

IARLJ EUROPEAN CHAPTER – GOTHENBURG CONFERENCE 21-22  
NOVEMBER 2013.

DISCUSSION DRAFT ON COI DUE PROCESS STANDARDS AND  
EXPLANATORY NOTES by Bernard Dawson on behalf of the COI-CG Working  
Party.

**I. COI DUE PROCESS STANDARDS:**

(A possible list not at this stage in any particular order)

**In relation to government use:**

**Transparency**

(=availability of COI to all parties in the decision-making procedure)

**Use of publicly available COI**

**Duty to state (COI) facts accurately**

**Duty to act fairly** (impartiality and neutrality of research)

**Duty to disclose to an applicant clear particulars of any information, including COI, that is relevant to the decision** (quaere whether COI which is general in nature and does not related to particular asylum seeker is covered). But duty to disclose may be overridden if disclosure would be likely to endanger the safety of any person or the information is classified)

**Equality of arms**

**Sufficiently time for parties to comment on relevant COI**

**Duty of data protection**

**Duty to decide on the basis of up-to-date (COI) information**

**Duty to give reasons** (obligation for the decision-maker to show the connection between his/her decision and COI if relevant to the case)

(e.g duty to rely on publicly available information only)

**Compliance with procedure rules**

(e.g. if legislation or policy governing designation of a country as a safe third country requires the government department to consult with certain bodies)

**Duty to consult / duty to consult widely**

(e.g. if state makes an order designating a country as “safe”)

**Duty to treat like cases alike** (e.g. to make sure COI is applied reasonably and consistently)

**Duty to keep legislation under periodic review** (e.g. in relation to designation of certain countries as safe)

**Duty to avoid misuse of power**

**In relation to judicial proceedings:**

**Right to an effective remedy**

**Right to be heard**

(e.g. opportunity for the A to respond to COI relied upon by government)

**Duty to ensure A understands the essential and significant issues upon which the court proceedings turn**

**Judicial instance not to conduct its own research (without giving opportunity of parties to respond)**

**Right to a fair hearing**

(e.g. a case which has been put into an accelerated procedure which denies the applicant the ability to rebut COI-based presumption of safety; e.g. would be unfair to rely upon evidence which neither party has had the opportunity to test).

**Adequate time to prepare and/or respond to relevant COI**

**Equality of arms**

(includes duty to submit relevant facts and evidence)

**Duty to take into account updated evidence (ex nunc principle)**

**Failure to take into account relevant factors**

**Taking into account of irrelevant factors**

**Abuse of power/illegality**

**Proper opportunity to rebut presumption of safety and efficacy of country of transfer's asylum procedures** (e.g. within Europe and the MSS v Belgium and NS cases).

## II. EXPLANATORY NOTES ON COI DUE PROCESS STANDARDS

1. The Oxford Dictionary defines due process of law as the “fair treatment through the normal judicial system, especially a citizen’s entitlement to notice of a charge and a hearing before an impartial judge”.

*I would however add that the concept of due process has disappeared from UK law as a distinct topic and its currency is largely in the United States. There is argument for re- considering the title. It may be that due process may translate well into other languages but I wonder if we might consider “COI Minimum Procedural Standards for use by judges.*

2. This principle of fairness is the key to the proper use of COI in asylum procedures at all stages whether by administrative officers or judges. The knowledge used to decide if a person is in need of protection will generally include that derived from dealing with other claims and from current research into the situation in the country of origin. It is important that previously sourced knowledge is tested against the criteria for the use of COI (see the IARLJ COI Judicial Check list which is attached to these Explanatory Notes) to ensure that it is up to date and relevant to the claim being made. It is equally important for the claimant to be told what previously acquired information is being used so that he or she has the opportunity to assess the sources and reliability and to produce rebuttal evidence. The same principles apply to current research. If the claimant is not made aware of what is being taken into account in deciding a claim then that is a failure of due process.
3. It will be seen therefore that fairness underpins due process and its absence in the field of COI could lead to injustice and a risk of persecutory harm.
4. COI is often a critical part of the consideration of a refugee claim and may be decisive in assessing whether there is a protection need. COI can determine the outcome of a claim when credibility is disputed.
5. There needs to be specific guidelines for government use in addition to those for judicial use. The decision whether a claimant is in need of protection requires an effective remedy but this does not mean that the principles of fairness and full disclosure should not be followed at the first instance stage. This is particularly so when there is only judicial review available as the effective remedy.
6. A decision maker or judicial tribunal or court works within a framework of legislation for the use of COI:

The EU Qualification Directive 2011/95/EU provides in article 4:

3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the Country of Origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied.

