Soft Law for Hard Decisions:

Administrative Appeals Tribunal Guidance Decisions for Protection Visa Determination under the *Migration Act*

Linda Jean Kirk

Bachelor of Laws (Hons I), University of Adelaide

Bachelor of Economics, University of Adelaide

Master of Laws, University of Cambridge

Graduate Diploma in Legal Practice, University of South Australia

A thesis submitted for the degree of Doctor of Juridical Science in November 2021

Faculty of Law

Table of Contents

Copyright notice

Abstract

The Administrative Appeals Tribunal (AAT)[1] is a key institution within the Australian administrative justice system. Every year, it conducts *de novo* reviews of thousands of administrative decisions made by Federal Government departments and agencies,[2] and thereby makes determinations in relation to the status, entitlements and obligations of individuals under a wide array of Commonwealth legislation.[3] The AAT's jurisdiction includes that conferred on it under the *Migration Act 1958 (Cth)* to review primary decisions made by the Department of Home Affairs to refuse to grant an applicant a protection visa.[4] Through its decision-making in individual cases, the AAT plays a central role in the implementation of government policy and the meeting of Australia's non-refoulement obligations.[5] This thesis argues that the outcomes and consequences of AAT reviews should not be limited to the resolution of individual matters. Consistently with its intended normative function,[6] the AAT should utilise its capacity to develop soft law guidance[7] to structure administrative discretions, and thereby promote consistent and predictable administrative decision-making.

This thesis focuses on the assessment by decision-makers of the eligibility of applicants for the grant of protection status.[8] It demonstrates that these are hard decisions, not only because of their potential life or death consequences, but also due to the complexity of the decision-making task.[9] Protection decision-makers are invested with wide-ranging

---

[1] Established by the *Administrative Appeals Tribunal Act 1975 (Cth).*

[2] The full list of Commonwealth Government departments and agencies can be viewed on the Australian Government Australian Business Register as at 12 October 2021.

[3] The powers and functions of the AAT are outlined in Chapter Two.

[4] Protection visas are a mechanism by which Australia provides protection for individuals from situations which engage its non-refoulement obligations discussed in Chapter Three.

[5] The obligation of non-refoulement prohibits States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations.

[6] The normative function of the AAT is explained in Chapter Two.

[7] The use of the term 'soft law' and 'soft law guidance' is explained in the Introduction and Chapter One, and the capacity of the AAT to develop 'soft law guidance' is outlined in Chapter Two.

[8] This includes protection status under the 1951 Refugee Convention and other international instruments that impose complementary non-refoulement obligations on States. See the discussion in Chapter Three.

[9] The nature of process for making these hard decisions is explained in the Introduction and Chapter Three.

discretions, specifically to identify material facts and evaluate evidence to make the difficult risk assessments which are central to an assessment of eligibility for protection status.[10] It is well-documented that protection status outcomes are frequently inconsistent, leading to their associated decision-making process commonly being described as a 'lottery'.

In Canada and the United Kingdom, the Immigration and Refugee Board (IRB) and the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC) have jurisdiction to determine protection status claims at first instance and on appeal respectively. These tribunals are also authorised by legislation to produce guidance for use by decision-makers tasked with making these hard decisions, and both have well-developed guidance practices which are endorsed by the superior courts.[11] The guidance produced by the IRB and UTIAC is designed to assist decision-makers to make the difficult risk assessments associated with the determination of protection status, and thereby increase predictability and consistency of decisional outcomes. Both are examples of the structuring of the discretions associated with protection status decision-making through the development of soft law norms by way of tribunal adjudication.

An amendment made to the *Migration Act* effective from April 2015 authorises the President and the Division Head of the Migration and Refugee Division of the AAT to direct that an AAT protection visa decision be a Guidance Decision.[12] In the more than six years since this provision took effect, this power has not been exercised on a single occasion. This thesis examines the jurisprudential foundations, legal validity and legitimacy of the development by the AAT of soft law guidance and, with reference to the guidance practices of the UTIAC and IRB, proposes a structured process for the production and use of Guidance Decisions by Australian protection visa decision-makers.[13]

---

[10] The task of protection status determination and the making of protection visa decisions by the Department of Home Affairs and the AAT is outlined in Chapter Three.

[11] The jurisdiction of the IRB and UTIAC to make primary decisions and conduct appeals respectively in relation to protection status claims and their respective guidance practices are described in Chapters Five and Six.

