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BRIDGING A PROTECTION GAP

Disability and the Refugee Convention

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Preface

In the Preamble to the UN Convention on the Rights of Persons with Disabilities, the States Parties recognised the need to promote and protect the human rights of all persons with disabilities, and expressed their concern that persons with disabilities continued to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world. The extensive obligations under the Convention include those of prohibiting all discrimination on the basis of disability, ensuring effective access to justice for persons with disabilities and taking, in accordance with international law, including international humanitarian and human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk.

In the twelve years since the coming into effect of the UN Convention, increasing importance has been attached to the international protection of the rights of the disabled.

In the European Court of Human Rights, in particular, growing numbers of cases have raised complaints relating to the treatment of disabled persons - complaints of discrimination, of lack of effective protection of the right to life, of unjustified restrictions on the right to liberty, of inhuman or degrading conditions of detention, of lack of effective access to justice, of interference with personal autonomy and of expulsion or extradition to a country where the disabled applicant faces a real risk of treatment in violation of the European Convention.

In examining, in these last cases, whether the protection provided to the disabled person satisfies the requirements of Article 3 of the Convention, the Strasbourg Court has paid close regard to the existence of fair and appropriate national procedures to assess and determine not only the nature and severity of the disability but the seriousness of the particular risks to which the disabled applicant would be exposed on return to the country concerned. Such an assessment must necessarily involve a detailed examination at national level of such matters as the foreseeable consequences of the return in the light of the general conditions in the country concerned, the personal circumstances of the applicant, the

nature and extent of any protection by the state concerned and the availability within that state of effective medical treatment, care and support for the disabled person.

While the present paper contains a discussion of the international and subsidiary protection afforded to disabled claimants and those with medical and care needs under the European Convention and Article 15 of the Qualification Directive, the principal focus on the paper is the protection of the disabled when making asylum claims under the Refugee Convention. While there exists a wealth of published material on the nature and scope of the protection granted by the Refugee Convention to those facing the risk of persecution, less attention has been paid to the special challenges faced by disabled persons when making claims under that Convention or to the legal standards required to ensure that such protection is effective and offers sufficient safeguards to those suffering from physical, mental, social or other disabilities. This paper, prepared by three experts in the field, with additional advice from doctors, clinical psychologists, lawyers and counter-trafficking experts, seeks to fill that gap by providing an overview of the interrelationship between disability and international protection claims.

Drawing on case-law, both national and international, under the Refugee Convention, as well as on other legal instruments, commentaries and relevant materials, the paper examines the particular challenges, both substantive and procedural, confronting those with disabilities when making claims of asylum. While, as the paper notes, it has been based on legal and clinical experience within England and Wales, its relevance is not confined to that jurisdiction, but has more general application to the treatment of the disabled under the Refugee Convention.

The paper examines the central question of the nature of the treatment of those suffering from disability that may be said to give rise to a "well-founded fear of persecution", and the further question whether the disability is such that the individual concerned may be said to form part of a "particular social group" within the meaning of Article 1 of the Convention. Attention is rightly drawn to the fact that the risk of persecution may result from the disability itself, in particular where the discriminatory treatment and social stigmatisation suffered by a disabled person reaches a sufficient threshold of seriousness.

Noting that disabled persons may be at risk not merely from state authorities but from non-state actors, including family members and those closest to them, the paper examines the issue of the sufficiency of the protection offered both in the immediate area of the disabled person's home and elsewhere in the territory to which the person will be returned and the related question whether there exist barriers which might prevent or deter the person from seeking the state's protection. The important issue of possible internal relocation within the territory is discussed, with a particular focus on the practicality and reasonableness of expecting a disabled person to relocate, the answer to which depends both on the general circumstances prevailing in that part of the country and the personal circumstances of the individual concerned.

The impact of disability on the procedures applied when determining asylum applications is given a similar detailed analysis. In a discussion that has echoes in the case-law of the Strasbourg Court, the paper emphasises the importance of ensuring the fairness of those procedures, if necessary by making adjustments in the normal processes, to avoid so far as possible disadvantaging the disabled claimant.

The paper highlights the importance of identifying at an early stage claimants who are vulnerable by reason of their physical, mental or psychological impairment, and of providing such persons with the necessary legal and clinical support to enable them to have effective access to the asylum processes. This may best be achieved through the provision and use of medical legal reports to inform the legal process both by assisting disabled claimants to present and articulate their claim and, in certain cases, by providing direct corroboration of claimed traumatic events.

Despite the obvious benefits of digital technology, its increasing use may, as the paper notes, bring with it additional difficulties for those who, because of disability, face substantial barriers to engaging with such forms of technology, the paper stressing the importance that any such use should comply with the highest standards of procedural fairness.

The paper addresses the problems frequently faced by disabled claimants in giving a coherent and consistent account of their reasons for claiming asylum. It rightly highlights the importance of avoiding

evidential procedures which prejudice those whose ability to cope with interviews or legal proceedings may be affected by depression or post-traumatic stress disorder – these include the common faults of an over-reliance on a perceived lack of consistency in recalling stressful and traumatic events, especially those occurring during childhood, and the imposition of a burden or standard of proof that prevents or hinders the fair and effective engagement of a disabled claimant with the asylum process.

Two further asylum issues that might have a particular pertinence for disabled claimants are addressed - the specific mechanisms in the United Kingdom for identifying and treating claims to asylum by survivors of human trafficking and slavery; and the question of exclusion from the definition of "refugee" in Article 1F of the Convention, the paper noting the disproportionate impact that the application of the provision might have on disabled claimants.

As the paper's discussion of the substantive and procedural obstacles confronting disabled asylum seekers well illustrates, there exist serious deficiencies in the treatment of the disabled which falls far short of the requirements of the UN Convention. The authors' conclusion that there remains a need for an over-arching framework on disability and international protection to bridge the gap which clearly exists and for more effective training of asylum interviewers and decision-makers when dealing with disabled asylum claimants is surely indisputable, as is their opinion that there is a need for a review of country of origin information and case-law with a particular focus on disability rights and on the risks faced by disabled asylum seekers if returned to the country concerned.

This timely paper is warmly to be welcomed, offering, as it does, not only much-needed information on the treatment of the disabled but valuable guidance to decision-makers, practitioners, judges and all concerned with this increasingly important and sensitive issue.

Nicolas Bratza

Former President of the European Court of Human Rights

1. Introduction

This report draws together information regarding the interaction between disability and claims under the 1951 Refugee Convention. It also briefly looks at subsidiary forms of legal protection. This report has been prepared based on legal and clinical experience within England and Wales in particular, but may be of wider relevance to those working to apply the Refugee Convention in other jurisdictions.

Written work on disability in this field has often focused on practical inclusivity rather than on the legal standards for protection. Without specific analysis and guidance there is a risk that disability, which can also intersect with other characteristics where people may experience discrimination, may be overlooked and the issues involved left 'invisible'. This document is intended as legal interpretive guidance for decision-makers, practitioners and the judiciary working with people in this field.

The authors of this report are Jennifer Blair of the Helen Bamber Foundation and Claudia Neale from Garden Court Chambers. The authors would like to thank Jenni Whitaker, research assistant for this publication, and the doctors, clinical psychologists, lawyers and counter-trafficking experts at the Helen Bamber Foundation who have provided advice on this publication alongside Asylos, the Asylum Research Centre and Dr S Chelvan, a barrister who attends the Home Office National Asylum Stakeholder Forum Equalities Subgroup and has acted in disability-based protection claims. Whilst this report was in the process of being drafted the case of *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 223 (IAC) was handed down by the Upper Tribunal. The authors of this report would like to express gratitude to those involved with that case, particularly Ali Bandegani from Garden Court Chambers, whose arguments, relied on in the judgment, we have also referenced in this publication.

The Helen Bamber Foundation (HBF) is a specialist clinical charity, which works with survivors of trafficking and torture. HBF provides support to individuals through a Model of Integrated Care, which includes trauma-focused therapy and a specialist Counter-Trafficking team, as well as medical, therapeutic, housing, destitution and legal protection advice and community integration input. HBF runs a Medico-Legal Report Service and undertakes research and training to promote trauma-informed methods of working. HBF has produced a *Trauma Informed Code of Conduct for all professionals working*

with survivors of human trafficking and slavery[1] and both editions of the *Slavery and Trafficking Survivor Care Standards*.[2] HBF's expertise is recognised globally and by the UK Home Office and the courts.[3]

2. Disability

Disability can itself be a reason for persecution. In some countries, people with specific conditions (whether physical, mental or both) may face violent and/or degrading treatment from the state, their own family, and/or wider society. Decision-makers and practitioners should be alert to this possibility even when the person seeking asylum has apparently claimed asylum on a different basis, such as their political opinion, religion or sexual orientation.

There is no single legal definition of 'disability'. However the UN Convention on the Rights of Persons with Disabilities (UN CRPD) describes:

> *"Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." (Article 1)*
>
> *"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation" (Article 2)*

[1] Helen Bamber Foundation, Trauma Informed Code of Conduct for all professionals working with survivors of human trafficking and slavery , October 2018.

[2] Human Trafficking Foundation, The Slavery and Trafficking Survivor Care Standards, October 2018.

[3] For example, in the Home Office API: Medico Legal Reports from the Helen Bamber Foundation and the Medical Foundation Medico Legal Report Service at 3.1 and KV (Sri Lanka) [2019] UKSC 10 at [6].

The UN CRPD places obligations on signatory states to combat discrimination, to promote accessibility and independence, inform disabled people of their rights and to protect and promote fundamental human rights. The UN CRPD therefore forms a kind of charter on disability rights.

Within the United Kingdom the Equality Act 2010 relies on a similar definition of disability:

> *"(1) A person (P) has a disability if—*
>
> *(a) P has a physical or mental impairment, and*
>
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities." (Section 6)*

The Equality Act 2010 sets out provisions to address a range of potentially discriminatory acts where a disabled person or those associated with them may be treated less favourably than others. There is also a requirement to make reasonable adjustments where necessary to address any disadvantage an individual would face due to a disability and a Public Sector Equality Duty (section 149). This creates a duty to reduce the gap between those with a protected characteristic such as disability and those without.

Other relevant human rights instruments include the European Convention on Human Rights (Article 14 of which provides for non-discrimination in relation to other treaty rights) and Article 21 of the Charter of Fundamental Rights of the European Union (which expressly prohibits discrimination on the basis of disability).

Language is important. A 'medical model' of disability focuses on specific illnesses or conditions a person is experiencing, and then on the treatment or management of that illness or condition. In such a medical model, the term 'person with a disability' may be used to describe a person with such an illness or condition.

On the other hand the 'social model' of disability defines disability in terms of the barriers certain people face in society, not by an 'impairment' or 'difference'.[4] Those using the social model will often use the phrase 'disabled people' rather than people 'with disabilities'. This encourages a focus on the way people are disabled by barriers in society rather than their inherent 'victimhood'. Such barriers may be due to a lack of physical adjustment and accessibility, or may be due to social attitudes, stigma and stereotypes from state actors, non-state actors and the communities and families of affected persons. The social model approach to disability, which promotes agency/personhood, reduces labelling people by difference and so emphasises inclusion and accessibility, is robustly applied by many state actors and third sector disability rights organisations and is often linked to a rights-based approach.

There can be a temptation in a refugee law context (as explored below) to use the medical model, which many people may find demeaning. We recommend that at policy level the social model is used, and that at an individual level, people's own preferences in terms of language should be taken into account to foster an environment of respect and dignity.

Disabled people may have a physical impairment (including blindness or mobility impairment like paraplegia), a diagnosed illness (such as HIV, cancer or schizophrenia). They may also have symptoms of a condition but without a firm diagnosis. It can be particularly difficult for people seeking asylum to consistently access specialist medical care to obtain a diagnosis. Disability is also a blanket term that covers conditions that may be due to an illness, a physical or cognitive impairment (such as learning difficulties from childhood or from a brain injury), a developmental disorder/neurodiverse condition such as autism and the treatment of intersecting health issues. In this report we often refer to 'condition' or 'illness' as shorthand, but recognise the diversity of experiences represented.

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[4] The social model originated from *The Fundamental Principles of Disability* (1976) by the Union of the Physically Impaired Against Segregation in the United Kingdom, which stated that *'Disability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society'.* The development of the social model has been usefully outlined by Mike Oliver, 'The Social Model in Action: If I Had a Hammer…', in Colin Barnes and Geof Mercer (eds.), *Implementing the Social Model of Disability: Theory and Research* (Leeds: The Disability Press, 2004).

3. The Refugee Convention

The 1951 Refugee Convention (as updated by the 1967 Protocol Relating to the Status of Refugees to have ongoing effect) defines a refugee as a person who:

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

In the United Kingdom the Refugee Convention is an international treaty which is legally binding in certain contexts due to the United Kingdom's commitment to follow it within the Immigration Rules ("*328. All asylum applications will be determined by the Secretary of State in accordance with the Refugee Convention*").[5] More generally the UK is committed to complying with its international legal obligations[6] and so where legislation and international legal obligations are being interpreted, such as human rights obligations, these should be interpreted in line with the UK's commitments under the Refugee Convention. The United Kingdom is also, at the time of writing, obliged to follow relevant European Union legal provisions providing for the recognition of refugees and minimum standards in asylum procedures and conditions (discussed below as relevant).

[5] The Immigration Rules are secondary legislation issued pursuant to s.3(2) of the Immigration Act 1971 and they give the Refugee Convention primacy of status due to s.2 of the Immigration Appeals Act 1993.

[6] Recognised by the UK also being a signatory to the Vienna Convention on the Law of Treaties. International law is not directly binding within the United Kingdom (it usually needs to be implemented), but national provisions will be interpreted in line with the United Kingdom's obligations under international law, for example see *ZA (Tanzania)* [2011] UKSC 4. The strong commitment to upholding the Refugee Convention has seen it being applied to interpret domestic law, see for example *R v Uxbridge Magistrates Court, ex parte Adimi* [1999] EWHC Admin 765.

4. Persecution for a Convention Reason

For a claim to fall within the Refugee Convention the fear of persecution must be for a Convention reason (race, religion, nationality, membership of a particular social group or political opinion). Disability can be relevant to this analysis in a wide range of ways.

The treatment a disabled person may face could create a risk of persecution on the basis of a Convention reason such as religion. For example, returning someone who suffers from delusions that they have magical or religious superhuman powers to a country where blasphemy is punished severely could give rise to a real risk of persecution on religious grounds.[7] **A key issue when considering the relationship between disability and a potential Convention reason is how the person and their behaviour will be perceived in the relevant country.** As another example, women's dress can be a political issue in some countries[8] and in that context if a disabled woman displaying disinhibited behaviour as a manifestation of her disability went into public spaces in her nightwear or in clothing deemed to contravene social mores, she may face risks of sexual or other abuse from state or non-state actors. In a recent unreported Upper Tribunal determination,[9] for example, it was found that a young Afghan with learning difficulties was entitled to refugee status because he would be at risk in his conservative home area of religious persecution because he had "no ability to censor himself, and appeared incapable of self-moderation when it came to expressing his views or managing his behaviour". Internal relocation was also deemed unreasonable because he would not be able to cope due to his disability.