EU Procedures Directive, Article 8 (2) (b) provides:

2. Member States shall ensure that decisions by the determining authority on applications for asylum are taken after appropriate examination. To that end, Member States shall ensure that ....

(d) precise and update information is obtained from various sources, such as the UNHCR, as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and making decisions.

The EU Common Guidelines for Processing COI

These provide additional “soft law” guidance.

### 3.1 General principles

#### 3.1.1 Quality criteria for evaluating and validating information

Please note that the quality criteria used to validate the source are different from the quality criteria used to validate the information.

Several quality criteria are important for the quality of research and the COI-report.

The first and foremost consideration must be the relevance of the information. If information is not relevant to the subject, it should be excluded.

Reliability, currency, objectivity, accuracy, traceability and transparency are all considered to be important criteria. However, it is not possible to order these criteria into a hierarchy. Their degree of importance depends on the subject of the questions being answered.

If some of these criteria are not met, this does not mean that the information cannot be used.

For instance, the objectivity of the information is generally considered to be very important.

However, in certain cases non-objective or non-neutral information can be used if other quality criteria are fulfilled, but it would be necessary to indicate this bias.

- Relevance: pertinent to the matter, fact, event, or situation in question.
- Reliability: trustworthy to the matter, fact, event, or situation in question.
- Currency: up-to-date or the most recent information available AND where the events in question have not changed since the release of the information.
- Objectivity: not influenced by emotions, personal prejudices, interests or biases.
- Accuracy: conformity of a statement, or opinion, or information to the factual reality or truth.
- Traceability: the degree to which the primary and/or original source of a piece of information can be identified.
- Transparency: the quality of the information is clear, non equivocal and intelligible.

The last mentioned points relate to due process.

7. The desirability for guidelines for Due Process was discussed in a round table meeting by the UNHCR and IARLJ on 22 May 2012. Arising out of the discussions the following COI Due Process Standards were identified. These are set out above

and suggested commentary on them is as follows:

A: In relation to government use by administrative decision makers:

**Transparency**

This requires the availability of COI to all parties in the decision-making procedure. The administration making the decision must inform the claimant of all the material that was employed in reaching a decision on an asylum claim. Such details should include a list of the reports and other material so that the claimant or his advisers are able to carry out checks on the material to confirm its source and ultimately its reliability.

If there is material the source of which the government does not wish to disclose for security reasons, there needs to be an explanation why there is a need for protection of the source and whether there has been judicial appraisal of the reliability of the source. The reasons for non-disclosure of the source should be sufficiently detailed for the claimant to assess whether those reasons are reasonably arrived at and justifiable.

A government should not be permitted to rely solely on such material in reaching decisions. What is needed is that the claimant or his advisers have sufficient time to: (i) consider the material; and, (ii) to obtain material by way of response if the claimant (or his advisers) consider it desirable. It is necessary to consider what resources are available for the latter option to be pursued. This is particularly important in fast track cases where the claimant is detained and has only limited access to legal advice

**Use of publicly available COI**

**Duty to state (COI) facts accurately**

**Duty to act fairly**

**Duty to disclose to an applicant clear particulars of any information, including COI, that is relevant to the decision.**

These standards involve issues relating to the quality of work undertaken by research departments and also to the importance of providing references so that sources can be checked. This standard attracts its own check list. The principles of transparency are to the fore. The sources of COI are as varied as the range and there is rarely likely to be justification for material that is not publicly available for the use of commentators and in particular, claimants. If no COI is available specific to the claimant's case he should be informed that this is so.

But the duty to disclose may be overridden if disclosure would be likely to endanger the safety of any person or the information is classified. This standard is related to the duty to state facts accurately and includes considerations of impartiality and neutrality of research. Research should only be undertaken by persons in the administration who are trained to do so.

## **Equality of arms**

It must be borne in mind that the claimant will have fewer resources than the administration and that his or her first language may not be that of the material being relied on.

