, the applicant must be given the opportunity to respond to the report. In one case, it was only after the applicant's solicitor raised the issue of fair procedures and natural justice that the CD and transcript were provided to the applicant.²⁵⁶ Although ORAC gave the applicant 10 days to instruct his or her own language analyst, the solicitor was unable to obtain the necessary funding to be able to do so. In the end both ORAC and the Tribunal relied on the initial language analysis, stating:

*"The Tribunal is cognisant of the fact that due to the current economic cutbacks no funding is available to enable an applicant to have a contra independent language analysis test carried out. In fairness to the applicant, the language analysis test is only one factor that is considered by the Tribunal."*²⁵⁷

In another case, a different Tribunal member noted the solicitor's concerns but refused to consider a language expert's comments on the basis that these comments concerned the treatment of Bajuni Somalis in general rather than the applicant in particular.²⁵⁸

6.6 Country of Origin Information (COI)

*"The applicant's statements cannot... be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin - while not a primary objective - is an important element in assessing the applicant's credibility."*²⁵⁹

In order to determine whether the applicant's fear of persecution is objectively well founded, the decision-maker must take into account detailed information concerning the conditions in the applicant's country of origin. This is compared to the applicant's testimony and frequently used by ORAC and the Tribunal to test the credibility of the applicant's claims. It is therefore

paramount that the information comes from publicly available sources that are up-to-date, unbiased and reliable.

Although the applicant can submit COI, this was only done in 32 % of the cases included in this report. In contrast, ORAC and/or the RAT obtained COI in 57 % of the cases.

6.6.1 Varied reliability

The Country of Origin-Country Guidance Working Party, an international group of judicial and quasi-judicial decision-makers and refugee law experts, state in their Judicial Criteria for Assessing Country of Origin Information:

*"In Ireland, it is seen as a helpful rule of thumb for judicial decision makers to corroborate information by taking examples from at least three strata in a "hierarchy" starting with (1) intergovernmental sources, then governmental sources and international NGOs, (2) then international news reports, national NGOs, national news, then local governmental sources, local news, then (3) ordinary witnesses."*²⁶⁰

It is noteworthy that governmental sources and international NGOs are included in the same 'strata'. Although ORAC and the Tribunal occasionally make use of international NGOs' reports, both ORAC and the Tribunal overwhelmingly rely on governmental and inter-governmental sources. While these sources are not necessarily unreliable, the Working Party cautions, *"it may be necessary to consider whether there is any governmental bias"*.²⁶¹ Moreover, Henderson and Pickup stress:

*"...an unsupported assertion from one state's immigration authorities does not acquire an independent status simply because it is swapped around between other national immigration authorities."*²⁶²

6.6.2 Selective use

*"In assessing the general human rights information, decision-makers must constantly be on guard to avoid implicitly re-characterizing the nature of the risk based on their own perceptions of reasonability."*²⁶³

ORAC and the Tribunal rarely used COI to support the applicant's substantive claims. It was only in one case that a Tribunal Member, who allowed the appeal, noted:

*"Notwithstanding [the issues raised by ORAC]...the core of the applicant's testimony is consistent and coherent, it does not contradict generally known facts and Country of Origin Information and is on balance capable of being believed."*²⁶⁵

Where the applicant submitted COI, this was frequently dismissed without explanation or given no consideration. In one case, where the applicant submitted COI reports on corruption, brutality and negligence among the police in the Ivory Coast, the Tribunal member merely noted,

*"local failures to provide effective policing do not amount to a lack of state protection."*²⁶⁶

Where the ORAC or the Tribunal accepted that applicants held genuine fears of persecution, they frequently used COI to undermine the reasonableness of their fears. For example, one ORAC decision relied on COI stating reconciliation services were available to, and would provide adequate protection for, an applicant involved in a blood feud in Albania.²⁶⁷

Similarly, where an applicant had received no response to his attempt to bring his issues to the attention of the authorities, the Tribunal Member relied on COI to stress steps were being taken to curb militant activity in Pakistan, stating:

*"While there are shortcomings within the police system in Pakistan, there is no system of justice or enforcement perfect within any jurisdiction..."*²⁶⁸

Another Tribunal Member dismissed the claim that an Irish-born child faced the risk of female genital mutilation (FGM) in Nigeria. He relied on COI to state, while FGM is not illegal under the federal laws of Nigeria, at least one person had been prosecuted for FGM and women who feared being targeted could *"move and live peacefully"* in other parts of Nigeria.²⁶⁹

Similarly, Tribunal Members frequently told applicants who had been victims of human trafficking and sexual abuse that, according to COI, human trafficking and sexual violence is illegal in their countries of origin and,

therefore, they had nothing to fear upon return.²⁷⁰ One Tribunal member claimed the applicant, as a young adult, would be able to avoid being re-trafficked.²⁷¹ Another Tribunal member stated an orphaned minor, who had been a victim of sexual abuse, could return to Tanzania because, according to COI, orphans are absorbed into other families and, while sexual abuse remained a problem, there had been several convictions.²⁷²

²⁰⁶ UNHCR (n 16), para 196, (emphasis added).

²⁰⁷ Q11.

²⁰⁸ Q10.