Disability may make a person more vulnerable to persecution. In relevant circumstances, a disabled person may be more likely to be targeted if they were perceived to be acting atypically. Consider for

[7] See K & Fornah [2006] UKHL 46 from Lord Brown at [117] "in relation to religion, for example, the persecutor may be acting because of his own religious beliefs; his victim may have none".

[8] See for example the starred determination of Gomez (Non-state actors: Acero-Garces disapproved) (Colombia) [2000] UKIAT 00007 at [40] "Sometimes political opinion may be located in a particular type of expression or activity, e.g. wearing western clothes in a highly fundamentalist Muslim country with strict social mores [...]".

[9] MS (Afghanistan) PA/00894/2018 promulgated 30 July 2019 and published 17 September 2019.

example the country guidance case law on political/imputed political opinion claims in Iran which identifies the potentially high risk posed at the 'pinch point' of return if people are questioned by the authorities. In this context, might severe mental illness, impairment or a developmental disorder/neurodiverse condition like autism render a person more vulnerable to hostility from the authorities on return?[10]

In addition, a disabled person may be less able to keep safe from abuse or exploitation/human trafficking. Some conditions impact on communication or interpersonal regulation, for example the combination of Post Traumatic Stress Disorder and Autism or learning difficulties can require different assessment processes, but completing these can then be instrumental in understanding neurodevelopmental/cognitive vulnerabilities and how they may have contributed to a history of past persecution and increase risk on return as a target for further abuse or exploitation. This kind of combination of factors may be very important, for example when assessing the situation of a young adult or separated child in the state's care. If someone is suffering from mental illnesses, including as a result of previous traumatic experiences, and/or has some other physical or mental condition, it may put them at greater risk of future abuse. In this regard see, for example, the Nigerian country guidance case of *HD (Trafficked Women) CG* [2016*] UKUT 454* which, among factors that are likely to increase a person's risk on return, notes that *"Visible or discernible characteristics of vulnerability, such as [...] mental health conditions, which may well have been caused by experiences of abuse when originally trafficked".*

There may be cases where disability intersects with another characteristic (in the Iranian example above, Kurdish ethnicity, male sex and specific disability could together intersect to create a heightened risk on return). A person who may face discrimination in a particular country due to a specific characteristic such as sex, sexual orientation, gender identity or statelessness, may face discrimination that then crosses the threshold to persecution when this characteristic intersects with the treatment of disability. For example, women in a certain country may face discrimination, but disabled women may in addition

[10] Relevant country guidance case law includes HB (Kurds) CG [2018] UKUT 430, SSH and HR (illegal exit: failed asylum seeker) CG [2016] UKUT 00308 and BA (Demonstrators in Britain – risk on return) Iran CG [2011) UKUT 00036.

face forced involuntary sterilisation in a way which will amount to persecution.[11] Similarly, gay men in a certain country may face discrimination, but when combined with HIV positive status this may create a heightened risk profile that crosses the threshold for persecution.[12] Sometimes the relevant intersecting characteristic may be race, religion, nationality or political opinion (perceived or otherwise) and sometimes it may instead constitute a particular social group.

5. Disability as a Particular Social Group

Sometimes disability may itself form a particular social group (or a subgrouping such as "sufferers of serious mental illness"). The Home Office accepts that disability or a subcategory thereof can constitute a particular social group.[13]

The UNHCR's recommended definition (from HCR/GIP/02/02 from 7 May 2002) of particular social group is:

> *"a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The*

[11] Where this is not medically necessary in the best interests of a woman medically unable to give or refuse informed consent, see for example, Holly Atkinson and Deborah Ottenheimer (2018) 'Involuntary sterilisation among HIV-positive Garifuna women from Honduras seeking asylum in the United States: Two case reports', 56 Journal of Forensic and Legal Medicine, 94-98.

[12] See for example, Human Rights Watch, 'Hated to death: Homophobia, Violence and Jamaica's HIV/AIDs epidemic', November 2004, and JP Figueroa et al. (2013) 'High HIV prevalence among MSM in Jamaica is Associated with Social Vulnerability and Other Sexually Transmitted Infections', 62 West Indian Med J. 4, 286-291.

[13] See DH (Particular Social Group: Mental Health) Afghanistan [2020] UKUT 223 (IAC) at [34] (which references the Court of Appeal disposal by consent of such a case) and [77] which records the Home Office agreement on this point in the particular case. Previously this had been accepted in the unreported case of W (Zimbabwe) AA/10877/2014 (9 June 2015) in the First-tier Tribunal, concerning a woman with Hanart syndrome where the digits of her hands were joined at birth, where it is noted at [50] that the Home Office's legal representative had "accepted that the appellant is a member of a particular social group that is to say people with disability and that she had been treated differently as a result of that disability and the key question for my consideration is whether her disability means that she would be persecuted on her return to Zimbabwe. It was accepted that the Appellant has an immutable *characteristic*". The appeal was allowed on asylum grounds, with the judge placing weight on country information noting the prevalence of sexual violence against disabled women in Zimbabwe.

> *characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."*

In the UK, the definition of 'particular social group' is codified in Article 10(1)(d) of Directive 2004/83/EC ("the Qualification Directive"), an EU instrument which has largely formed the basis of UK domestic asylum law since it came into force in 2004. (Other EU countries now use the more recent Directive 2011/95/EU, from which the UK opted out.) Article 10(1)(d) provides in relevant part:

> *"...a group shall be considered to form a particular social group where in particular:*
>
> *— members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and*
>
> *— that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society".*

The UNHCR Annotated Comments on the previous Qualification Directive encouraged explicit examples of groups which can qualify for refugee status, notably on the basis of 'gender, age, disability and health status'.[14]

There is additional case law exploring the meaning of 'particular social group' finding that it is *"an immutable characteristic . . . [a characteristic] that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not to be required to be changed,"*

In re Acosta (1985) 19 I. & N. 211 (United States Board of Immigration Appeals), approved by Lord Hoffmann in Shah and Islam [1999] UKHL 20. Lord Hoffmann added that *"I cannot accept that the term "particular social group" implies an additional element of cohesiveness, co-operation or interdependence. The*

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[14] UN High Commissioner for Refugees (UNHCR), UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted *(OJ L 304/12 of 30.9.2004)*, 28 January 2005.

fact that members of a group may or may not have some form of organisation or interdependence seems to me irrelevant to the question of whether it would be contrary to principles of human rights to discriminate against its members." According to Lord Bingham of Cornhill in Fornah and K [2006] UKHL 46, the test of causation will be met when "the persecutory treatment of which the claimant has a well-founded fear is causally linked with the Convention ground on which the claimant relies. The ground on which the claimant relies need not be the only or even the primary reason for the apprehended persecution. It is enough that the ground relied on is an effective reason."

There are examples of other legal jurisdictions where disability is recognised as constituting a 'particular social group', for example in South Africa the Refugees Act 1998 includes "a group of persons of particular…disability" within its definition of 'particular social group'[15] and in the Canadian case of *Liaqat v Canada*,[16] the Federal Court recognised the applicant's mental illness was an 'innate and unchangeable characteristic'.[17]

Clearly there is no conceptual difficulty in saying that disability is, in general, an "immutable characteristic" in the *Re Acosta* sense and that it fulfils the first limb of Article 10(1)(d). At any specific point in time a long term condition or impairment will be a feature of a person's life that it is likely they cannot change, so it will be immutable, even if they have a medical prognosis which means they hope for an improvement in their condition eventually.[18] International protection status determinations must

[15] No. 130 of 1998: Refugees Act, 1998 [South Africa], [1(xxi)].

[16] Liaqat v MCI [2005] FC 893 [Canada], [29].

[17] Further international examples are considered by Michelle Foster, 'The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments Relating to 'Membership of a Particular Social Group' (Geneva: UNHCR, 2012), 61-63.

[18] A comparison can be drawn with age, which in the United Kingdom has been found by the courts to be an immutable characteristic - constantly changing but fixed at any particular time and outside of an individual's power to alter, *LQ (Age: Immutable Characteristic) Afghanistan v. Secretary of State for the Home Department* [2008] UKAIT 00005.

focus on the individual's characteristics at the date of assessment.[19] As such disability will be an immutable characteristic.

Until 2020, the weight of UK authority was that the two limbs of Article 10(1)(d) must both be met (see *SB (PSG -Protection Regulations -Reg 6) Moldova CG* [2008] UKAIT 00002 and *AZ (Trafficked women) Thailand CG* [2010] UKUT 118 (IAC)). If that was so, a person would have needed to show both that their disability was an immutable characteristic, and that disabled people, or a particular subgroup of disabled people, have a sufficiently 'distinct identity' in the relevant country.

However, in the landmark Upper Tribunal determination in *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 223 (IAC) the Tribunal accepted that the two limbs of Article 10(1)(d) were alternative and not cumulative, contrary to previous Upper Tribunal decisions. It went on to find that, on the facts of the case, the risk faced on return to Afghanistan by the appellant was on account of his membership in a particular social group, namely 'those suffering serious mental illness'. Whether a person with a mental illness forms part of a particular social group will be a complex question of fact and law. The Tribunal accepted that a person may suffer serious mental illness which is innate, i.e. a characteristic already present when they are born, or which has been developed since. That illness may also be immutable. It also accepted that, depending on the specific context in the country of origin and on personal circumstances, persons living with a serious mental illness may be perceived as being different by the surrounding society and thus, have a distinct identity in their country of origin. This is a fact specific assessment.

Another significant feature of *DH* is its acceptance that a mentally ill person can form part of a particular social group even if they do not have a clear diagnosis of a specific condition.

In applying the second limb of Article 10(1)(d), it may be relevant that 180 states and the European Union are signatories to the UN CRPD, indicating the extent to which disabled people are recognised as

[19] As per *Ravichandran* [1995] EWCA Civ 16, upheld by the Supreme Court in *TN and MA (Afghanistan) v Secretary of state for the Home Department* [2015] UKSC 40.

a marginalised group globally and by these signatory states. In addition, many countries will have national action plans or strategies to address issues relevant to disability (including specific areas of disability such as HIV, mental health and so on) and so this may be a helpful indicator that a relevant category of disabled people are perceived as a group by society.

It is essential for decision-makers and advocates to pay close attention to the country background evidence (including expert evidence) as to how people with particular disabilities/conditions are viewed and treated in the country concerned. Published Country of Origin information compendia and Country Policy and Information Notes by the UK Home Office should be inclusive of disability-specific intelligence and informed by input from specialists in the field. It needs to be borne in mind that disability documents from specific countries or international bodies are rarely written with international protection determination procedures in mind and an absence of published country information cannot be assumed to speak to an absence of discrimination (instead, for example, it could be indicative of a problem being so endemic it is seen as passing without comment).

For example, the US State Department produces annual reports on human rights practices in specific countries[20] and the 2019 report on the Democratic Republic of the Congo (DRC) records in a specific section that although disabled people are in principle protected by the constitution and in law (indicating that legally they are apparently seen as a specific social group) these protections are not effectively enforced and extensive social stigmatization of disabled people is reported.[21]

A useful illustrative example is the unreported Upper Tribunal case of *DL v SSHD* DA/01706/2014,[22] in which it was found that a man with a severe psychotic illness had a well-founded fear of persecution in the DRC on account of membership of a particular social group:

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[20] See US State Department, 'Country Reports on Human Rights Practices', March 2017- March 2020.

[21] US State Department, 'Democratic Republic of the Congo 2019 Human Rights Report', 11 March 2020.

[22] Published on 17 February 2020 and promulgated on 2 December 2019, the findings were made without apparent reference to the full authorities listed in this document.

> *"37. The evidence relating to attitudes towards psychotic illness in the DRC shows that discriminatory attitudes are likely to be prevalent in any case where a person is unwell and exhibiting abnormal behaviour. From a societal perspective, the perception is that all people suffering from psychotic episodes are likely to have an innate characteristic i.e. the perception that the illness is associated with witchcraft or has some other supernatural cause.*
>
> *38. However, due to the difficulty in defining a social group that might include some members that do not have an innate and immutable characteristic, for the purpose of this case, a narrower group of 'people suffering from a severe and enduring psychotic disorder' can be defined.*
>
> *[...]*
>
> *39. [...] 'People suffering from a severe and enduring psychotic disorder' are subject to a range of possible ill-treatment in the DRC including physical abuse, ostracism, discrimination and severe stigmatisation. Even if people living on the street are more vulnerable to abuse it matters not if there are mixed motives for ill-treatment if at least one motive is for a Convention reason: see Sivakumar v SSHD [2003] INLR 457. In another country, people suffering from the same illness may be viewed differently and might not be construed as a particular social group. However, we concluded that the evidence relating to attitudes towards psychotic illness in the DRC shows that the persecution the appellant fears is likely to be for reasons of his membership of a particular social group for the purpose of the Refugee Convention."*

It is clear from *DH* and *DL* that, in some circumstances, persecution arising from a disability will amount to persecution on account of membership in a particular social group. Whether this is the case will always be a fact-sensitive question.

There is one aspect of the reasoning in *DH,* however, which we respectfully consider should not be followed. At [80]-[83] the Upper Tribunal contrasts the "biomedical model" with the "psychosocial model" of mental disability, stating that *'the biomedical model assumes that depression originates from a*

physiological abnormality within the brain and there is no significant dissimilarity between mental and physical diseases… The medical model is more in line with the "immutable characteristics" approach to refugee determination. The essential element of the psychosocial model is the cumulative effect of environmental stressors on the individual in question and not a particular "innate" biological quality. This, arguably, makes it more difficult to identify an immutable characteristic. The issue is further complicated in that some mental disabilities may have a genetic or biological cause which makes the disability in question "immutable."' In our view, this is not really an accurate characterisation of the terms 'medical model' and 'social model' as those terms are used in the field of disability studies. Nor do we consider that recognition of a mental disability as an 'immutable characteristic' should depend on it having a purportedly physiological cause. A characteristic is immutable if it is beyond the power of the individual to change; this is so whether its causes are physiological, psychosocial or a mix of both.

6. Treatment that Amounts to Persecution

Even where disability is accepted as constituting a 'particular social group' in the relevant state or territory, in order for there to be a positive refugee status determination, there will also need to be a positive assessment as to whether the individual has a well-founded fear of persecution on return.

