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Evidentiary assessment and the EU qualification directive

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Introduction¹

As the 1951 Refugee Convention² gives few express clues on evidentiary assessment, the prescriptions of the 2004 EU Qualification Directive³ can reasonably be expected to impact the disharmonious domestic practices of Member States to quite some degree. The content of the Directive is at present being transposed into the domestic law of Member States.⁴ Without any doubt, this process will leave visible traces in the status determination of protection seekers throughout the Union. There are good reasons to analyse the Directive's impact on evidentiary assessment before the transposition process is concluded, not at least to avoid misreadings of its sparse, convoluted, yet important provisions on that subject.

The Directive affects the assessment of facts and circumstances in different ways. It must be emphasized that changes in domestic legislation brought about by the Directive's adoption can have repercussions on the themes of proof used in the asylum procedure. The Directive can cause existing themes of proof in domestic law to be set aside⁵ or create new formulations of themes of proof.⁶ This begs a rather complex analysis, resting on a comparison between the Directive and domestic law in each Member State. Both tasks are beyond the reach of the present contribution.

What can be dealt with, however, is the Directive's express regulation of assessments performed in connection with applications for international protection (art. 4 QD, which covers both categories of international protection under the Directive) as well as various forms of terminating protection (art. 14.2 QD regarding the refugee status category, art. 19.4 QD for the subsidiary protection status category). The Directive lacks a corresponding provision for exclusion, but as I shall argue below, international law provides guidance in this regard. The following analysis, it is hoped, will shed light on the meaning of the provisions referred to.

¹ The author is indebted to Aleksandra Popovic and Jens Vedsted-Hansen for helpful comments and critique.

² Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S 137 [hereinafter 1951 Refugee Convention].

³ Council Directive 2004/83/EC (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 [hereinafter "the Directive", abbreviated QD].

⁴ According to art. 38.1 QD, Member States "shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 10 October 2006".

⁵ The following example from Swedish legislation may serve as an illustration. The Directive defines the category *subsidiary protection status* using a locution taken from the European Court's case law ("substantial grounds have been shown for believing that the person concerned... would face a real risk", see art. 2.e QD), while Section 3:3 p 1 of the Swedish Aliens Act defines the analogue category *subsidiary protection status* using the locution "well-founded fear". If the Swedish legislator chooses not to amend Section 3:3 p 1 of the Swedish Aliens Act upon adoption of the Directive, there is a certain theoretical risk that this divergence will cause specific rejections of applications to be challenged. Hypothetically, an applicant could argue that in practice, the Directive's locution lacks the theme of proof "fear", and sets a lower standard of proof than the locution "well-founded fear". However, other reasons may support keeping the wording in Section 3:3 p 1 of the Swedish Aliens Act. Using the locution "well-founded fear" in Section 3:2 and Section 3:3 p 1 provides an opportunity for a uniform examination of individual cases using one identical theme of proof in the prognosis phase. When creating this theme of proof, however, one must ensure that the theme of proof "well-founded fear" is not constructed in such a way that it sets higher requirements than the European Court's "substantial grounds" theme. Because the contours of the theme of proof "well-founded fear" are currently so unclear in Swedish case law, any position taken by a legislator would require a thorough process of reflection on its significance.

⁶ For example, art. 7.2 QD defines the conditions under which actors of protection can be considered as providing protection. Formally, this adds new themes of proof to the asylum procedure.

What Article 4 QD says – and what it does not say

Article 4 QD of the directive is part of a chapter bearing the heading “Assessment of Applications for International Protection”. This chapter contains provisions which limit Member States’ discretion in certain, selected areas. These norms are not to be misinterpreted as an exhaustive procedural regulation of evidentiary issues in cases of persons applying for protection; rather, they provide a few targets.

The terminology in directive article 4 QD deviates from that which is customary in many domestic jurisdictions and in international law. In this sense, the article is a unique contribution to the dilemma of evidence. The article heading makes clear that the article is intended to regulate only selected aspects related to evidence in applications for protection (“Assessment of facts and circumstances”). The purpose is not to provide a comprehensive methodology. However, considering the current diversity in Member States’ asylum procedures, it would probably be unrealistic to seek a more ambitious harmonization during the very first phase of the Common European Asylum System, of which the Directive is a part.

Looking at its single components piece by piece, article 4 QD provides an intriguing catalogue of norms:

- A facultative evidentiary rule which obligates the applicant (art. 4.1 QD, first sentence);
- A duty to assess the relevant elements in cooperation with the applicant (art. 4.1 QD, second sentence);
- A list of the potential evidence covered by the rules in art. 4.1 QD: statements and documentation at the applicant’s disposal which present pertinent information (art. 4.2 QD);
- A mandatory rule on evaluation of evidence on an individual basis (art. 4.3 QD);
- A mandatory rule on the evidentiary material and facts included in the assessment (art. 4.3 QD):
 - country information;
 - the applicant’s relevant statement and documentation;
 - the applicant’s individual position and personal circumstances, in order to determine whether the actions represent persecution or serious harm;
 - the motives behind the applicant’s sur place activities and their effect on the risk prognosis; and
 - potential for protection in other countries in which the applicant can claim citizenship;
- An alleviating evidentiary rule for cases of earlier persecution, serious harm, or direct threats of such persecution or harm (art. 4.4 QD); and

- A general alleviating evidentiary rule in cases where the facultative rule of proof in article 4.1 QD is applied (art. 4.5 QD).

