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Country Guidance in Asylum Cases: Approaches in the UK and Sweden

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Abstract:

The fundamental issue in asylum adjudication has been described as ensuring that those at risk of persecution on their return are afforded the protection to which they are entitled under international and national law, while preventing those who are not at risk from exploiting the asylum process as an alternative route of entry. Information on the situation in a particular country or region is essential both for judging the objective risk of harm upon return for the asylum seeker and the assessment of the claimant's narrative. Judges and decision makers therefore need to have access to detailed, reliable and up-to-date information. It is equally important that they do not reach dramatically different conclusions on the same material as this would jeopardise the predictability of decision making, rendering it arbitrary and unfair. The manner in which guidance is provided on how questions of law and fact are to be interpreted in order to achieve consistency and predictability varies between countries, depending on their legal systems and traditions. In the United Kingdom, a system of Country Guidance cases has developed which provides guidance on the situation in a particular country or region. This is to a large extent binding on similar cases. In Sweden as well as in many other European countries, there is no similar system. In this working paper, it is discussed how the matter of country guidance is approached in Sweden and the United Kingdom respectively. It is suggested that for a system of country guidance cases to be introduced not only does a number of practical requirements need to be fulfilled; it is equally necessary that providing guidance on matters of fact rather than on purely legal matters is a task accepted and embraced as such by the courts and one that is considered compatible with the legal tradition of the country in question.

Keywords;

country guidance- asylum- legal culture- legal certainty- Sweden

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1. Introduction

The judgment of asylum cases is complicated. The fundamental issue in asylum adjudication has been described as ensuring that those at risk of persecution on their return are afforded the protection to which they are entitled under international and national law, while preventing those who are not at risk from exploiting the asylum process as an alternative route of entry.¹ This requires judges and first-tier decision makers to address a number of factors: the credibility of the narrative presented by the asylum seeker and whether any claims of persecution can give rise to an acceptable likelihood of risk of harm, and a consideration of whether the harm feared by the asylum seeker falls within the scope of protection in international, regional or national law, the situation in the country of origin and the risk of future harm to be inflicted upon the asylum seeker if returned.² These issues involve the assessment both of matters of law and fact, both of which are fundamental for establishing whether or not a person is a refugee in accordance with the refugee definition expressed in Article 1A(2) of the 1951 Convention relating to the Status of Refugees³ (the Refugee Convention) or whether the applicant is eligible for subsidiary or alternative protection.

Judges and administrative decision makers are required to take into account a number of sources when assessing the validity of a claim for protection. These include the relevant national and international legal framework, national and international jurisprudence, and statements and interventions concerning the interpretation of matters of law by UN agencies such as the Office of United Nations High Commissioner for Refugees (UNHCR) or organisations such as the International Red Cross Committee (ICRC) and country of origin information (COI) concerning the country in question. COI, or background country materials, is derived from a number of sources, including legal materials, reference works, reports, papers and other statements by international bodies such as the UNHCR or the United Nations treaty monitoring bodies, reports by non-governmental organisations (NGOs), reports by national bodies, and media clippings, as well as information obtained from other asylum claims.⁴ Information on the situation in a particular country or region is essential both for judging the objective risk of harm upon return for the asylum seeker and the assessment of the claimant's narrative. It is therefore essential that judges and decision makers have access to detailed, reliable and up-to-date information. It is equally important that they do not reach

¹ Robert Thomas, *Administrative Justice and Asylum Appeal: A Study of Tribunal Adjudication*, Oxford, Hart Publishing, 2011, 16.

² Sir Nicholas Blake, President, Upper Tribunal Immigration and Asylum Chamber UK, 'Luxembourg, Strasbourg and the national court: the emergence of a country guidance system for refugee and human rights protection' paper, 4 November 2012, para. 13. The paper was presented at a seminar held by the Refugee Law Initiative 22 November 2012. It was later published in the *International Journal of Refugee Law* (2013) 25 (2):349-372.

³ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S.137, *entry into force* 22 April 1954.

⁴ "Judicial Criteria for Assessing Country of Origin Information (COI): A Checklist" a paper for 7th Biennial IARLJ World Conference, Mexico City, 6-9 November 2006 COI-CG Working Party *International Journal of Refugee Law* (2009) 21 (1): 149-168

dramatically different conclusions on the same material as this would jeopardise the predictability of decision making, rendering it arbitrary and unfair.⁵

The manner in which guidance is provided on how questions of law and fact are to be interpreted varies between countries, depending on their legal systems and traditions. One instance upon which positions vary is the extent to which precedents are considered binding or authoritative on an inferior court, or on a court that has decided a particular case.⁶ A second example is the approach held by judges on ‘making law’ – and whether this is something that judges do, can do, or should do.

Providing guidance for lower courts and administrative authorities, whether in the form of a legally binding precedent, an authoritative statement or merely in an advisory capacity on matters of *law* could be considered relatively unproblematic, since higher courts are presumed to have both the competence and time to reflect on complicated legal issues and to make authoritative statements applicable beyond an individual case.⁷ With regard to precedents on matters of *fact*, such as how to understand the situation in a particular country or region in general, or for a particular group, then things become more complicated. The notion of ‘complicated’ does not imply that it would be more difficult to interpret matters of fact than those of law. Rather it refers to that of giving guiding statements, especially when such statements and interpretations are considered binding. It is a complex business both for reasons of legal tradition and the nature of the guidance that courts of a higher instance are expected to provide, and for more practical reasons. The latter, for example, refers to the fact that the political and security situation in a particular country might be susceptible to rapid change, so that precedents of this kind can quickly become outdated and in need of replacement. Yet, in asylum cases in particular, the need for guidance and consistency on how a particular situation is to be interpreted is essential both for the development of jurisprudence and (not least) for the legal security of the asylum seeker.

The objective of this working paper, against the background provided above, is to discuss the different approaches adopted by the United Kingdom (UK) and Sweden. The intention is to highlight the pros and cons of the methods chosen and to discuss why a particular procedure has been selected. Sweden and the UK have been singled out for illustration because both countries are among the top five receiving countries⁸ in the European Union (EU), and because there appears to be taking place a certain amount of transnational judicial dialogue between the two jurisdictions.⁹ Furthermore, the legal traditions of the two countries are distinctly different.

⁵ Blake 2012, para. 16.

⁶ H. Patrick Glenn *Legal Traditions of the World* 2nd ed. Oxford, Oxford University Press, 2004.

⁷ Whether this is true or if it is a conventional view that does not take into account the different functions performed at different levels of the judicial hierarchy is a matter for discussion.

⁸ *UNHCR Asylum Trends 2012. Levels and Trends in Industrialized Countries* UNHCR 2013.

⁹ Perhaps it is more correct to refer to it as a conversation where one party speaks and the other mostly listens, given the fact that UK judgments are occasionally referred to by Swedish courts. However, the opposite does not often happen.

For the purposes of this investigation a small number of interviews with Swedish and UK judges and administrative decision makers were conducted.¹⁰ The interviews have mainly been used as background material for a better understanding of the systems in all their complexities. Given the fact that the issue of country of origin information and guidance as well as the matter of the status and nature of a legal precedent and the role of the judge – to say the least – is comprehensive, I do not intend to provide any final answers on this matter but rather to point to a few interesting aspects.

2. Sweden

2.1. Some notes on the Swedish legal system

As it cannot be assumed that all readers are familiar with the details and peculiarities of the Swedish asylum system, this section will begin with a brief introduction of the Swedish legal system, and the asylum process in particular. The Swedish legal system, as with the Scandinavian legal systems in general, is often considered to be a civil law system. As the Scandinavian legal systems, however, differ from the legal systems of Continental Law Europe on certain important points – in the limited use and importance of all-embracing legal systems or concepts as well as legal formalities, the lack of large, systematic codifications, and the absence of an actual reception of Roman law, to mention a few – it is probably more correct to regard them as a separate legal family.¹¹ The school of Scandinavian Legal Realism and its approach to what the law is and what it ought to be, advocating a naturalistic, positivist approach to law and rejecting influences of metaphysics upon scientific thinking in general and legal thinking in particular, has also had significant influence on the Scandinavian legal tradition.¹² Though the influence of this particular school of thought is now much less dominant than it was fifty years ago, its legacy remains traceable in the manner in which Swedish jurists perceive the law and what it means to interpret and implement it.