²⁰⁹ *IR v MJELR and RAT* (n15), para 32.

²¹⁰ In 21% of all applications, ORAC either made no reference at all to the evidence or merely stated it had been 'considered'.

²¹¹ In 33% of all cases, RAT either made no reference at all to the evidence or merely stated it had been 'considered'.

²¹² Q51, Q78.

²¹³ As evidence of the applicant's military service: Q10, Q30, Q59, the applicant's political activity: Q51, and damage to the applicant's property: Q12.

²¹⁴ From doctors: Q2, Q3, Q72; employers: Q12, political organisations: ²¹⁰ Q29, Q45, Q78 religious and ethnic communities: Q48, Q73.

²¹⁵ Q3, Q6, Q13, Q15, Q16, Q20, Q30, Q33, Q43, Q45, Q54, Q58, Q77.

²¹⁶ Q7, Q33, Q42, Q53, Q54.

²¹⁷ Q71, (emphasis added).

²¹⁸ Q54.

²¹⁹ Ibid.

²²⁰ Q36.

²²¹ UNHCR (n16), para 48.

²²² Q17.

²²³ Q6, Q13, Q20, Q25, Q34, Q43, Q47, Q60, Q71, Q84.

²²⁴ Q46.

²²⁵ Q14.

²²⁶ Q27.

²²⁷ Q71.

²²⁸ Ibid.

²²⁹ UN Commission on Human Rights Resolution on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, (E/CN.4/RES/2000/43), 20 April 2000.

²³⁰ UN General Assembly Resolution, 55th session, Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: Report of the Third Committee, (A/Res/55/89), 4 December 2000.

²³¹ Hereafter 'Istanbul Protocol'.

²³² Istanbul Protocol, p 1.

²³³ *Bati and Others v. Turkey*, (appl. no. 33097/96 and 57834/00), Judgment (First Section), 3 June 2004 Reports 2004-IV, 249.

²³⁴ H Battjes, (2006), 'Legal effects of the Istanbul Protocol', in R Bruin, E Bloemen, M Reneman (eds.), *Care Full: Medico-legal Reports and the Istanbul Protocol in Asylum Procedures*, Pharos, Amnesty International and Dutch Council for Refugees, Utrecht: Amsterdam, p.27.

²³⁵ Q77.

²³⁶ Q71.

²³⁷ Q20.

²³⁸ Q37.

²³⁹ Q78.

²⁴⁰ Q29.

²⁴¹ Ibid.

²⁴² Q2.

²⁴³ Q57.

²⁴⁴ Q29.

²⁴⁵ Q50.

²⁴⁶ Office of the Refugee Applications Commissioner, (2011), *Annual Report 2011*, p 19.

²⁴⁷ Q1, Q18, Q48, Q50.

²⁴⁸ H Fraser, (2009), 'The role of 'educated native speakers' in providing language analysis for the determination of the origin of asylum seekers', *International Journal of Speech, Language and the Law*, 16(1), pp 113–138, at p 128.

²⁴⁹ Language and National Origin Group (hereafter 'LNOG'), (2004), 'Guidelines for the use of language analysis in relation to questions of national origin in refugee cases', *International Journal of Speech Language and the Law*, 11(2), p.261-266.

²⁵⁰ www.sprakab.se/Language_analysis.html [accessed on 13 September 2012].

²⁵¹ Q48.

²⁵² LNOG (n 266), para 11.

²⁵³ Q1, Q18, Q48.

²⁵⁴ Q1.

²⁵⁵ Q18.

²⁵⁶ Q48.

²⁵⁷ Ibid.

²⁵⁸ Q50.

²⁵⁹ UNHCR (n16), para 42.

²⁶⁰ Country of Origin-Country Guidance Working Party (hereafter 'CO-CG WP'), (November, 2006), *Judicial Criteria for Assessing Country of Origin Information (COI): A Checklist*, Paper for 7th Biennial International Association of Refugee Law Judges World Conference, Mexico City, para 30.

²⁶¹ For example, the UK Home Office, the US State Department and the Immigration and Refugee Board of Canada.

²⁶² CO-CG WP (n 278), para 52.

²⁶³ M Henderson and A Pickup, (2012) *'Best Practice Guide to Asylum and Human Rights Appeals'*, Electronic Immigration Network, para 17.39.

²⁶⁴ JC Hathaway, (1991), *The Law of Refugee Status*, Toronto: Butterworths, p 81.

²⁶⁵ Q86.

²⁶⁶ Q32.

²⁶⁷ Q9.

²⁶⁸ Q44.

²⁶⁹ Q26.

²⁷⁰ Q22, Q49, Q75, Q76.

²⁷¹ Q22.

²⁷² Q49.

7. Conclusions and Recommendations

The purpose of this study was to ascertain why asylum applications in Ireland are more likely to be refused than accepted. An aspect of this was whether the process adopted in Ireland was itself working in a way which is more likely to lead to a refusal of an application for asylum rather than an acceptance. In addition, it also set out to look at how decisions are reached regarding the credibility of an application.

The focus was on the whole asylum process – from the point at which someone makes their application for asylum to the point where they have a final decision from the Refugee Appeals Tribunal.

