

# “Assessment of Credibility under the EU Qualifications Directive: Judicial criteria and standards”\*

International Association of Refugee Law Judges  
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## *“An introduction to the IARLJ Credo paper”*

by  
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\* IARLJ was a partner, with Hungarian Helsinki Committee and UNHCR, in the ‘CREDO project’ which was co-financed by European Refugee Fund .



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# Assessment of Credibility under the EU Qualifications Directive: Judicial criteria and standards

## Background

- **Credo Project**, partners with HHC and UNHCR - ERF support, completed over 2011-13 – 40+ judges from 22 countries.
- **Timely** - with move to common standards in the revised APD and QD.
- **Aim** – Guidance to EU judges on best practice and standards in credibility assessment.
- **Who for?** Judges in full merits and error of law appeals and others in RSD .(Now more important - Art 46(3) APD 2013)
- **What is included?** A six part paper- “Sets the scene”, Structured approach, the Guidance principles, the CEAS, Role of judge and a Discussion paper on proof issues.

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## “Setting the scene”

This required explaining:

- A. **“CONTEXTUAL DISAMBIGUATION” of the term “CREDIBILITY”**
- B. **THE UNIQUE CHARACTER OF DECISION-MAKING IN REFUGEE AND OTHER INTERNATIONAL PROTECTION CLAIMS**
- C. **THE LEGAL FRAMEWORK AND THE CEAS**
- D. **A STRUCTURED APPROACH TO DECISION MAKING AND THE ROLE OF THE JUDGE IN REFUGEE AND SUBSIDIARY PROTECTION CASES**
- E. **THE BURDEN AND STANDARD OF PROOF IN REFUGEE AND SUBSIDIARY PROTECTION CLAIMS AND APPEALS**

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## *A. "Setting the scene"*

### **The confusing use of the term**

#### **"credibility" ?** (in English especially)

- The "credibility" of the whole claim for recognition? ,  
or
- The "credibility" of the past and present evidence of the claimant?

**Only the latter is valid in this context!**

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## *B. “Setting the scene” – The unique factors include....*

- The decision-making is **international rights-based, not domestic privilege-based** ( as with immigration law); Refugee status is declaratory, not constitutive, COI use is essential, more focus on future than past, Core treaties ,GC, ECHR are living instruments. Many claimants have vulnerabilities thus psychological and trauma dimensions affecting them **must** be considered, . .also
- Judicial independence and impartiality are under pressure from societal/political pressures, Claimants logically have difficulties with corroborative evidence and the use and abuse of “supporting” documentation and Cross-cultural challenges and of working through interpreters are the norm.

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## *C. “Setting the scene”-*

### **The legal framework and the CEAS**

- Is covered in an overview of the historical development of refugee law, the CEAS and relevant EU law.
- see Part IV of the paper.

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*D. “Setting the scene” — see Part II of paper*

## **Take a structured approach**

- We suggest a structured decision making process assists greatly (and later explain the role of the judge in full merits review appeals in Part V):-
- Our nine step structure is in the Part II Chart (**expanded helpfully by UNHCR in their “Beyond Proof” paper** )
- Relevantly Step 2 in the chart addresses the issue of :
- ***Establishing the claimant’s accepted material facts – “Believability box”***
- **Here is where the credibility assessment takes place (and the Guidance of Part III of the paper should be used)**
- Only then should judges/decision makers move to Step 4 the **“Risk box”** (well founded fear assessment ) ... and then the other steps that follow.

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*“Setting the scene – E”*

## **We needed to look at burden and standard of proof**

- We found the burden of proof is reasonably understood and uniform.
- BUT - the standard of proof issue is a vexed one – we found no universally accepted approach. For discussion later : “Will the Dutch:*A, B and C* reference, on Art 4, to CJEU assist us?”
- We asked ourselves: “Is a standard needed at all if the criteria and standards are followed?” ... And see “Discussion Paper” at Part VI.
- At Madrid all agreed more work needed -IARLJ (EU) and beyond.
- **We hope a WP to continue work on this and related CEAS issues can be set up at this conference.**



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*In Part III we suggest Criteria and Standards.*

**Firstly, our preliminary assumptions for these –as in the paper:-**

- Assessment is an onerous task and must work from : National transposing law, EU directives, GC, other EU and international HR conventions etc, and judicial interpretation
- **The guidance is based on EU administrative law principles** like: rights to hearing and effective remedy, *audi alteram partem*, proportionality, legal certainty that are set out in core EU instruments
- The **Issues are so serious only highest standards of fairness** are applicable
- **Credibility assessment is a tool used to establish the claimant’s “accepted profile”** as the first issue in overall assessment of status recognition (“Believability box”)
- The guidance principles are non exhaustive, and there is overlap.