In recent years European law both in the form of EU law and the European Convention on Human Rights (ECHR) has had a substantial influence on national law in Scandinavian countries, as has (in certain spheres) American and UK law. The impact of international law varies substantially depending on the field of law.¹³ The ECHR was incorporated into Swedish law in 1995 and is, so far, the only human rights treaty to be accorded this status.¹⁴ As Sweden adheres to the dualist tradition, international treaties must become Swedish law in order to be directly applicable in national courts.

¹⁰ Those interviewed requested anonymity.

¹¹ Ulf Bernitz “What is Scandinavian Law? Concept, Characteristics, Future” 13-30 (20) in *What is Scandinavian Law?* Peter Wahlgren (ed.), Scandinavian Studies in Law, Vol. 50, Stockholm Institute for Scandinavian Law, 2007.

¹² See e.g. Jes Bjarup “The Philosophy of Scandinavian Legal Realism” (March 2005) *Ratio Juris* 18(1), 1–15.

¹³ On the impact of international law on Swedish law and jurisprudence, see Inger Österdahl & Rebecca Stern (eds.) *Folkrätten i svensk rätt* Stockholm, Liber 2011.

¹⁴ Swedish Code of Statutes - SFS 1994:1219.

Swedish law recognises four main sources of law: legislation, preparatory legislative materials, case law and legal doctrine.¹⁵ Legislation is the primary source, while the remaining three are secondary and are applied to interpret the law in a specific case. The preparatory works are particularly important in the Swedish legal tradition. As a result, the preparatory works are usually comprehensive and quite detailed though the level of this detail varies depending on how the legislation in question is formulated and to what extent the legislator has intended to leave room for interpretation for those applying the law. Additionally, the older a certain piece of legislation grows then with it more importance is attached to the case law of the courts of higher instance. It should be mentioned in this context that in the Swedish legal system precedents are not legally binding. In practice, however, judgments by the supreme courts are very influential and will in general be followed by the lower courts. If, however, a lower court deviates from a precedent this does not constitute sufficient grounds for an appeal. If the case is appealed there is nonetheless a good chance that the appeal will succeed, provided the court of appeal does not decide to agree with the new interpretation. As for international courts, judgments by the Court of Justice of the European Union are, in accordance with EU law, binding on Swedish courts, as are judgments by the European Court of Human Rights when concerning Sweden. Decisions and similar statements on individual communications by international treaty monitoring bodies such as the Human Rights Committee, however, do not have this legally binding status. Foreign legal decisions have no legal authority as such in Swedish law.

There are two parallel systems of courts in Sweden: the general courts, dealing with criminal and civil cases, and the general administrative courts concerned with cases relating to public administration. Both sets of courts are organised in a three-tier system. For the general courts there are district courts (*tingsrätter*), courts of appeal (*hovrätter*) and the Supreme Court (*Högsta domstolen*). With the general administrative courts there are administrative courts (*förvaltningsrätter*), administrative courts of appeal (*kammarrätter*) and the Supreme Administrative Court (*Högsta förvaltningsdomstolen*). In addition, there are a number of specialised courts and tribunals, for example concerning migration or environment-related cases.

2.2. The Swedish asylum appeals procedure in brief

In 2005 the Swedish asylum system was the subject of a major reform aimed at transforming the asylum procedure from an administrative process, where appeals were handled by the Aliens Appeals Board, into a proper two-party process, thereby enhancing the transparency and legal security of the system and benefiting the applicant.¹⁶ The reform introduced a system in which the Migration Board remained the body of first instance but where appeals were handled within the general administrative courts system. The first level of appeal is the Migration Courts, which are not separate courts but divisions of the administrative courts in four cities. The second and final level is the Migration Court of Appeal, which is a division of the Administrative Court of Appeal in Stockholm. The current asylum procedure, which

¹⁵ For an introduction to Swedish law, see Laura Carlson *The Fundamentals of Swedish Law* 2nd ed., Lund, Studentlitteratur 2012. See also Stig Strömholm *Rätt, rättskällor och rättstillämpning*, 5th ed., Stockholm: Norstedts Juridik, 1996, chapters 15-18.

¹⁶ Prop. (Government Bill) 2004/05:170 *Ny instans- och processordning i utlännings- och medborgarskapsärenden*. The reform also meant the introduction of a new Aliens Act, Swedish Code of Statutes - SFS 2005:716.

entered into effect on 31 March 2006, is thus a comparatively new system where judges as well as other stakeholders – first-tier decision makers, presenting officers, and lawyers – have had to acquaint themselves with (for many) a relatively new field of law and procedural system, and with all that this entails.¹⁷

Unless a case is deemed to be simple, judges in the administrative courts are assisted by three lay assessors (*nämndemän*). Judgments of the Migration Court can be appealed to the Migration Court of Appeal. In most cases that are dealt with by the general administrative courts, the judgment of an administrative court of appeal can be appealed (provided certain formal conditions are met) to the Supreme Administrative Court. However, except in certain rare cases, the Migration Court of Appeal is the court of last resort in cases concerning immigration, asylum and citizenship. In neither the Migration Court nor the Migration Court of Appeal are judges formally required to be specialists in migration law in order to be appointed. In practice, however, working at a Migration Court or at the Migration Court of Appeal inevitably leads to a certain level of specialisation. At the same time, most judges at the Migration Courts or the Migration Court of Appeal also adjudicate in other types of cases, such as tax and social insurance cases. Few judges choose exclusively to confine their careers to migration law; one reason for this perhaps being the relatively low status that migration law has so far enjoyed among judges and lawyers.¹⁸

Leave for appeal is required before a case can be reviewed by the Migration Court of Appeal. Leave is granted if “it is of importance for the guidance of the application of the law that the appeal is examined by the Migration Court of Appeal or there are other exceptional grounds for examining the appeal”.¹⁹ As of 1 July 2013 leave for appeal can be limited to a particular question arising in a case and does not need to apply to the case in its entirety.²⁰ If leave is denied, the judgment of the Migration Court is final. A decision to deny leave to appeal as such cannot be appealed. The Migration Court of Appeal can also remit decisions to a Migration Court or to the Migration Board.

2.3. Migration Court of Appeal precedents; country guidance in particular

The primary task of the Migration Court of Appeal is through precedents to provide guidance to the lower courts and the Migration Board and for the application of the law in general. The responsibility of the Migration Court of Appeal to contribute to the advancement of Swedish migration law, jurisprudence in particular, is clearly stated in the preparatory works.²¹ Since its creation in 2006 the Migration Court of Appeal had by June 2013 delivered about 300 judgments. Some 259 of them have to date been reported and included in the Court’s database on guiding judgments.²² The fact that a judgment by the Court is not reported does not

¹⁷ Interview, Judge 1.

¹⁸ Interview, judge 2.

¹⁹ Aliens Act Chapter 16, Section 12.

²⁰ Prop. (Government Bill) 2012/13: 45 *En mer ändamålsenlig förvaltningsprocess*, 142-144.

²¹ Prop. (Government Bill) 2004/05: 170 *Ny instans- och processordning i utlännings- och medborgarskapsärenden*, 133.