## **Sufficient time for parties to comment on relevant COI**

As observed above the claimant will have fewer resources than the administration. He or she may be detained. The availability of specialist legal assistance may be under pressure for economic or reasons relating to timescale<sup>1</sup>.

## **Duty of data protection of the sources?**

There will be occasions when the sources which the author of a report will not wish to disclose in order to protect his identity. Any decision to anonymise must be accompanied by reasons sufficient for the party affected to consider whether such a decision is justified. Regard needs to be had to where sources who had valuable information to give but wished to do so under conditions of anonymity.<sup>2</sup>

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<sup>1</sup> See the decision of the ECtHR in *IM v France* (application number 9152/09) where there is discussion about the impact of short time scales in fast track procedures. Quoting from an analysis in English of the decision by the Electronic Immigration Network: “The Court acknowledged that fast-track asylum procedures, which were applied in many European countries, could make it easier to process applications that were clearly unreasonable or manifestly ill-founded. While the re-examination of an asylum application under the fast-track procedure did not deprive aliens in administrative detention of a detailed review of their claims, in so far as they had had a first application examined under the normal procedure, this was not the case with first-time applications. Thus, the consideration of I.M.'s asylum application by OFPRA under the fast-track procedure would have been the only examination of the merits of his asylum claim prior to his deportation had his request to the European Court of Human Rights for interim measures not been granted in good time.

Because the asylum claim had been registered under the fast-track procedure, the time-limit for lodging the application had been reduced from 21 to five days. This was a short period which imposed certain constraints, as the applicant was expected to submit an application in French – without any linguistic assistance – meeting the same requirements as applications under the normal procedure, and to provide supporting documents concerning, among other things, his ethnic origin. The Court stressed that this information had been decisive, since the succinct reasoning of OFPRA's decision had focused primarily on the inconsistencies and lack of conclusive evidence in the applicant's application.

While the effectiveness of a remedy within the meaning of Article 13 did not depend on the certainty of a favourable outcome for the applicant, the Court could not but conclude that, without its intervention, the applicant would have been deported to Sudan without his claims having been subjected to the closest possible scrutiny. He had not had an effective remedy in practice by which to assert his complaint under Article 3 of the Convention. The Court therefore held that there had been a violation of Article 13 taken together with Article 3.

<sup>2</sup> This was considered at [230] *et seq* of *Sufi and Elmi v UK* :

230 “In assessing the weight to be attributed to country material, consideration must be given to its source, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources

**Duty to decide on the basis of up-to-date (COI) information it must be current to the matters relied on in support of the claim**

Although case workers may have acquired considerable knowledge they should in all cases check that knowledge against current material to ensure that it is still reliable and relevant.

**Duty to give reasons (obligation for the decision-maker to show the connection between his/her decision and COI if relevant to the case)**

The decision refusing the claim needs to be intelligible and adequate and must enable the claimant to understand why the claim was declined and what consideration was giving to COI in accordance with these standards. The reasons given should enable a claimant to make (with legal advice) a proper assessment as to whether the decision should be challenged.

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are all relevant considerations (*Saadi v. Italy* [GC], no. 37201/06, § 143, ECHR 2008 ..., BAILII: [\[2008\] ECHR 179](#). and *NA. v. the United Kingdom*, cited above, § 120).

231. The Court also recognises that consideration must be given to the presence and reporting capacities of the author of the material in the country in question. In this respect, the Court observes that States (whether the respondent State in a particular case or any other Contracting or non-Contracting State), through their diplomatic missions and their ability to gather information, will often be able to provide material which may be highly relevant to the Court's assessment of the case before it. It finds that the same consideration must apply, *a fortiori*, in respect of agencies of the United Nations, particularly given their direct access to the authorities of the country of destination as well as their ability to carry out on-site inspections and assessments in a manner which States and non-governmental organisations may not be able to do.
232. The Court appreciates the many difficulties faced by governments and NGOs gathering information in dangerous and volatile situations. It accepts that it will not always be possible for investigations to be carried out in the immediate vicinity of a conflict and, in such cases, information provided by sources with first-hand knowledge of the situation may have to be relied on. The Court will not, therefore, disregard a report simply on account of the fact that its author did not visit the area in question and instead relied on information provided by sources.
233. That being said, where a report is wholly reliant on information provided by sources, the authority and reputation of those sources and the extent of their presence in the relevant area will be relevant factors for the Court in assessing the weight to be attributed to their evidence. The Court recognises that where there are legitimate security concerns, sources may wish to remain anonymous. However, in the absence of any information about the nature of the sources' operations in the relevant area, it will be virtually impossible for the Court to assess their reliability. Consequently, the approach taken by the Court will depend on the consistency of the sources' conclusions with the remainder of the available information. Where the sources' conclusions are consistent with other country information, their evidence may be of corroborative weight. However, the Court will generally exercise caution when considering reports from anonymous sources which are inconsistent with the remainder of the information before it."
- 234.