The conclusions that have been reached in this study, and which are examined in more detail below, are that:

- The system puts asylum applicants at a disadvantage from the outset, making it difficult for them to put forward a claim that is more likely to be seen as credible.
- The standard of proof that is being used is not applicable in asylum cases resulting in the application of a test that is too high and is a misapplication of the burden of proof.
- There is a focus on very specific aspects of a case leading to a distortion of the examination and conclusions about the credibility of a claim.
- There is an inability or unwillingness to see the oral account of an applicant as evidence in itself and a mis-use of documentary evidence.
- There is a lack of fairness and transparency in the Refugee Appeals Tribunal in particular.

7.1 Putting applicants at a disadvantage

In order for a decision to be taken as to whether or not a person applying for asylum should be given refugee status it is essential that the facts of their claim are first of all established. Only then can those facts be set against what is known about the country of origin information and the claim assessed in the light of both national and international law.

This is the position adopted by Goodwin-Gill and McAdam:

*"At each stage, hard evidence is likely to be absent, so that finally the asylum seeker's own statement, their force, coherence and credibility must be relied on, in the light of what is known generally, from a variety of sources, regarding conditions in the country of origin."*²⁷³

The person applying does not know what information is relevant, how much detail is required, what factors are taken into account when their application is assessed or how they are assessed. They are therefore dependent upon the process that has been set up to enable them to give an account of the circumstances which led them to claim asylum and why they fear to return to their country. In Ireland, as stated above, this is done through a series of interviews and a questionnaire which the applicant is required to complete and submit within a relatively limited period and without legal advice and assistance.

7.1.1 The use of a questionnaire

There is a lot to be said for a process that decides, within a reasonable period of time, whether someone is or is not entitled to protection as a refugee. This enables those who are accepted to begin the process of adjusting to a new life and, where family members have been left behind, to seek reunification. For those refused, they will not have had the chance to adjust to a new life so that moving on or returning to their countries of origin will not be such an upheaval, a factor that is particularly important where children are concerned.

In addition, starting that process of examination by the completion of a questionnaire enables the person applying to give their own account of their reasons for leaving or fear of returning in their own words. But only if it is seen as part of a process of gathering information to reach an informed decision and not as a piece of evidence to be used against an applicant. It is simply not credible for a genuine, unrehearsed oral testimony to remain consistent over a period of time. As will be seen from section 3, consistency is also affected by a number of factors including the impact upon memory of trauma and repeated requests for information. Therefore, the inability to recall details at a later date or inconsistencies in accounts are not necessarily indicative of a lack of credibility.

It is particularly important therefore that the questionnaire is seen as just part of the information

gathering process, not a defined document in itself, particularly for those who are less articulate and/or less able to express themselves properly in writing. That also applies to anyone who has experienced trauma, for example, a victim of torture or ill-treatment, who may find the process of giving an account so soon in an alien environment difficult if not impossible.

Furthermore, the requirement to repeat an account on several occasions can put someone at a disadvantage and lead to inadvertent errors on the applicant's part and an erroneous finding that their lack of consistency means a lack of honesty or the absence of truth.

Applicants for refugee status are inherently at a disadvantage by the fact that their cases are taken in an unknown system, in a foreign culture and, possibly, in a language that they do not know. The applicants may have suffered trauma and may be suspicious or wary of officials and reluctant to disclose too much information at an early stage. In addition, it is not unusual, particularly for someone who has newly arrived in the country, to find their time and attention dominated by their immediate needs.

The general instruction in the leaflet that applicants are given by ORAC to give full information in the questionnaire is undermined by the fact that the person applying for asylum does not in fact know either what type of information is required or in what depth. And notwithstanding the statement that pages can be added, most applicants will give information to fit the fairly limited space on the printed form.

As will be noted from section 2 above, some of the questions are very technical and others are better answered with an understanding of what lies behind the question. If, as is evident from the files examined in this report, the applicant subsequently mentions information or provides details which are not contained in this questionnaire, it is often held against them and is used to undermine the credibility of their application. And yet, with the best of intentions and with no barriers regarding level of understanding or ability to recall sometimes painful events, it is rare that a person claiming asylum - without the assistance of a person specifically trained to assist with such applications - will be able to provide the detailed account which sets out the claim for asylum at this all important stage. Neither

the guidance set out in the questionnaire itself nor in the Information Leaflet for Applicants will be enough to enable someone to know how much detail should be given in answer to key questions and the way in which that information should be relayed.

One response to errors or omissions in a questionnaire is, as has been seen in the cases included in this study, to say that these people were not giving an accurate account because they were not being truthful and could not therefore be consistent. A more nuanced approach would be to recognise that questionnaires are not always as straightforward as the drafters may think. In addition, when one adds in factors such as being new to the country, language barriers, lack of knowledge of the culture or system, lack of professional assistance and the requirement to submit the questionnaire within a very limited period whilst trying to adapt to an alien living environment, then, inevitably, mistakes will occur. And yet the final determination of an asylum claim can rest on the information given or omitted in this questionnaire.

The absence of legal advice and assistance at the start of the application procedure is also a particular feature of a process that puts the applicant at a disadvantage. It is not unusual for a person to go through the complete asylum process (ORAC and the RAT) without the opportunity to sit down with a legal representative with a view to a specialist helping them to set out their statement of claim.