²² www.dom.se.

indicate that it is not a precedent. However, the judgments reported are those that are considered by the Migration Court of Appeal to be of particular importance.²³ The decision on which judgments are to be reported is made by the Court itself.²⁴ The precedents available concern both procedural and material issues of law. The emphasis in the early days was on establishing the framework for the transformed process in migration matters. Examples include clarifications of the applicable sources of law,²⁵ the allocation of the burden of proof,²⁶ and the right to legal counsel.²⁷ As a consequence of the relatively limited number of cases so far to be granted leave to appeal by the Migration Court of Appeal, the Migration Courts – the first-tier courts – in the vast majority of cases effectively become the courts of final instance. The three Migration Courts being equal in status and independent in relation to one another, they are not formally obliged to harmonise their case law or assessment on either matters of law or fact. As a result, the case law of the three first-tier courts has occasionally been different on certain points.

In the process leading up to the establishment of a new appeals system the appropriateness of enjoining a court that normally is not of the last instance the task of producing precedents in a field of law in which interpretative guidance was so clearly needed was questioned by several stakeholders, one being the prominent Legal Council (Lagrådet).²⁸ The current system has continued to be criticised on a number of counts, including the requirement for a leave to appeal (i.e. that a case is not granted an appeal merely on the basis of how the evidence has been assessed or that the decision of the lower court is questionable on some other account²⁹), the limited number of cases where a leave to appeal is granted (since 2006 approximately less than 10 per cent³⁰) which has resulted in a number of important matters both of a procedural and material nature to remain so far un-commented on by the Migration Court of Appeal and, also, the reluctance of the Migration Court of Appeal to provide country guidance.³¹ Such criticism has been voiced both by external commentators such as NGOs and refugee law practitioners and (though perhaps in a more diplomatic manner) by the Migration Board and the Migration Courts.

As the explicit role of the Migration Court of Appeal is to provide guidance, views on what should be covered by such advice and direction have been manifold. From the very beginning

²³ Rebecca Stern *Ny utlänningslag under lupp* Stockholm, Svenska Röda Korset, 2008, 20, SOU 2009:56 *Den nya migrationsprocessen*, 205-206.

²⁴ RIK 6 §, SOU 2009:56, 205.

²⁵ MIG 2006:1.

²⁶ *Ibid.*

²⁷ MIG 2006:2.

²⁸ Lagrådets (Legal Council) expert opinion May 2005, 4–12.

²⁹ SOU 2009:56, 200.

³⁰ Interview, Judge 1.

³¹ SOU 2009:56, 200 *ff.* See also Annika Lagerqvist Veloz Roca *Gränsöverskridande. En förvaltningsrättslig knäckfråga* Juridiska fakultetens skriftserie nr 77, Stockholm, 2011, 11-21.

the Migration Board and the Migration Courts have sought directions from the Migration Court of Appeal on both matters of law and fact. This has particularly concerned the topics of how to assess the situation in a particular country or region, or a consideration of the potential protection status of a particular ethnic or social group – what might be referred to as ‘country guidance’ (though the concept encompasses more than a strict assessment of country conditions).³² The Migration Board of Appeal, however, has so far declared that it will not issue such guidance. The reasons provided by the Migration Court of Appeal have been *i)* the task of the Court is to provide guidance on legal issues, not on the situation in a particular country as the latter is not a matter of adjudication; *ii)* it is for the parties in a case to provide country information they considered relevant for the case and the court will base its judgment on what was presented to it; and *iii)* the situation in a country or region can be subject to rapid change, making it difficult for the Migration Court of Appeal to provide country guidance that is sufficiently updated, given the time-consuming process of identifying a suitable case to form the basis of a precedent and then drafting said judgment.³³ If such guidance were to be presented, representatives of the Court have argued, the situation in a country would need to be revisited and precedents on such issues reviewed regularly.³⁴

The reluctance of the body of final instance to provide country guidance has proved to be a source of frustration for both the Migration Courts and Migration Board.³⁵ This unwillingness, as mentioned earlier, has been argued to risk creating inconsistency in how the conditions of a certain country are assessed between the Migration Courts. It has also been argued that there is a danger that particular country conditions, or the situation for a particular group, are not as thoroughly assessed as desired, given the limited time and resources available to the Migration Courts.³⁶ The negative effects for the individual asylum seeker, as well as for legal security in general and the reliability of the system, are obvious.

The Migration Board has applied different methods for providing internal guidance for decision makers and presenting officers on matters of law and fact. A number of various internal documents referred to as ‘guiding decisions’, ‘clarifying decisions’ and ‘signals’, have been introduced over the years. In 2009 the Migration Board reviewed its system for providing guidance for internal use and the concept of ‘legal position papers’ was introduced, replacing previous steering documents.³⁷ Legal position papers are described as general recommendations on the implementation of laws and regulations within the field of activities of the Migration Board, aimed at ensuring a uniform application of the law within the Board – in other words, the Board’s position on a certain issue. The legal position papers are the responsibility of the Head of Legal Affairs. At the time of writing close to 60 legal position papers had been issued by the Board covering a number of issues, including advice on how

³² *Ibid.*

³³ SOU 2009:56, 201.

³⁴ *Ibid.*

³⁵ Interview 3, senior official Migration Board, interview 5, judge.

³⁶ *Ibid.*

³⁷ Migration Board Annual Report 2009, 12.

the situation in a particular country, or for a particular group, should be assessed.³⁸ The position papers are published in the Migration Board online country and legal information system Lifos and are (as is most of the information available in this system) accessible to the public.

The Migration Board's legal position papers have been well received by other interested parties, though they might not always agree with the conclusions presented in a particular paper. UNHCR refers to the position papers as a key factor in the improvement of quality and predictability of Migration Board decisions.³⁹ The quality of the legal position papers as such – the analysis and arguments presented – have steadily increased since the first papers were issued, partly as a result of the consultative process involving the UNHCR, NGOs and the migration courts (first and second-tier). A further reason is perhaps due to the fact that the Migration Board is the expert authority in the field and with the position papers has found an effective manner of systematising and communicating the knowledge that they possess.⁴⁰ The international perspective of asylum law and the fact that no national asylum authority operates in an exclusively national context is increasingly acknowledged in the position papers, as the references to international case law from international and regional courts and monitoring bodies as well as other jurisdictions appear to be steadily increasing.

The introduction of legal position papers, the number of papers published since 2009 and the wide range of issues they address suggests that the Migration Board is trying to remedy the lack of authoritative guidance from the Migration Court of Appeal by introducing their own system of advice and direction. Though it should not be seen as the only or even the main reason for producing internal guidelines, frustration over the lack of precedents and country guidance from the place of final instance in the asylum system occasionally shines through in the position papers. One illustrative example is the January 2011 legal position paper on methods for examining and assessing the future risks for persons seeking asylum based on their sexual orientation.⁴¹ Here it is pointed out that the guidance found in national legislation and case law on this point is limited, and that the Migration Board had accordingly turned to the United Kingdom's Supreme Court judgment in *HJ (Iran) & HT (Cameroon) v SSHD (HJ and HT)*, [2010] UKSC 31. This judgment was referred to as providing a method for assessing the claims based on these grounds as being "far more constructive than what is offered in our national law and case law".⁴²

³⁸<http://lifos.migrationsverket.se/sokning.html?category=1122&sort=creationDate&baseQuery=r%C3%A4ttsligt+st%C3%A4llningstagande+&page=6> (last visited 1 July 2013).

³⁹ Liv Feijen & Emelia Frennmark *Kvalitet i svensk asylprövning : en studie av Migrationsverkets utredning av och beslut om internationellt skydd*, Stockholm, UNHCR/Migrationsverket, 2011, 210.

⁴⁰ *Ibid.*

⁴¹ RCI 03/2011.

⁴² *Ibid.*, 4.

3. The United Kingdom

3.1. A few notes on the UK legal system

The differences between the Swedish and the UK legal systems are many and varied. This is a result both of the differences in the systems as such and in the legal cultures.⁴³ The English legal structure is a common law system that has had a substantial influence on the legal arrangements of many other countries. The term ‘common law system’ refers to forms of law-making, particularly judge-made law. The role of judge-made law or case law is one of the distinguishing features of the common law system. This, however, does not mean that legislation or statute law plays a less important role than it would in a civil law system; rather a slightly different one. Parliament is legally the supreme law-making body and can make laws on any subject it chooses. The difference can be described as the text, and therefore the content, of a statute being fixed whereas judge-made law is non-fixed, having been ascertained from a case which can be developed or clarified in later cases.⁴⁴ In any conflict between statutory law and case law, statutory law prevails.