Establishing a well-founded fear of persecution is a higher threshold than simply showing that an individual would face some form of discrimination. Within the European Union, Article 9 of the Qualification Directive (Directive 2004/83/EC) states that:

> *"1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must:*
>
> *(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or*
>
> *(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).*

> *2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:*
>
> *(a) acts of physical or mental violence, including acts of sexual violence;*
>
> *(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;*
>
> *(c) prosecution or punishment, which is disproportionate or discriminatory;*
>
> *(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;*
>
> *(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);*
>
> *(f) acts of a gender-specific or child-specific nature..."*

Persecution could therefore involve a single serious act of harm or a set of circumstances which cumulatively amount to persecution. The definition of persecution is wider than the highest level of severity of threats to life, liberty or threats of torture.

Lord Steyn in *Ullah v Special Adjudicator* [2004] UKHL 26 at [32] adopted Hathaway's definition: "In sum, persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community." The former Immigration Appeal Tribunal in *Gashi (Asylum; Persecution) Kosovo* [1996] UKIAT13695 set out three categories of rights identified by Hathaway:

> *"Professor Hathaway lays out four distinct types of obligation in a hierarchy of relative importance. He starts off first with those human rights which are non-derogible (sic) even in times of compelling of national emergency. These rights include the right to life and the prohibition against torture and cruel, B inhuman or degrading punishment or treatment. In the second category are those rights which are derogible (sic) during a life threatening public emergency to the nation. In this regard the emergency must be one which is officially*

> *recognised by the State. The third category are those which States are required to take steps to the maximum of their available resources progressively to realise in a non-discriminatory way. They include the right to earn a livelihood; the right to a basic education. Also an entitlement to food, housing, and medical care which can at an extreme level be tantamount to persecution if denied "*

The analysis in *Gashi* suggests that a violation of rights in the first category will always be persecutory; that a violation of rights in the second category will be persecutory if the state cannot demonstrate any valid justification for their temporary curtailment; and that a systematically discriminatory denial of rights in the third category could also be persecutory.

However, *Gashi* predates the Qualification Directive. It is unclear how Article 9 of the Qualification Directive would narrow the definition of persecution.[23] If its definition were narrower, there may be an incongruence between the Refugee Convention and the Directive (however Recital 14 of the Directive still allows states to "introduce or maintain more favourable provisions than the standards laid down in this Directive"). It should be noted that, although the Directive is directly effective in the UK, the First-tier and Upper Tribunals are also required by statute to apply the Convention directly in determining appeals.[24]

Sufficiently severe discriminatory treatment can, in some circumstances, itself constitute persecution. The UNHCR has stated that discrimination can amount to persecution where it leads to consequences

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[23] The Court of Appeal in *SH (Palestinian Territories)* [2008] EWCA Civ 1150 adopted a restrictive approach, interpreting Article 9(1)(a) as being engaged only when a non-derogable right (Articles 2, 3, 4 or 7 ECHR) had been violated. But *SH* has not been frequently cited in subsequent cases, and it does not entirely cohere with other Court of Appeal authority: see for example *BE (Iran)* [2008] EWCA Civ 540 at [40] and *PK (Ukraine)* [2019] EWCA Civ 1756 which contemplate the possibility that in some circumstances even a non-custodial punishment for exercising a protected right could amount to persecution. Outside the UK/EU the definition of "persecution" may be wider than that recognised under the Qualification Directive (see *SH (Palestinian Territories)* at [45] where it was said that Article 9(1)(a) "afforded a narrower ground for claiming asylum than had hitherto been understood by some to be the case").

[24] Because the relevant grounds of appeal in section 84 of the Nationality, Immigration and Asylum Act 2002 are defined with reference to the Refugee Convention. See *Essa (Revocation of protection status appeals)* [2018] UKUT 244 (IAC).

of a substantially prejudicial nature, such as serious restrictions on a person's right to earn his livelihood, to practise his religion, or on his access to normally available educational facilities.[25] Sufficiently severe discrimination can amount to degrading treatment within the meaning of Article 3 ECHR (as in, for example, *Cyprus v Turkey* (2002) 35 EHRR 30 and *East African Asians v United Kingdom* (1973) 3 EHRR 76), which is one of the non-derogable rights referred to in Article 9(1)(a) of the Qualification Directive.

The kinds of disability-specific risks of persecution are varied and cannot be covered exhaustively here. They range from physical abuse to emotional abuse and situations of profound neglect without any accessible system of redress.[26] Some may be very specific due to individual circumstances or the local cultural/legal situation and some may arise in the context of the purported treatment of an illness or supposed illness.

For example, there are certain clinical conditions, such as albinism (where people with this condition have been killed in some parts of the world[27]), which have been regarded in the United Kingdom as constituting a particular social group (*JA (child - risk of persecution) Nigeria* [2016] UKUT 560 (IAC)). Certain medical conditions may be stigmatising in certain societies. Examples include mental illnesses, epilepsy (which can present among survivors of torture who have sustained head injuries) and contagious diseases, including HIV/AIDs.

Disability can be a risk factor for statelessness, as the births of disabled children may be less likely to be registered,[28] or disabled people may face additional practical, evidential and legal barriers in establishing a claim to any nationality (for example a deaf Kuwaiti bidoon child who has not had the opportunity speak/sign may have had no means of communicating with her parents and so may not be able to

[25] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (UNHCR: Geneva, 1992).

[26] UNHCR, 'Working with persons with disabilities in forced displacement', 2019.

[27] Amnesty International, 'The ritual murders of people with albinism in Malawi', 2 February 2017.

[28] UNHCR, 'Working with persons with disabilities in forced displacement', 2011.

communicate any detail in order to establish her nationality or show whether she is documented – and so able to access some services on return – or not).

In some countries there may be inadequate or even grossly inadequate safeguards to prevent an individual being detained arbitrarily in hospital on mental health grounds. Whilst detention for medical treatment can be appropriate (and indeed necessary), arbitrary indefinite detention may amount to persecution.

Some institutionalised people may face risks of other kinds, such as being locked in inappropriate or unhygienic places, solitary cells, being chained in place, or being forced to undergo painful and clinically unsound purported 'treatments' or risks of physical and sexual abuse from those detaining them. These kinds of treatments would clearly be capable of amounting to persecution.[29]

Other examples of disability-specific risks include cases of confinement outside of clinical institutions (such as chaining in place by relatives or at holy sites[30]); faith or traditional healing or exorcism procedures which are inhuman and degrading and potentially harmful; and exploitation and human trafficking risks (such as forced begging). "*Disability-specific forms of persecution may include the systematic denial of socioeconomic rights such as access to health care or education and the personal circumstances of the applicant may lead to persecution on cumulative grounds*" (Straimer 2010).[31] Where a disabled person is living with significant confinement or curtailment of socio-economic rights in order to avoid

[29] See for example Nikolyan v Armenia [2019] ECHR 674 where a formal legal procedure supported by evidence was found to breach Articles 6 and 8 ECHR.

[30] For example, BBC News reported that "…hundreds of mentally ill individuals from impoverished families spend every season of their life here, chained to trees and waiting for a cure" in 'Why Pakistan's poor seek mental health treatment at shrine' 29 September 2016; the Guardian reported on an individual in Ghana: "A bracelet shackle round each of his ankles leads to a chain rusted to the same tone as the Ghanaian mud and welded tight around a thick, solid tree root. He sits naked on a cloth, hugging thin legs, his skin dusty dry and his eyes vacant. He has been there for three years" in 'All we can offer is the chain: the scandal of Ghana's shackled sick' 3 February 2020 and Reuters reported that in Afghanistan, a "man with mental health problems sits on the wet floor as he is chained to a wall of a room at the Mia Ali Baba shrine" in 'Plight of Afghanistan's mentally ill', 10 July 2012.

[31] Clara Straimer (2010), 'Vulnerable or invisible? Asylum seekers with disabilities in Europe', New issues in refugee research (UNHCR, Research paper 194).

mistreatment (including the fear they would face abuse following the abandonment by family carers through perceptions of shame at the stigma associated with the person's condition or illness), it is useful to consider the country guidance case of *EH (Blood Feuds) Albania CG* [2012] UKUT 348 at [71]-[72] where it was found that the significant curtailment of socio-economic rights forced by self-confinement in blood feud cases constituted persecution because it was analogous to the 'living discreetly' test in *HJ (Iran)* [2010] UKSC 31.

As a practical example, the 2018 *UNHCR Eligibility Guidelines for Assessing the international Protection Needs of Asylum-Seekers from Afghanistan* note at III.9:

> **9. *Individuals with Disabilities, Including in Particular Mental Disabilities, and Individuals Suffering from Mental Illnesses***
>
> Persons with disabilities, including in particular persons with mental disabilities, and persons suffering from mental illnesses are reportedly subjected to ill-treatment by members of society, including their own family members, on the grounds that their illness or disability is a punishment for sins committed by the persons affected or by their parents.[506] Persons with disabilities face discrimination and limitations in access to employment, education and to adequate health care.[507]
>
> UNHCR considers that depending on the individual circumstances of the case, persons with disabilities, including in particular persons with mental disabilities, and persons suffering from mental illnesses may be in need of international refugee protection on the basis of a well-founded fear of persecution at the hands of non-State actors for reasons of membership of a particular social group or other relevant Convention grounds, combined with a general inability of the State to provide protection from such persecution.

Some disabled people may be at risk of violence from state actors (as discussed above such as where a delusional person could face blasphemy charges and mistreatment) and/or non-state actors, including those closest to them, so the assessment of risk on return includes evaluating whether there is a real risk that an individual will be mistreated or cast out by their family and/or community on return. Research suggests that disabled adults are at higher risk of violence than non-disabled adults, with

those with mental illnesses being particularly vulnerable, and with violence outside of state institutions most often carried out by someone close to the person.[32]

It should therefore not be assumed that if a person is not returning as a 'lone' person (i.e. because they have family or friends) they would therefore not be at risk. Disabled people are not chattel or slaves and are entitled to live openly in their own right. If they have mental capacity, they cannot be required to live as dependent on a third party. In the exceptional case of a disabled person who lacks mental capacity to make decisions about their care and residence, extreme care should be taken to ensure that recommendations are made on a best interests and welfare basis.

Similarly, the mere existence of medical treatment in a country is not evidence of an absence of persecution; there are likely to be hospitals with mental health departments almost globally, but that does not speak to wider social stigma and discrimination.

Assessing such risks requires a detailed understanding of an individual's condition, presentation, treatment and care needs and prognosis, and a subsequent assessment of the practicalities and risks the individual would face from the pinch-point of return at a national border and in the medium and longer term. The assessment is ultimately of whether the cumulated risks on return amount to persecution.

7. Sufficiency of Protection

A person will not qualify as a refugee if there is sufficient protection in their home area (or elsewhere in the territory – see below for more information on the test for internal relocation) to protect them from the risk of persecution.

[32] See Karen Hughes et al (2012) 'Prevalence and risk of violence against adults with disabilities: a systematic review and meta-analysis of observational studies', 379 *The Lancet,* 1621-1629; and UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment : note / by the Secretary-General, A/63/175, 28 July 2008.

Sufficiency of protection does not mean perfect protection. If there is a functioning, effective police force then the general position may be that there is a sufficiency of state protection. In the United Kingdom this is often referred to as the 'Horvath standard' based on the case of *Horvath* [2000] UKHL 37.

However, the *Horvath* standard is only the starting point. "*Notwithstanding systemic sufficiency of state protection, a claimant may still have a well founded fear of persecution if authorities know or ought to know of circumstances particular to his/her case giving rise to the fear, but are unlikely to provide the additional protection the particular circumstances reasonably require*", *AW (sufficiency of protection) Pakistan* [2011] UKUT 31(IAC). It is possible to envisage a wide range of circumstances where a disabled person might have additional protection needs, such as those resulting from abuse in institutional settings, which are then not met by the authorities.[33]

It is also important to note that the effectiveness of the system is to be judged by its systemic ability to prevent and/or deter the relevant form of persecution, not just punishment of it after the event: see *AW* above, citing *Bagdanavicius* [2005] EWCA Civ.1605. (That proposition in *Bagdanavicius* was left undisturbed on appeal to the House of Lords.) Thus, it should not be assumed that there is a sufficiency of protection merely because the state is at times able and willing to punish criminals. What matters is its ability to provide protection.

Furthermore, the Refugee Convention expressly protects those who are 'unwilling' to avail themselves of state protection, as well as those who are unable to do so. Again, there are many circumstances in which it is possible to envisage substantial barriers preventing a disabled person from seeking state protection effectively or willingly. Such state protection would have to be accessible and inclusive of any reasonable adjustments they would need. The person may for example be afraid of the police or authorities or their condition might impact on their communication ability or ability to reach a police station.

[33] See, for example, where such abuse is systematic, such as government-run facilities in Nigeria where people with mental health conditions are chained and subject to hardship and abuse. Human Rights Watch, 'Nigeria: People with Mental Health Conditions Chained, Abused', 11 November 2019.

8. Disability and Internal Relocation/Flight

Even if a person faces a real risk of persecution in their home area, their claim will be refused if there is another part of the country or territory to which they could safely relocate, provided that it would not be unreasonable or unduly harsh to expect them to relocate there. In the United Kingdom this principle is embodied in paragraph 339O of the Immigration Rules:

> *"339O (i) The Secretary of State will not make:*
>
> *(a) a grant of refugee status if in part of the country of origin a person would not have a well founded fear of being persecuted, and the person can reasonably be expected to stay in that part of the country; or*
>
> *(b) a grant of humanitarian protection if in part of the country of return a person would not face a real risk of suffering serious harm, and the person can reasonably be expected to stay in that part of the country.*
>
> *(ii) In examining whether a part of the country of origin or country of return meets the requirements in (i) the Secretary of State, when making a decision on whether to grant asylum or humanitarian protection, will have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the person.*
>
> *(iii) (i) applies notwithstanding technical obstacles to return to the country of origin or country of return".*

In practice, this principle is generally engaged where a person faces a risk from non-state actors, rather than from the state, because the state usually controls the state's territory and so internal relocation would not keep a person safe. For example, internal relocation alternatives may be considered where a person faces a risk from their own family, from traffickers or criminal gangs, or from armed groups.

There are two limbs to the internal relocation analysis, namely 1) relevance and 2) reasonableness. 'Relevance' means that it must be considered whether or not the individual can find safety in the place of relocation. 'Reasonableness' means that even if relocation would provide safety from the threat of

persecution, it still must be considered whether it is **unreasonable** or **unduly harsh** to expect the individual to relocate to the proposed internal flight alternative. A person seeking asylum does **not** need to show that the conditions they would face in the place of relocation would breach the high threshold of Article 3 ECHR (the prohibition on torture and cruel and inhuman treatment or punishment): *AH (Sudan)* [2007] UKHL 49. Nor do they need to show that the risks they would face there are sufficiently serious to engage Article 15(c) of the Qualification Directive (which requires a "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict").