[12] Section 420B *Migration Act 1958 (Cth)* introduced by the *Migration Amendment (Protection and Other Measures) Act 2015 (Cth)*. Discussed in Chapters Four and Seven.

[13] This process is detailed in Chapter Seven.

Declaration

This thesis is an original work of my research and contains no material which has been accepted for the award of any other degree or diploma at any university or equivalent institution and that, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Linda Jean Kirk

26 November 2021

Publications during enrolment

Linda Kirk, 'Island Nation: The Impact of International Human Rights Law on Australian Refugee Law' in David Cantor and Bruce Burson (eds) *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill Nijoff, 2016) 49-85.

Linda Kirk, 'Improving Consistency in Protection Status Decisions in Australia: Looking to the United Kingdom for "Guidance"?' (2017) 31(2) *Journal of Immigration Asylum and Nationality Law* 151-174.

Acknowledgements

Writing a doctoral thesis requires a great deal of support and understanding from family, friends and colleagues. I wish to sincerely thank and acknowledge the following people who have assisted and supported me on my journey. I must thank my supervisors, Professor Susan Kneebone of the Faculty of Law, University of Melbourne, Associate Professor Maria O'Sullivan of the Faculty of Law, Monash University, and Professor Matthew Groves of the Faculty of Business and Law at Deakin University. Susan and Maria found time within their busy schedules to read my work and give me timely and constructive feedback on draft chapters. Matthew's supervision until he left Monash in December 2017 was invaluable in the development of the theoretical framework of the thesis. I am indebted to him for his detailed written feedback on early drafts, and his guidance in relation to situating the thesis within the broader context of the normative role of the Administrative Appeals Tribunal. My friend and Monash University Associate Professor, Dr Yee-Fui Ng, provided me with encouragement and support from the earliest days of this research, and kindly reviewed draft chapters of the thesis, for which I am very appreciative. I am also very grateful to Associate Professor Daniel Ghezelbash of Macquarie University for allowing me to refer to his valuable empirical research, and for giving me his encouraging and constructive feedback on draft chapters.

I wish to express my gratitude to my academic colleagues and friends at the Australian National University, the University of London, and the University of New South Wales. Much of the research for the thesis was undertaken during my tenure at the ANU from July 2014 to January 2018. Professor Don Rothwell was my academic supervisor and Director of the Migration Law Program when I was its Deputy Director and Sub-Dean. Don was extremely encouraging and supportive of my research and was a wise and thoughtful mentor. Emerita Professor Robin Creyke generously agreed to review draft chapters of the thesis and gave me very helpful comments in relation to its scope and structure. I consider myself privileged to have received feedback on my work from the doyenne of Australian Administrative Law.

I am extremely grateful to Professor David Cantor, Professor of Refugee Protection and Forced Migration Studies and Director of the Refugee Law Initiative at the School of Advanced Study, University of London. I first met David when I was a Visiting Fellow in Human Rights at the School of Advanced Study in June 2012. David encouraged me to undertake research into Country Guidance decisions and later supported my successful application for an Australian Government Endeavour Research Fellowship which allowed me to spend six months undertaking research at the University of London from June to December 2017. He invited me to deliver a paper at the Refugee Law Initiative's 8th International Refugee Law Seminar Series in October 2017, which gave me the opportunity to present my research and gain valuable feedback from British scholars and practitioners.

I also wish to acknowledge and thank Professor George Williams and Professor Andrew Lynch, the past and present Dean of the Faculty of Law and Justice at UNSW. I joined UNSW Law as an Associate Professor in June 2018 on a 0.2 fractional basis to design and deliver a new post-graduate course in Migration and Citizenship Law. George and Andrew warmly welcomed me into the Faculty and have been very supportive of my teaching and research endeavours. Dr Janina Boughey invited me to join the teaching team for Administrative Law in early 2019 and gave me the opportunity to teach the subject again after a long hiatus, for which I am very grateful. Professor Jane McAdam, Director of the Andrew and Renata Kaldor Centre of International Refugee Law and my academic supervisor at UNSW has been a valued colleague and friend. I am very appreciative to Jane for granting me Affiliate status at the Kaldor Centre, and for giving me the opportunity to present my research at the Kaldor Centre Annual Conference in November 2016. I am fortunate to share an office at UNSW with Professor Mark Aronson and Dr Chantal Bostock. I have really appreciated the many discussions I have had with Chantal about the process of successfully writing and submitting a dissertation. Mark has been incredibly generous with his time, sharing with me his expert insights into a range of topics. I am very grateful for the serendipitous opportunity to be guided by and learn from one of Australia's leading administrative law scholars. Finally, my friend, thesis buddy, and doctoral candidate at UNSW, Natasha Yacoub, has given me loads of support and encouragement and made me laugh, particularly during the final stages of writing this thesis.

