

Credit :

UTokyo Online Education, Refugee Recognition

- Understanding the Essentials 2019 Allan Mackey

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*Judicial standards -“residual or benefit of doubt.”*

The international standard submitted by the UNHCR, and accepted by many jurisdictions is: “Where residual or remaining doubts are held by assessors/judges in the assessment of some parts of the claimant’s presentation of past and present facts and circumstances, due to unsupported evidence, *prima facie*, where all other evidence is accepted as credible, the benefit of the doubt principle should be applied to those parts where doubts remain.”

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A Model decision—

a. Partial acceptance of credibility :

**NZ REFUGEE APPEAL NO 76199 (11 November  
2008)**

**Q and A**

## ***Credibility - Summary.***

Be pragmatic : Remember look at the totality of the claim. If all is found accepted then the next question is: there a real risk? If partial only that is the profile to be assessed for risk .If nothing is accepted, does assessment need not go on?

Good credibility assessment is a combination of knowledge of: COI, all facets of the claim, materiality, balance and prompt, well reasoned decision making.

## ***Credibility - Summary.***

A good quality RSD and assessment system is vastly assisted by fairness, prompt processing, “get it right first time” attitudes.

And– A fair removal or deportation of failed claimants after exhaustion of their appeal rights including “suspensory effect”!

## Country of Origin Information(COI)

COI is an essential part of the whole RSD process and the better it is the better the overall decision making will become.

But the lack of COI does not mean a recognition should not or cannot be made!

Fortunately recognising the” shared burden” it is somehow usually available and there is Judicial guidance on its use and validity...

## **Country of Origin Information checklist**

When using and assessing the content of Country of Origin Information (COI) in the context of refugee and protection cases, judges and others will find the following nine questions highly relevant:

## **Country of Origin Information checklist**

### *Relevance and adequacy of the information*

- i) How relevant is the COI to the case in hand?
- ii) Does the COI source adequately cover the relevant issue(s)?
- iii) How current or temporally relevant is the COI?



## Country of Origin Information checklist

### *Source of the information*

- iv) Is the COI material satisfactorily sourced?
- v) Is the COI based on publicly available and accessible sources?
- vi) Has the COI been prepared on an empirical basis using sound methodology?

## Country of Origin Information checklist

### *Nature / type of the information*

- vii) Does the COI exhibit impartiality and independence?
- viii) Is the COI balanced and not overly selective?

## Country of Origin Information checklist

### *Prior judicial scrutiny*

ix) Has there been judicial scrutiny of the COI by other national courts of the COI in question?

## Country of Origin Information

COI supports Claimants, legal representatives and all persons making decisions on refugee status and other forms of international protection in their evaluation of:

- the human rights and security situation
- the political situation and the legal framework
- cultural aspects and societal attitudes
- past and present major events and incidents
- the geography of the country concerned

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**STEP 3**

**HARM**

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October 2019

International Association of Refugee and Migration  
Judges

In this highly specialised field of adjudication, a great deal depends upon the expertise of the Tribunal itself. Its adjudication is not a conventional lawyer's exercise of applying a legal litmus test to ascertain the facts; it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has its legal and linguistic limits, has a broad humanitarian purpose.

*R v Immigration Appeal Tribunal Ex Parte Syeda Khatoon Shah* [1997] Imm AR 145 (CA) at 153

## Harm

Refugee Convention = “being persecuted”

CAT = torture

ICCPR = Arbitrary deprivation of Life  
Cruel, inhuman and degrading  
treatment or punishment

## “Being Persecuted”

“Persecution” is not defined in the Convention.

Therefore, it must be read according to the Vienna Convention on the Law of Treaties:

- Good Faith (Art 26)
- Ordinary meaning (Art 31)
- Treaty context includes object and purpose (Art 31)



## “Being Persecuted”

### “Being persecuted” vs “persecution”

- Emphasis is on the predicament of the claimant rather than the actions of the persecutor.
- Passive tense used in both English and French texts.

## Being Persecuted

### What is “being persecuted”?

Being persecuted is serious harm arising from the “sustained or systemic violation of internationally recognised human rights, demonstrative of failure of state protection”.