By comparison to the corresponding provision in the 2001 Commission Proposal⁷, article 4 QD is much more complex and difficult to grasp.

Certain central, evidentiary issues are not regulated by the Directive. For example, the Directive contains no rule prescribing a standard of proof (with the most central issue being how likely the risk of persecution or serious harm will be). The relationship between the applicant's burden of proof and the Member State's investigative burden is not discussed. The evaluation of evidence is not addressed beyond the general provisions in arts. 4.4 QD and 4.5 QD. The applicant's general credibility surfaces only in art. 4.5.e QD, within the framework of an alleviating evidentiary rule. It is interesting to note that the Draft Directive on asylum procedures⁸ does not address these aspects either. With regard to the named issues, the domestic authorities must fall back on those obligations and duties stipulated in the 1951 Refugee Convention and other treaty law. Nonetheless, a closer look at the structure of Article 4 QD suggests that there are certain communicative rules of considerable practical importance embedded in it.

The structure of evidentiary assessment under Article 4 QD

Let us follow the path of communication sketched out in article 4 QD. A close reading suggests that it comprises three distinct stages of what we might call an evidentiary procedure in the broad sense:

- A first stage where information is submitted;
- A second stage where the relevancy of information is assessed; and
- A third and final stage where the application is assessed and a decision taken on the basis of this assessment

In the first stage, the applicant provides elements needed to substantiate the application for international protection (article 4.1 QD, first sentence). These "elements" are typically those assumed to be at the applicant's disposal (see the list in article 4.2 QD).

In the second stage, the Member State is obliged to assess those elements which are relevant to the application for protection and can thereby constitute evidence (Article 4.1 QD, second sentence). In order to acquire criteria for the assessment of relevancy, the Member State needs to identify the applicant's claim and the ensuing themes of proof first.⁹ Thereafter, the Member State is in a position to perform a relevance assessment of each element in order to identify elements which can serve as evidence.

⁷ Commission of the European Communities, Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Convention relating to the status of refugees and the 1967 protocol, or as persons who otherwise need international protection (COM(2001)510), 12 September 2001 [hereinafter Commission Proposal], art. 7.

⁸ Council of the European Union, Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, ASILE 64, Annex I, 9 November 2004 [hereinafter Draft Directive on Asylum Procedures, abbreviated PD]

⁹ Without doing so, it will be impossible to comply with the obligation laid down in article 8.2 PD, stating that "Member States shall also ensure that, where an application is rejected, the reasons in fact and in law are stated in the decision...".

Elements determined to be relevant are then assessed by the Member State in cooperation with the applicant (article 4.1 QD, second sentence). This mandatory rule entails far-reaching obligations to communicate, for both the Member State and the applicant. A Member State that performs an assessment of the applicant's "elements", without allowing the applicant to participate in this part of the process, violates article 4.1 QD. The obligation remains throughout the entire process. If the Member State itself supplies additional information to the case at hand, which can affect the assessment of "elements" provided by the applicant, then these shall once again be assessed in cooperation with the applicant. The cooperative assessment usually occurs on a running basis throughout the case, since the Member State's investigation brings additional information to the case, which can affect the applicant's obligations under article 4.1 QD, first sentence. This means the duty to communicate extends all the way to the time at which a decision is made, and also includes the Member State's investigation, to the extent that it influences the value of the "relevant elements" supplied by the applicant.

Obviously, the evidence originating with the applicant is not the only evidence to be examined in the procedure. Article 4.3 QD provides more detailed instructions about the assessment process, and combines the ex officio investigation with the applicant's own evidence. Article 4.3 QD speaks exclusively of relevant facts and statements. Consequently, the relevance is determined before the article is applied. Again, this presupposes that the Member State has a clear idea of exactly what constitutes the applicant's claim, and which the themes of proof are that emerge from it.

This view of the path of communication is further confirmed by terminological discrepancies in articles 4.1 QD and 4.5 QD. Subsequent information added to the applicant's case is called "elements", as long as the relevance assessment and evidentiary assessment have not taken place. However, data considered relevant after the relevance assessment has been performed is designated as "aspects" in article 4.5 QD.

Article 4 thereby entails a duty to communicate, which is a necessary condition in order for the applicant to be able to meet the requirements according to article 4.1 QD, first sentence. The duty to communicate ensures that the applicant gains sufficient understanding of what the Member State regards as "all elements needed to substantiate the application". Without this understanding, the applicant cannot fulfil the obligation of providing these elements "as soon as possible". In the course of the cooperative relevance assessment, the applicant may realize that additional information is needed by the authorities. In other words, the duty to communicate affects the correct interpretation of the facultative time rule in article 4.1 QD, first sentence. The applicant cannot be expected to provide all elements without some guidance from the Member State – guidance given via the cooperative relevance assessment.