From 2011-2016 I was the Chair of the Council of the Australasian Chapter of the International Association of Refugee Law Judges (IARLJ). In this capacity, I attended numerous national and international meetings and conferences at which I met with senior members of the judiciary and tribunal members, including from the United Kingdom and Canada. I wish to acknowledge and thank my friend and colleague Judge Judith Gleeson, Senior Judge of the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC), and former Senior Judge Hugo Storey, who is credited with being a founding father of the UTIAC's system of Country Guidance in the early 2000s. My many conversations with Judith and Hugo and the opportunity they gave me to observe a Country Guidance hearing at Field House in London in February 2013 contributed enormously to my understanding of the system of asylum appeals in the United Kingdom. I was fortunate to meet Dr Hilary Evans Cameron of Ryerson University Lincoln Alexander School of Law at the IARLJ Regional Conference in Wellington, New Zealand in December 2018. I am very appreciative to Hilary for the insights she has since shared with me from her decade of experience representing claimants at the Canadian Immigration and Refugee Board, and her innovative research and scholarship into fact-finding in refugee status determination.

Following my appointment as a Senior Member of the Administrative Appeals Tribunal in January 2017, I have been fortunate to work closely with Deputy President Bernard McCabe in the General Division. I have greatly benefited from the many conversations we have had in relation to work of the AAT and its broader normative function beyond individualised merits review. I am most grateful to Bernard for sharing with me his more than two decades of experience as an AAT Member, and his thoughts in relation to the AAT's potential to better contribute to quality administrative decision-making.

Finally, I wish to acknowledge the love and support of my wonderful family. My mother and father, Gloria and Les, worked tirelessly to give me the education that has allowed me to have the most rewarding of careers in the law, politics and academia. Together with my brother Steven, Mum and Dad encouraged and motivated me to achieve what sometimes seemed an unattainable goal of completing this thesis. The passing of my father on 10 July 2020 was absolutely devasting, but it inspired me to complete the thesis for him. At last I can say, 'Dad, it's finished.'

Dedication

In loving memory of my father

Leslie Stanley Kirk

List of Abbreviations

AAT	Administrative Appeals Tribunal
CG	Country Guidance
CGD	Country Guidance Determination
COI	Country of Origin Information
CPIN	Country Policy and Information Note
DFAT	Department of Foreign Affairs and Trade
DHA	Department of Home Affairs
EASO	European Asylum Support Office
FTTIAC	First Tier Tribunal (Immigration and Asylum Chamber)
GD	Guidance Decision
IJ	Immigration Judge
IRB	Immigration and Refugee Board
JG	Jurisprudential Guide
LC	Lead Case
MD	Ministerial Direction
MRD	Migration and Refugee Division
PD	Persuasive Decision
SSHD	Secretary of State for the Home Department
UNHCR	United Nations High Commissioner for Refugees
UTIAC	Upper Tribunal (Immigration and Asylum Chamber)
UKVI	UK Visas and Immigration (Home Office)

Introduction

Soft Law for Hard Decisions:

Structuring Discretion in Protection Status Determination

This thesis concerns the development and use of soft law to make hard decisions, specifically the identification by the Administrative Appeals Tribunal (AAT) of a protection visa decision as a Guidance Decision under section 420B *Migration Act 1958 (Cth).*[1] This Introduction explains why protection status determination is widely considered as hard,[2] and outlines the common criticism that outcomes are inconsistent and unpredictable.[3] It identifies the theoretical framework for the thesis and the basis for its central contention that soft law can provide structure to the discretions associated with protection status determination and thereby reduce inconsistent and unpredictable decision-making while retaining the flexibility required to assess the individual merits of claims.[4] It introduces what the thesis argues are the jurisprudential foundations for the potential development by the AAT of soft law guidance to structure discretion in a manner similar to the well-established guidance practices of tribunals in the United Kingdom and Canada.[5] Also outlined are the terminology used in the thesis, the specific research questions it addresses, the motivation for the research and its methodology, as well as the scope and structure of the thesis and its contribution to the academic literature.