The assessment of whether internal relocation is unreasonable or unduly harsh takes account of the particular characteristics of the **individual,** whose age, gender, experience, health, skills and family ties may all be very relevant. Initially the test can appear to be a high threshold – it is often said that the harshness of relocation has to be judged by reference to "standards prevailing generally in the country of nationality" (see *Januzi* [2006] UKHL 5 and *AH (Sudan)*), and the circumstances in the person's home country may be very difficult. However, in *AA (Uganda)* [2008] EWCA Civ 579, the Court of Appeal found that there will be conditions in the place of relocation that are unacceptable to the extent that it would be unduly harsh to return the applicant to them even if the conditions are widespread in the place of relocation.

It is often the case that internal relocation will be found to be unduly harsh for a disabled person, where it may not have been for a person who was not disabled. An illustrative example is provided by the country guidance cases on trafficking survivors from Albania, *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC) and *TD and AD (Trafficked women) CG* [2016] UKUT 92 (IAC). These decisions make it clear that the physical and/or psychological harm suffered by a survivor of trafficking is a highly relevant factor in deciding whether it will be unduly harsh for them to relocate internally. See *TD and AD* at [110]:

> *"At paragraphs 147-151 of AM & BM, the Tribunal considered the evidence of Dr Agnew-Davies in respect of the psychological effects of trafficking. We adopt and underline the view expressed in that case that in all claims it is important to consider the circumstances of the*

> *individual, including her strength, age, and psychological make-up. For VOTs [victims of trafficking] who have been through extreme traumatic experiences it is not difficult to see how they are likely to suffer psychological consequences such as complex PTSD. The VOT may suffer lasting physical damage as a result of her experiences. These are important factors which must be considered when assessing whether internal flight is reasonable for any individual VOT. Whilst the evidence relating to psychological support services for VOTs once they have left the shelters suggests some availability, that it is undoubtedly patchy and in many cases wholly inadequate as we have observed above. An individual, because of her condition, may have difficulty in accessing or engaging with such services that do exist. She may be required to pay for mental health care, increasing her financial burden. These are all matters relevant to the consideration of whether internal flight is reasonably available."*

Another illustrative example is *AS (Safety of Kabul) Afghanistan CG* [2020] UKUT 130 (IAC). Despite the dire conditions, high unemployment and poverty in Kabul, the Upper Tribunal held that it was not generally unduly harsh for a "single adult male in good health" to relocate there even if he has no support network in the city. However, it acknowledged that "*the particular circumstances of an individual applicant must be taken into account in the context of conditions in the place of relocation, including a person's age, nature and quality of support network/connections with Kabul/Afghanistan,* their physical and mental health*, and their language, education and vocational skills when determining whether a person falls within the general position set out above. Given the limited options for employment, capability to undertake manual work may be relevant*" (emphasis added).

People with post-traumatic stress disorder (and particularly those with 'complex PTSD' – a diagnosis newly recognized in the 11th Revision of the International Classification of Diseases,[34] may have difficulties in (re-) integrating into society following forced return to their country of origin for reasons that are closely and specifically related to their mental health problems. Core features of PTSD include hypervigilance and avoidance of reminders of past trauma, both of which may result in social

[34] International Classification of Diseases, 11th Revision, ICD-11 for Mortality and Morbidity Statistics, 06B41.

withdrawal. Many people with PTSD have a tendency to 'dissociate' - a psychological defence mechanism in which the mind is detached from the emotional state and the body. This may manifest as episodes of loss of awareness or even of consciousness which can in turn give rise to stigma or increase vulnerability to exploitation. In addition, the 'disorders of self-organization' that characterize complex PTSD include difficulties in regulation emotions (which may manifest as uncontrolled anger and irritability) and impairment in the capacity to establish and maintain trust and thereby to form and sustain relationships.[35]

9. The Impact of Disability on the Asylum Determination Procedure

The CRPD requires States to take steps to ensure reasonable accommodations are taken where needed to avoid disadvantaging a disabled person. Crock et al. (2013) have argued that failure to provide reasonable adjustments/accommodations is a form of discrimination which could, depending on severity, itself amount to a serious human rights violation and thus constitute 'persecution'.[36] It should be noted that the United Kingdom entered a number of reservations to the UN CRPD, significantly 'insofar as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right ... to enter and remain.'[37] Nevertheless, domestically, the Equality Act 2010 creates a duty to make reasonable adjustments where a disabled person may otherwise face substantial disadvantage. In the context of the asylum determination procedure, the kinds of reasonable adjustment that may be needed can vary considerably - from alternative mechanisms for capturing biometrics where a person, for example, cannot give fingerprints, to waiting for an assessment of mental

[35] M Cloitre, M Shevlin, CR Brewin et al (2018) 'The International Trauma Questionnaire: development of a self-report measure of ICD-11 PTSD and complex PTSD', 138 Acta Psychiat Scand 6, 536-546 and M Cloitre, BC Stolbach, JL Herman et al (2009) 'A developmental approach to complex PTSD: childhood and adult cumulative trauma as predictors of symptom complexity', 22 J Trauma Stress 5, 399-408.

[36] M Crock et al, 'Where disability and displacement intersect: Asylum Seekers and Refugees with Disabilities', 21 *International Journal of Refugee Law* 4, 735-764.

[37] Cited in *RS (Zimbabwe) v Secretary of State for the Home Department* [2010] UKUT 363 (IAC), [283].

capacity to be finalised, or to agreeing to expedite a claim where delays or standard timeframes are causing a person's health to deteriorate.

The UNHCR Executive Committee has made specific recommendations to states on displacement and disabled refugees.[38] These recommendations urge states to adopt an accessible asylum registration and determination process and to set accessibility standards. People seeking asylum should be able to present their claims fairly and fully and to be provided with the necessary support to enable them to do so. Information should be understood by claimants (not merely provided). The Committee calls on states to *"to protect and assist refugees and other persons with disabilities against all forms of discrimination and to provide sustainable and appropriate support in addressing all their needs".*

The UNHCR has also produced guidance on 'Working with persons with disabilities in forced displacement' which focuses on key guiding principles of:

1. Applying a rights-based approach;
2. Inclusion;
3. Participation;
4. Non-discrimination.

The guidance makes key recommendations that all facilities should be physically accessible. We would add that this applies equally to telephone or digital processes which may be less accessible to people with certain illnesses and conditions, such as hearing or sight deficits and learning difficulties. There should be proper procedures in place to improve data collection (disaggregating by disability) and to ensure accountability, working in tandem with civil society disability rights organisations to ensure policy made about disability involves leadership from disabled people themselves and from the specialist organisations representing them. The guidance notes that "Persons with disabilities experience violence at much higher rates than persons without disabilities" and yet "Despite being at heightened risk,

[38] UNHCR, 'Report of the Sixty-first session of the Executive Committee of the High Commissioner's Programme', A/AC.96/1095, 12 October 2010.

persons with disabilities are often overlooked in SGBV [sexual and gender-based violence] prevention and response programmes. Inaccessible information; reporting and communication barriers; and lack of awareness by service providers and family members may serve to exclude persons with disabilities from SGBV prevention and response activities".

Some asylum seekers will be disabled. This includes people who are disabled due to their experiences of persecution and during displacement, people who are blind, deaf, have severe mobility impairments or cannot write due to a physical impairment or illness, people who are HIV positive with specific medical needs, people suffering chronic medical conditions including cancers, people with trauma symptoms unrelated to persecution or displacement, and people with learning difficulties and developmental disorders/neurodiverse conditions. These kinds of conditions are foreseeable; asylum determination procedures need to be developed in a way which ensures that people with these kinds of enduring illnesses or conditions have **equal** access to international protection. This is an anticipatory duty, to design processes in an accessible and inclusive way, which sits alongside the reactive duty to make reasonable adjustments in individual cases.

Every effort should be made to avoid administrative processes which place undue stressors and barriers to accessing justice on a population which is already struggling with issues such as language barriers, destitution and forced displacement, on top of the difficulties rebuilding support systems and personal confidence after experiences that may involve torture, human trafficking and witnessing or being subjected to atrocities and the worst forms of human cruelty. Where a person presents as apparently 'non-compliant' with a process, care should be taken to consider whether this may instead be a result of not understanding or being able to tolerate/cope with the process, which may then need to be adjusted. For, example some people may not be able to cope with a long interview (in which case consideration should be given to splitting up an interview over more than one day or abbreviating the

interview process. Some asylum seekers may have PTSD-related avoidance symptoms which make it difficult for them to discuss traumatic events with a stranger, official or at all[39]).

The UNHCR in Australia has produced a 'Guidance note on the psychologically vulnerable applicant in the protection visa assessment process' (November 2017), which states: "*The psychological abilities required to undertake the protection visa assessment process may be impaired by: mental illness; psychological trauma; acquired brain injury; neurological disorders; intellectual and developmental disabilities; substance abuse; medications affecting mental state and physical illness. When an applicant's psychological abilities are reduced, the fairness and accuracy of protection visa assessment may be compromised unless each stage of the process is informed by the applicant's mental state and cognitive abilities*".

A wide range of reasonable adjustments may be required for the asylum determination processes to be truly inclusive and equal: some can be anticipated as being relevant fairly often (such as regular breaks) and some may need to be specific to an individual (such as agreeing to interview a disabled separated child at a foster carer's home where they feel safer and have access to facilities and care). In an interview or appeal context disabled adults and children may be more suggestible than others and care should be taken to avoid hostile or leading questioning.[40] Some people may require the support of an appropriate adult at formal interviews or hearings.[41] A person acting in the capacity of an appropriate adult at a formal interview or hearing should have their role properly explained to them and decision-makers should understand this is an interactive role to promote understanding and safeguarding (not a silent witness merely there for moral support).

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[39] There is strong clinical evidence that people in any event find it difficult to disclose shameful and traumatic events to a stranger or public official – see Abbas, von Werthern, Katona, Brady and Woo (2020) 'The textures of narrative dilemmas: qualitative study in front-line professionals working with asylum seekers in the UK', *BJ Psych Bulletin*, 1-7.

[40] G. H. Gudjonsson and L. Henry (2003) 'Child and Adult Witnesses with Intellectual Disability: The Importance of Suggestibility', 8 *Legal and Criminological Psychology* 2, 241–252.

[41] See, for example, the UK Home Office 'Guide for Appropriate Adults' created for reference in criminal justice proceedings: https://www.gov.uk/government/publications/guide-for-appropriate-adults

Identification of vulnerability is key and robust processes should be in place for those involved with asylum determination procedures to assure themselves, in a continuing process, that the person seeking asylum is not vulnerable in a way which will interfere with access to justice. Where there is concern about vulnerability, a procedure, appointment or hearing may need to be postponed for expert clinical evidence to be provided. Without first identifying the issues in this way, the fairness and accessibility of an interview or hearing may be compromised.

Many claims for international protection are registered when people first arrive in the United Kingdom or are in the United Kingdom in very precarious circumstances without a stable support network (as with many survivors of human trafficking) and so at that stage the detail of a person's situation may not be known to the authorities. Signposting or active referrals may be needed to NHS, social welfare and civil society organisations. A disabled person may face additional barriers in accessing legal representation and also may not self-identify as disabled (attitudes to disability vary around the world and for some people, including among people raised in the United Kingdom, this would be a concept that would carry stigma). The person may not yet even be aware of having a mental impairment or medical condition. This may reflect their own limited understanding of their physical or trauma symptoms (for example a person suffering from Post-Traumatic Stress Disorder may feel they are struggling to cope or may describe a somatic symptom like regular headaches (and be convinced that the symptom has a primarily physical cause) because they do not fully understand the link between their trauma, their stress and their bodily symptoms.

Details of the way a person was disadvantaged by a standardized asylum process may only come to light after the process has gone ahead (for example after an asylum interview or after a refusal in an appeal or when further submissions are submitted) and so particular sympathy is needed for fresh claims submitted in this context.

In her research for the UNHCR report 'Vulnerable or invisible? Asylum seekers with disabilities in Europe' Straimer noted: "*disability may become a barrier to accessing protection. Depending on the nature of the impairment, an existing disability may impact on the access of asylum seekers to a fair asylum procedure.*

Ignorance of mental impairments, for example, may jeopardize access to protection as applicants may fail the credibility assessment and are often denied legal representation (Kanter et al. 2001; Silove et al. 2006)."[42]

At the same time stereotypes should be avoided and appropriate training provided to those working in this sector to avoid assumptions that disabled people are less capable of making decisions and any less entitled to live full, rounded lives than any other person. For example decision-makers should not accept the instructions of a third party without confirming with the person directly, unless a proper process is in place to give a third party the legal authority to make decisions in the person's best interests such as a Court of Protection Deputyship in England and Wales.

Legal representatives requesting reasonable adjustments to a process should consider what the person's particular needs are that make such adjustments necessary. It is not usually appropriate to assume a person is 'vulnerable' in every situation just because they have a long term physical or mental impairment. Doing so may underestimate the capabilities and agency of many disabled people seeking asylum. At the same time, whilst recognition of individual need, capability and circumstances are desirable in any safeguarding assessment, there is also a need to anticipate the additional needs that are disproportionately present amongst certain groups, such as the evidence-based acknowledgment that the administrative immigration detention of survivors of torture is inappropriate due to the prevalence of trauma symptoms amongst this group and risk of detention triggering a deterioration in mental health.[43]

Similarly, the rise in digital processes creates additional difficulties for people who face substantial and potentially insuperable barriers to engaging with these forms of technology. Digital technologies do offer

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[42] See note 32.

[43] As per the Home Office's 'Adults at risk in immigration detention' policy v.5, 6 March 2019: "*An individual will be regarded as being an adult at risk if: • they declare that they are suffering from a condition, or have experienced a traumatic event (such as trafficking, torture or sexual violence), that would be likely to render them particularly vulnerable to harm if they are placed in detention or remain in detention*". Similarly the use of burdensome alternatives to detention (such as intensive reporting conditions, which may cause pain, distress and hardship for disabled asylum seekers) should be avoided where a less burdensome way of keeping contact with a person is appropriate (such as where they are living in accommodation provided by the state so their whereabouts is known anyway).

opportunities for accessibility, for example by reducing burdensome travel and official appointments, which may trigger traumatic memories of torture. However the difficulties some people will have accessing technology, stable internet connections, scanners, childcare, private and secure spaces and connections, combined with language barriers, literacy issues and disability-specific challenges means that there is an ongoing need to have the option of individualised/face to face support where necessary. This option must always be clearly communicated to and understood by the person involved. Digital processes should not sacrifice access to justice for the sake of expediency or cost savings.[44] Standards of procedural fairness in international protection claims must be particularly high given the risk to life and safety if those seeking international protection are wrongly turned away. Where a person would benefit from the presence of a legal representative, appropriate adult or supporter at a face to face hearing, this will also be true of a remote hearing.[45] Remote/digital assessment and legal processes are still developing and clear scrutiny, evaluation, standards and benchmarking processes should be put in place to ensure before they are treated as anything other than pilot processes.[46] Similarly the use of algorithms and automated or semi-automated programmes/bots in decision-making (including for facial recognition) is in its infancy and the risks that this kind of process may stereotype or exclude/discriminate against disabled people or people who share other characteristics would run

[44] See, for example, Tomlinson, Hynes, Marshall and Maxwell, Judicial Review in the Administrative Court during the COVID-19 Pandemic, 15 April 2020.

