



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

**ASSESSMENT OF THE CREDIBILITY OF ASYLUM-SEEKERS:
THE BURDEN OF PROOF AND THE LIMITS OF THE ECHR'S EXAMINATION**

Speech by Carlo Ranzoni

Opening of the Judicial Year – Seminar – 27 January 2017

Ladies and Gentleman, dear colleagues,

Evidence assessment, in particular the assessment of credibility, is a difficult task. I am not a specialist in asylum procedures. However, as a former judge in criminal matters I am familiar with evidence assessment and with the challenges domestic authorities are faced with in this regard. I am also aware of our Court's limits, especially in assessing the credibility of people we have never seen or spoken to.

The issue of the assessment of credibility and the burden of proof was the theme of Workshop 1.

My colleague Georges Ravarani, Judge of the European Court of Human Rights elected in respect of Luxembourg, in the first part of his contribution outlined the recent case-law of our Court, in particular *F.G. v. Sweden* and *J.K. and Others v. Sweden*. He summarised the following principles:

1. Subsidiarity: it is not the Court's task to substitute its own assessment of the facts for that of the domestic authorities; however, it must be satisfied that the assessment at domestic level is adequate and sufficiently supported by domestic and international materials.
2. Risk assessment and burden of proof: it is for the individual to submit reasons and evidence for his or her claim, but there is a shared duty to ascertain and evaluate all the relevant facts.
3. General and individual risks: the authorities are required to carry out the assessment of general risks of their own motion. Individual risks, as a rule, must be asserted and substantiated by the asylum-seeker. However, if the authorities have been made aware of such individual risks, they likewise have to assess them of their own motion.
4. Past ill-treatment: this would provide a strong indication of a future, real risk of ill-treatment in the case of a generally coherent and credible account of events consistent with further information. In such circumstances, the burden shifts to the State.
5. *Ex nunc* assessment: the relevant point in time is that of the Court's consideration of the case.

The speaker then pointed to some problematic issues and referred, *inter alia*, to the criticism in the dissenting opinions in *J.K. and Others*; I shall refrain from repeating these deviating views as I was one of the dissenters. He also mentioned divergences with EU law, found that the *ex nunc* assessment and the Court's fourth-instance role was in contradiction with subsidiarity, and pointed to the problems of the shared duty to both ascertain and evaluate the facts.

In the second part, Judge Ravarani examined how national authorities receive and apply the Court's case-law, identifying several factors rendering the task of implementing general principles far from easy:

1. Although the Court frequently underlines that it is not an immigration or asylum court, this denial is contested. Moreover, Judge Ravarani highlighted the dilemma facing national asylum judges in deciding between the normal asylum criteria and our Court's criteria.
2. He referred to the problem of our Court assessing evidence without seeing the parties in person or having the tools available to the national authorities in establishing the facts in all their complexity.
3. He highlighted the problem of stating general rules in a specific area such as that of adducing evidence, and the potential conflict between the theoretical solutions adopted by our Court and the European Court of Justice.

Judge Ravarani provided a concrete example in relation to the last-mentioned problem, emphasising that the application of a principle affirmed by the ECJ could lead to different treatment concerning the burden of proof between, on the one hand, sexually or religiously persecuted individuals and, on the other hand, politically persecuted individuals. He also tackled the problem that could arise if the national court disregarded EU law. Finally, he explained that, should the person then turn to Strasbourg, our Court would, unlike the ECJ, examine the specific case, with two possible outcomes: it could find that the national court had imposed an undue burden of proof on the applicant; or it could hold that the asylum-seeker had to bear a certain burden of proof, which would entail a contradictory approach on the part of the two European courts and almost insoluble problems for national courts.

Ms Michèle de Segonzac, President of the National Asylum Tribunal (*Cour nationale du droit d'asile* – "the CNDA") in France, first pointed out in her speech that asylum judges were confronted with foreign nationals who were often in a vulnerable and deprived situation and relied on the very conditions in which they had fled to explain their inability to prove their allegations.