1. Hard decisions

1.1 The protection status determination task

The task of protection status determination is one that must be undertaken by all States which are parties to the *Refugee Convention*[6] and other international instruments that

---

[1] Section 420B *Migration Act 1958 (Cth) ('Migration Act').* Section 36(2)(a) and s 36(2)(aa) *Migration Act* provide the refugee criteria and complementary protection criteria for a protection visa.

[2] See discussion in section 1 below and in Chapter Three.

[3] See discussion in section 1 below and in Chapter Four.

[4] See discussion in Chapters One and Two.

[5] See discussion in [3.3] below and Chapter Two.

[6] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('Refugee Convention') and the 1967 *Protocol relating to the Status of Refugees*, opened

impose complementary non-refoulement obligations.[7] The legal criteria and processes for the recognition of protection status are contained in relevant domestic legislation and are specific to each State. However, the universal decision-making tasks of identifying material facts, assessing evidence and evaluating risk to the claimant on return are common to all jurisdictions.[8]

It is widely recognised that protection status decision-making is hard.[9] It has been described as 'notoriously difficult' and 'perhaps the most problematic adjudicatory function in the modern state.'[10] The 'superficial simplicity' of the task 'conceals a mass of detailed, difficult,

---

for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('Protocol'). Australia acceded to the Refugee Convention in 1954 and the Protocol in 1973, thereby undertaking to apply their substantive provisions.

[7] The obligation of non-refoulement prohibits States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'), the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991) ('Second Optional Protocol'), the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CROC') and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT'). Australia ratified the ICCPR in 1980, the Second Optional Protocol in 1990, the CAT in 1989 and the CROC in 1990. Like the Refugee Convention, these instruments have not been formally incorporated into Australia's migration legislation. The ICCPR is referenced in the Act in relation to 'significant harm' for the purposes of the complementary protection criterion, but generally speaking, its provisions have not been drawn into the Act.

[8] While the Refugee Convention contains a universally applicable refugee definition, it does not prescribe a process by which States parties are to determine to whom that definition applies. Accordingly, States have developed their own refugee status determination processes: Bruce Burson, 'Refugee Status Determination' in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law*, (Oxford University Press, 2021); Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th edition, 2021, Oxford University Press) Chapter 11, [2.1].

[9] Angus Grant and Sean Rehaag, 'Unappealing: An Assessment of the Limits on Appeal Rights in Canada's New Refugee Determination System' (2016) 49(1) *University of British Columbia Law Review* 203, 203; 647; Martin Jones and France Houle, 'Introduction: Building a Better Refugee Status Determination System' (2008) 25(2) *Refuge* 3, 6; Cécile Rousseau et al, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-Making Process of the Canadian Immigration and Refugee Board' (2002) 15(1) *Journal of Refugee Studies* 43, 43 describe it as 'one of the most complex adjudication functions in industrialized societies' citing Peter Showler, former Chair of the Canadian Immigration and Refugee Board, Oral statement at the Spring meeting of the Canadian Council for Refugees, Vancouver, June 2000 who claimed 'it is the single most complex adjudication function in contemporary Western societies.' See also Tone Maia Liodden, 'Who is a Refugee? Uncertainty and Discretion in Asylum Decisions' (2020) 32(4) *International Journal of Refugee Law* 645, 647.

[10] Thomas, Robert, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart Publishing, 2011) 48.

and very problematic factual and legal issues'.[11] As outlined in Chapter Three, the task of the decision-maker is undertaken in circumstances where the material facts and relevant evidence are difficult to ascertain and assess, and the determination of an individual's risk on return to their country is largely an evaluative exercise which requires considerable skill and judgement. Protection status decision-making is also hard because decision-makers must determine the likelihood that claimants may face persecution or serious harm in countries with which they may be unfamiliar. This involves not only predictions about what may happen in the future, but also the making of factual findings about country conditions where information may be 'scant and unreliable.'[12]

Another reason protection status determination is difficult is because much of the evidence before the decision-maker is provided by the claimant who has a strong interest in the outcome.[13] Credibility is often a determinative factor in protection claims, but the context in which these decisions are made means that credibility assessment is frequently difficult.[14] In hearings 'cross-cultural communication failures are common',[15] and are often compounded by the challenges of receiving oral evidence through interpreters.[16] Furthermore, applicants are invariably under great pressure in presenting their claims, and may be suffering from post-traumatic stress disorder or other conditions that impact their ability to give oral evidence.[17] Applicants also may not have the assistance they need to

---

[11] Ibid.