[45] In the context of the Covid-19 public health crisis, HBF has recently produced recommendations to Tribunal Judges on safeguarding and remote legal processes: Helen Bamber Foundation and Freedom from Torture, 'The Courts, Tribunals and the Covid-19 Public Health Crisis', May 2020.

[46] Evidence from the United States has found that the use of video teleconferencing in hearings roughly doubles the likelihood that asylum seeker's application is refused. See Jo Hynes, Nick Gill and Joe Tomlinson (2020), 'In defence of the hearing? Emerging geographies of publicness, materiality, access and communication in court hearings', 14 *Geography Compass* 9. Video conferencing in "high-stakes" conditions in the US have also been found to reduce trust and understanding and exacerbate existent cultural differences in communication, creating additional inconsistencies and inaccuracies; see Mark Federman (2006) 'On the effects of Immigration and Refugee Board Hearings via videoconference', 19 *Journal of Refugee Studies,* 433-452. On the difficulties with remote interpreting see Sabine Braun (2013) 'Keep your distance? Remote interpreting in legal proceedings: A critical assessment of a growing practice', 15 *Interpreting* 2, 200-228.

contrary to the object and purpose of the Refugee Convention to protect those at risk from discrimination.[47]

Data privacy is as important for disabled people as anyone else. Information relating to health status is sensitive and should usually only be shared with the person's informed and genuine consent (unless in an individual case a data sharing legal exception applies). In line with principles of dignity and the right to respect for private life, there should be no assumption that a disabled person will share their medical records as part of an asylum determination procedure or any immigration process: it can be degrading for people to have every aspect of personal and intimate conversations with medical professionals examined in a forensic or immigration context and it is unlikely that a person's complete medical records will be directly relevant or have been prepared for use in a forensic context. Furthermore, obtaining medical evidence, even from a treating clinician, can be costly or inaccessible, as General Practitioners charge for some letters and busy clinicians may not have time to prepare reports for legal cases.

10. Medico-Legal Reports

A medico-legal report is a report prepared by a clinician to inform a legal process. Medico-legal reports specifically prepared for a forensic context may be extremely useful in an asylum determination procedure to assist in the fair and accurate assessment of the claim. A medico-legal report may be a professional report from a treating clinician or a report from an independent expert (who is then obliged to comply with the duties of an expert). In the United Kingdom there are a limited number of independent clinical experts who can provide these reports and there are tight restrictions on public

[47] See Lord Hoffman in *Islam v. Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah,* [1999] UKHL 20: "*the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination*." For digital process compare also the Magistrates Association's submission in response to the 2019 Judicial Ways of Working papers (2018): "*We agree that fully video hearings are generally inappropriate for defendants… [with] identified vulnerabilities. Video hearings are also unlikely to work where interpreters or intermediaries are necessary. […We do] not believe fully video hearings are appropriate for any hearings that are contested, or where the understanding of parties is key to the legitimacy of the process. This would include any hearings where decisions are being made that have important or long-lasting impacts on parties*."

funding for them which means that for some people this kind of evidence will not be accessible. Therefore the lower standard of proof should not be inflated to require this kind of evidence and claims should not be refused because a person has not provided expert clinical evidence.

A medico-legal report can serve a dual purpose: it can identify the respects in which the person seeking asylum's condition or illness may affect their ability to present and articulate their claim; and it may also provide direct corroboration of traumatic events in their past, where, for example, the Istanbul Protocol is applied. A medico-legal report may also provide relevant information about diagnosis (if possible or available), prognosis, treatment, care needs and presentation, as well as an evaluation of the person's risk of harm to themselves and any clinical features which may create a risk to or from others. A medico-legal report may also be obtained to assess cognitive issues such as learning difficulties and a medico-legal report may cover psychiatric/psychological/mental health, physical health or injuries or both.

However, it is important to take some care in this approach - in particular, around the need to safeguard the autonomy and rights of a disabled person seeking asylum. A capacitous person seeking asylum cannot and should not be compelled to undergo a medical assessment against their wishes or any medical procedure which is not clinically required (such as x-rays that are not clinically necessary), nor are their representatives entitled to present their claim in a manner contrary to their instructions. This can sometimes present difficulties where, for instance, a person lacks insight into their own mental illness so will not agree to an assessment; but that problem would not justify representatives in acting contrary to a capacitous client's instructions. Where a person seeking asylum lacks mental capacity to litigate or instruct their representatives, a range of legal safeguards apply (governed in England and Wales by the Mental Capacity Act 2005). For separated children it is particularly important that clinically unnecessary medical procedures are not undertaken, for example for the purposes of age assessment, when informed consent cannot be provided.

11. Assessments of Credibility

Disability may impact a person's ability to navigate the asylum process and to give a cogent account of their reasons for claiming asylum.

Within the UK's asylum system, a person seeking asylum is put through a challenging multi-stage process. Their first interview – the "screening interview" – often takes place on the day of their arrival or shortly afterwards, often with a telephone interpreter who may not necessarily speak the correct dialect. Despite this, the person will be asked to give brief details of their asylum claim, and their screening interview record (which is merely a handwritten or typed note by the officer, not an audio recording) is often relied upon later in the person's claim if there are any perceived inconsistencies.[48]

Cases then proceed on a different day to a "substantive asylum interview" in which the person is questioned, sometimes for several hours, by an immigration officer. This questioning is intended to cover the stressful and often traumatic events which led to the person seeking international protection in the United Kingdom. The standard means for interviews has been in-person, but sometimes substantive asylum interviews are undertaken by means of remote video-link with the person attending Home Office premises (and the person may not be notified in advance about the planned use of video-link, which is problematic because it denies people the opportunity to request an in-person interview in advance as a reasonable adjustment). Following this stage, a person may be granted or refused international protection in a decision letter. If their claim is refused it may be certified as 'clearly unfounded' meaning there would be no right of appeal. If it is refused but not certified then the person would have a right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber).

At the appeal stage the person may again have to re-live the process of disclosing their past and will usually be cross-examined in court by a Home Office Presenting Officer or barrister. The appeal is adversarial in nature and there is no published Code of Conduct for Home Office Presenting Officers (meaning they may translate the purpose of their role to be 'winning at any cost' rather than 'achieving a just result, while upholding principles of equality and diversity'). Unsurprisingly, this process can be extremely traumatic for people who may already be distressed, traumatised or less able to cope with administrative processes.

[48] Although case law makes clear that it can be procedurally unfair to place significant weight on the contents of this initial interview, e.g. *R (Dirshe) v SSHD* [2005] EWCA Civ 421.

The Home Office and judges rely very heavily on *consistency* in assessing credibility. If a person is perceived as inconsistent about the details of their claim – such as the dates, durations and sequences of events – they are often accused of having fabricated their claim. In fact, however, the research on memory shows that this is not a reliable means of ascertaining whether someone is telling the truth. This is even less so when a person has been traumatised/is suffering from a psychiatric illness such as post-traumatic stress disorder (PTSD) or depression, as many people seeking asylum are. Consider, for example:

1. The UNHCR highlights that "psychological research has consistently shown that memories of even the most important, traumatic, or recent life events can be difficult to retrieve and recall with any accuracy. Inconsistency, loss of detail, and gaps in recall are a natural phenomenon of the way a person records, stores, and retrieves memories."[49] Cameron (2010) summarises a large amount of research which has shown that remembering the dates, durations and sequences of past events is inherently very difficult, and that our memory is poor for this kind of temporal information.[50]

2. Traumatic memories are different from normal memories. Herlihy and Turner (2013) explain: "When recounting a normal event, we are able voluntarily to retrieve a verbal narrative, with a beginning, middle and end, and a sense of being in the past. This narrative is updateable, as described above, should new information become available. However, traumatic memory has some quite different attributes. This is a sensory 'snapshot' of the traumatic moment – perhaps just the sound of screams, the image of a face, or a feeling of pain; it is without narrative structure and, crucially, does not have a sense of being in the past but is 're-experienced', as if it were happening in the present... They are not voluntary, as normal memories, but triggered, by internal or external cues (such as the sight of someone in uniform, a pain, or a feeling of guilt)."[51] Thus, decision-makers should not expect asylum-

[49] UNHCR, 'Beyond Proof: Credibility Assessment in EU Asylum Systems', May 2013

[50] HE Cameron (2010) 'Refugee status determinations and the limits of memory', 22 *International Journal of Refugee Law* 4, 469-511.

[51] J Herlihy and S Turner (2013) 'What do we know so far about emotion and refugee law?', 64 *Northern Ireland Legal Quarterly* 1, 47–62.

seekers' accounts of traumatic events to be recalled and recounted in the same way as ordinary, non-traumatic memories. Following traumatic experiences 'verbally accessible' memories may be accessible, but 'situationally accessible' memories, which are the result of 'nonconscious' processing during a traumatic event are not subject to the same degree of conscious retrieval and control and instead may automatically be accessed in the form of intrusive thoughts and flashbacks in contexts or environments with similarities to the traumatic situation.[52]

3. Overgeneral memory is associated with PTSD and depression, and this can impair the ability to recount specific autobiographical memories. PTSD can result in particular difficulties with recalling contextual details of traumatic situations.[53] Herlihy and Turner (2013) explain that "when people are depressed, they give more overgeneral memories. The phenomenon has also been shown to be associated with PTSD. There are suggestions that there is also a cultural element to overgeneral memory, most of the studies in the literature having been conducted with participants of Western culture."[54] In a subsequent study, Graham, Herlihy and Brewin (2014) explain that "[a]utobiographical memory specificity (AMS) refers to the ability to recall specific memories, commonly defined as lasting less than one day, and overgeneral memory (OGM) refers to the tendency to recall general memories, either categories of events that happened repeatedly or events that lasted a long time."[55] Their study found that "asylum seekers and refugees with PTSD and depression are less able to retrieve specific memories of their personal past within a given time limit when prompted to do so."[56] Thus, an asylum-seeker under the pressure of an interview may

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[52] CR Brewin, T Dalgleish and S Joseph (1996) 'A dual representation theory of posttraumatic stress disorder', 103 *Psychological Review* 4, 670-686.

[53] H Flor and F Nees (2014) 'Learning, memory and brain plasticity in posttraumatic stress disorder: Context matters', 32 *Restorative Neurology and Neuroscience* 1, 95-102.

[54] See note 53.

[55] B Graham, J Herlihy and C Brewin (2014) 'Overgeneral memory in asylum seekers and refugees' 45 *Journal of Behavior Therapy and Experimental* Psychiatry, 375-380.

[56] Ibid.

have problems with recalling specific memories. Notably, this applies not just to memories of the traumatic events themselves but to autobiographical memory generally.

4. Depression and PTSD can also affect a person's ability to cope with the interview process and with direct interviewing, particularly where this is adversarial.[57] Herlihy and Turner (2013) explain that "feelings of worthlessness can lower a person's confidence in their memory and knowledge, leaving them appearing unsure – and hence not credible. Similarly, poor concentration, or simply not having slept for more than a few hours together for many months, can make a person poorly equipped for lengthy, detailed interviews about their present and past circumstances."[58] People who have experienced sexual trauma often have particular difficulty recounting it accurately and consistently and research shows this is also the case in Home Office interviews.[59]

5. Evidence confirms that internal consistency is not a particularly useful heuristic in determining credibility. Cameron (2010) states "when it comes to assessing credibility, police officers, prosecutors and judges, as well as lay people, have 'hit rates just above the level of chance'... one of the commonly proposed explanations for this low success rate is that professional lie detectors and lay people alike tend to rely on the 'consistency heuristic' – the notion that 'consistency implies truth, whereas inconsistency implies deception'. In fact, it has now been clearly demonstrated in study upon study that truthful and deceptive accounts are 'equally consistent over time', most likely because 'liars try to remember what they have said in previous interrogations, while truth-tellers try to remember what they have actually experienced'. Contrary to popular belief, these tasks are equally challenging... [A]ll memories are reconstructions, and certain kinds of information are not easily

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[57] J Cohen (2001) 'Errors of recall and credibility: can omissions and discrepancies in successive statements reasonably be said to undermine credibility of testimony?', 69 *Medico-legal Journal* 1, 25-34 and J Herlihy and S Turner (2007) 'Asylum claims and memory of trauma: sharing our knowledge' 191 *British Journal of Psychiatry* 1, 3-4.

[58] See note 53.

[59] A Hook and B Andrews (2005) 'The relationship of non-disclosure in therapy to shame and depression', 44 *British Journal of Clinical Psychology* 3, 425-438; also D Bögner, J Herlihy and CR Brewin (2007) 'Impact of sexual violence on disclosure during Home Office interviews', 191 *British Journal of Psychiatry* 1, 75-81.

reconstructed… [O]ver time a person's memory, and hence her story, may change and may change significantly, owing to a number of well-documented memory effects. Some memories fade or become distorted while others get stronger. Loss and gain of information is 'typical of how memory works.'"[8] This is particularly important where a person is suffering from PTSD and/or depression. Herlihy and Turner (2013) summarise multiple studies which have shown that inconsistencies do arise across repeated interviews in the genuine accounts of victims of trauma.[60]

6. Consistency in interviews and appeal hearings can be even more difficult for asylum-seekers who are children, or who were children when they first claimed asylum or experienced persecution. There are significant differences between children's and adults' autobiographical memories. The UNHCR publication 'The Heart of the Matter' explains "The ability to provide a coherent account develops rapidly between approximately 12 and 16 years of age, along with brain development, but does not fully mature until around 20 years… [Y]oung adolescents typically provide narratives with factual content and action statements but with less orientation in time and place, and fewer interpretations or explanations, than older adolescents."[61]

7. Childhood trauma can have particular effects on memory. Generally, retrieval of emotion-based memories is difficult for adolescents, and research indicates this is even more so in traumatised and depressed adolescents. Depression can also significantly affect a young person's account of their autobiographical memories. Early exposure to trauma, abuse and neglect is also linked with overgeneral autobiographical memories, and adolescents with a history of childhood abuse or neglect have less specific autobiographical memories.[62]

8. Trust and confidence are fundamental to disclosures of difficult or distressing material. Research from Abbas and others (2020) demonstrates that it is simply not reasonable to expect a person to

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[60] See note 53.

[61] UNHCR and European Refugee Fund, 'The Heart of the Matter: Assessing Credibility when Children Apply for Asylum in the European Union,' December 2014

[62] Z Given-Wilson, J Herlihy and M Hodes (2016) 'Telling the story: A psychological review on assessing adolescents' asylum claims,' 57 *Canadian Psychology/Psychologie canadienne* 4, 265-273.