Mr. Justice Blake, President of the Upper Tribunal of the Immigration and Asylum Chamber in the UK, when sitting in the High Court, stated:

“...most people who have experience of obtaining a narrative from asylum seekers from a different language or a different culture recognise that time, confidence in the interviewer and the interview process and some patience and some specific direction to pertinent questions is needed to adduce a comprehensive and adequate account. This is particularly the case where sexual assaults are alleged and all kind of cultural and gender sensitive issues may be in play as to why the full picture is not disclosed early on.”²⁷⁴

That narrative could be obtained by an interviewing officer of ORAC but their role of being the decision maker means that it is less likely that the applicant will see

them as being independent which will undermine their confidence. In addition, as seen in the scepticism and focus of ORAC interviews, they are not likely to create a situation where the applicant feels comfortable enough to provide the information required at an early stage.

The answer can only come from the engagement of a legal representative at an early stage of the process to assist the applicant to give their account, obtain evidence where it may be available and thereby assist the decision maker to have a full picture and make a fully informed decision.

The fact that, in the current system, it is only at the High Court stage that a statement will be prepared by a lawyer in the name of the applicant (which may be several years after the asylum claim is first made) is indicative of a system that does not have the applicant's account at the heart of the decision making process. Even then, it is not an opportunity for the applicant to sit down with a lawyer and outline their claim. It is a statement that is usually prepared by the barrister on the papers sent to him or her by the solicitor and is based on the documents before them (as referred to above). Therefore, a person going through the asylum system in Ireland may never have the opportunity to have a statement about their reasons for claiming asylum taken directly from them and prepared with the assistance of a trained lawyer specialising in asylum.

7.1.2 Examination at interview

The person being interviewed is almost completely dependent upon the interviewing officer for the opportunity to "establish the full details" of their claim. In view of the fact that most questionnaires will have been completed without legal advice or assistance, the obligation of the interviewing officer to ensure that the interview really is an opportunity for the applicant to give an account of their experiences and fears is even greater. This is particularly so when the applicant attends without legal representation. In the files examined, 94 % of applicants had no legal representative present at the interview.

The role of the interview as a key element in the process is in keeping with expert views on the purpose of an interview or a hearing. For example, Goodwin-Gill and McAdam (2007) state:

*"The object of the interview, examination or hearing is to encourage and obtain a narrative, and an understanding of the applicant's reasons for leaving, or refusing to return to, his or her country of origin."*²⁷⁵

In the files examined, it was considered that officers had conducted appropriate enquiries in 56% of the interviews examined. In other words, regardless of the tone of the interview, whether it was logical, whether it took place over more than one interview, that the information both put to the applicant and obtained from them, was directly relevant to the central issues in their claim and which the officer is required to take into account. In theory therefore, that provides the officer with a sound account upon which to make a decision, to be considered alongside any documentary evidence submitted or obtained including information about the situation which prevails in the country of origin. It also means that in 44% of cases, the decision was based upon only a partial examination of the claim put forward by the applicant.

This research showed that, even where the interview appeared to elicit the relevant facts or explanations, this did not necessarily lead to a decision based upon the information obtained. In 52% of cases, decisions were significantly based on the officer's preconceptions, speculation or their lack of knowledge or understanding for example about crossing international borders or the ability to obtain documentation. The decisions were not necessarily on the facts or information obtained during the examination process.²⁷⁶ In others, the factors which are intended to form just part of the assessment of credibility often dominated the decision. On occasions, those factors, whilst part of the assessment that ORAC is required to undertake, meant that the central issue in a claim was never properly determined.

ORAC officers are trained to conduct interviews and therefore it can be assumed that, to a significant extent, the interview styles, including content and direction, reflect what is expected of them. This therefore raises the issue as to whether or not the training is appropriate, effective or if the conduct and quality of the decisions are monitored by ORAC and, where necessary, steps taken to encourage a better examination and a higher quality decision.

7.1.3 Documentary evidence

The officers do not appear to take the oral statements of the applicants as evidence in themselves, despite the fact that it is more normal than not for a refugee to be unable to provide documentary evidence. Instead the lack of documentary evidence can be an issue raised at interview although, almost without exception, ORAC will, when presented with evidence particular to the claim, state that they are "unable to verify the authenticity". No explanations were evident in the files examined as to the inability of ORAC to check the authenticity of documents. However, there is also evidence that documents, even without verification, are used by ORAC and the RAT if they undermine an applicant's claim. Taken together with the comments made when documentary evidence is not forthcoming, then it is difficult to escape the conclusion that there is an inability or unwillingness in ORAC to get at the truth of the case and make a fully informed decision.

7.2 Burden and standard of proof

In the cases examined it appeared that both ORAC and the RAT set the bar far too high when deciding if an applicant was in need of protection. That is partly evident in direct statements from ORAC, for example, about the burden of proof and, in the RAT in particular, the lengths to which Tribunal Members were prepared to go to explain why a claim was lacking in credibility and why the documentary evidence did not assist. This is also seen from the way in which it appears that every small detail of an account must be shown to be true. As a consequence, many applicants risk being refused asylum because the standard of proof demanded of them is impossible to meet.