The principal sources of UK law are legislation (primary and delegated), common law (case law), European Union law and the European Convention on Human Rights. The courts may also take into account custom and doctrine. Preparatory works are of limited importance, if any.⁴⁵ The prominent role of case law emphasises the key part played by judges in the common law system. In the separation of powers between the legislature and the judiciary, the role of the judiciary is to interpret laws and to develop the common law, not to make law. The power accorded to judges for ‘shaping’ the law however must be regarded as considerable.⁴⁶ Adding to this power is the doctrine of binding judicial precedent (*stare decisis*), according to which judges can mould the interpretation and understanding of what the law ‘is’; an interpretation that is not only guiding or authoritative but legally binding on courts of lower or equal status (with certain exceptions). This binding force of judgments and the statements therein by a judge on points of law, and their consequent impact on future cases, could be argued to further enhance the key role played by the judiciary and by the individual judge in the system (at least in the higher instances).

As for case law from international courts, judgments of the Court of Justice of the European Union (CJEU) must be followed by UK courts (as by courts in other EU countries). The 1998 Human Rights Act by which the rights of the European Convention on Human Rights were incorporated into English law requires that the courts take into account judgments, decisions, declarations or advisory opinions of the European Court of Human Rights (ECtHR).⁴⁷ This

⁴³ Furthermore, it is difficult to speak of such a thing as ‘the UK legal system’ given that it consists of three systems (those of England and Wales, Scotland and Northern Ireland) which, however, share a number of features and rules. In this text, I refer to the system of England and Wales when talking about the legal system.

⁴⁴ William Twining & David Myers *How to Do Things with Rules* Oxford, Oxford University Press, 2010, 121-172.

⁴⁵ *Pepper v Hart* [1992] 3 WLR 1032 House of Lords.

⁴⁶ Interview 4, judge.

⁴⁷ Human Rights Act c. 42, Section 2(1).

does not mean that they are legally binding in general on English courts.⁴⁸ Being a dualist country, it is a requirement that for an international treaty to have effect at national level in the UK it must be incorporated into national law by legislation. Decisions by treaty monitoring bodies such as the UN Human Rights Committee are not considered binding by English courts.

3.2. The UK asylum appeals procedure in brief

The first level in the UK asylum system is the United Kingdom Border Agency (UKBA), which examines applications and makes the first decisions on asylum and human rights claims. The UKBA is an agency of the Home Office. Most applicants have a right to appeal to the First Tier Tribunal (Immigration and Asylum Chamber) and to remain in the UK while waiting for their appeal.⁴⁹ The appeals system has changed on a number of occasions; the current Tribunal structure was introduced in 2010.⁵⁰ There is a further right to appeal on the grounds of an error of law – that is, something more than a disagreement on the facts – to the Upper Tribunal Immigration and Asylum Chamber (UTIAC). The Upper Tribunal is a superior court of record and forms part of the Tribunals Service, an executive agency of the Ministry of Justice. Appeals are heard by one or more Senior or Designated Immigration Judges who are sometimes accompanied by non-legal members of the Tribunal. Permission for such an appeal is sought from the First Tier Tribunal and then, if refused, from the Upper Tribunal directly. On hearing an appeal, the Upper Tribunal can either decide the case for itself or remit it to the First Tier Tribunal.⁵¹ There is, provided certain conditions are fulfilled, a further right to appeal to the Court of Appeal. A prerequisite is that the grounds of appeal relate to a point of law. In cases of general importance, an appeal can be made to the United Kingdom Supreme Court.⁵² Additionally to the appeals process, there is the possibility of judicial review. The system is somewhat complex, but as the aim of this paper is not to analyse the asylum process the details will not be given on what is required for an appeal to be heard by the higher courts.⁵³

The judges of the First Tier Tribunal and the Upper Tribunal are recognised experts in the field of asylum and immigration law, their work being exclusively concerned with asylum, immigration, human rights and the free movement law. Blake indicates that the role of the Tribunal as a specialist tribunal with a greater inquisitorial role than the common law courts means that courts who sit in judgment on the Tribunal's decisions must accord considerable

⁴⁸ Under Article 46 of the European Convention on Human Rights, the state parties to the Convention are obliged to implement judgments to which they are parties.

⁴⁹ Applicants who have already claimed asylum in a safe third country or who have been found to have produced manifestly unfounded claims are usually only allowed to make an appeal after they have been removed from the UK. There is also the parallel system of fast-track procedures. For a pedagogical overview, see Gina Clayton *Textbook on Immigration and Asylum Law*, Oxford, Oxford University Press, 2012 (5th ed.), 416-423.

⁵⁰ The current structure is described in the Tribunals, Courts and Enforcement Act 2007 c.15 (TCEA) Chapter 2.

⁵¹ TCEA Part 1, Chapter 2, Section 12.

⁵² Clayton (2012), 252-253.

⁵³ See Thomas (2011), 240-258, 276-278 for a discussion.

weight to the assessments made.⁵⁴ That said, Blake emphasises the responsibility of the Tribunal not only to deploy its expertise but to do so fairly and transparently and to be willing to review positions taken and first impressions.⁵⁵

3.3. Country Guidance cases in the UK asylum system

As indicated earlier, the importance of reliable, relevant, updated and sufficient country of origin information in asylum cases cannot be overestimated. This information is the basis for substantiating or refusing a claim for protection made by an applicant and must be thoroughly examined and assessed. While every asylum claim is unique to the individual asylum seeker, it is inevitable that similar background issues will fall to be proved in different cases. For the government agency or the court to assess (substantially) the same facts repeatedly is time-consuming, not least when there are many applicants of the same nationality and background. This can lead to different interpretations and conclusions about the existence and degree of risk on return being reached from the same facts, which in turn can have a negative effect on the legal security.⁵⁶ There is also the problem of judges being presented with different information leading to different outcomes in very similar cases, which can lead to accusations of arbitrariness. In the case of the UK, this problem has been addressed by the introduction of so-called country guidance cases, providing authoritative guidance on generally recurring country issues produced by senior judges of the Upper Asylum Tribunal.⁵⁷

The idea of a ‘factual precedent’ was first suggested in UK case law in *S & Ors v SSHD* [2002]⁵⁸ even though the practice of authoritative decisions had existed for a number of years.⁵⁹ In this judgment in the Court of Appeal Lord Justice Laws stated that even though “the notion of a judicial decision which is binding as to *fact* is foreign to the common law”⁶⁰ the repeated hearing of evidence on similar or even identical factual issues in case after case constituted a problematic waste of judicial and financial resources, as well as giving rise to the risk or even the likelihood of inconsistent results.⁶¹ Therefore the idea of a factual precedent, thus relieving the court from examining substantial amounts of country information in each individual case, is argued to be “in the context of the IAT’s

⁵⁴ Blake (2012), 10-11, see also Amanda Shah “‘An Inquisitorial Quality’: are Country Guideline cases appropriate in an adversarial legal system?” in Colin Yeo (ed.) *Country Guideline Cases: Benign and Practical?* London, Immigration Advisory Service, 2005.

⁵⁵ Blake (2012), 10-11.

⁵⁶ *Ibid*, 5.

⁵⁷ Thomas (2011). 197.

⁵⁸ *S & Ors v SSHD* [2002] EWCA Civ 539, paras. 27-28.

⁵⁹ *NM v Secretary of State for the Home Department (Lone Women-Ashraf) Somalia CG* [2005] UKIAT 00076, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 31 March 2005 para. 139.

⁶⁰ *S & Ors v SSHD* [2002] EWCA Civ 539 para. 26.