This means the applicant can provide additional "elements" in the case, even after the cooperative relevance assessment, without violating the facultative time rule in article 4.1 QD, first sentence, as long as the necessity of these new "elements" has not emerged earlier. What is more, the assessments stipulated in article 4.5.a QD (genuine effort), 4.5.b QD (satisfactory explanation), 4.5.c QD (plausibility) and 4.5.e QD (credibility) presuppose the discharge of the duty to communicate by the Member State. In addition, the possibility to "accelerate" or "prioritise" cases where the applicant has not complied with her or his duties under articles

4.1 and 4.2 QD is foreclosed where a Member State failed to comply scrupulously with its duty of communication.¹⁰

The third and final stage of the evidentiary procedure is regulated to a certain extent in article 4 QD, paras. 3 to 5, which contain norms regarding what shall be included in the decision makers' assessment, the presumption effects of any earlier persecution, and a qualified alleviating evidentiary rule. The assessment according to article 4.3 QD takes into account all relevant information brought to bear in the case by the applicant and the Member State, and naturally this assessment is performed prior to the decision regarding status.

All in all, article 4 provides a relatively clear structure for the asylum procedure. The applicant is enjoined with a burden of assertion, which is more specific than the prevalent conception that the applicant is bound by some form of burden of proof.¹¹ The directive is also relatively clear regarding how the investigative burden is divided between the applicant and the Member State. In this case, there are three dimensions to consider. First, the applicant's burden has been limited to the elements listed in article 4.2 QD. It should be properly designated as a burden of information. Second, the Member State has an investigative burden with regard to the information listed in article 4.3 QD, and which is not covered by the applicant's burden of information. Third, the directive obligates the Member State to conduct, on a running basis, an assessment of the applicant's "elements", in cooperation with the applicant. This duty can be termed as the Member State's duty to communicate, and it applies throughout the entire process until the time at which a decision is made.

A closer look at the facultative rule of proof

The first sentence in article 4.1 QD of the directive provides that the Member States must consider it the applicant's duty to present, as soon as possible, all elements required to substantiate the application for international protection. This norm comprises two parts.

First, it gives the Member States the competence to enjoin the applicant with a general obligation to present grounds for an application for protection ("a duty to submit ... all elements needed to substantiate the application for international protection") This duty shall be regarded as a burden of assertion rather than a general burden of proof. In addition, it must be emphasized that the word "substantiate" does not refer to a standard of proof¹²; rather, it only qualifies the "elements" described in the norm.

Had the EC legislator intended to give a binding rule for a standard of proof, then the requirement would have been classified on a scale in a clear manner. If one interprets the term "to substantiate" as a standard of proof, then the rule would perhaps approach the level of criminal law. In the context of asylum law, such a requirement on evidence would be

¹⁰ See, art. 23.4.k PD:

"Moreover, Member States may lay down that an examination procedure in accordance with the basic principles and guarantees of Chapter II be prioritised or accelerated if:...

(k) the applicant failed without good reasons to comply with obligations referred to in Articles 4(1) and (2) of Council Directive 2004/83/EC or in Articles 9A(2)(a) and (b) and 20(1) of this Directive"

¹¹ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1, Geneva, January 1992 [hereinafter UNHCR Handbook], para. 196.

¹² The norm never even mentions the term "standard of proof", and it does not contain other terminology typically used to qualify the standard of proof.

completely unreasonable¹³, and it would not find support in case law or doctrine. Thus, the conclusion must be that the regulations do not imply a standard of proof; nor do the other parts of the directive provide any guidance in the issue.¹⁴

Secondly, the norm contains a time rule, namely that evidence shall be presented “as soon as possible”. Confusingly enough, the norm describes the duty to present all elements needed to substantiate the application for international protection. This must not be interpreted to mean that the applicant is obligated to present those elements which conclusively substantiate the application as early as the date of the first application or during the first interview. First of all, the number of elements is limited by the list given in article 4.2 QD (the quantity of information described in article 4.3 QD is greater). Second, before the process has started and has made substantial progress, it is impossible to predict which elements will have relevance and importance. In other words, the expression “as soon as possible” must be understood to mean that the applicant is obligated to present information as soon as the need for this information has been established. This clarification can happen at any time during the process, all the way up to the point at which a decision is made. The term “all” refers to elements the Member State has declared necessary at one or another point in the procedure.

The facultative nature of the norm is further emphasized in the formulation of the first sentence in article 4.5 QD.¹⁵ The norm refers to the possibility of enjoining the applicant with a burden of assertion, and part of the investigative burden. The investigative burden is not explicitly specified, but other parts of article 4 QD provide indications of its scope. As it appears here, it is not only the applicant’s information that provides grounds for assessment, but also information to which the Member State might typically have access or find it easier to obtain (such as country information).

What would be the alternative to the facultative rule of proof in the first sentence of Article 4.1 QD? Considering the fact that domestic asylum law is ultimately dictated by the prohibitions of refoulement in international law, the only alternative is that the Member State itself examines every planned act of removal ex officio with respect to these prohibitions, without the applicant initiating such an examination. Put in a different way, the Member State alone bears both the information burden and the investigative burden. For political reasons, this is likely to be less than attractive to the Member States. Considering the fact that the facultative rule of proof in Article 4.1 QD, first sentence, dictates a placement of burden which is less advantageous for the individual, this rule must be interpreted in a restrictive manner.

¹³ The formulation of the various rules on non-refoulement as prohibitions placed on states disallows to construct the burden of proof so that only the applicant bears it. Article 33 of the 1951 Refugee Convention is structured so that a state investigation of the consequences of refoulement precede any claim of “the benefit” emanating from article 33 (1) via the applicant. The Member State’s duty to investigate appears to be the basis for art. 4.3 QD, at least where a) and d) refer to data that is primarily or exclusively accessible by the Member State, and which can only be brought to bear in the case by the Member State.