### **Compliance with procedure rules**

Where legislation or policy governing designation of a country as a safe third country requires the government department to consult with certain bodies

### **Duty to consult / duty to consult widely**

Where an administration is reaching a conclusion of general application, for example where a state makes an order designating a country as “safe,” there needs to be consultation with inter governmental organizations such as UNHCR and NGOs as well as advocates and researchers so that they can make representations and report the results of their own enquiries.

### **Duty to treat like cases alike**

There must be a regular liaison within the administration to ensure that research is shared so that COI is applied reasonably and consistently. The approach by a government may indicate that like cases are to be treated in a particular way. This may raise a legitimate expectation which it may be unfair or unreasonable not to honour.

### **Duty to keep legislation under periodic review**

This is of particular relevance in relation to designation of certain countries as safe.

### **Duty to avoid misuse of power**

Governments need to be mindful of the possibility that claimants may have limited education, may not speak the language of the country in which the claim is being considered and may be hampered by an overburdened legal system that is unable to offer more than the most basic assistance.

There is a presumption that the power of decision making will be exercised in a manner which is fair in all the circumstances taking account of the above factors. It is necessary for there to be an opportunity for the claimant to make representations before or after the decision has been taken in order to produce a more favourable result.

The test to be applied to decision making is whether a fair minded observer would conclude that there has been no bias or procedures adopted that render the decision making unfair.

### **B: In relation to judicial proceedings:**

#### **Right to an effective remedy**

#### **Right to be heard**

#### **Duty to ensure an appellant or claimant understands the essential and significant issues upon which the court proceedings turn.**

These three standards can be considered together.



Where there is only review of an administrative decision, should it be decided that there has been inadequate consideration of the COI or a failure to apply the standards above, there needs to be a mechanism whereby the failures can be corrected.

Minimum standards for the conduct of hearings require that the claimant should have access to representation, that there be suitable interpretation where necessary and that there is the fullest opportunity for the claimant to make representations.

**Judicial instance not to conduct its own research (without giving opportunity of parties to respond)**

This embraces the fundamental principle of fairness which has already been outlined. There will be a difference of approach dependent on whether the jurisdiction is an inquisitorial or adversarial one. Whereas an inquisitorial approach may require the judge to make his or her own enquiries it is a fundamental principle of fairness that the party affected has the opportunity of seeing the outcome of that research and has the opportunity to adduce rebuttal evidence.

Where the jurisdiction is adversarial and the judge considers that he or she is unable to make a proper decision on the material that has been provided, the better course is to explain this to the parties and invite them to make further enquiries. Research for relevant COI is a specialist task requiring a good understanding of the mechanics of how this can be reliably conducted.

Where a judge has knowledge of relevant COI from previous appeals which has not been referred to or has been acquired through other means, it is necessary to notify the parties of the extent of the knowledge and how it was acquired and in addition to give the parties the opportunity to produce their own evidence in response.

**Right to a fair hearing including adequate time to prepare and/or respond to relevant COI. Proper opportunity to rebut presumption of safety and efficacy of country of transfer's asylum procedures.**

This is particularly so where a case which has been put into an accelerated procedure that denies the applicant the ability to rebut COI-based presumption of safety; e.g. it would be unfair to rely upon evidence which neither party has had the opportunity to test.

**Equality of arms  
(includes duty to submit relevant facts and evidence)**

It is essential to ensure that where there is COI evidence from the state, a claimant is given sufficient time and proportionally appropriate resources to obtain rebuttal evidence or simply evidence to support his claim.