[12] Grant and Rehaag (n9) 203 citing France Houle, 'The Credibility and Authoritativeness of Documentary Information in Determining Refugee Status: The Canadian Experience' (1994) 6(1) *International Journal of Refugee Law* 6; Susan Kerns, 'Country Conditions Documentation in US Asylum Cases: Leveling the Evidentiary Playing Field' (2000) *Indiana Journal of Global Legal Studies* 197; Arwen Swink, 'Queer refuge: A review of the role of country condition analysis in asylum adjudications for members of sexual minorities' (2005) 29 *Hastings International and Comparative Law Review* 251.

[13] Ibid, citing Martin Jones and Sasha Baglay, *Refugee Law* (Irwin Law, 2007) 241.

[14] Ibid, citing Cécile Rousseau, et al (n9). See also Walter Kälin, 'Troubled Communication: Cross-cultural Misunderstandings in the Asylum Hearing' (1986) 20 *International Migration Review* 230; UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (first published in 1979 and re-issued in 1992 and in 2019) (UNHCR Handbook) [195].

[15] Ibid, citing Cécile Rousseau, et al (n9) 62-64.

[16] Ibid, citing Robert F Barsky, 'The Interpreter and the Canadian Convention Refugee Hearing: Crossing the Potentially Life-threatening Boundaries Between 'coccode-e-eh,' 'cluck-cluck,' and 'cot-cot-cot'' (1993) 6(2) TTR: *Traduction, Terminologie, Rédaction* 131 at 141-146.

[17] Ibid, citing Hilary Evans Cameron, 'Refugee Status Determinations and the Limits of Memory' (2010) 22(4) *International Journal of Refugee Law* 469 at 504.

prepare their claims and gather necessary evidence because they are unable to secure representation from a legal practitioner or migration agent.[18]

Determining protection status claims is also hard due to the systemic challenges in ensuring consistency.[19] Protection status determination systems are often likened to a 'lottery' by virtue of the frequency of divergent recognition rates and decisional inconsistencies between decision-makers.[20] Consistency of outcomes is extremely difficult to achieve in protection status determination, particularly because the applicable standards of proof are open-textured and admit differential approaches by decision-makers to the assessment of limited and uncertain evidential material.[21] The extent of the inconsistencies in protection status determination systems has led some to conclude that outcomes are dependent not on the merits of the claims, but the 'unarticulated personal views of decision-makers.'[22]

In addition to being hard to make, protection status decisions involve 'high stakes.'[23] Failing to grant protection to a person who meets the eligibility criteria may result in them being returned to a country where they face persecution, torture or even death, and the State breaching its international non-refoulement obligations. The consequences of granting protection to individuals who do not satisfy the legal criteria are also serious because they

---

[18] Recent research by Daniel Ghezelbash found that only 4% of unrepresented protection visa review applicants were successful at the AAT. This figure rose to 28% when the applicant had legal representation. The data showed that just over half (52%) of all applicants do not have representation when they appear before the AAT: Daniel Ghezelbash, 'How refugees succeed in visa reviews: new research reveals the factors that matter', The Conversation, Blog Post, 9 March 2020. In the Canadian context see Sean Rehaag, 'The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment' (2011) 49 *Osgoode Hall Law Journal* 71. The Immigration Advice and Application Assistance Scheme (IAAAS) provides Government-funded access to professional immigration advice and application assistance at the primary decision stage. It is not available for applications for review of a primary decision by the AAT: https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/protection-866/iaaas

[19] Grant and Rehaag (n9) 205 citing Sean Rehaag, 'Troubling Patterns in Canadian Refugee Adjudication' (2008) 39(2) *Ottawa Law Review* 335 at 352.

[20] Thomas (n10) 48 citing CG Blake, 'Judicial Review, Second Tier Tribunals and Legality' in Martin Partington (ed), *The Leggatt Review of Tribunals: Academic Seminar Papers* (University of Bristol, Faculty of Law, Working Paper Series No 3, 2001.