Where the applicant's account is unsubstantiated by evidence then, unless it runs contrary to known facts, he or she should be given the benefit of the doubt. 'Known facts' should not be the decision-maker's assumptions or speculation about what they believe to be plausible in any given situation but objective facts taken from a variety of sources. The principle of the benefit of the doubt is intended to ensure that a person in need of international protection who is unable to substantiate their claim is provided with a safety net. There is no need for such a safety net where the evidence, apart from

their own statements, can demonstrate that they have a well-founded fear of persecution within the meaning of the Refugee Convention. To not apply the benefit of the doubt to someone on the grounds that their statements are unsupported by documentary evidence is to take away all meaning to the concept.

7.3 Distortion of the examination and decision making process

Reference has been made in this report to section 11B of the Refugee Act 1996 as amended. It is evident from the cases examined in this study that this has had the effect of making those who gather information and those who decide the claims paying too much attention to factors which, whilst relevant, may be peripheral to the main requirement which is to determine if the applicant is at risk of persecution on return.

One example of this is the focus on the applicant's failure to apply in the 'first safe country', in other words the country which the applicant first reaches after they have left their country of nationality or residence where the persecution is feared. The requirement in the Refugee Act to find that this is a factor which undermines credibility is arguably contrary to the Refugee Convention.

As Professor James Hathaway has put it:

*"There is no requirement in the Convention that a refugee seek protection in the country nearest her home, or even in the first state to which she flees. Nor is it requisite that a claimant travel directly from her country of first asylum to the state in which she intends to seek durable protection. The universal scope of post-Protocol refugee law effectively allows most refugees to choose for themselves the country in which they will claim refugee status."*²⁷⁷

In addition, the European Council on Refugees and Exiles (ECRE) has warned against a negative finding on credibility relating to identity documents:

*"The absence of valid identity documents should not affect the credibility of an asylum claim nor result in the application being determined to be manifestly unfounded. Recognition of refugee status is not dependent on the production of any particular formal document."*²⁷⁸

Both ORAC and the RAT first of all disregard statements about choice of country to be valid or explanations for lack of identity documents and, secondly, do not appear to have a good understanding of how people smugglers operate and, thirdly, have had their perspectives on what is actually quite permissible under the Refugee Convention distorted so that they are making decisions which undermine the protection afforded by the Convention.

This study has shown that there is an emphasis on factors which are mentioned in section 11B. In addition, that decision makers are unable to accept any explanation for conduct or behaviour which appears contrary to their expectation of norms. This has meant that, despite more than half of interviews conducted by ORAC being seen to gather all the relevant information, the decisions based upon them can be marred by superficial factors and an inability to accept what may well be perfectly valid explanations for the absence of identity documents, travel routes and passage across border points.

Furthermore, there appears to be either a lack of understanding or an unwillingness to accept that, notwithstanding the factors in section 11B which weigh against an applicant's credibility, they may not be the determinative issues. For example, a gay man from a country where homosexuality is criminalised and where popular opinion is against him should not need to worry that he cannot produce a valid identity document or give an accepted account of his journey to Ireland. Likewise a Syrian national from a community that is supporting the opposition should not need to prove that his delay in claiming asylum is not indicative of an absence of fear when he is facing removal to Syria.

It would be invaluable if ORAC and the RAT could move away from their concept of a "genuine refugee" and the behaviour associated with it as most of those in need of international protection do not fit so neatly into a box.

7.4 The oral testimony

There are two issues about the apparent value of the oral testimony. Firstly, the frequency with which, in ORAC in particular, an applicant is informed about the difficulty in accepting their account without documentary proof

was significant. This is despite the fact that documents, when submitted, did not ordinarily form part of the assessment of credibility. Secondly, and particularly at the Tribunal stage, a decision is ordinarily made on the credibility of an applicant or their application before there is any consideration of the documentary evidence, including country information. Hence the conclusion that a medico-legal report cannot assist because acceptance depends upon the applicant's account and this has already been dismissed.

It is quite possible for a person to be recognised as a refugee on the basis of their oral account alone when that account is assessed in the light of what is known about their country from a variety of sources and the right standard of proof applied. Furthermore, any documentary evidence should form part of the assessment to assist in reaching a finding on credibility, not be discounted after credibility has been concluded and therefore set aside.

7.5 The Refugee Appeals Tribunal

The finding that half of the cases in this study were decided by a small number of Tribunal Members and that all of those cases were dismissed gives serious cause for concern. Furthermore, the manner in which those decisions were reached, including failure to properly take into account all of the information on file, conclusions based on demeanour and the Tribunal Members use of their own understanding of what is reasonable, undermines confidence that the RAT is genuinely acting independently to reach a fair and objective decision on the protection needs of applicants.

Furthermore, the apparent confidence with which comments are made about applicants in dismissive, almost derogatory terms at times, possibly encouraged by the knowledge that their decisions will not be published and available in a public domain, should give cause for concern about how some Tribunal Members view their role.

A system that is operating to reach a fully informed decision, free from bias, will be one that is open to examination in a way that has been absent thus far in Ireland.