**Duty to take into account updated evidence (ex nunc principle)**

**Failure to take into account relevant factors**

**Taking into account of irrelevant factors**

*I have bracketed these three standards which I do not consider relate to due process in the sense that is being discussed but instead relate to the substantive application of the COI that has been obtained. These points are more about the evaluation of the evidence. These standards however serve as a reminder to the judge of the importance of how the COI that has been obtained is to be considered. They are set out in the original IARLJ Checklist in detail.*

**Abuse of power/illegality**

This is an all-embracing standard relating to all aspects of the pre-trial and hearing procedures. As stated above, the judge needs to be conscious that just because many asylum seekers often present the same or a similar account, this is not necessarily indicative that the account presented is untrue. Parties need to be given adequate time to put their cases and to ensure that they have the facilities to do so such as interpreters who have been assessed as competent to translate from the language of the claimant.

*I hesitate about this standard being included which relates to all proceedings and consider that it arguably does not add anything specific to the Due Process considerations.*

**AUTHORITIES**

The topic is a wide one which is referred to from time to time in decisions of the European and national higher courts. The reader may already be aware of some if not all of the principal decisions. Many are focused on standards relating to the substance of COI in decision making but also on the process behind that. Those which have been particularly considered are as follows:

***Sufi and Elmi v United Kingdom* (Applications Nos 8319/07 and 11449/07) (ECtHR)** at paragraphs 230 -234 consider the weight to be attributed to country material. In addition there is an assessment of the independence, reliability and objectivity of the material.

***NA v United Kingdom* (Application Number 25904/07) (ECtHR)** at Paragraphs 118-122 again looks at COI reports, noting that consideration must be given to the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources etc.

***EG v United Kingdom* (Application Number 41178/08) (ECtHR)** This case discusses the country information for Sri Lanka following the case of *NA. v UK*, and a paragraph of the COI which is referred to in the judgment, mentions due process.

***R (on the application of NS) v Secretary of State for the Home Department (C-411/10)*** (CJEU) This case discusses the basic principles underlying those procedures and the guarantees to be given to asylum seekers by Chapter II of Directive 2005/85, Specific rules on the procedures for granting refugee status by Chapter III of the Directive, which also introduces the safe third country concept (article 27) and the safe country of origin concept: article 31. Chapter V includes rules on the right of asylum seekers to an effective remedy.

***HID and BA v Refugee Applications Commissioner and Others (Greece and the European Commission Intervening) (Case C-175/11)***(CJEU) at sections H9 – H16 considers the concept of “safe country of origin” according to which, when a third country could be regarded as safe, Member States could decide that an examination procedure be prioritised or accelerated in the case where the asylum application was considered unfounded. That prioritised procedure was not to deprive those Claimants of the guarantees required by art.23 of Directive 2005/85.

***R (on the application of MD (Gambia)) v Secretary of State for the Home Department [2011] EWCA Civ 121*** and ***R (on the application of JB (Jamaica)) [2012] EWHC 1660 (Admin)***. These are not European cases, but they both consider safe country certification and are of interest.

In ***Abdulla and others v Bundesrepublik Deutschland*** (Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08) (CJEU) the Claimants' refugee status was revoked following changed circumstances in Iraq after the fall of the Baath party. The case gives guidance on the conditions and procedural standards which must be met in order for refugee status to cease pursuant to article 11(1)(e) of Directive 2004/83.

***MSS v Belgium (Case 30696/09) (ECtHR)*** This case refers to the growing insecurity in Afghanistan, the plausibility of the applicant's story concerning the risks he had faced and would still face if he were sent back to that country

***Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration (C-69/10)*** (CJEU) discusses Directive 2005/85 on minimum standards on procedures in Member States for granting and withdrawing refugee status

***KRS v United Kingdom (Admissibility) (32733/08)(ECtHR)*** This case discusses Recommendation R(97) 22 (containing guidelines on the application of the safe third country concept).

***M v Minister for Justice, Equality and Law Reform, Ireland and another (Case C-277/11)*** (CJEU) looks at the obligation of national courts to ensure that Claimants are able to make known their views before the adoption of any decision that does not grant the protection requested, although it does not specifically refer to COI.

***CM (Zimbabwe) v SSHD [2013] EWCA Civ 1303*** where the Court of Appeal in considering the duty of disclosure confirmed that in a country guidance context the

Secretary of State must disclosure material tending to qualify the view otherwise being put forward as to what is the appropriate country guidance.

*I.M. v FRANCE (application number 9152/09)* detailed above at *footnote 1*

BWD 20 November 2013

DISCUSSION DRAFT