[21] Ibid 44. As explained in Chapter Three, in the Australian context, the applicable standards of proof for refugee and complementary protection status are 'real chance' and 'real risk' respectively.

[22] Ibid citing R Prasad, 'The Asylum Lottery' *The Guardian* (25 January 2002).

[23] Grant and Rehaag (n9) 205; Tone Maia Liodden 'Making the Right Decision: Justice in the Asylum Bureaucracy in Norway' in Nick Gill and Anthony Good (eds), *Asylum Determination in Europe*, Palgrave Socio-Legal Studies, 2019) 241.

may encourage unfounded claims and threaten to undermine the integrity of, and erode public confidence in, the State's protection status determination system.[24]

1.2 Protection visa decision-making under the *Migration Act*

The *Migration Act* and the *Migration Regulations 1994 (Cth)* contain the relevant legislative provisions which govern the assessment of applications for a protection visa.[25] As detailed in Chapter Three, applications are considered at first instance by the Department of Home Affairs (DHA) and decisions to refuse to grant a protection visa are subject to review by the AAT.[26] Both DHA decision-makers and the AAT on review are required to apply the legal tests contained in the *Migration Act* and *Migration Regulations* which set out the refugee and complementary protection criteria for the grant of a protection visa.[27] Decision-makers have access to current and reliable country of origin information about human rights and security conditions in refugee-producing countries.[28] They may also refer to eligibility guidance produced by UNHCR or the European Asylum Support Office (EASO).[29] However, decision-makers are not provided with internal policy guidance produced by the DHA or the AAT that identifies groups and individuals at risk of refoulement if returned to these countries, and who prima facie meet the refugee or complementary protection criteria under the *Migration Act.*[30] Decision-makers therefore have considerable autonomy when making the difficult risk assessments required to satisfy themselves that an individual applicant meets one or other of the eligibility criteria.[31]

---

[24] Ibid 206 citing Stephen Gallagher, 'Canada's Dysfunctional Refugee Determination System: Canadian Asylum Policy from a Comparative Perspective' (2003) 78 *Public Policy Sources* 3, 20.

[25] Protection visas are a mechanism by which Australia provides protection for individuals from situations which engage its non-refoulement obligations. See further Chapter Three for a description of the legislative provisions relevant to protection visas and the processes for the assessment of eligibility by the Department of Home Affairs and the review of primary decisions by the AAT.

[26] *Migration Act 1958 (Cth)* ('*Migration Act*') and *Migration Regulations 1994 (Cth)* ('*Migration Regulations'*).

[27] Section 36(2)(a) and s36(2)(aa) *Migration Act* provide the refugee criteria and complementary protection criteria for a protection visa.

[28] See further discussion in Chapter Three.

[29] UNHCR *Eligibility Guidelines* and European Asylum Support Office (EASO) *Country Guidance*.

[30] As detailed in Chapter Three, decision-makers must have regard to Country Information Assessments published by the Department of Foreign Affairs and Trade, but these do not specify the groups and individuals who meet the refugee or complementary protection criteria in the *Migration Act*.

[31] Section 65 *Migration Act*. See discussion in Chapter Three [1.1].

Recent empirical research, outlined in Chapter Four, has documented the wide divergencies between primary decisions and outcomes following AAT review, as well as the inconsistent outcomes between AAT decision-makers, for applicants from the same countries of origin.[32] This research confirms the frequently made claims that protection visa decision-making in Australia resembles a lottery.[33] As Chapter Four outlines, the inconsistent decision-making of primary decision-makers and the AAT on review has been recognised by successive governments, which have responded by introducing 'top-down' measures in the form of Ministerial Directions to reduce the incidence of inconsistent decision-making.[34] These measures have been largely ineffective in achieving their aim of increasing the consistency of protection visa decisions.[35]

This thesis identifies multiple sources for the endemic inconsistencies in protection status decision-making, including variable credibility assessments and the personal characteristics and backgrounds of the decision-makers.[36] However it focuses on the wide-ranging discretions invested in decision-makers to identify material facts, evaluate evidence and make risk assessments. It argues that these discretions are capable of being structured, specifically by soft law produced by tribunal adjudication, to reduce the prevalence of inconsistent and unpredictable outcomes.

2. Administrative Discretion

This thesis is concerned with the exercise of discretion by administrative decision-makers. The term 'administrative discretion' is used to describe the discretion which is exercised by

---

[32] See discussion of this research in Chapter Four.