7.6 A 'culture of disbelief'?

It is difficult to reach any conclusion other than that a culture of disbelief does indeed exist in the Refugee Status Determination procedure in Ireland. To a degree, that is inadvertent and comes from the application of a system that requires decision-makers to focus upon aspects of a case which often take attention away from the central issue regarding risk of persecution on return to the applicant's country. In addition, it also comes from decision-makers not being properly informed about or alert to the caution to be applied when reaching a conclusion about a statement made by an applicant earlier in the process and the need to collect all the information and evaluate it before reaching a decision. They also need to have a much greater awareness of and empathy for the difficulties that face applicants when giving an account in different ways across a protracted process and their role in assisting that process.

However, the evidence obtained in this study goes further than suggesting that the process itself is responsible and, particularly where the Tribunal is concerned, there are reasons to believe that there is a culture of disbelief that itself informs the approach that some Tribunal Members take and the way in which they set about the task of deciding the appeals that come before them.

7.7 Recommendations

The recommendations below follow from the evidence obtained and the conclusions reached in this report. Most of these recommendations require change at an administrative level only but consideration does need to be given to changes at a legislative level:

- Training for decision-makers to see the questionnaire as part of a process of gathering information in which they share responsibility to obtain all of the relevant information before making a decision and reaching conclusions.
- Special procedures at all levels for the identification, support and consideration of claims from victims of torture and other trauma.

- Training to provide decision-makers with a better understanding of the difficulties facing applicants in obtaining evidence and the way in which an oral testimony can in fact be the basis of a positive decision without documentary evidence particular to the claim.
- Training on the application of the standard and burden of proof.
- The availability of legal advice and assistance at the earliest stage of the process primarily to assist the applicant to present their claim but also to ensure that the decision-maker is better able to make a fully informed decision on the key issues.
- Facilities for assessing the validity of documents presented in support of a claim.
- The consideration of country information from a wider variety of sources: inter-governmental, governmental and non-governmental.
- A procedure for requiring decision-makers to put any evidence considered against the applicant to them for their comment.
- Open procedures for the appointment of Tribunal Members.
- New procedures for the allocation of cases to members of the Tribunal and an end to the discretion of the Chair for this responsibility.
- Public hearings as a norm before the Tribunal unless the applicant is a child or other special considerations apply.
- The publication of all Tribunal decisions in redacted form for access outside of those closely involved in the asylum appeal process.
- The requirement for the Chair of the Tribunal to appear before the Justice Committee to answer questions about the RAT's annual report.
- A review of section 11B of the Refugee Act 1996 as amended to bring it into line with the Refugee Convention.

²⁷³ GS Goodwin-Gill, and J McAdam (hereafter 'Goodwin-Gill and McAdam'), (2007), *The Refugee in International Law*, 3rd ed, Oxford: Oxford University Press, p. 64.

²⁷⁴ Mr. Justice Blake in *R (on the application of Ngirincuti) v SSHD* [2008] EWHC 1952 (Admin.) quoted in Macdonald (n 59), p. 984. The Immigration and Asylum Chamber in the UK is an independent body which hears both immigration and asylum appeals.

²⁷⁵ Goodwin-Gill and McAdam, p 544.

²⁷⁶ This included a high number of cases where the interview itself was concluded to have followed appropriate enquiries.

²⁷⁷ Hathaway (n 63) p 46.

²⁷⁸ ECRC (1999), *ECRC Guidelines on Fair and Efficient Procedures for Determining Refugee Status*.