¹⁴ A comparison with the construction of an “arguable complaint” under Article 13 ECHR is of interest here. The ECtHR has launched the concept of arguability as a threshold to determine which complaints may raise an issue under Article 13 ECHR. Moreover, there seems to be an interrelation between arguability and the existence of a *prima facie* case (ECtHR, *Boyle and Rice v. United Kingdom*, Judgement of 27 April 1988, Appl. No. 9659/82 - 9658/82, paras 52 and 57). The language of arguability and *prima facie* cases is not further specified, but clearly suggests that there is no requirement to present a fully-fledged claim in order to trigger remedies.

¹⁵ “Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection,…”

Member States' obligation to assess "relevant elements" in cooperation with the applicant

It is the Member State's duty, in cooperation with the applicant, to assess the relevant elements of the application. In contrast to the first sentence in Article 4.1 QD, this norm is not of a facultative character. In particular, it is not dependent on the Member State's choices with regard to the rule of proof in the paragraph's first sentence. As adduced above, the obligation to cooperate with the applicant in the assessment of "the relevant elements of the application" entails a duty of continuous communication on the part of the authorities, wherever the burden of proof is placed.

The duty to assess comprises two components. All the elements provided by the applicant must undergo a relevance assessment, which presupposes that the applicant's claim and the themes of proof have been identified in advance. Elements the authorities determine to be relevant must in turn undergo an assessment, and the result of this assessment must be communicated so the applicant is able to fulfil the burden of assertion through additions and clarifications. The rule can mean that the applicant must be given access to information and assessments the authorities have brought to bear in the case (arts. 4.3.c, d, and e QD). Otherwise, the applicant cannot be part of the assessment process, and this would conflict with art. 4.1 QD, second sentence. Consequently, this would mean that classified investigative material which cannot be shared with the applicant must be excluded from the basis for a decision in the case.¹⁶

The list of "elements" in Article 4.2 QD

As it hinges on the facultative article 4.1 QD, first sentence, it is obvious that Article 4.2 QD is facultative as well. However, if the Member State chooses to avail itself of the possibility to enjoin the applicant with the burdens of assertion and information mentioned in article 4.1 QD, first sentence, this duty is limited by the exhaustive list of "elements" in article 4.2 QD. The list in the norm contains both evidentiary material and facts, and combines the elements which are relevant for reconstruction of the applicant's journey with those related to the applicant's protection needs.

Member State's assessment of the applicant's protection need must take into consideration those elements listed in article 4.2 QD as a minimum. However, the assessment obligation may reach farther than that. For example, if the applicant provides general information about

¹⁶ This issue is handled differently in domestic law. By way of example, Danish practice is based on the principle that all material adduced to the case is to be shared with the parties, exceptions can be made with regard to classified material. Yet even classified material has to be shared with the legal representative of the applicant, who is obliged not to disclose it. There is no explicit basis for this practice in the Aliens Act. Rather, it is justified by an analogy to para. 729c and 748 of the Administration of Justice Act on Procedure (*LBK nr. 961 of 21 September 2004 Bekendtgørelse af lov om rettens pleje - Retsplejeloven*). In the Dutch system, the first instance Immigration and Nationality Service (IND) gives the asylum applicant (or her/his legal representative) access to all procedural material, with the exception of classified material (e.g. what is termed '*individuele ambtsberichten*', that is, individual reports by authorities). Certain classified material can be shared with the Court, provided the decision is appealed. This follows from art. 8:29 of the Dutch Administrative Law (*Algemene Wet Bestuursrecht*) and art. 3.1.4 of the Dutch Procedural rules for the Aliens Chamber of the District Courts (*Procesregels vreemdelingenkamers*). The classified material is then shared with the Court only, and not with the applicant or legal representative. However, the consent of the applicant is a precondition for the Court's exclusive access to classified material. I am indebted to Karin Zwaan for providing this information. Although the Swedish system is based on a principle of transparency, giving parties access to the file, it possess no mechanism for sharing classified material with the applicant's legal representative.

the country of origin or that country's case law, this information shall be assessed according to the same procedure as that used for the elements described in article 4.2 QD.

Moreover, article 4.2 QD states that the elements which the applicant shall submit also consist of "the reasons for *applying* for international protection".¹⁷ Obviously, this does not demand much from the applicant and represents a rather low threshold, reminiscent of the "prima facie case" an applicant needs to establish when submitting an "arguable complaint" under Article 13 ECHR.¹⁸ If Member States had opted for a more demanding model, they would probably have used a phrase as "the reasons for being granted international protection". In that case, it would have been for the applicant alone to establish the claim and its legal motivation. Such a demand would have been excessive, and out of touch with reality. Hence, the phrase "the reasons for applying for international protection" further confirms that the applicant merely carries a rudimentary burden of information, which does not embrace the formulation of a legal claim and the identification of its basis in law.

The rule of individual assessment

Article 4.3 QD makes clear that the assessment of an application for international protection must be on an individual basis.¹⁹ If a Member State applies presumptions in the procedure, it must be possible to confute the presumption in the asylum procedure. Examples of such presumptions include cases where persons of a certain nationality are not considered to have protection needs. Another example is the presumption that all Member States operate equivalent protection systems, underpinning the Dublin Regulation²⁰.