She went on to show that credibility was necessarily a common language among asylum judges, both in analysing the country risk and assessing the personal account given by the asylum-seeker. On the first point she cited the *Y.P. and L.P. v. France* judgment in which the Court observed that the national authorities had considered the applicants' fears to be unfounded, "without referring to any international report on the situation prevailing in their country of origin". That reference to geopolitical information was perceived as a requirement allowing the court to establish an objective basis for its assessment of applications. With regard to assessment of the applicant's personal account, the speaker showed that substantial efforts to identify objective criteria had been made, particularly in a practical guide published by the European Asylum Support Service entitled "Evidence Assessment", a document which I find very interesting and helpful.

With regard to the second point, Ms de Segonzac analysed the Court's case-law and its impact on the methods used by national judges in assessing credibility.

She first addressed the question of the place of the documents produced by asylum-seekers and the assessment of the probative value of such documents. Referring to the *R.V. v. France* judgment, she showed that the method involved an overall assessment of all the material submitted. However, the Court's assessment may be significantly different from that of the national judge, as the Court carries out an *ex nunc* assessment, taking into account new facts, but without hearing the applicant. The speaker observed, rightly in my view, that a comparison between the documents and the oral statements very often shed decisive light on the case. In any event, the Court's case-law (see, among

other authorities, the judgments *R.J. v. France* and *I. v. Sweden*) would appear to require asylum judges to explain their assessment of the probative value of the documents on the basis of objective factors.

Ms de Segonzac then explained that the *F.G. v. Sweden* judgment contained unprecedented implications for the examination of asylum applications, particularly the obligation for the national authorities to assess of their own motion all the factors of which they were – or ought to be – aware irrespective of the choices expressed by the asylum-seekers regarding the grounds for their applications.

Lastly, the speaker showed that the dialogue between judges promoted a convergence of points of view while having regard to the realities and constraints affecting each one. That convergence of points of view was mutually enriching, both between the Court and the national courts and at the international level (see *J.K. v. Sweden*). However, it was also a challenge for a court dealing with cases on the ground. Taking the example of the CNDA, Ms de Segonzac reiterated the number of applications per year (40,000 in 2016) in order to give an idea of the scope of the task involved, and the number of judges (nearly 300) and rapporteurs (nearly 200) to show the need to devise training strategies based on an assessment of credibility. In any event, for asylum-seekers this would mean lending a more attentive ear, increased regard for the vulnerability of their situation and a real enhancement of their rights.

In the subsequent discussion, several points were raised and questions asked. I cannot go into all the details, but I will briefly mention the main points:

The discussion concentrated on the issue of *ex nunc* assessment. The participants tried to find a solution for the dilemma between the subsidiary role of our Court and the *ex nunc* assessment made in specific cases. However, no such solution could be found.

The discussions ranged between criticism of and support for the Court's approach. It was mentioned that the problem, to some extent, also existed at national level. Furthermore, the question was raised whether national authorities had the possibility of "taking a case back" for a fresh assessment, in particular when new relevant and disputed facts had come up before the Court. However, no clear answer was given. Regarding another question, namely whether Protocol No. 16 could offer a solution, no clear answer was found either.

Final remarks of the rapporteur:

It is the role of the European Court of Human Rights to give guidance on the assessment of credibility and to define the burden of proof. However, there are limits to this task and to our Court's examination when it comes to the assessment of concrete cases. My main "lessons learned" are:

first, the national authorities, in principle, are best placed to assess not just the facts but also the credibility of applicants and witnesses (keyword: competence); second, if the national authorities do their job, there is no need for our Court to intervene (keyword: subsidiarity) – we should not become an international immigration or asylum court; and third, coordination with other international authorities and courts is indispensable (keyword: dialogue).

Thank you very much.