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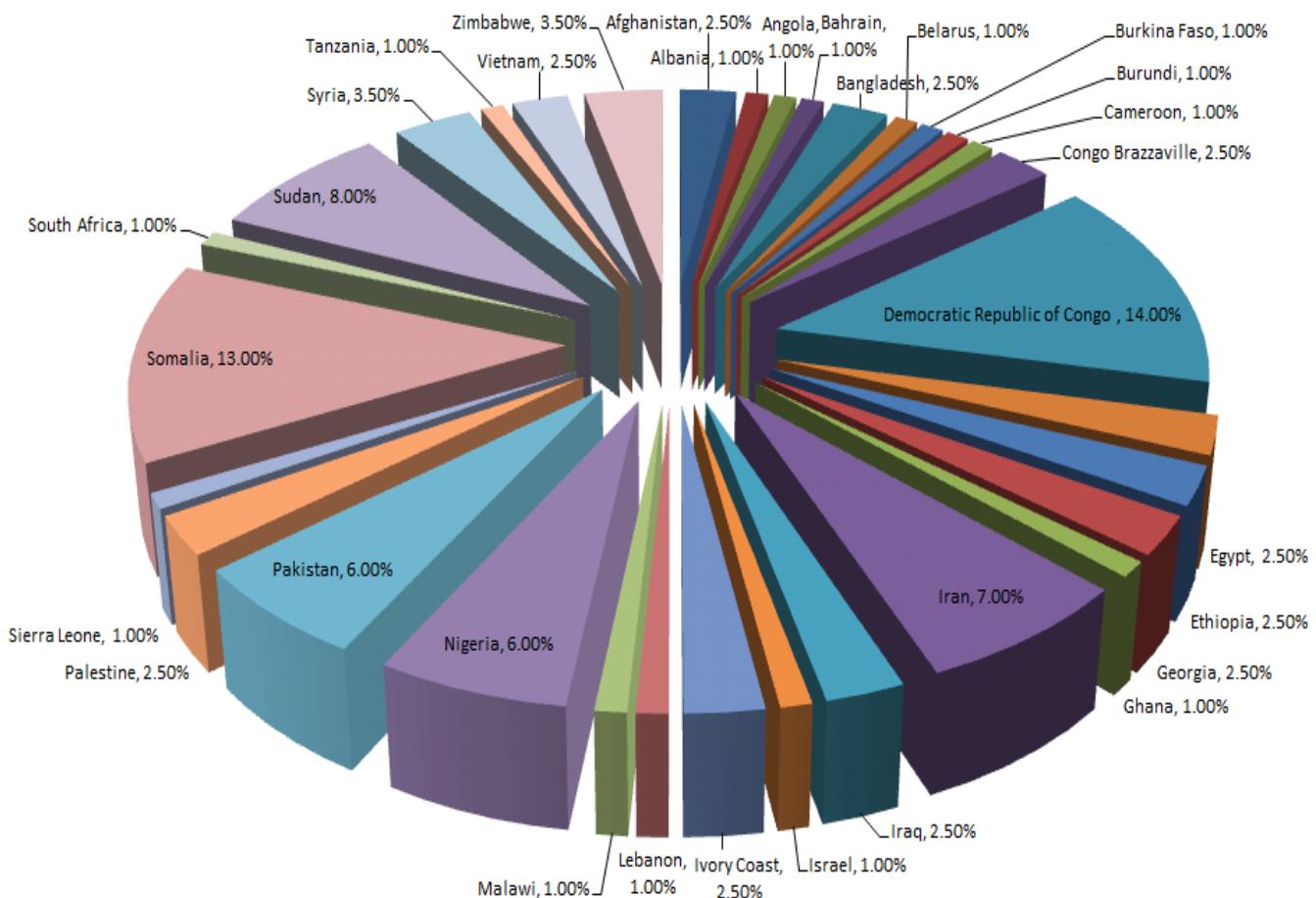
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Appendix 1

Countries of origin of applicants in the study



Appendix 2

The research questionnaire

Assessment of asylum claims by ORAC and the RAT

Date of examination of file _____

1. Personal information

- 1.1 ORAC reference: _____
- 1.2 Solicitors' firm/reference (current): _____
- 1.3 Nationality: _____
- 1.4 Country of origin/habitual residence (if different to nationality): _____
- 1.5 Gender: Male Female
- 1.6 Age range at date of ORAC application¹:
Below 18 18-20 21-30 31-40 41-50 51-60 61-70 71-80
- 1.7 Accompanied by² : _____
- 1.8 Main language(s): _____

2. Key dates

- 2.1 Date of arrival (initial and subsequent if relevant) in Ireland: _____
- 2.2 Date of application(s) for asylum: _____
- 2.3 Date of submission of questionnaire: _____
- 2.4 Date(s) of full asylum interview(s) at ORAC: _____
- 2.5 Date of ORAC decision: _____
- 2.6 Appeal hearing date(s): _____
- 2.7 Date of (first) RAT decision: _____
- 2.8 Date of High Court decision: _____
- 2.9 Date of second or subsequent RAT decisions following remittal by the High Court: _____

3. Official records on file³

- 3.1 ASY1 (initial screening interview): Yes No

Please indicate if any dependants were included as part of the asylum claim or applied separately:

- 3.2 Questionnaire: Yes No

- 3.3 Section 11 Interview notes (asylum interview): Yes No

- 3.4 ORAC decision: Yes No

- 3.5 RAT decision: Yes No

¹For example, 10-16; 18-20; 21-30; 31-40; 41-50; etc.

²For example, spouse/partner and/or children (inc. numbers and whether minors or adults)

³Further details about each of these documents is required below

4. Evidence obtained by ORAC or submitted by the applicant

- 4.1 Did the applicant submit any evidence in support of his/her application/appeal: Yes No
- 4.1.1 If yes, what evidence was submitted at each stage (with the questionnaire, at interview, after interview, in support of the appeal)?
-
- 4.1.2 Was the evidence referred to/considered by ORAC or the RAT? If so, please provide details in the relevant sections below.
-
- 4.1.3 If no evidence was submitted to ORAC or the RAT, was the applicant ever asked or advised (e.g. by ORAC) that they should submit any evidence? If so what and what was their reason for not doing so?
-
- 4.2 Did ORAC seek or obtain any evidence e.g. about presence in or an asylum claim in another EU country?
Yes No
- 4.2.1 If yes, what was the evidence?
-
- 4.2.2 Did they give the applicant an opportunity to comment on the evidence?
-
- 4.2.3 If so, with what result?
-

5. Legal Representation

- 5.1 Legal Representative on record (if any)⁴ :
-
- 5.2 Please provide brief information about any evidence of legal advice and assistance given throughout the ORAC process:
-