⁶¹ *Ibid*, para. 28.

responsibilities [...] in principle to be benign and practical”.⁶² For such a practice to be acceptable, it is emphasised in *S & Ors v SSHD* that a number of safeguards have to apply, including: the decision must be sufficiently comprehensive; all the real issues must be addressed; there must be a careful explanation of the court’s position on the relevant country information; and that particular attention is paid to expert advice.⁶³ The facts of the individual case must furthermore always be examined in order to assess properly the risk for the individual applicant.

Though the practice of country guidance cases was considered controversial from the beginning (for reasons that we will return to) it grew quickly after *S & Ors v SSHD*. In 2004 the concept was given a statutory basis.⁶⁴ It has since exercised significant influence both within the appeals and asylum processes in general.⁶⁵ A country guidance case will usually consist of one or more appeals heard together that have been identified at a case management hearing as appropriate for the task of issuing guidance for the assessment of risk upon return.⁶⁶ In many cases these are individual appeals that have already been within the appeal system for a period and where some judicial decision has been made.⁶⁷ At the hearing a wider range of country information than usual will be considered and country experts might be called to give oral evidence. It should be emphasised that even though a case is listed as a potential country guidance case the main focus of the Tribunal is the resolution of the individual case. Broader country guidance is considered an additional component, though a valuable one.⁶⁸

Once a case has been decided it is submitted to the Reporting Committee of the Upper Tribunal by the judges deciding it together with the Country Guidance Convenor. It is the Reporting Committee who decides if a case is to be designated as a country guidance case (‘CG’). This will only happen if the case provides a balanced, impartial and authoritative assessment of available country information and is sufficiently well reasoned and consistent with binding statutory provisions or precedents of senior courts – in short, if it is of such general significance that it can provide guidance relevant for subsequent appeals.⁶⁹ Unstable or fluid conditions in a particular country do not preclude a case from being designated as country guidance. What matters is the particular context and whether conclusions can be drawn concerning risk categories.⁷⁰ That said, an unstable situation where things change

⁶² *Ibid.*

⁶³ *S & Ors v SSHD [2002] EWCA Civ 539* para. 29.

⁶⁴ Nationality, Immigration and Asylum Act 2002 c. 41, Part 5, Section 107(3).

⁶⁵ Thomas (2011), 200.

⁶⁶ *Ibid.*, 206-214 on the process of issuing country guidance.

⁶⁷ *Ibid.*, 203, footnote 21.

⁶⁸ *Ibid.*, 204.

⁶⁹ Blake (2012), 6 with reference to guidance issued by the Chamber President of the Upper Tribunal.

⁷⁰ Thomas (2011), 203.

rapidly could justify not providing country guidance, since it would be at risk of quickly becoming out of date.

Before a case is published it is given a title and a head-note summarising the issue upon which guidance is given, and it will have been drafted; both are subject to approval by the Reporting Committee. Country Guidance cases are published, bearing the letters ‘CG’, on the Upper Tribunal case database.⁷¹ The range of issues on which country guidance cases has been produced is broad. Thomas identifies three general trends: first, country guidance linked to the application of a legal concept from the field of refugee, asylum, or human rights law; second, the identification of particular categories of persons who might be at risk on return to their country of origin and third, the enumeration of risk factors which are likely to be relevant when assessing the degree of risk on return in any individual case.⁷² One reflection here is that the term ‘country guidance’ might be misleading because the guidance provided is not restricted to the situation in a particular country even though it is issued in the context of an individual appeal against the return to a particular state.

Once the case is reported as a CG case, its status can be described as follows:

an authoritative finding on the country guidance issue identified in the determination...as a result, unless it has been expressly superseded or replaced by any later ‘CG’ determination, or is inconsistent with other authority binding the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal a) relates to the country guidance issue in question, and b) depends upon the same or similar evidence.⁷³

Blake summarises the effect of designating a case as one of country guidance in the following way: where an issue arises in a later case that previously has been considered in a CG case, the CG case must be referred to in deciding the subsequent appeal; where there is no material change in the evidence considered in the CG case the judge should regard the guidance as authoritative and apply it provided the evidence in the latter case is the same or similar; if the issue in the subsequent appeal is identical to that in the GC case then it will be decided in the same way as the guiding case but it remains the responsibility of the judge in the subsequent case to assess the impact of the CG case on the particular case if relevant and credible material of a different risk assessment has emerged which was not available to the Tribunal at the time of deciding the CG case.⁷⁴ In short, the CG case is to be considered authoritative if new circumstances have not appeared changing the scene from when the decision in the CG case was made. Normally it would be considered an error of law to do otherwise.⁷⁵

The country guidance provided by a case singled out as a CG case, however, is obviously not set in stone as they are only valid until replaced by subsequent guidance. This temporal

⁷¹ <http://www.justice.gov.uk/tribunals/immigration-asylum-upper/decisions>.

⁷² Thomas (2011), 210.

⁷³ Practice Directions for the Immigration and Asylum Chamber of the First-tier and the Upper Tribunal 12.2.

⁷⁴ Blake (2012), 7-8.

⁷⁵ *R (Iran) & Ors v Secretary of State for the Home Department*, Court of Appeal - Civil Division, July 27, 2005, [2005] INLR 633,[2005] Imm AR 535,[2005] EWCA Civ 982.

validity may vary depending on the nature of the issues dealt with.⁷⁶ Country guidance on social and religious causes – women’s or LGBT rights, conversion – might have greater longevity than guidance on the political situation in a certain country or region because the former tends to change at a slower pace. The Tribunal has pointed out that the time elapsing since the making of a country guidance decision can be both a risk of caution to those applying it – making it even more important than usual to take fresh country information into account when assessing the individual appeal – and a signal that new guidance on the same issue is needed.⁷⁷ Furthermore, a country guidance case can be appealed to a higher court, which may or may not come to a different conclusion.

Finally, something should be said about the binding effect of country guidance cases. The reference in *S* by Lord Justice Laws to ‘factual precedents’ can be misinterpreted, since this means that these decisions must be followed by a subsequent court on the same or lower level. ‘Guidance’, on the other hand, should be followed unless there is good reason not to. In the case of country guidance cases ‘good reason’ would be that it does not apply to the particular facts in an appeal, that there is new evidence showing that the original reasoning should be revised, or that the passage of time has rendered the guidance obsolete.⁷⁸ Even if the guidance is authoritative, it is not to be regarded as binding indefinitely – it has, as was explained by the Tribunal in 2005 in *NM v Secretary of State for the Home Department (Lone Women-Ashraf) Somalia* CG [2005], “the flexibility to accommodate individual cases, changes, fresh evidence and the other circumstances”.⁷⁹ In *NM* it is strongly emphasised that a country guidance case is not legally binding in the way a precedent should be understood,⁸⁰ while Blake somewhat less categorically asserts that “the differences may be marginal although the public perception could be important”.⁸¹

4. Benefits and disadvantages of the two approaches

For an outsider, the UK country guidance system at first glance appears to be efficient, time-saving, and a functioning safeguard of consistency in relation to the treatment of general country conditions. It also appears a somewhat inevitable step to take, considering the number of asylum applications submitted in the country each year, many of those invoking similar circumstances and risks of future persecution. The system, however, has its disadvantages. Thomas in his 2011 analysis⁸² identifies a number of concerns which will be returned to below. In Sweden, on the other hand, even though the number of asylum applications

⁷⁶ Thomas (2011), 216.

⁷⁷ *NM and Others (Lone Women - Ashraf) Somalia v. Secretary of State for the Home Department*, CG [2005] UKIAT 00076, para. 140.

⁷⁸ *NM v Secretary of State for the Home Department (Lone Women-Ashraf) Somalia* CG [2005] para. 140.

⁷⁹ *Ibid.*

⁸⁰ *NM v Secretary of State for the Home Department (Lone Women-Ashraf) Somalia* CG [2005] para. 141.

⁸¹ Blake (2012), 9.