> disclose the detail of events which cause feelings of distress, shame, guilt and which are deeply sensitive to a stranger. It can take several meetings before a person will open up about their experiences to even a trained professional (and there will be some events people will struggle to discuss at all).[63]

There are many steps which immigration lawyers and judges can and should take to ameliorate these difficulties. **Those working in the field of immigration law in the UK should be aware of the Court of Appeal judgment in AM (Afghanistan) [2017] EWCA Civ 1123 and should read it in full. They should also read the official Tribunal guidance on child, vulnerable adult and sensitive appellants, 'Joint Presidential Guidance Note No. 2 of 2010'.** These materials may be relevant/useful by analogy for those outside the UK, in combination with the UNHCR guidance and academic literature set out above. The Advocate's Gateway is an initiative making evidence-based recommendations and toolkits for working with vulnerable clients and for legal representatives the Electronic Immigration Network (EIN) website publishes a 'Best Practice Guide' with a chapter on 'Taking instructions, vulnerability and capacity'.[64]

HBF has also produced a 'Trauma-Informed Code of Conduct For all Professionals working with Survivors of Human Trafficking and Slavery' which sets out detailed steps that professionals should take to foster an environment of safety, trust and respect when working with survivors, including when asking for sensitive information.[65] This guidance is expressly referred to in the recently released in 2020 Statutory Guidance for England and Wales on the Modern Slavery Act 2015.

The practical steps which should be taken include the following:

1. Lawyers often only become involved after an asylum claim is made, but where they are involved at the outset they should consider disability early on and if they are concerned about an individual's fitness for interview (meaning ability to cope with, and provide reliable evidence within, the interview

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[63] See note 41.

[64] The Advocates Gateway and Electronic Immigration Network, 'Taking instructions, vulnerability and capacity', *Best Practice Guide,* 1 December 2019.

[65] See note 1.

process) then they should obtain evidence of this as soon as possible. If a person is unfit for interview then they should not be interviewed by the Home Office and instead other evidence should be obtained to present their claim on the papers. For either an asylum or fresh claim, if a person's disability means they are not fit to travel to an appointment then evidence of this needs to be obtained so that reasonable adjustments can be made. A request for reasonable adjustments can be expressly made under the Equality Act 2010.2. Lawyers should always consider obtaining a comprehensive report from a clinician such as a specialist GP, psychiatrist, clinical psychologist or other specialist healthcare professional such as a psychiatric nurse or mental health specialist social worker where there is a question of possible mental health related disability. Letters or reports from treating professionals can be very useful (for example, in showing consistency of presentation over time). For use in a forensic context, an independent expert report will often also be needed to obtain the level of detail required for specific, relevant issues. If the clinical evidence identifies that a person is suffering from PTSD, depression, learning disabilities or any other condition, it should clearly identify what effect this may have on their memory, their cognition, and their ability to engage with an interview or give evidence in court. In England and Wales the Legal Aid Agency will only fund a medico-legal report in a pre-decision case if this is strongly justified (such as where mental capacity needs to be assessed for legal representatives to act at all), so most independent medico-legal reports are obtained at appeal stage or to support fresh claims. In a disability-based or connected protection claim this evidence can be critical however and so if possible should be obtained pre-decision.

2. At the appeal hearing key medical evidence should be immediately drawn to the judge's attention and the parties should discuss what can be done to accommodate any reasonable adjustments/special measures needed. A written application can be made in advance for any specific reasonable adjustments (for example, if a person is taking strong sleeping medication, for a hearing to be listed in the afternoon).

3. In some circumstances the medical evidence may also support a person's credibility. A clinician trained in applying the Istanbul Protocol may be able to express a view as to whether a person's

mental illnesses (or physical injuries) are objectively consistent with the traumatic events they claim to have suffered.

4. In an appeal the Home Office's representative may suggest that a person is fabricating their mental illness and that the diagnosis is not soundly based. In this regard bear in mind the Istanbul Protocol at [290]: *"The investigator must always be aware of these possibilities and try to identify potential reasons for exaggeration or fabrication. The clinician should keep in mind, however, that such fabrication requires detailed knowledge about trauma-related symptoms that individuals rarely possess."* Medico-legal reports should deal with the possibility of fabrication or exaggeration and explain what observations the diagnosis is based on – making clear what is based on the author's own observations and not simply on what the person has said. See the important guidance in *JL (medical reports-credibility) China* [2013] UKUT 00145 (IAC).

5. If a person has an offending history or other apparent 'bad character', such as drug use, then a medico legal report may also provide important context about the interconnection between any vulnerability and anti-social behaviour (rather than the latter arising due to malice or being 'resilient').

6. In some circumstances a person will be unfit to give evidence in court and to be cross-examined. Such a person may or may not be able to give some evidence through a witness statement. In other circumstances, a person may be fit to give evidence but it may be appropriate for the judge to limit cross-examination. For example, in many cases detailed questioning about the torture or sexual violence a person has suffered is likely to re-traumatise and harm them, and is unlikely to have much, if any, probative value.

7. Judges should not draw adverse inferences from a person's demeanour. Mental illness manifests in a variety of ways (including dissociation) and the fact that a person is not visibly distressed does not mean that they are not suffering from mental illness (so if a judge says in a decision that the person did not look like they were disabled then this is most likely to be an error of law). See *SS (Sri Lanka)* [2018] EWCA Civ 1391 at [33]-[43] and *Tilki* [2002] UKIAT 06015.

8. In cases of physical disability and where treatment on return is a relevant issue (including in suicide risk cases) then once again detailed medical evidence is needed. It is very seldom a good idea to

include an individual's entire medical subject access request. These records may include sensitive personal information that does not need to be disclosed because it is not relevant and it may be humiliating for a person to have their private information shared in his way. Clinical records are not prepared with a forensic context in mind and so very often medical files include factual errors. It is much better to obtain a tailored letter from a relevant clinician or healthcare professional answering specific questions about the person's conditions, treatment needs and the impact that removal or a disruption or cessation in treatment would have on them. GP's NHS contracts do not pay them to complete forensic reports and GPs and NHS clinicians are not usually trained in the asylum system. As a result requests for letters may not be prioritised in a clinician's busy workload, letters may be charged for (which people seeking asylum may be unable to afford) and the evidence that they do provide may be limited, particularly if it is early on in their care for the person or if they have not developed a trusting relationship with the person. It can take substantial persistence to obtain evidence that is sufficiently relevant and if sufficiently relevant evidence cannot be obtained from a treating clinician then legal representatives will need to try to obtain medical evidence privately. Where social services are involved legal representatives should similarly try to request a detailed corroborative report from them; a three-line letter (what both GPs and social workers will often send if not asked for something specific) is insufficient.

9. In rare cases a person's mental illness will be such that they lack capacity to instruct their lawyers (in terms of the Mental Capacity Act 2005). If this is the case, it should be identified as early as possible, and a person with capacity will need to be appointed to give instructions in their best interests. It is only relatively recently that the power to appoint litigation friends in the First-tier and Upper Tribunals has been recognised,[66] and there is still no official guidance or process for identifying and appointing a litigation friend or litigation friend of last resort (the Official Solicitor, in England and Wales, generally will not act as a litigation friend of last resort in the Tribunals). Sometimes a friend or family member will be appropriate, but care should be taken to ensure that they do not have a conflict of interest. The suggestion in *AM (Afghanistan)* that local authority social

[66] *R (C) v First-tier Tribunal* [2016] EQHC 707 (Admin).

> workers can give instructions on behalf of children should, with respect, not necessarily be followed – the local authority's interests are sometimes at odds with those of a person seeking asylum, such as where there is a disputed age assessment or budgetary concerns on the part of the local authority. At present children are not, as a matter of course, required to have a litigation friend in the First-tier and Upper Tribunal (Immigration and Asylum Chambers); however in practice this is likely to be advisable, particularly for disabled children and younger children. Where a case grinds to a halt for want of a litigation friend, specialist legal advice should be sought, because it would be unacceptable if a severely disabled person were denied the right to seek asylum purely because of the results of their disability.[67]

In addition to consistency, the Home Office and immigration judges often rely on the 'plausibility' of what a person says happened, either basing this plausibility assessment on country information evidence or otherwise on the decision maker's personal belief of what is believable.[68] The UNHCR in Australia has produced a 'Guidance note on the psychologically vulnerable applicant in the protection visa assessment process' (November 2017), which notes: *"A cautious approach to determining the plausibility of an applicant's account of their behaviour in relation to a legally relevant event should be taken. Some psychologically vulnerable applicants may be less able to provide a persuasive account of their reasons and motivations for particular actions. If an applicant was mentally unwell or traumatised at*

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[67] Failure to take appropriate steps, such as through the provision of the Official Solicitor, to ensure access to justice and a fair trial in important legal proceedings would breach Article 6 ECHR (the right to a fair trial) and – to the extent that immigration processes do not necessarily fall within the scope of Article 6 ECHR – the procedural protections of Articles 3, 8 and 14 ECHR, see *R.P. and Others v the United Kingdom* [2012] ECHR 1796 on disability, the UNCRPD and the right to a fair trial and *R (Gudanaviciene and others) v the Director of Legal Aid Casework* [2014] EWCA Civ 1622 on the procedural protections of other Convention rights.

[68] Although this latter approach has been discouraged in jurisprudence and can itself constitute an error of law. For example, Lord Bingham stated in (1985) 'The judge as juror', 38 *Current Legal Problems* 1, 1-27: "*No judge worth his salt could possibly assume that men of different nationalities, educations, trades, experiences, creeds and temperaments would act as he might think he would have done or even – which may be quite different – in accordance with his concept of what a reasonable man would have done*". Similarly, it was held in *Y* [2006] EWCA Civ 1223 at [25]: "*…there is a considerable risk that he will be over influenced by his own views on what is or is not plausible, and those views will have inevitably been influenced by his own background in this country and by the customs and ways of our own society.*"

the time of the actions in question, their conduct may have been influenced by an abnormal mental state. Cultural habits, social norms, personality and the perceived exigencies of the situation combine to shape conduct".[69]

12. Ability to Present and Articulate a Claim

It is often said that the burden of proof is on the asylum-seeker to establish their claim, albeit to a low standard of proof ("real risk" or "reasonable likelihood"). But clearly this may present difficulties for disabled people seeking asylum, whose ability to remember and describe what happened, to articulate their fears, and to engage with the asylum process may all be significantly affected by their disability.

The European Court of Human Rights held in *J.K. v Sweden* (2017) 64 EHRR 15 that a shared burden of proof lay on the person seeking asylum and the authorities:

> *"93. Owing to the special situation in which asylum-seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when assessing the credibility of their statements and the documents submitted in support thereof. Yet when information is presented which gives strong reasons to question the veracity of an asylum-seeker's submissions, the individual must provide a satisfactory explanation for the alleged inaccuracies in those [...]. Even if the applicant's account of some details may appear somewhat implausible, the Court has considered that this does not necessarily detract from the overall general credibility of the applicant's claim*
>
> *[...]*
>
> *95. Moreover, although a number of individual factors may not, when considered separately, constitute a real risk, the same factors may give rise to a real risk when taken cumulatively and when considered in a situation of general violence and heightened security [...]. The following elements may represent such risk factors: previous criminal record and/or arrest*

[69] UNHCR Regional Representation in Canberra, 'Guidance note on the Psychologically Vulnerable Applicant in the Protection Visa Assessment Process', November 2017.

> *warrant, the age, gender and origin of a returnee, a previous record as a suspected or actual member of a persecuted group, and a previous asylum claim submitted abroad [...]*
>
> *96. The Court notes that it is the shared duty of an asylum-seeker and the immigration authorities to ascertain and evaluate all relevant facts of the case in the asylum proceedings. Asylum-seekers are normally the only parties who are able to provide information about their own personal circumstances. [...]*
>
> *97. However, the rules concerning the burden of proof should not render ineffective the applicants' rights protected under Article 3 of the Convention. It is also important to take into account all the difficulties which an asylum-seeker may encounter abroad when collecting evidence [...] Both the standards developed by the UNCHR (paragraph 12 of the Note and paragraph 196 of the Handbook, both cited in paragraphs 53-54 above) and Article 4 § 5 of the Qualification Directive recognise, explicitly or implicitly, that the benefit of the doubt should be granted in favour of an individual seeking international protection.*
>
> *98. The Court notes that, as far as the evaluation of the general situation in a specific country is concerned, a different approach should be taken. In respect of such matters, the domestic authorities examining a request for international protection have full access to information. For this reason, the general situation in another country, including the ability of its public authorities to provide protection, has to be established proprio motu by the competent domestic immigration authorities [...]."*

This is welcome insofar as it emphasises that the authorities will often be in a better position than the person seeking asylum to verify the general situation in the country concerned, and cannot simply place the burden on the person seeking asylum. For disabled people seeking asylum who cannot clearly

articulate their experiences and/or fears, it needs to be read together with the passage from the UNHCR Handbook set out below.[70]

The UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status', states that the subjective character of fear of persecution requires an evaluation of the opinions, feelings and psychological make-up of the person concerned.[71] The international asylum decision-making framework has always recognised that refugees may not be able to "prove" every part of their claim. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status states:

> *"196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant,* ***the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner****. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be*

[70] Compare also for example with 'The Heart of the Matter' (see note 63): "A child is likely to have more difficulty than an adult substantiating his or her application with elements that are 'complete, up to date and relevant', especially if the child left his country of origin at a young age and/or has an incomplete understanding of events there. UNHCR has stated that, "although the burden of proof is normally shared between the examiner and the applicant in adult claims, it may be necessary for the examiner to assume a greater burden of proof in children's claims, especially if the child concerned is unaccompanied." One determining authority official put it this way: "Of course our duty to substantiate is increased when it comes to unaccompanied children. For example, at the moment there are many children coming from Syria who usually have identity documents, but for many countries that is not the case. And then, there are many minors who have difficulty to know what a reason for asylum is, and need help to present their account and reasons. The legal counsel will be at hand to provide assistance, but we as [determining] authority have, the way I see it, a more far-reaching responsibility than in adults' claims"."

[71] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (UNHCR: Geneva, 1992).

statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

197. The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.

198. A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case.

[...] It will be necessary for the examiner to gain the confidence of the applicant in order to assist the latter in putting forward his case and in fully explaining his opinions and feelings. In creating such a climate of confidence it is, of course, of the utmost importance that the applicant's statements will be treated as confidential and that he be so informed.

201. Very frequently the fact-finding process will not be complete until a wide range of circumstances has been ascertained. Taking isolated incidents out of context may be misleading.

[...]

(2) Benefit of the doubt

203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196), it is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.