⁴ Name of organisation or firm not the individual solicitor

6. ASY1

- 6.1 Please identify any issues such as delay in arrival/claim for asylum after departure from country of nationality/habitual residence; outline of basis of claim for asylum; previous asylum claims in any country, documentation submitted⁵ etc.:
-
- 6.2 Please identify any language issues (including whether an interpreter was used):
-
- 6.3 Please indicate whether any family members claimed asylum at the same time and if so who and with what outcome if known (e.g. spouse, children):
-

7. Questionnaire

- 7.1 Please give details of the translation agency (if any):
-
- 7.2 Did the applicant receive any assistance in completing the questionnaire from anyone and, if so, from whom?
-
- 7.3 Does the questionnaire give you a clear picture of why the person either left their country or why they cannot return: Yes No
- 7.4 If yes, what is the basis of the asylum claim as set out in the questionnaire?
-
- 7.5 Highlight any issues which appear to indicate that a question that has not been properly understood by the applicant (e.g. what do they identify as the basis of their claim – the "Convention reason"):
-
- 7.6 Highlight any aspect of the questionnaire which may suggest an erroneous or incomplete translation (e.g. incoherent or unintelligible answer) or if the translator gives a comment on the account:
-
- 7.7 Highlight any issue raised in the questionnaire which you would expect an interviewing officer to discuss during any subsequent interview and give brief reasons why you consider that to be relevant (e.g. inconsistencies, lack of complete information):
-

8 Interview(s)

- 8.1 Date(s): _____

⁵ These are all potentially relevant to a credibility finding and it needs to be seen how they are dealt with later on in the process

8.2 Legal representative present: Yes No

8.3 Language of interview:

8.4 Name of interpreter (if any):

8.5 Length of interview (and details of any breaks):

8.6 Name of interviewing officer (IO):

8.7 Lines of enquiry

8.7.1 What were the main issues that the IO concentrated upon in the interview e.g. journey to Ireland, knowledge of the claimed country of origin/religion/tribe?

8.7.2 Did the IO address the issues you identified in the ASYI or in the questionnaire and if so how/to what extent?

8.7.3 Did the IO follow up answers given by the applicant in an appropriate way? If so how?

8.7.4 Was there any clear line of questioning from the IO which indicates that the main intention was to ascertain the full facts in order to make an informed decision? If not, what do you assess to be the emphasis as identified by the line of questions and why?

8.7.5 Was there any indication on the face of the record of any interpretation difficulties or problems with the applicant understanding the questions? If so what and how were they dealt with by the IO?

8.7.6 If there was more than one interview, was there any clear evidence as to why a second or subsequent interview was necessary?

8.7.7 What was/were the main issue(s) covered in the second or subsequent interview?

9. ORAC recommendation/decision

9.1 Delay between interview and decision:

9.2 What reference did ORAC make to the evidence submitted by the applicant (if any) and if so what:

9.3 Reasons for refusing application (please summarise):

9.4 Do the reasons question the credibility of the claim? Yes No

9.5 Where credibility is questioned, what are the main reasons given (please summarise)?

9.6 How do they relate to the substance of the claim as identified in the questionnaire and/or interview (e.g. central, relevant but not major, etc)?

9.7 Was the applicant given an opportunity in the interview to address the concerns of the IO and if so how?

9.8 What part if any did information obtained by ORAC other than from the applicant play in the decision?

9.9 Apart from the applicant's credibility, were any other substantive reasons given for dismissing the applicant's claim for refugee status and if so what (e.g. country evidence)?

9.10 By comparison to doubts cast on the applicant's credibility, what part did any other information play in relation to the decision?

10. Refugee Appeals Tribunal

10.1 Date(s) of hearing(s):

10.2 Date determination issued:

10.3 Was the applicant legally represented? Yes No

10.4 By whom? Solicitor Barrister

10.5 Language used in hearing:

10.6 Name of interpreter:

10.7 Name of Tribunal Member (TM):

10.8 Length of determination (pages):

10.9 RAT's determination:

10.9.1 Number of pages devoted to account of applicant's individual claim (whether recount of questionnaire, evidence given at hearing etc):

10.9.2 Number of pages devoted to the legal framework:

10.9.3 What reference did the TM make in the determination to the issue of the standard of proof?

10.9.4 Number of pages devoted to the analysis of the claim:

10.9.5 Were there any issues relating to the credibility of the applicant in the TM's analysis and if so what?

10.9.6 Apart from credibility issues, did the TM have other reasons for dismissing the claim and if so what?

10.9.7 Were the credibility issues that were held against the applicant put to him/her during the appeal hearing?

10.9.8 Did the credibility issues relate to previous statements by the applicant or failure to provide information or explanation at an earlier stage and if so what?

10.9.9 What reference, if any, did the TM make to the demeanour of the applicant? Did the TM make any subjective comments about the applicant?

10.9.10 How did the TM deal with any evidence submitted by or on behalf of the applicant?

10.10 Is there any evidence on file of a challenge to the RAT's determination and if so what and with what outcome (if known)?

10.11 Did any challenge question the credibility findings of the TM?

10.12 If so, with that result?

10.13 What was the final outcome for the applicant (e.g. refugee status, subsidiary protection, leave to remain, family reunification, deportation order) if known from the file? If unknown, in which stage is the case pending?

Initials of person completing this form: _____



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