Interestingly enough, the first sentence in article 4.3 QD is fashioned so that the individual assessment includes all the types of information listed in the article's paragraphs a to e.

In cases where formal or informal presumptions are applied, the Member State's investigative burden also includes information which can confute the presumption. In other words, the Member State must investigate ex officio if proof to the contrary exists which confutes the presumption.²¹

Article 4.3 QD is valid for all applications for international protection (see article 2.g QD). Even cases involving applicants from so-called safe countries of origin or which bring the rules of the Dublin Regulation²² into play shall be individually assessed. This means that room must be made for a material assessment that is not consumed by the presumption.²³

¹⁷ Emphasis added.

¹⁸ See note 14 above.

¹⁹ This rule is also established in article 7.2.a PD

²⁰ Council Regulation 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national OJ L50/1 [hereinafter Dublin Regulation].

²¹ This principle, however, is not reflected in paragraphs 17 and 21 in the preamble in the Draft directive for asylum procedures, where the starting point is that the applicant's information confutes presumptions of safety in a third country or in the country of origin.

²² One should not be confused by art. 25.1 PD, which states that Member States "are not required" to examine cases falling under the named Regulation. The Regulation itself offers room for a substantive assessment of applications (by virtue of arts. 3.2, 15, 19.2 or 20.1.e).

²³ See, however, paragraphs 22 and 23 in the preamble to the Draft Directive for asylum procedures, which indicate that exceptions to the rule of material assessment can be made.

What is to be considered before taking a decision?

Article 4.3 QD lists evidence and issues which must be considered before a decision is made. The list is not exhaustive. Member States are required to include at least all those items listed in paragraphs a to e in the assessment.

Country information

Article 4.3.a concerns relevant country information. Collection of such information is part of the Member State's investigative burden, and this is further confirmed in article 7.2.b PD.²⁴

The applicant's statements and documentation

Article 4.3.b QD addresses the applicant's relevant statements and documentation, including information about whether the applicant has been or can be subjected to persecution or serious harm. The norm reflects the fact that the applicant's subjective risk assessment must be part of both the procedure and the final assessment. This procedural requirement results from the refugee definition, which uses the term "well-founded fear of being persecuted" as well as other language indicating the importance of the applicant's own assessment.²⁵ In cases where applicants have not been given the opportunity to develop their own risk assessments before a decision to reject the application is made, the Member State has failed to fulfil its obligations under both the Convention Relating to the Status of Refugees and the directive.

The applicant's individual situation and personal circumstances

Article 4.3.c QD addresses in more detail the provision for an individualized assessment and requires that decision makers take into consideration the applicant's personal situation and circumstances, before determining whether actions to which the applicant has been or risks being subjected constitute persecution or serious harm.²⁶ This dimension of the assessment ensures inter alia that the risk of discrimination is discovered. Also, the norm's non-exhaustive list of elements such as background, gender and age provides a certain amount of guidance as to how extensive the Member State's investigative burden must be to satisfy norm requirements. Furthermore, the norm ensures that the assessment takes into

²⁴ "Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that ...

(b) precise and up-to-date information is obtained from various sources, such as information from the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions".

²⁵ See G. Noll, "Evidentiary Assessment under the Refugee Convention: Risk, Pain and the Intersubjectivity of Fear", in G. Noll (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Law*, Martinus Nijhoff Publishers, Leiden/Boston, 2005, pp. 141-160.

²⁶ In its comments on this norm, the UNHCR clarified that "[t]he fact that family members or close associates of the applicant have been exposed to persecution may be an important element in the assessment of a well-founded fear of persecution of the applicant". 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)*, Geneva, January 2005, p 15. In agreement with what has been stated above, the norm must not be misinterpreted so that other persons' experiences are excluded from the Member State's risk assessment, merely because this dimension is not expressly named in the list i in article 4.3 QD. Such an interpretation would not be consistent with the non-exhaustive nature of the list.

consideration how trauma and other mental suffering can influence the concepts of “well-founded fear of being persecuted” and “serious harm” in each individual case.

It must be emphasized that this norm brings up both evidentiary issues and issues of law. The concepts of “persecution” and “serious harm” are legal ones, and the issue of whether a certain action or failure to act can be defined as such is a legal question.²⁷

“Sur place” activities and risk assessment

Article 4.3.d QD relates to so-called *sur place* activities, and must be read in light of article 5 QD²⁸ as well as the applicable provisions in the 1951 Refugee Convention and other instruments of international law. The norm’s construction dictates that the investigation must illustrate any connection that might exist between the applicant’s own will and the likelihood of any risk of persecution. In other words, the purpose of the norm, among other things, is to identify cases where the applicant’s *sur place* activities are identified as such by the home country. If the applicant manifestly “manufactures” a risk scenario, the home country has no real reason to persecute or harm the applicant, since her or his activities are not considered to be a genuine dissociation from the home country. Such cases ought to be rare, and they raise difficult issues regarding evidence and assessment (the applicant’s intent, the home country’s perception, and interpretation of the applicant’s activities after return). It must be emphasized here that the 1951 Refugee Convention does not deny its protection to persons whose reasons for flight have resulted from *sur place* activities, irrespective of intent. This means the principle of non-refoulement and the applicable rights also apply to persons judged to have “manufactured” their reasons for seeking asylum in the destination country.