⁸² Thomas (2011), 221-225. See also Blake (2012) on ‘potential problems’, 8-14.

submitted in Sweden each year is higher⁸³ than in the UK and hence the need for structured guidance presumably is equally pressing, the Migration Court of Appeal has chosen not to introduce a system of authoritative guidance on country conditions. In this section, the benefits and criticisms of the two different approaches are discussed. For clarity the arguments are roughly divided into two groups: “efficiency/the time factor” and “consistency, legal certainty and individual justice”. In practice however, the categories are intertwined and difficult to separate.

4.1 Efficiency/the time factor

If efficiency is a primary goal, the benefits of the UK country guidance system would appear quite obvious: the system makes it possible for both the parties and judiciary to know what the Tribunal considers relevant guidance and where to look for it, as well as indicating to the parties and the lower courts what to deal with and what has to be the object of their evidence or argument.⁸⁴ It contributes to the efficiency of the asylum process because the same material will not have to be assessed in each individual case. This allows judges and parties to concentrate on the relevant issues. The Court of Appeal put it this way in *SG (Iraq) v Secretary of State for the Home Department* [2012] EWCA Civ 940 (13 July 2012):

46. The system of Country Guidance determinations enables appropriate resources, in terms of the representations of the parties to the Country Guidance appeal, expert and factual evidence and the personnel and time of the Tribunal, to be applied to the determination of conditions in, and therefore the risks of return for persons such as the appellants in the Country Guidance appeal to, the country in question. The procedure is aimed at arriving at a reliable (in the sense of accurate) determination.

47. It is for these reasons, as well as the desirability of consistency, that decision makers and tribunal judges are required to take Country Guidance determination into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so.

Turning now to the drawbacks, one such pointed out by Thomas is that some country guidance decisions on the list are of marginal use as they apply to countries from which applicants appear infrequently, thus meaning that the Tribunal’s time and resources has been unnecessarily spent.⁸⁵ The second difficulty is that the focus on country guidance of general applicability might lead to that country issues that are relevant only for a limited number of applicants might not receive the same kind of assessment.⁸⁶ The third concern that Thomas lists is the time aspect – that is, the balance that has to be struck between ensuring that the guidance provided is sufficiently comprehensive and does not slow down the process in other appeals waiting for guidance to be produced and reported.⁸⁷ Blake also addresses this problem, pointing out the costs of delay in assessing claims presented for the individual, who

⁸³ *UNHCR Asylum Trends 2012. Levels and Trends in Industrialized Countries* UNHCR 2013.

⁸⁴ *NM v Secretary of State for the Home Department (Lone Women-Ashraf) Somalia CG [2005]* para. 142.

⁸⁵ Thomas (2011), 221-225.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

is left in limbo waiting for the case to be decided while the circumstances pertaining to it can change or even cease to exist. There are also implications for society in terms of loss of public confidence and the costs involved in providing livelihoods for those awaiting decisions. Additionally, it might prove difficult after a long wait to remove an unsuccessful applicant who might, for example, have started a family in the UK, thus being eligible to present claims under Article 8 of the ECHR on the principle of the best interests of the child.⁸⁸

The time aspect is also the issue of Thomas's fourth concern, as in the risk of country guidance cases becoming out of date and therefore obsolete and inapplicable. Thomas here suggests that one way of solving the problem would be to limit the lifespan of country guidance cases so that they would automatically cease to be authoritative after a certain time. The difficulty with this approach however is that old country guidance may be perfectly applicable and removing its status would cause rather than solve problems.⁸⁹ Further concerns include the amount of time it might take for a particular country issue to be finally resolved – in the light of Tribunal decisions being subject to the possibility of appeal – and that once issued, such guidance might have lost its point.

In the case of Sweden, the lack of country guidance could be seen as having a negative effect on the efficiency of the asylum process as it requires the first tier courts and the Migration Board to include and analyse all available COI in the context of every individual case which is a time-consuming task. Having a precedent to follow also in this respect presumably would speed up the process. The Migration Court of Appeal however has a point when stating that in light of the fact that the Migration Court of Appeal only grants leave to appeal to a very limited number of all the applications it receives each year, country guidance judgments from the Court would be at risk of soon becoming out of date and hence inapplicable while still being “the last word” on the issue at hand.⁹⁰ The efficiency of the process would be negatively affected as it would require the lower courts to ensure themselves that the applicable country guidance case is still relevant; thus having to do the work anyway in addition to explaining why the country guidance case is not applicable. When one considers that the precedents of the Migration Court of Appeal in many cases tend to be applied without considerable reflection by the adjudicator if there is new or additional information available that could lead to a different conclusion, it is uncertain if this additional check would be carried out in every individual case.⁹¹

An obvious resolution of the time aspect issue would be to increase the number of cases granted leave to appeal. It can be mentioned in this context that the Migration Court of Appeal has been criticised for not producing sufficient precedents in general, thus leaving the lower courts and administrative bodies without guidance on a number of legal matters. This criticism of the Migration Court of Appeal on country guidance is thus part of general discontent over the Court's approach to producing precedents as a whole. The question is how the introduction of a duty to produce country guidance cases would affect the number of

⁸⁸ Blake (2012), 11-12.

⁸⁹ See Blake's comments on replacing country guidance and Thomas's suggestions. Blake (2012), 13-14.

⁹⁰ Approximately 10-15,000 applications for leave to appeal are processed by the Migration Court of Appeal per year. Interview 1, judge.

⁹¹ *Ibid.*

precedents issued in total, and what priority would be given to country guidance issues given that a number of matters of law so far remain un-commented by the Migration Court of Appeal.

4.2 Consistency, legal certainty and individual justice

Moving on to the matter of legal certainty, country guidance in the form applied in the UK system can moreover be argued to help ensure consistency and predictability in decision-making and hence contribute to legal certainty. It is also a way of systematising and preserving knowledge of the conditions in a particular country or region for use in future cases, thus contributing to the correctness of risk assessment and the decisions reached.

Concern has however been expressed over the use of country guidance in the UK leading to certainty and consistency taking priority over individual justice. This not least as the system somewhat undermines the principle that precedents are binding on points of law, not fact, and that the assessment of facts presented in a case should not be restricted or bound by factual findings in a previous dispute to which the parties in the case were not involved. Thomas summarises this particular critique thus: “country guidance is too blunt a tool with which to perform a sensitive and complex adjudicative task”.⁹² A related concern is that of what is referred to as the Tribunal’s strict approach, which is that country guidance is argued to limit rather than extend the range of individuals eligible for asylum.⁹³ Thomas argues that a possible response to this critique would be to focus not only on the participation of the parties but also on the contribution of the expertise of the adjudicator and the possibilities opened by the inquisitorial approach for thoroughly investigating the issues of a particular case.⁹⁴ This connects with Blake’s discussion on country guidance cases as interference in judicial discretion – that is, that judges would be deprived of the ability to reach appropriate, independent conclusions in the cases before them if they are obliged to follow the authoritative guidance presented in CG cases. In this context, Blake points out that this is not the intention with CG cases and that as no two are identical, individual assessment has all but ceased to matter.⁹⁵ An illustration of the individuality of decision-making often referred to is found in the 2004 case of *Otshudi v Secretary of State for the Home Department* [2004] EWCA Civ 893, in which two conscientious decision makers came to very different conclusions on the same evidence.⁹⁶ Blake however notes that as asylum protection is becoming less concerned with individuals in need of protection because of their individual actions or beliefs than with the absence of protection from harm in the country of return, country guidance which relieves the individual judge from examining and assessing vast amounts of more general country information does have its place.⁹⁷ Country guidance cases

⁹² Thomas (2011), 226.

⁹³ *Ibid*, 223.

⁹⁴ *Ibid*. See also *HM and others (Article 15(c)) Iraq CG* [2012] UKUT 00409(IAC), para- 22-23.

⁹⁵ Blake (2012), 8-9.