> *204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts." [Emphasis added]*

The lower standard of proof ("real risk" or "reasonable likelihood"), which does not require an applicant to prove their case on the balance of probabilities, affords a "positive role for uncertainty": *Karanakaran* [2000] 3 All ER 449. However, while this approach to evidence assists asylum-seekers whose claims lack corroborative evidence or who face difficulties with disclosure, it still on the face of it relies on the asylum-seeker's ability to articulate a coherent, plausible account of their fears. In the European Union (and at the time of writing in force in the United Kingdom also) Article 4(3) of the Qualification Directive, provides:

> *"5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:*
>
> *(a) the applicant has made a genuine effort to substantiate his application;*
>
> *(b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;*
>
> *(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;*
>
> *(d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and*
>
> *(e) the general credibility of the applicant has been established."*

It can be seen, therefore, that as a starting point the onus appears to be placed on the asylum-seeker to make "coherent" and "plausible" statements and to establish their "general credibility". However this

must not be taken to set too high a standard of proof: this assessment must still be holistic, realistic and fair assessment in line with the person's individual characteristics, including if they are a child[72] or a disabled person whose condition or illness interferes with their ability to articulate their experiences and/or their fears. The UNHCR Handbook (as above) therefore goes on to address this as follows, referring to "mentally disturbed" asylum-seekers:

> *"206. It has been seen that in determining refugee status the subjective element of fear and the objective element of its well-foundedness need to be established.*
>
> *207. It frequently happens that an examiner is confronted with an applicant having mental or emotional disturbances that impede a normal examination of his case. A mentally disturbed person may, however, be a refugee, and while his claim cannot therefore be disregarded, it will call for different techniques of examination.*
>
> *208. The examiner should, in such cases, whenever possible, obtain expert medical advice. The medical report should provide information on the nature and degree of mental illness and should assess the applicant's ability to fulfil the requirements normally expected of an applicant in presenting his case (see paragraph 205 (a) above). The conclusions of the medical report will determine the examiner's further approach.*
>
> *209. This approach has to vary according to the degree of the applicant's affliction and no rigid rules can be laid down. The nature and degree of the applicant's "fear" must also be taken into consideration, since some degree of mental disturbance is frequently found in persons who have been exposed to severe persecution. Where there are indications that the fear expressed by the applicant may not be based on actual experience or may be an exaggerated fear, it may be necessary, in arriving at a decision, to lay greater emphasis on the objective circumstances, rather than on the statements made by the applicant.*

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[72] In respect of assessing international protection claims from children, the aforementioned UNHCR report, 'The Heart of the Matter' (see note 53) provides a detailed and useful guide which, in the view of the authors of this document would also remain essential reading when approaching the claim of a disabled child.

> *210. It will, in any event, be necessary to lighten the burden of proof normally incumbent upon the applicant, and information that cannot easily be obtained from the applicant may have to be sought elsewhere, e.g. from friends, relatives and other persons closely acquainted with the applicant, or from his guardian, if one has been appointed. It may also be necessary to draw certain conclusions from the surrounding circumstances. If, for instance, the applicant belongs to and is in the company of a group of refugees, there is a presumption that he shares their fate and qualifies in the same manner as they do.*
>
> *211. In examining his application, therefore, it may not be possible to attach the same importance as is normally attached to the subjective element of "fear", which may be less reliable, and it may be necessary to place greater emphasis on the objective situation.*
>
> *212. In view of the above considerations, investigation into the refugee status of a mentally disturbed person will, as a rule, have to be more searching than in a "normal" case and will call for a close examination of the applicant's past history and background, using whatever outside sources of information may be available."*

This provides some guidance for decision-makers as to how they should approach the burden/standard of proof in the case of a disabled person whose condition or illness impairs their ability to articulate their fears/experiences. Clearly, as the UNHCR suggests, a medico-legal report or clinical evidence, where available, will in many cases be a valuable facet of the decision-making process.

Where a disabled person lacks mental capacity (within the meaning of the Mental Capacity Act 2005) to make decisions about their legal protection claim (for example a person may be unable to instruct a legal representative, make litigation decisions or give informed consent to claiming asylum) appropriate steps should be taken to ensure that a third party is properly appointed to act in the person's best interests.[73] Such lack of capacity can have a direct connection to a person's claim for international

[73] In England and Wales, for example, the Court of Protection can appoint a third party as a Deputy or make decisions in an incapacitous person's best interests and the Official Solicitor can sometimes act as a litigation friend or advise external organisations on options for an incapacitous person. However, see section 11, point 9 above.

protection (for example a person may have suffered a serious brain injury during an incident of torture) and people seeking asylum may not have access to a support network or family member in the United Kingdom who they could rely on to optimise their involvement in proceedings or focus on their best interests and so particular care is needed to ensure people in this situation can access professional support and international protection processes in a fair and just way.

13. Consistency and Good Practice in Decision-Making

To ensure that disabled people are not disadvantaged when making claims for international protection there needs to be a clear framework to set standards, evaluate and audit performance, create and review policy and procedure and ensure appropriate training is in place for decision-makers. Such approaches should actively engage and centralise the expertise of disabled people and specialist organisations in leadership roles and using consultative and collaborative methods. In the United Kingdom some elements of this is done (there is for example a National Asylum Stakeholder Forum Equalities Subgroup), but there is no overarching disability strategy for asylum casework and there is no specific training on disability and the asylum process with the kind of follow up, benchmarking and audit which would be desirable to ensure effectiveness. There has also not, to the knowledge of this report's authors, been an audit or review of country information from the perspective of disability rights and international protection claims founded on disability-based persecution or where disability is a key risk factor on return (as discussed above).

The authors of this report are not aware of any systematic research of asylum decision-making from the perspective of analysing the approach taken to disability-based persecution. However, an initial analysis of a sample of such claims has raised some preliminary concerns that would benefit from further investigation. A recent HBF publication, 'The need to evaluate legal protection decision-making in claims involving disability' (2021),[74] highlights concern about the lack of a systematic process for identifying and accommodating disability-based vulnerabilities in the asylum determination process, limited awareness

[74] 'The need to evaluate legal protection decision making in claims involving disability', Helen Bamber Foundation, 2021.

of country specific information on disability and failures to understand and consider disability when making credibility assessments and assessments of coping ability on return.

The quality of decision-making and concerns around stereotyping in international protection claims based on sexual orientation and religious conversion have, rightly, been scrutinised in recent times and in our view there would be a benefit from an evaluation of disability-based claims, to bridge what is currently a perceived protection gap.

14. Survivors of Human Trafficking and Slavery

In the United Kingdom there is a specific mechanism for identifying survivors of human trafficking and slavery which is separate from the asylum determination procedure. This identification mechanism looks backwards, to identify past experiences, whereas the refugee convention is forward-looking, to consider ongoing risk.

However, it is clear how a real risk of being enslaved, trafficked or re-trafficked (from original or new traffickers) in the future can meet the threshold for persecution under the Refugee Convention. Disability can be a characteristic that renders a person more vulnerable to exploitation: as a few examples, some disabled people may be less able to safeguard themselves due to a relevant condition, many disabled people face substantial barriers to accessing safe and decent forms of employment to reduce the risk of exploitation which may be increased if they return as Internally Displaced People (IDPs) and certain forms of trafficking, such as forced begging and sometimes forced marriage, particularly target or impact disabled people for exploitation. For certain disabled people disability will intersect with other vulnerabilities on return to create higher risks of sexual exploitation/servitude, including if a person is preyed upon while homeless.

There is a common misconception that after leaving a trafficking situation a survivor will 'know better' in the future and so will keep themselves safe from predatory people and grooming or abusive situations. In fact, there is consistent research evidence that victims of abuse and exploitation are at greater risk of being 'revictimised' (Classen et al 2005; Van der Kolk 1989). Abuse renders victims more rather than less vulnerable to future abuse. The psychological damage caused by severe abuse over-rides the

sensible conscious decision-making that might on first principles be thought such people might learn and apply as a result of their experiences.[75] Where traffickers use specific means of control, such as witchcraft rituals or juju rituals these also operate as a form of psychological violence resulting in a persisting sense of being entrapped and overwhelmed.[76]

There are also practical and procedural challenges faced by disabled people navigating international protection and trafficking processes. Survivors of trafficking may lack insight into their experience (and may sometimes express loyalty or feelings of love for their abusers, similar to Stockholm syndrome,[77] especially when abusers may even be family members) or the overwhelming fear of previous traffickers finding them (or their families) may dominate their thoughts (whether this is likely in reality or not) predominating over fears of retrafficking by new traffickers due to the person's objective characteristics and the situation they would face on return. Similarly, people who have not previously been trafficked but may be at risk of this in the future due to their current situation/characteristics may have difficulty articulating this claim in detail, because they have not yet experienced this.

The complexity of claims in this area and the intersecting vulnerabilities of people in this situation can create severe barriers to accessing the specialist legal advice needed to collate and submit appropriate supporting evidence or witness statements.[78] For disabled people these difficulties may be amplified further and Home Office decision makers and other services may need to provide intensive support to help people in this situation access advice to appropriately present their claim. Once again this is a field

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[75] CC Classen, OG Palesh and R Aggarwal (2005) 'Sexual Revictimization: A Review of the Empirical Literature', 6 *Trauma Violence Abuse* 2, 103-129 and BA Van der Kolk (1989) 'The compulsion to repeat the trauma. Re-enactment, revictimization, and masochism', 12 *Psychiatric Clinics of North America* 2, 389-411.

[76] M Van der Watt and B Kruger (2019) 'Breaking bondages: control methods, "Juju" and human trafficking' in J Winterdyk and J Jones (eds.) *Palgave International Handbook of Human Trafficking* (Palgrave Macmillan, 2020), 935-951.

[77] S Julich (2005) 'Stockholm syndrome and child sexual abuse', 14 *Journal of Child Sex Abuse* 3, 107-129.

[78] See research from Young Legal Aid Lawyers in Jon Robbins, 'Victims of trafficking failed as a result of legal aid 'market failure'', 23 June 2020. See also Anti Trafficking and Labour Exploitation Unit (ATLEU), 'The impact of COVID-19 on the availability of legal aid for victims of trafficking and slavery', 21 May 2020. In relation to the difficulties accessing legal advice in the legal aid sector more widely see Dr Jo Wilding, 'Droughts and Deserts: A report on the immigration legal aid market', 12 June 2019.

where – due to these difficulties – further submissions and requests for reconsiderations are common and in the circumstances should be treated sympathetically.

Where there are two different decision-making mechanisms involved (the asylum system and the national referral mechanism for victims of trafficking and modern slavery) there is also a risk of very extended delays in decision-making. Long delays are detrimental to survivors in general, with implications for their mental health, physical health (for example if they are exposed to periods of destitution, disruptions or barriers to medical treatment and inadequate nutrition), wellbeing and recovery.[79] However, for disabled people who may already be suffering from a very precarious health and welfare status long administrative delays can lead to severe harm, with potentially long-term or permanent consequences for health outcomes. It is therefore critical that even in complex cases decisions are made in a timely way and that where appropriate claims are expedited.

15. Considering Exclusion from the Refugee Convention

Some disabled people may face exclusion from the Refugee Convention under Article 1F and Article 33(2).

Article 1F excludes three classes of people from the definition of "refugee", even though (*ex hypothesi*) they have a well-founded fear of persecution in their home country. These are individuals in respect of whom there are serious reasons to consider that the individual:

> *"a) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes*
>
> *b) has committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee*

[79] See, for example, N Procter, M Kenny, H Eaton and C Grech (2018) 'Lethal Hopelessness: Understanding and Responding to Asylum Seeker Mental Distress and Mental Deterioration', 27 *International Journal of Mental Health Nursing,* 448-454.

c) has been guilty of acts contrary to the purposes and principles of the United Nations."

Article 1F might disproportionately impact disabled people. For example:

- A person with cognitive/learning disabilities or a psychotic illness might have committed a serious crime for which they are not or not wholly culpable because of their illness.
- A person with cognitive/learning disabilities might have been exploited by an armed group or a criminal gang and forced/induced to participate in criminal activities without having a full understanding of what they were doing.

As regards Article 1F(a), some assistance is provided by the decision of the UK House of Lords in *JS (Sri Lanka) v SSHD* [2010] UKSC 15. The House of Lords definitively disapproved the former presumption in *Gurung* [2003] Imm AR 115 that mere membership of a terrorist organisation could be sufficient. It drew on the Rome Statute of the International Criminal Court and the Statute of the International Criminal Tribunal for the Former Yugoslavia, to arrive at a basis of liability which was wider than joint enterprise liability under UK law, but nonetheless not unlimited. It held that "article 1F disqualifies those who make *"a substantial contribution to" the crime, knowing that their acts or omissions will facilitate it,"* and that *"criminal responsibility would only attach to those with the necessary mens rea (mental element). But, as article 30 of the ICC Statute makes plain, if a person is aware that in the ordinary course of events a particular consequence will follow from his actions, he is taken to have acted with both knowledge and intent."*

Clearly, disability may potentially be relevant to this evaluative exercise, which has a subjective as well as an objective element. If a person has in fact done acts/omissions which contributed to the commission of genocide, crimes against humanity or war crimes, but lacked the necessary knowledge that their acts/omissions would facilitate these acts, then they will not be excluded.

What is less clear is how far these interpretative concepts can be read across to Article 1F(b). The English Court of Appeal in *AH (Algeria)* [2012] EWCA Civ 395 said that, in deciding whether a crime is a "serious non-political crime", *"[s]entence is, of course, a material factor but it is not a benchmark. In deciding whether the crime is serious enough to justify his loss of protection, the tribunal must take all facts and matters into*

account, with regard to the nature of the crime, the part played by the accused in its commission, any mitigating or aggravating features and the eventual penalty imposed."

But what if a person with a serious mental illness and/or cognitive impairment committed a crime which was objectively serious, but their culpability was reduced or extinguished by their illness? In this regard, the UNHCR's Background Note states at [21] *"Where the mental element is not satisfied, for example, because of ignorance of a key fact, individual criminal responsibility is not established. In some cases, the individual may not have the mental capacity to be held responsible for a crime, for example, because of insanity, mental handicap, involuntary intoxication or, in the case of children, immaturity."* That is welcome, but it leaves some questions unanswered. Suppose that the person was never tried or convicted in the country where the crime was committed; or that they received an unfair trial which disregarded their illness/disability in assessing their culpability. In deciding whether the person should not be held criminally responsible under Article 1F(b), should the country of asylum apply its own criminal law concepts, that of the country where the crime was committed, or neither? Unlike Article 1F(a), which refers to an autonomous and well-defined body of international criminal law, Article 1F(b) has no such clarity.

Another key question has been whether a person's past crime may be "expiated" such that, despite falling into one of the Article 1F categories, they no longer fall to be excluded. The UNHCR's Background Note on the Application of the Exclusion Clauses stated at [23] that *"[w]here expiation of the crime is considered to have taken place, application of the exclusion clauses may no longer be justified. This may be the case where the individual has served a penal sentence for the crime in question, or perhaps where a significant period of time has elapsed since commission of the offence. Relevant factors would include the seriousness of the offence, the passage of time, and any expression of regret shown by the individual concerned."* However, in the UK, the concept of "expiation" was decisively rejected in *AH (Algeria)* [2015] EWCA Civ 1003, following the approach of the Supreme Court of Canada in *Febles v Canada* [2014] 3 SCR 431. In the UK courts' view, the question is whether the "serious non-political crime" has been committed; whether the person has subsequently served a sentence and/or made amends is of no relevance.