Citizenship in another state?

Lastly, article 4.3.e QD brings up considerations of the applicant’s possibilities of receiving protection from another country “where he could assert citizenship” In other words, the norm addresses potential citizenship. While in terms of the rules it is completely legitimate for a Member State to consider these possibilities within the framework for asylum procedure, it must be noted that the criteria listed in the norm do not reflect the requirements emanating from the Convention Relating to the Status of Refugees. Consequently, for correct implementation and application, article 4.3.e QD must be read together with the 1951 Refugee Convention.

In its comments to the Directive, the UNHCR points out the following:

The factor outlined in Paragraph (3)(e) should not form part of the refugee status determination assessment. There is no obligation on the part of an applicant under international law to avail him- or herself of the protection of another country where s/he could “assert” nationality. The issue was explicitly discussed by the drafters of the Convention. It is regulated in Article 1A(2) (last sentence), which deals with applicants of dual nationality, and in Article 1E of the 1951 Convention. There is no margin beyond the limits of these provisions. For Article 1E to apply, a person

²⁷ For a comprehensive analysis, see J. Vedsted-Hansen, “The Borderline between Questions of Fact and Questions of Law” in G. Noll (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Law*, Martinus Nijhoff Publishers, Leiden/Boston, 2005, pp. 57-66.

²⁸ See below.

otherwise included in the refugee definition would need to fulfil the requirement of having taken residence in the country and having been recognized by the competent authorities in that country “as having the rights and obligations which are attached to the possession of the nationality of that country”. Since Article 1E is already reflected in Article 12(1)(b) of the Directive, Article 4 (3)(e) should not be incorporated into national legislation and practice if full compatibility with Article 1 of the 1951 Convention is to be ensured.²⁹

This analysis is formally correct and must be endorsed.

Alleviating evidentiary rule for cases of earlier persecution

In principle, the assessment of well-founded fear or real risk for serious harm is directed toward future events. Article 4.4 QD formalizes evidence assessment in cases where the applicant has previously been subjected to persecution or serious harm, or has received direct threats of such persecution or harm. Earlier persecution, serious harm or direct threats shall therefore be appraised as a “serious indication of the applicant’s well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated”.

In practice, article 4.4 QD presents an alleviating evidentiary rule, where the applicant’s previous experiences can reduce the need for a more extensive investigation and establishment of future risks. In order for article 4.4 QD to have value, the Member State itself must present the “good reasons” showing that the persecution or harm will not be repeated. This portion of the investigative burden are consequently the responsibility of the Member State.³⁰ Here, we have reason to remind ourselves of the duty to perform an individual assessment according to article 4.3 QD, first sentence. In light of this, general references to altered circumstances in the home country cannot constitute the “good reasons” referred to in article 4.4 QD. The Member State must show, on an individual basis, why earlier persecution or harm will not entail renewed persecution or harm after rejection of the application and refoulement.

Extreme care shall be taken in assessing whether there is good reason to assume that persecution or serious harm will not be repeated. In cases where earlier persecution or serious harm has caused the applicant mental repercussions, these effects can be made considerably worse by deportation to a context in which the original persecution or harm occurred. In cases where the applicant risks such a retraumatization, the persecution or harm has been made permanent: the persecutor or perpetrator of harm does not need to commit new acts, since as soon as the applicant is returned to the home country and the context of harm, the earlier acts create new, damaging effects. Such applicants continue to be refugees as defined by the

²⁹ UNHCR, note 26 above, p 15.

³⁰ If the investigative burden is designed to be mutual for Member States and applicants, then previous persecution or harm would not constitute a procedural difference. As a result, the special provision in article 4.4 would be redundant. General principles of interpretation in international law and EC law stipulate that redundancy must be avoided. In international law, this is expressed in the principle of effectiveness (the maxim *ut res magis valeat quam pereat*) which also comprises part of the contextual interpretation according to article 31 in the 1969 Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 *UNTS* 331, entry into force on 27 January 1980.

Convention Relating to the Status of Refugees, and are protected in accordance with both article 3 ECHR and article 3 CAT.³¹

General alleviating evidentiary rule

Where a Member State has made use of the possibilities available to it under article 4.1 QD, first sentence, it triggers the general alleviating evidentiary rule in article 4.5 QD. Should the Member State make use of the alternative to enjoin the applicant with the burden of assertion and the burden of information in accordance with article 4.1 QD, first sentence, then these burdens are greatly limited by article 4.5 QD. However, nothing hinders Member States from applying other alleviating evidentiary rules, as long as these are more advantageous to the applicant and in accordance with the rest of the Directive. As will emerge in the following, there can be cases where duties stipulated by international law require the Member State to apply a more advantageous alleviating evidentiary rule.

In general, article 4.5 QD addresses situations where the applicant's case cannot be supported by written or other tangible evidence. This suggestive type of evidence shall not need confirmation, if all the conditions described in paragraphs a to e are met. It must be noted that the English version of the directive makes use of the term "confirmation" and not "corroboration". The legislator assumed that the applicant does not need to present formal evidence to support the application.

There is reason to exercise great care in the implementation and application of article 4.5 QD, so as to avoid interpretations that conflict with obligations stipulated by international law. The article does not reflect the progress made in state case law, as it is described in UNHCR's handbook. Nor does its formulation take into consideration the progress made in medicine, psychology and legal science. Therefore, to obtain a realistic picture, article 4.5 QD must be read in the context of applicable duties stipulated by international law.