⁹⁶ See discussion in Robert Thomas “Refugee Roulette. A UK Perspective” 164-186 (165) in Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag (eds.) *Refugee Roulette. Disparities in Asylum Adjudication and Proposals for Reform* New York, New York University Press, 2009.

⁹⁷ Blake (2012), 8-9.

concerning Iraq and Somalia are two examples of when cases designated “CG” consider very broad categories of persons and, as a consequence, have an impact on a large number of asylum claims and appeals.⁹⁸

In the Swedish context, the opposite situation is a cause of concern as a lack of country guidance could be a breeding ground for inconsistency and arbitrariness in decision making, leading to a lack of predictability and hence unsatisfactory legal certainty for the individual. From the perspective of the lower instances, a guiding judgment providing a thorough, in-depth expert analysis of the future risk for a particular group of the situation in a particular country undoubtedly is most helpful.⁹⁹ It also counteracts the risk of the outcome of a case, at least to a certain extent, being made dependent on which of the three Migration Courts that handles the appeal.¹⁰⁰ As pointed out above in relation to the UK, country guidance in this context is also useful for the applicant and his or her legal representative as it helps focus their argumentation on essential aspects, as well as on what points any additional COI might be needed. In a situation as the present in the Sweden where the main focus of presenting facts and investigating claims in the asylum process is placed in the first instance and where it is expected of the applicant to present all necessary information and evidence of the eligibility of his or her claim for protection, while at the same time limited remuneration is provided for the time spent by legal representatives on identifying and analysing country of origin information, country guidance in a broad sense could undoubtedly contribute to increased consistency in decision-making but also to increased legal certainty for the individual.

The aforementioned legal position papers of the Migration Board have in the past few years surfaced as a means to cover the gap created by the lack of guiding judgments of this kind. One obvious complication, however, with the legal position papers is their unclear status. They have no formal legal status whatever and are only to be taken as internal guidelines intended for the presenting officers and decision makers of the Migration Board.¹⁰¹ The idea is for position papers to provide guidance for the decision makers in their application of the law, and should not refer to them in their decisions.¹⁰² At the same time, it is clear from the accompanying instructions that the Migration Board staff should follow the interpretation provided in position papers. The guidance that they provide on a growing number of issues thus in practice presumably will inevitably be regarded by the Migration Board staff as authoritative, and decisions or actions contrary to what is expressed in a legal position paper are likely to be changed or revoked.¹⁰³ The *informal* status of the position papers therefore is

⁹⁸ Recent examples include the aforementioned *HM and others (Article 15(c)) Iraq* CG [2012] UKUT 00409(IAC), *MK (documents - relocation) Iraq v. Secretary of State for the Home Department*, CG [2012] UKUT 00126 (IAC), *AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia* CG [2011] UKUT 00445 (IAC),

⁹⁹ Feijen & Frennmark (2011), 54-57.

¹⁰⁰ Rebecca Stern ”Hur bedöms ett skyddsbehov? Om gränsdragning, konsekvens och förutsägbarhet i svensk asylpraxis”(2012) . *Svensk Juristtidning* Vol. 3/2012, 282-299.

¹⁰¹ Interview 2, senior legal officer. The purpose of the legal position papers is similar to that of the UK Home Office Operational Guidance Notes.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

quite considerable, given their impact on the assessment and implementation of asylum and migration law in the individual case.

As they are not sources of law, and not intended as such, their influence could prove problematic – particularly if they are also applied by the migration courts. There is a fine line to be drawn here. To refer to the Migration Board’s legal position papers as sources of country information is one thing, though using the primary source would be preferable. To apply the conclusions presented in a position paper of what constitutes the correct implementation of the law in the context of a particular country or for a particular group would, however, attribute far more weight to the non-binding conclusions of a place of lower instance than that for which they were intended, thus conferring on these conclusions a legal status they do not possess. In the words of a senior Migration Board official it “would turn the hierarchy of sources of law on its head”.¹⁰⁴ This is particularly true if the analysis and conclusions presented in a paper were to be accepted without question. A quick and by no means complete look at case law of the Migration Courts from 2011 to 2013 indicates that legal position papers are referred to in a number of judgments, often in the context of the Migration Board having issued a legal position paper on the situation in particular country and that the Court found no reason to depart from the assessment. However, it is difficult to ascertain the influence a legal position paper might have had in an individual case, both because the Migration Courts are aware of their non-existent formal status and because it simply cannot be understood from the judgment itself. Summing up, even though the legal position papers might be a useful tool in ensuring consistency and predictability in decision-making, they are by no means an acceptable alternative to country guidance provided by a senior court.

5. Remarks

So is it possible to conclude that one approach to country guidance is preferable to the other? The perhaps dull but expected answer is that it is not so much a matter of which system is the best objectively, but what best fits the country and legal system in which it is to be applied. For a practice of designating country guidance cases and thereby establishing a preferred interpretation of facts concerning a particular country or group of individuals to function, the presence of a number of factors is required. These include the availability of relevant expertise (internally and externally); the availability of cases suitable for the purpose of country guidance; the capacity and ability in terms of resources to review decisions within an acceptable time when such is required; and, last but not least, that the senior court (or judge) not only considers itself competent to analyse for example complex political situations in a foreign country, but also that it is necessary to do so in order to fulfil the task of providing guidance.

In the UK context, the above mentioned factors appear to be present as well as a clearly expressed wish to promote consistency in decision making and to avoid as far as possible arbitrary decisions and what has been referred to as ‘refugee roulette’, i.e. where large numbers of judges can be placed in the position of deciding on the same issue by reference to variable amounts of country of origin information, and then finally coming to different

¹⁰⁴ Interview 2, senior legal officer.

conclusions about it.¹⁰⁵ The principle of treating like cases alike, and creating conditions for this goal to be achieved, thus appears to be a primary consideration. As a result, the difficulties inherent in the system discussed above, including the claim that individual justice is at risk of being overridden by the striving for predictability and stability, as well as the ever problematic time factor, does not seem to seriously challenge the system. The status and authority accorded in the UK to country guidance cases seems to have led to that country guidance is generally relied upon by all parties, not least judges, and that much is required for a judge to successfully depart from the findings of such a case without the decision being changed by a higher court.¹⁰⁶ From the perspective of an outsider this approach comes across as, above all, practical and pragmatic and one that indeed includes safeguards for individual variations – as a country guidance case need not be applied if the circumstances of the case in question are not compatible – but where effectiveness, consistency and predictability is the main focus. The consequences for the individual case can be difficult to assess.

Another important factor for the UK system of country guidance to have gained such widespread acceptance presumably is that the Upper Tribunal is not the place of final instance. As its decisions can be and occasionally are challenged and changed, there is room for correcting mistakes. Having said this, the authority of the Tribunal case law should not be underestimated, as the statement by Baroness Hale in *Secretary of State for the Home Department (Appellant) v. AH (Sudan) and Others (FC) (Respondents)*, [2007] UKHL 49, underscores. It is most telling that Baroness Hale, while expressing some concern on the manner in which the Tribunal had assessed the risks in the particular case, still affirmed that the decisions of the Tribunal “should be respected unless it is quite clear that they have misdirected themselves in law”.¹⁰⁷ An additional observation is the strong position of judges and the trust placed in them both as a collective and as individuals to be able to provide authoritative guidance not only on matters of law but also on fact, a position likely to be explained at least in part by the key importance of case law (and hence the judges) in the common law system in the development and interpretation of the law.