The other relevant exclusion clause, Article 33(2), does not exclude a person from refugee status altogether, but merely excludes them from the protection of the Convention against refoulement. It provides that *"[t]he benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."* Thus there are two bases of exclusion: danger to the security of the country of asylum; or having been convicted of a particularly serious crime and constituting a danger to the community. The UK applies a statutory presumption (section 72 of the Nationality, Immigration and Asylum Act 2002) that a person sentenced to more than two years' imprisonment will fall within this provision, although that presumption can be rebutted by evidence.

The concept of "dangerousness" plainly has the potential to discriminate against disabled people, particularly those who have committed offences due to a severe psychotic illness or some other stigmatised condition. On the face of it, the test of "danger to the community" is a test of objective risk and not subjective culpability.

16. Subsidiary Protection

Where none of the five Refugee Convention reasons is engaged, but it is established that a person faces a real risk of serious harm in the country of return, they may be entitled to humanitarian/subsidiary protection under Article 15 of the Qualification Directive. This form of protection is called "subsidiary protection" in the Qualification Directive, but is translated into UK domestic law as "humanitarian protection".

Serious harm includes the death penalty or execution (Article 15(a)) and torture and inhuman or degrading treatment or punishment (Article 15(b)). Thus, a disabled person who will face torture or inhuman/degrading treatment or punishment on return on account of their disability, but cannot qualify for asylum because they cannot show that they would be persecuted on account of one of the "Convention reasons", can instead qualify for humanitarian/subsidiary protection.

The Court of Justice of the European Union has also clarified that the discriminatory lack of rehabilitative treatment for a torture survivor can warrant a grant of humanitarian protection. In the case of Case C-353/16 *MP (Sri Lanka) v Secretary of State for the Home Department* a Sri Lankan torture survivor was found to not be at future risk of torture, but was found to face a discriminatory lack of rehabilitative treatment that he needed to help him recovery from the impact of trauma. He was highly traumatised and suicidal. In this situation his welfare would seriously deteriorate upon his removal, leading to a risk of serious harm (including a suicide risk) and so he was granted humanitarian protection. This test is particularly important for those with a diagnosis of Post Traumatic Stress Disorder and Complex Post Traumatic Stress Disorder where there may be limited clinical treatment in some areas, particularly where the rehabilitation of torture survivors is a deliberately and discriminatorily low priority. Complex Post Traumatic Stress Disorder is treated through individually tailored psychotherapy which requires the slow building up of trust and needs to continue for considerably longer than other evidence-based therapeutic treatments for trauma. This is in-keeping with the recommendations of the International Society for Traumatic Stress Studies (ISTSS) whose guidelines for complex PTSD recommend a three-phase approach, focusing initially on stabilisation through the understanding and control of symptoms, followed by work on processing of traumatic memories and a final phase of social and psychological integration (Cloitre et al 2012).[80]

Where the country of origin is a war zone, and the question is whether Article 15(c) of the Qualification Directive is engaged, a person's condition or impairment may be very relevant. Article 15(c) is engaged where there is a "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict". It is well-established that there is a "sliding scale", whereby a person may face a greater threat from armed conflict because of their personal characteristics. See *Elgafaji* (C-465/07). As the Home Office Asylum Policy Instruction on Humanitarian Protection states, "*...the more the applicant is able to show that he or she is specifically affected by factors particular to his personal circumstances (e.g. a child or someone of advanced age, disability, gender, ill-health,*

[80] M Cloitre, CA Courtois, JD Ford et al, 'The ISTSS Expert Consensus Treatment Guidelines for Complex PTSD in Adults', 5 November 2012.

ethnicity or, for example, by virtue of being a perceived collaborator, medical professional, teacher or government official), the lower the level of indiscriminate violence required for him to be eligible."

There are some countries, such as Syria and Libya, where the Home Office accepts that Article 15(c) is engaged for everyone in all parts of the country. However, there are other countries where it is open to question, such as parts of Iraq and Afghanistan. In such circumstances the level of threat a person faces and the impact that conflict will have on them may well be affected by their physical and/or mental illnesses or conditions. The Asylum and Immigration Tribunal in *AM and AM* [2008] UKAIT 00091 also accepted at [93]-[98] that, in considering whether a threat to a civilian's life or person arises "by reason of" indiscriminate violence, the serious harm involved does not have to be a direct effect of the indiscriminate violence; it is sufficient that there is a causal nexus of some kind. For example, it can encompass not just deaths and wounding from indiscriminate bombings of a civilian neighbourhood, but also the displacement of the surviving population to a region where it is likely to die of starvation and disease. However, this cannot extend to include consequences that are connected only remotely. Self-evidently, a disabled person may be at enhanced risk in situations of conflict-related displacement and destitution.

17. Other Forms of Legal Protection

Those seeking international protection may be granted leave to remain under other legal instruments, such as where leave is granted to a survivor of human trafficking because their personal circumstances require it (as per Article 14(1)(a) of the Council of Europe Convention on Action against Trafficking in Human Beings). Leave to remain may also be granted to prevent breaches of specific fundamental rights, such as Articles 3 and/or 8 of the European Convention on Human Rights.

These kinds of protection can have specific relevance for people with medical conditions and care needs, whose personal circumstances may require leave to remain be granted, who may face inhuman and degrading treatment on expulsion/removal or who would face a disproportionate interference with their right to respect of their private life (and medical treatment forms part of the sphere of private life). As an example, in the UK country guidance case on Afghan Sikhs, *TG and Others* [2015] UKUT 595 the

Upper Tribunal found that international protection claims required individual consideration but all the claims in the appeal were conceded by the Home Office on the question of Article 8 ECHR because the appellants would face 'very significant obstacles to reintegration' due to the discrimination they would face on return, whether or not this also amounted to persecution.

It is critically important that asylum claims are not missed and less stable forms of legal protection pursued instead. In practice, and partly because international protection claims founded on or linked to disability are not always articulated as such by the person claiming asylum, there is a real risk that a disability-linked claim will not be identified correctly and will only be considered for a less advantageous other form of legal protection (for example not all other forms of legal protection provide a route to settlement, access to free legal advice, integration and education support, family reunion options and there may be very high fees for visa renewals, which is all less advantageous than leave to remain as a refugee).

A person should only be considered for other forms of legal protection where it is first confirmed that they do not qualify for refugee or humanitarian protection.[81] The exception to this is where a person is granted a period of discretionary leave to remain while their international protection claim is being considered. Granting leave to remain on another basis (most commonly as a victim of trafficking) while the international protection claim is resolved can make a material positive difference to a person's recovery, stability, access to services and support.

[81] For example, the Home Office policy 'Medical claims under Articles 3 and 8 of the European Convention on Human Rights' v.7, 10 August 2020 notes: *"You will need to be alert to the fact that if they will not be able to access treatment in their home country for a reason which falls within the Refugee Convention then this might become an asylum claim"* and *"You must keep in mind that a claim to have suffered torture, cruel, inhumane or degrading treatment or punishment may amount to an asylum claim. You must keep in mind that a claim to have suffered torture, cruel, inhumane or degrading treatment or punishment may amount to an asylum claim."* Similarly the the UNHCR in Australia 'Guidance note on the psychologically vulnerable applicant in the protection visa assessment process' (see note 71) states *"It may also be necessary to consider whether the applicant's mental disorder gives rise to a claim for protection"*.

18. Article 3 ECHR and Health/Care/Support Needs

In some circumstances a person will qualify for refugee status or (subsidiary/humanitarian protection (including to avoid a breach of Article 3 ECHR)). These forms of status offer additional protections and should be considered, as above, before any less protective form of legal status is considered. In some circumstances a person granted leave to remain to prevent a breach of Article 3 ECHR will receive a shorter period of leave (if they do not qualify for humanitarian protection).

One of the most contentious areas of UK immigration/human rights law for the past decade has been the circumstances in which a disabled person's removal to a country where they would face serious physical/mental suffering will breach Article 3 ECHR. Such physical/mental suffering might arise from an absence of adequate medical treatment and/or social support, and/or from destitution and poor humanitarian conditions.

Until recently, the orthodox test in UK law was that set out in *N* [2005] 2 AC 396 at [69]: *"whether the applicant's illness has reached such a critical stage (ie he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity."* Substantially the same conclusion was reached by the European Court of Human Rights in *N v United Kingdom* (2008) 47 EHRR 39. That test applied not only to "medical" cases in the strict sense, but also to cases relying on destitution/poor humanitarian conditions, whether the applicant was seriously ill or not: *Said v SSHD* [2016] EWCA Civ 442 and *SHH v United Kingdom* (2013) 57 EHRR 18.

There was an exception to the *N* test where the suffering/poor humanitarian conditions arose not from naturally occurring poverty/lack of resources, but from the actions and inactions of the State or of the parties to an internal armed conflict: see *MSS v Belgium & Greece* (2011) 53 EHRR 2, *Sufi & Elmi v UK* (2012) 54 EHRR 9, *Tarakhel v Switzerland* (Application No. 29217/12); compare also the older UK case of *Limbuela v SSHD* [2006] 1 AC 396.

However, there have recently been seismic changes in this area of law. In *Paposhvili v Belgium* (41738/10, 13 December 2016) the Strasbourg Court readdressed the test in *N*. For some time UK courts remained

bound by *N* as a matter of domestic precedent. The Supreme Court has now handed down *AM (Zimbabwe) v SSHD* [2020] UKSC 17 which adopts and interprets the *Paposhvili* test. The following passage from *Paposhvili* was adopted:

> *"183. The Court considers that the 'other very exceptional cases' within the meaning of the judgment in N v The United Kingdom (para 43) which may raise an issue under article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness."*

The UK Supreme Court elaborated on this in the following way:

> *"31. It remains, however, to consider what the Grand Chamber did mean by its reference to a "significant" reduction in life expectancy in para 183 of its judgment in the Paposhvili case. Like the skin of a chameleon, the adjective takes a different colour so as to suit a different context. Here the general context is inhuman treatment; and the particular context is that the alternative to "a significant reduction in life expectancy" is "a serious, rapid and irreversible decline in … health resulting in intense suffering". From these contexts the adjective takes its colour. The word "significant" often means something less than the word "substantial". In context, however, it must in my view mean substantial. Indeed, were a reduction in life expectancy to be less than substantial, it would not attain the minimum level of severity which article 3 requires. Surely the Court of Appeal was correct to suggest, albeit in words too extreme, that a reduction in life expectancy to death in the near future is more likely to be significant than any other reduction. But even a reduction to death in the near future might be significant for one person but not for another. Take a person aged 74, with*

> *an expectancy of life normal for that age. Were that person's expectancy be reduced to, say, two years, the reduction might well - in this context - not be significant. But compare that person with one aged 24 with an expectancy of life normal for that age. Were his or her expectancy to be reduced to two years, the reduction might well be significant."*

Paposhvili also marks a significant and welcome clarification regarding the burden of proof. As the UK Supreme Court explained:

> *"32. The Grand Chamber's pronouncements in the Paposhvili case about the procedural requirements of article 3, summarised in para 23 above, can on no view be regarded as mere clarification of what the court had previously said; and we may expect that, when it gives judgment in the Savran case, the Grand Chamber will shed light on the extent of the requirements. Yet observations on them may even now be made with reasonable confidence. The basic principle is that, if you allege a breach of your rights, it is for you to establish it. But "Convention proceedings do not in all cases lend themselves to a rigorous application of [that] principle …": DH v Czech Republic (2008) 47 EHRR 3, para 179. It is clear that, in application to claims under article 3 to resist return by reference to ill-health, the Grand Chamber has indeed modified that principle. The threshold, set out in para 23(a) above, is for the applicant to adduce evidence "capable of demonstrating that there are substantial grounds for believing" that article 3 would be violated. It may make formidable intellectual demands on decision-makers who conclude that the evidence does not establish "substantial grounds" to have to proceed to consider whether nevertheless it is "capable of demonstrating" them. But, irrespective of the perhaps unnecessary complexity of the test, let no one imagine that it represents an undemanding threshold for an applicant to cross. For the requisite capacity of the evidence adduced by the applicant is to demonstrate "substantial" grounds for believing that it is a "very exceptional" case because of a "real" risk of subjection to "inhuman" treatment. All three parties accept that Sales LJ was correct, in para 16, to describe the threshold as an obligation on an applicant to raise a "prima facie case" of potential infringement of article 3. This means a case which, if not challenged or*

> *countered, would establish the infringement: see para 112 of a useful analysis in the Determination of the President of the Upper Tribunal and two of its senior judges in AXB v Secretary of State for the Home Department [2019] UKUT 397 (IAC). Indeed, as the tribunal proceeded to explain in para 123, the arrangements in the UK are such that the decisions whether the applicant has adduced evidence to the requisite standard and, if so, whether it has been successfully countered fall to be taken initially by the Secretary of State and, in the event of an appeal, again by the First-tier Tribunal.*
>
> *33. In the event that the applicant presents evidence to the standard addressed above, the returning state can seek to challenge or counter it in the manner helpfully outlined in the judgment in the Paposhvili case at paras 187 to 191 and summarised at para 23(b) to (e) above. The premise behind the guidance, surely reasonable, is that, while it is for the applicant to adduce evidence about his or her medical condition, current treatment (including the likely suitability of any other treatment) and the effect on him or her of inability to access it, the returning state is better able to collect evidence about the availability and accessibility of suitable treatment in the receiving state. What will most surprise the first-time reader of the Grand Chamber's judgment is the reference in para 187 to the suggested obligation on the returning state to dispel "any" doubts raised by the applicant's evidence. But, when the reader reaches para 191 and notes the reference, in precisely the same context, to "serious doubts", he will realise that "any" doubts in para 187 means any serious doubts. For proof, or in this case disproof, beyond all doubt is a concept rightly unknown to the Convention."*

On any view, this case represents a sea change in the legal standards applicable to Article 3 claims by disabled and seriously ill people who face undignified and degrading treatment upon expulsion from the United Kingdom.

19. Conclusion

This report is designed as an overview highlighting some of the interrelationships between disability and international protection claims. However this is an area which is markedly under-documented compared with some other equalities issues in asylum procedure and decision-making, with potentially very serious implications for justice. There is a need for an over-arching framework on disability and international protection, for training of interviewers, decision-makers and Home Office lawyers on these issues and for country of origin information and case law to be reviewed with a disability rights approach in mind. One of the most robustly documented areas of concern is the approach to credibility often adopted by decision-makers, which focusses on a person being able to give a consistent, plausible, coherent and complete account of their history and fears on return, despite this being clinically impossible for some people seeking asylum. There is a need to revisit and emphasise the lower standard of proof for protection claims, to ensure disabled people seeking asylum are not held to an impossible or unrealistic standard of evidence and ability to articulate a claim in full.