The wording of the alleviating evidentiary rule signifies a heavier burden for the applicant than the analogue principle of "benefit of the doubt", as this is described in UNHCR's handbook.³² In addition to the requirements given in the handbook, article 4.5 QD places at least one additional condition on the applicant³³: s/he is required to have applied for international protection as early as possible, unless s/he can provide good reasons for not doing so.

With regard to this provision, UNHCR has pointed out that "a late submission should not increase the standard of proof for the asylum applicant".³⁴ Although article 4.5.d QD

³¹ For detailed arguments, see Noll, note 25 above, at footnote 39. In its comments on the Directive, UNHCR merely refers to humanitarian considerations for offering protection, obviously inspired by article 1.C.5 of the 1951 Convention: "UNHCR would nonetheless advocate in line with general humanitarian principles that even where the assessment concludes that serious harm will not be repeated, compelling reasons arising out of previous persecution, may still warrant the granting of refugee status. The following formulation could be added in national implementing legislation to reflect this principle: "*Compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant the grant of asylum*"." UNHCR, note 26 above, p 16.

³² See paragraphs 203 and 204.

³³ A detailed comparison of the handbook's paragraphs 204 and 205 with article 4.5 QD reveals more differences in wording. However, these discrepancies probably do not correspond to perceptible normative differences in practice.

³⁴ UNHCR, note 26 above, p 16.

addresses more specifically how the burden of proof is placed, rather than the standard of proof, the thinking behind UNCHR's comment is correct. The Member States' investigative burden results from the rule of non-refoulement, and from a logical standpoint, it is not affected by the point in time at which the application is made. Therefore, the burden of proof cannot be reassigned in cases where application is filed at a "late" point in time.

It must be emphasized, however, that article 4.5.d QD opens the door for alleviation of requirements on proof when applicants can present good reasons as to why they have not sought protection earlier. Correctly applied, Article 4.5.d QD will hardly cause independent repercussions in Member States' case law; rather, the article shall be considered as a manifestation of Member States' political wishes without any real operative capacity.

Both the UNHCR Handbook and article 4.5.c QD seem to require that the applicant's claims exhibit internal coherence and plausibility, as well as a qualified, external freedom from contradiction. In this situation, it should be remembered that PTSD or other related conditions can limit or completely stifle the applicant's ability to deliver coherent and plausible claims.³⁵ The Member States take on the investigative burden at the point where the applicant's capacity to present such claims ends. Therefore, in cases of correct application, this constellation of cases cannot affect the alleviating evidentiary rule.

Lastly, alleviation of the applicant's requirement on proof assumes that the applicant's general credibility is established (according to article 4.5.e QD). This condition may lead to conflicts with international law. The prohibitions of refoulement entail a procedure addressing risk scenarios in the country to which the applicant is to be returned. In the broad sense, the applicant's credibility at large is not relevant in terms of investigating these risk scenarios; however, the credibility of the applicant's claims in relation to these risk scenarios is relevant.³⁶ It is this aspect of credibility which the procedure may legitimately take into consideration. However, undocumented entry into the country, poor cooperation in the investigation of the journey, and other similar situations cannot be legitimately sanctioned by refusing alleviation.³⁷

It is fully understandable that Member States wish to stimulate early applications for protection, or willing cooperation in the investigation of the journey or any smuggling services the applicant might have used. This notwithstanding, the assessment of credibility must not be abused and applied as an instrument of sanction. Such sanctioning activity finds no support in directive article 4.5.d and e QD, which shall be interpreted in light of the prohibitions of refoulement in international law.

Cessation and exclusion

The Directive contains norms on cessation and exclusion in Chapters II, III and V, dealing with what could be termed the inclusion stage. The material norms on cessation and exclusion

³⁵ See in detail J. Herlihy, "Evidentiary Assessment and Psychological Difficulties", in G. Noll (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Law*, Martinus Nijhoff Publishers, Haag, 2005, pp 123-140.

³⁶ An applicant may very well tell the truth about previous persecution, but omit or distort facts about the journey to the destination country.

³⁷ It should also be recalled that the heavy emphasis on travel itinerary is a relatively recent development. The drafters of the Handbook were looking at a state practice where credibility assessments were largely unaffected by the complications brought about through the idea of protection elsewhere. I am indebted to Jens Vedsted-Hansen for this reflection.

are laid down in Chapters III and V.³⁸ They affect evidentiary issues only by assigning themes of proof.

In Chapters III and V, norms relating to inclusion precede those on cessation and exclusion. Also, it must be noted that Chapter II is applicable to all applications for protection, even those which subsequently raise the issue of exclusion. The directive's methodology therefore supports the procedural principle of "inclusion before exclusion". There has been some debate on the justification of the named principle.³⁹ Whatever position one wishes to take, there can hardly be any doubt that states have to assess the consequences of removing an excluded person under prohibitions of refoulement in human rights law.⁴⁰ Therefore, it would be a waste of resources to conduct exclusion proceedings without concurrently taking into account risks upon return. Moreover, the principle of "inclusion before exclusion" is well in line with developments towards a "single procedure", where all issues related to protection and removal are assessed in what has been termed a "one-stop shop".