It is uncertain whether all of the requirements described above are present to a sufficient extent in the Swedish context. As regards expertise, the Migration Court of Appeal is indeed the place of final instance in the field of migration law in Sweden. It is, however, yet to become a court where all judges have had specialised training and years of experience of migration law before being appointed – this has simply not been possible, given that the current migration court system was only established in 2006. Moreover, the majority of the judges of the Court also adjudicate in other fields of law as the Migration Court of Appeal is part of the Stockholm Administrative Court of Appeal. In consequence, there is likely to be less time available to develop one’s expertise not only in the legal aspects but also in the

¹⁰⁵ As discussed in Ramji-Nogales, Schoenholtz & Schrag (2009), referred to in Hugo Storey “Treating like cases alike in refugee law adjudication”, paper presented at “Treating Like Cases Alike in Refugee Law Adjudication: The Troubling Lack of Consistency in Refugee Status Adjudication Within and Across State Parties to International Refugee Rights Instruments”, International Joint Public Seminar, 25th April 2013, Refugee Law Initiative/ Centre for Refugee Studies of York University <http://rli.sas.ac.uk/tlal/> (last visited 20 August 2013).

¹⁰⁶ Thomas (2011), 219-220. See also *SG (Iraq) v Secretary of State for the Home Department* [2012] EWCA Civ 940 (13 July 2012), paras. 46-47.

¹⁰⁷ *Secretary of State for the Home Department (Appellant) v. AH (Sudan) and Others (FC) (Respondents)*, [2007] UKHL 49, para. 30.

prevailing situation in a particular country.¹⁰⁸ The fact that the system is fairly young also means that there is a limited body of previous judgments and findings to draw upon, which suggests that the wheel sometimes would need to be reinvented.¹⁰⁹ As for the availability of cases, this is unlikely to be a problem as such, but given the prerequisites for a case to be granted leave to appeal by the Migration Court of Appeal there might be difficulties in identifying and choosing which cases could be listed as possible country guidance cases – what criteria would be used to distinguish one case in a certain situation from another? Would the legal issue argued by the applicant still be decisive? As for the time factor, the Migration Court of Appeal, as mentioned above, has already been criticised for not producing sufficient judgments, suggesting (as has been pointed out by the Court itself) that by adding a category of cases that require regular review would only put even more pressure on the court and might even prove to be counterproductive.

Finally, on the last factor it is clear that the Swedish Migration Court of Appeal considers it to be its main task to provide guidance on matters of law, not on facts. The Court has interpreted this as meaning guidance on matters of law as such, not in a wider perspective that could also include matters of fact that have an effect on the application of the law as such. It has been done, but only when the Court has seen that the case law of the lower courts has been inconsistent to the extent that legal security for the individual was at risk and where the main matter still could be interpreted as concerning the interpretation of the law.¹¹⁰ Whatever statement the Court has made on the situation in a particular country or region in that context however in general is to be regarded as applicable only to that particular case.¹¹¹ Having this said, the Migration Court of Appeal is not unaware of the need to sometimes adopt a standpoint on country-related issues, as is illustrated by the impact of the Migration Court of Appeal judgments concerning the interpretation of the concept of ‘internal armed conflict’ in relation to Iraq (2007) and Somalia (2009 and 2011) respectively.¹¹² It simply does not wish regularly to do so.

This position, combined with a fear among the judiciary of the political aspects of migration law and of being accused of politicising legal decisions in order to follow government policy aiming to limit the number of asylum seekers, could be argued to lead to a reluctance on the part of the Court to provide judgments when such ‘political sensibility’ could be implied – for example, in deciding that the situation in a certain country does not constitute sufficient grounds for protection and hence many applications for asylum can be denied.¹¹³ Such

¹⁰⁸ Interviews 1,2 and 5, judges.

¹⁰⁹ The applicability of case law from the previous body the Aliens Appeals Board has been debated, see e.g. Stern 2008.

¹¹⁰ Interview 1 and 2, judges, SOU 2009:56, 201.

¹¹¹ Interview 1, judge.

¹¹² *Ibid.* The guiding cases concerned are MIG 2007:9 (Iraq) and MIG 2009:27, MIG 2011:4 and MIG 2011:8 (Somalia).

¹¹³ See the discussion on the role of the Swedish judge in Olof Stållvik *Domarrollen. Rättsregler, yrkeskultur och ideal* Uppsala, Uppsala universitet, 2009. See also Sir Stephen Sedley “Asylum: Can the Judiciary Maintain its Independence?” paper presented at Stemming the Tide or Keeping the Balance - The Role of the Judiciary - Wellington 2002, IARLJ Conference in New Zealand, 5th World Conference October 2002 and John M. Scheb

criticism was directed towards the previously mentioned controversial Migration Court of Appeal judgment on Iraq in February 2007 where the Court found that the situation in Iraq at the time did not meet the criteria of an internal armed conflict despite the media daily publishing pictures of the ongoing fighting and the Swedish Foreign Office referring to “the war in Iraq”.¹¹⁴ Before that judgment entered into force, a majority of the Iraqi asylum seekers had been granted asylum in Sweden. As a result of the judgment, subsidiary protection based on the existence of an internal armed conflict no longer was applicable and hence substantially fewer applicants were granted protection. In the context of the number of Iraqis that came to Sweden at the time and the difficulties the asylum system had in terms of resources to cope with the large numbers of asylum seekers, it is not difficult to understand that the judgment was questioned in terms of it being politically sensitive. Though this criticism was unfounded – the controversial conclusions drawn by the Court having more to do with an excessively strict interpretation of the criteria of an internal armed conflict than with aiming to curb the number of persons seeking asylum in Sweden – the experience might have acted as a deterrent. Of course these issues are no strangers to the UK debate, both in relation to country guidance cases which have been accused of being negative towards appellants – that is, limiting the range of people who qualify for asylum, and for example, in the context of humanitarian protection and discretionary leave in medical cases.¹¹⁵

Summing up, the way in which the need for some kind of country guidance to lower courts and decision makers has been met so far in Sweden and the UK is quite different. In neither country is it formally impossible to provide guidance on how to interpret the situation in a particular country – on facts – but only in the UK so far is this considered to be part of what the court is supposed regularly to do. The answer to why this is so appears to be in part a matter of different legal cultures and in part more practical obstacles, such as a lack of time and perhaps experience in analysing the complex political and social situation of a particular country or region. Of these two, the cultural factor is likely to be the less obvious but in this author’s view the most important, as the legal culture of a country sets the framework for what the court and the judges consider their task to be, how this is best fulfilled and the limitations of these tasks.

An overarching question in this discussion, and one that is likely to be continually discussed in the UK as well, is what one actually achieves with authoritative guidance in the interpretation of facts and how far one is prepared to go in order to ensure predictability and consistency in the determination of asylum cases. Indeed, treating like cases alike is a primary consideration, but must be placed in relation to the importance of avoiding falling into the trap of formulaic decision making. Storey has compared the country guidance system with the ECtHR system of “lead cases” that has developed in recent years – cases which, as Storey indicates, have had a considerable influence on all the Council of Europe state parties.¹¹⁶ The comparison is interesting, but as Strasbourg case law does not have the same binding status,

II & William Lyons “Judicial Behaviour and Public Opinion: Popular Expectations regarding the Factors that Influence Supreme Court Decisions” (June 2001) *Political Behaviour* 23:2, 181-194.

¹¹⁴ For an overview, see e.g. Stern 2008 and Rebecca Stern “Folkkrättens roll i vägledande migrationsrättslig praxis” (2010) *Svensk Juristtidning* 4/2010, 358-376.

¹¹⁵ Interview 3, judge, Sedley (2002).

¹¹⁶ Storey (2013), 5-6.

except in the context of a particular case, as a national precedent or decision providing authoritative guidance, its influence is perhaps less direct on lower courts than would be the case with decisions from a national court further up in the hierarchy.¹¹⁷ The signals sent out by a country guidance case or equivalent are strong and it would take, as has been discussed in this paper, quite a lot for a judge or decision maker not to follow them. All in all, the system still rests upon the ability of the individual judge or decision maker to determine when it is correct to apply an authoritative judgment and when it is not. The independence of the judge and the impartiality of his or her decision-making – those pillars upon which most judicial structures and cultures rest – thus remain the best safeguards for the legal security of the asylum-seeker, and for each claim for protection to be examined with respect shown to its unique features.

¹¹⁷ Storey, of course, mentions the non-binding status of the Strasbourg judgments.

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