- *DS (Iran)* [2016] NZIPT 800788

So, if a basic human right is being violated, and the state cannot, or will not, provide protection, this is “being persecuted”.

# “Being Persecuted”

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## **Why do we use human rights as the yardstick at all?**

What is the justification for looking to human rights instruments for the meaning of “being persecuted?”

- International human rights norms already define harm.
- Human rights are explicitly referred to in the Preamble (“[The UN Charter and the UDHR] have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination...”). So, to look to such treaties is consistent with the purpose of the Convention.
- Pragmatism.
- The evolutionary nature of human rights.

## Being Persecuted”

### **Evolutionary nature of human rights?**

It is not human rights which evolve but our application of them across social and cultural changes.

This has allowed refugee protection to be granted for reasons not explicitly mentioned in the Convention, ie:

- sexual orientation
- gender

The Convention thus remains a dynamic, evolving document. “

## “Being Persecuted”

### **Why do we use human rights as the yardstick at all?**

Instead of a rigid application of pre-defined forms of harm, decision-makers are able to consider:

1. the nature of the right; and
  2. the nature of the restriction; as well as
  3. the seriousness of the harm
- in order to understand whether the person is at risk of “being persecuted”.

## “Being Persecuted”

### **The universality of human rights**

Core human rights are to be found in universal instruments (CAT, ICCPR, ICESCR, CERD, CEDAW and CRC). These are the internationally-recognised standards for human activity.

Social, cultural or religious practices do not escape assessment according to international standards. No country can defend human rights violations by hiding behind domestic law, “custom” or “tradition”.

## “Being Persecuted”

### **In summary:**

Internationally recognised human rights:

- have been widely ratified – it does not infringe on state sovereignty to hold other states to those standards.
- Provide an objective standard separate to domestic laws and morality.
- Avoid political judgements about practices of another country.
- Mean the Convention is flexible and can respond to new threats to human dignity.

## “Being Persecuted”

### Identifying human rights

The rights-based approach includes:

1. Non-derogable ICCPR rights like protection against arbitrary deprivation of life, torture or cruel treatment.
2. Other ICCPR rights like rights to religion, private and family life.
3. ICESCR rights, e.g. rights to work and housing (where these are denied on a discriminatory basis).

Look first to the ICCPR and ICESCR. CAT, CERD, CEDAW and CRC are relevant but the ICCPR and ICESCR are the primary rights-based instruments under the UDHR.



## “Being Persecuted”

### **When does a breach of a right lead to “being persecuted”?**

3 essential elements are required:

- serious harm;
- arising from the breach of the right;
- in the absence of state protection.
- $P = SH + FSP$

The  
**Serious Harm**  
element

## “Serious Harm”

### **When does harm become serious?**

Matter for the decision-maker’s judgement, but relevant factors include:

- To what degree are key aspects of human dignity impacted?
- Is the harm of sufficient gravity that surrogate, international protection is required?
- Duration and intensity.
- Particular characteristics of the individual, especially vulnerabilities.

The  
**State Protection**  
element

## “State Protection”

The analysis requires a failure of state protection but the Convention does *not* require that the state be the agent of harm. A third party (a non-State agent) can equally be the agent of harm. So, there are four possible variations:

1. Persecution committed by the State
2. Persecution condoned by the State
3. Persecution tolerated by the State
4. Persecution not tolerated or condoned by the State, but for which the State refuses or is unable to provide protection

## “State Protection”

### **The required threshold of “state protection”**

There is a presumption of state protection:

“Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens.”

*Canada (Attorney General) v Ward* [1993] 2 SCR 689

In rebutting the presumption, the question is whether state protection will reduce the risk of serious harm below that of a real chance - see *Refugee Appeal No 71427* (16 August 2000) at [62]-[67].

NB: UK *Horvath* and EUQD (reasonableness) is strongly rejected in NZ

## “State Protection”

The extent to which there is state involvement in the persecution is relevant because:

- Where the state is the persecutor, an absence of state protection can usually be presumed.
- Where a non-State agent is the persecutor, an absence of state protection will need to be established.

# More discussion on the “being persecuted” and Human rights approach

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See a summary of the development of the concept of persecution in Refugee law in Power point presentation Mackey and Storey

**“What constitutes persecution/being persecuted?” 2014 IARMJ.**