A different matter is raised by situations where protection status has been granted at an earlier stage, and the termination of protection is considered at a later point in time. Article 14 QD (refugee status) and article 19 QD (subsidiary protection status) both deal with that type of situation. With regard to refugee status, article 14.2 QD regulates the reassignment of the burden of proof in procedures for revocation of, ending of or refusal to renew an applicant's protection status in cases related to cessation:⁴¹

Without prejudice to the duty of the refugee in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his/her disposal, the Member State, which has granted refugee status, shall on an individual basis demonstrate that the person concerned has ceased to be or has never been a refugee in accordance with paragraph 1 of this Article.

This rule stipulates an individual assessment and places the burden of proof with the Member State. It can seem odd that a corresponding rule for exclusion has not been suggested. This rule is established in general international law and is applied in many countries' procedures.

³⁸ In Chapter III (refugee status), article 11 QD deals with cessation, while article 12 QD regulates exclusion. In Chapter V (subsidiary protection status), article 16 relates to cessation, while article 17 QD sets out the parameters for exclusion.

³⁹ "...Article 1F assumes that, but for the exclusionary provision, the applicant would otherwise be an arguable case for refugee status". Geoff Gilbert, "Current Issues in the Application of the Exclusion Clauses", in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, pp. 425- 478, at p. 466. See also M. Bliss, "'Serious Reasons for Considering': Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses", in 12 *International Journal of International Law*, (Special Supplementary Issue), 2000, pp. 92-132, at 106-108, with further references. But see J. Hathaway and C. Harvey, "Framing Refugee Protection in the New World Disorder", in 34 *Cornell International Law Journal*, vol. no. 2, 2001, pp. 257-330.

⁴⁰ Art. 21.1 QD reminds Member States that the principle of non-refoulement shall be respected "in accordance with their international obligations". That is, the prohibitions of refoulement under human rights law are not consumed by the framework set up by the Directive.

⁴¹ Interestingly enough, article 13.2 of the Commission proposal used the term "burden of proof" and was explicit on its placement ("The Member State which has granted refugee status bears the burden of proof to establish that an individual has ceased to be in need of international protection for a reason stipulated in paragraph 1."). In article 14.2 QD and article 19.4 QD the term "burden of proof" is not used, but the significance of the rule should be identical.

Of course, one can argue that there is no need for regulation in EC law when such a rule emanates from international law.⁴²

Article 19.4 QD introduces a similar provision for subsidiary protection status. However, it covers not only cessation, but exclusion as well. Therefore, the prescription of individual assessment and the shifting of the burden of proof is applicable to post-procedure exclusion from subsidiary protection status as well.

However, article 19.4 QD stipulates a problematic linkage between the applicant's duty to submit all elements needed to substantiate international protection and later procedures for exclusion from subsidiary protection. The emphasis on the applicant's information duties seems to be on collision course with the applicant's right to remain silent, triggered by the specific character of exclusion procedures.⁴³ At first sight, the linkage is hard to understand, because article 4.1 QD relates to an inclusion procedure, while article 19.4 QD obviously covers a separate procedure for termination of subsidiary protection status, taking place at a later point in time. Reasonably, article 19.4 must be interpreted in a manner avoiding collisions with the right to remain silent, emanating from human rights law.⁴⁴ However, termination procedures may obviously also raise protection issues separate from the question of exclusion. With regard to those issues, the applicant's burden of information is not diminished by the right to remain silent. This interpretation gives a meaning to the formulation of article 19.4 QD without impairing the right to remain silent.

Conclusions

Do the Directive's core provisions on evidentiary assessment add any value? At the very least, its drafters must be credited for observing that evidentiary assessment matters at all, and should be addressed in any serious effort of harmonisation. Also, the legal community should welcome that the Directive's core provisions cast evidentiary assessment as a process hinging on communication between State and applicant for the better part of the procedure. Yet, one might have hoped that this duty of communication would have been expressed in a manner more accessible to practitioners.

At large, the processing of information and evidence is divided into three distinct stages. The first is about the submission of information, the second seeks to establish the relevancy of information, while the third is about evidentiary assessment in the narrow sense, considering the value of evidence and basing the decision on it. The complications of article 4 QD notwithstanding; this division is a valuable one. It also imposes a duty on the authorities to identify the applicant's claim, and, concurrently, the themes of proof flowing from it. This might very well exceed present practice in Member States, and would thus translate into an improvement for the rule of law at large.

From a practitioner's perspective, the Directive must be perceived as a mixed blessing. Its at times confusing language might very well promote confusing decisions, especially in the area of credibility assessment. While these shortcomings can be defused with a careful analysis of

⁴² See Geoff Gilbert, "Exclusion and Evidentiary Assessment", in G. Noll (ed.) *Proof, Evidence and Credibility in Asylum Procedures*, 2005, pp. 161-178, at p. 168.

⁴³ "The applicant should also have the option to remain silent with regards to any allegation of prior criminal activity – there should be no need for the applicant to help the State construct a case under Article 1F against her/him." Gilbert, note 42 above, at p. 168.

⁴⁴ For a full argument, see Gilbert, *supra*.

international law and its impact on the interpretation of the Directive, the question remains whether transposition and ensuing application in ever more truncated asylum procedures will allow for sophisticated interpretation of this kind.