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## *The basic criteria used in credibility assessment :*

- **Impossibility**
- **Internal consistency**
- **External consistency**
- **Plausibility**
- **Is there sufficiency of detail?**
- **Timeliness of the claim**
- **Assessment “in the round” – or on the totality of the evidence**
- **Is there personal involvement of the claimant?**
- **Use (and abuse) of “Benefit of the doubt”/Article 4 QD**

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## *The Judicial standards of good practice in credibility assessment:-*

*“Standards of good practice, suggested for sound reasoning, that supports valid findings, under the above criteria, have been developed by international refugee judges. They cover a wide range of issues that are applicable in credibility assessment. **While appropriate deference to skill and experience should normally be accorded to first instance decision-makers, or full merits review judges, a material failure to adhere to one or more of these standards will often lead to an error of law conclusion on judicial review.**”*

The presentation style we have taken is:

- **Standard or rule**, in brief summary
- **Explanation** and /or **Examples**
- **Authorities** from: legislation, case law (CJEU, ECtHR, National Courts within EU, non EU Courts, UNHCR and also academic commentary.)

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## *Judicial standards of good practice in credibility assessment*

For ease of use the standards are grouped into four categories : **Substantive**, **procedural** ,vulnerable claimants and “ **residual doubt/ Article 4 QD.**”

a. The **substantive** standards required include:

- Consistency
- Plausibility
- **Equality of arms- “*audi alteram partem*”**
- Reasons must be given conclusively-and not “may have happened “findings
- Material issues-- findings are vital
- Speculation is inappropriate

continued ---

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## ***Judicial standards of good practice in credibility assessment-***

### **Substantive standards continued:-**

- Objective approach
- Use /misuse of documentation (A10 & A17)
- Past persecution ( if claimed findings are necessary)
- COI use is vital
- Corroboration is not essential – and such evidence needs careful use
- Partly credible claims may succeed
- *Sur place* claims-earlier lies/bad faith issues can be relevant(A16,A18)
- Demeanour – use with extreme caution , (but NB. oral hearings)

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## *Judicial standards of good practice in credibility assessment-* **b.Procedural:**

- *General-* Credibility assessments may be fundamentally flawed where, through faulty or inappropriate procedures, claimants do not have the opportunity to present their claims, and supporting evidence, fairly and reasonably, both in written and oral form.
- Interpreters –bias or incompetence
- Representation-legal or other support
- Time limits – for lodging claims, appeals, translations etc
- Bias, incompetence or conflict of interest of the decision maker or RSD system itself- “Justice must be seen to be done!”

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## *Judicial standards of good practice in credibility assessment-*

### **C. Vulnerable claimants :**

**“A failure to take into account any specific vulnerabilities of claimants can lead to an error of law.”**

“One general standard of good judicial practice only is provided as, not only would it be impossible for such a list to be exhaustive, but also it is frequently the case that the vulnerability of individual claimants may have a number of overlapping causes, It is the totality of their physical and psychological predicament that must be taken into account in the assessment of their evidence.”

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## *Judicial standards of good practice in credibility assessment-*

### **c. “Vulnerabilities” that may impact on credibility include:**

- Children , especially unaccompanied minors
- Women: DV, sexual and other abuse, forced marriage, honour killings/abuse
- Victims of trafficking
- PTSD/past torture
- Mental health
- Religious beliefs
- Sexual orientation( “LGBTI” claimants)
- Ethnic, cultural background
- Physical impairment



# Assessment of Credibility under the EU Qualifications Directive: Judicial criteria and standards

**Residual doubt /Article 4 –A vexed issue for more debate!**

**“Where residual doubts are held by judges, in the assessment of the credibility of claimant’s facts and circumstances, due to unsupported evidence, it will be, *prima facie*, an error of law not to adopt, at least, the minimum provisions of Article 4 QD.”**

*This is our primary standard on the issue of how residual doubt should be addressed. It is based on optional approach provided in the terms of Article 4.1 whereby “Member states **may** consider it is the duty of the applicant....AND Articles 4.2 and 4.5 (a)-(e) which commences: “Where member states **apply the principle .. and aspects of... Statements are not supported by documentary or other evidence...”***

*We considered that any alternative approach to Art 4.1- 4.5 validly taken by MS had to be above the minimum standard expressed and thus presumably would be the UNHCR approach to “Benefit of the doubt”.*

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## CJEU cases/references on Article 4 QD or credibility assessment issues?

**To date only: MM v Ireland (C-277/11) 22/11/2012** – which confirms;

- The MSs' requirement to co-operate actively with claimants (as in Art 4(1) QD and Art 8(2))b)APD--see [66]-[68] and [95]
- But not to provide “effectively” the “assessment/determination” of facts etc for comment.—see [69]-[73]

Pending reference of **A, B & C v The Netherlands** is directed to Art 4 interpretation—subs filed but not yet heard—Judgement -late 2014??

The related reference **X and ors v Ne** focusses on Art 10(1) and psg issue ... Decision due 7 November 13 – any assistance?

# **Assessment of Credibility under the EU Qualifications Directive**

**Comments on Professor Hathaway's  
presentation**

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**Comment on proof standard in credibility assessment-** see United Kingdom: Lord Justice Sedley in :*Karanakaran v SSHD* [2000] EWCA 11—

No probabilistic cut-off operates here: everything capable of having a bearing has to be given the weight, great or little, due to it. What the decision-makers ultimately make of the material is a matter for their own conscientious judgment, so long as the procedure by which they approach and entertain it is lawful and fair and provided their decision logically addresses the Convention issues.