[33] See for example David Corlett who observes '[t]he granting of protection is akin to winning a lottery. People with similar cases get different outcomes. Some people who detainees believe to have flimsy protection claims have gained protection while others whose claims are compelling are rejected.' David Corlett, *Returning Failed Asylum Seekers from Australia,* Discussion Paper (Printmode, 2007) 30; Maria Psihogios-Billington, *A Case for Justice: Position Paper on the Legal Process of Seeking Asylum in Australia* (Asylum Seeker Resource Centre, 2009), 4.

[34] Section 499(1) *Migration Act* provides that '[t]he Minister may give written directions to a person or body having functions or powers under this Act if the directions are about: (a) the performance of those functions; or (b) the exercise of those powers'. Sub-section 499(2A) provides that '[a] person or body must comply with a direction under subsection (1)'. See discussion in Chapter Four.

[35] See discussion in Chapter Four [2.2] and [3.2].

[36] Ibid.

public officials who are invested with statutory power to assess the eligibility of applicants for status or entitlements under a legislative scheme. The particular administrative discretions examined in the thesis are those associated with the assessment of the eligibility of individuals for the grant of protection status.

2.1 Law and discretion

The analysis in this thesis is anchored in the theoretical framework and legal scholarship in relation to discretion outlined in Chapter One. The conventional view of discretion conceives of it in the manner described by Ronald Dworkin, as 'like the hole in a doughnut'; it 'does not exist except as an area left open by a surrounding belt of restriction.'[37] Discretion is the 'decision space' within the limits of the powers conferred on administrative officials in which they have autonomy to choose from a range of permissible outcomes.[38]

The term 'discretion', as it is used in this thesis, is a broader concept than that of 'discretionary power' as it is commonly understood in administrative law. The latter term is generally used to refer to 'a power which leaves an administrative authority some degree of latitude as regards the decision to be taken, enabling it to choose from among several legally admissible decisions the one which it finds to be the most appropriate.'[39] This thesis conceives of discretion in its broadest sense, which as Denis Galligan has explained, denotes 'a sphere of autonomy' within which decisions are 'in some degree a matter of personal judgment and assessment.'[40] The decision-maker has 'significant scope for settling the reasons and standards according to which that power is to be exercised, and for applying them in the making of specific decisions.'[41] As Chapter One explains, this conception of

---

[37] Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 2005) 31. See discussion in Chapter One.

[38] Peter Mascini, 'Discretion from a Legal Perspective' in Tony Evans and Peter Hupe (eds) *Discretion and the Quest for Controlled Freedom* (Springer, 2019) 121, 122.

[39] Ulrich Stelkens, *General Principles of Administrative Law* § 5 Discretion, citing Council of Europe Committee of Ministers Recommendation No. R (89) 8 concerning the Exercise of Discretionary Powers by Administrative Authorities, cited in Ulrich Stelkens and Agnė Andrijauskaitė 'Sources and Content of the Pan-European General Principles of Good Administration' in Ulrich Stelkens and Agnė Andrijauskaitė (eds) *Good Administration and the Council of Europe: Law, Principles, and Effectiveness* (Oxford University Press, 2020) 41.

[40] DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon, 1986) 16, 32. Discussed in Nicola Lacey,'The Jurisprudence of Discretion' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1992) 366.

[41] Ibid 30.

discretion encompasses that which is exercised by protection status decision-makers tasked with identifying material facts and evaluating evidence required to make the risk assessments that are central to a determination of whether an applicant meets the eligibility criteria for protection. This thesis argues that this discretion should be structured and controlled if the endemic inconsistencies associated with protection visa decision-making are to be addressed.

2.2 Structuring discretion

As discretion is not prescribed by rules, it is often portrayed as 'unstructured', and potentially 'arbitrary and capricious'.[42] It is therefore considered 'to be unpredictable and posing a potential threat to the consistency and legitimacy of rulings.'[43] Chapter One details the arguments made by KC Davis for controlling discretion in his highly influential work, *Discretionary Justice*.[44] Davis proposed the incremental development of a body of rules to structure discretion, and thereby reduce the incidence of arbitrary and inconsistent decision-making leading to individualised injustice. Davis' proposals provide the foundation for the arguments made in this thesis in relation to the potential for the AAT to develop soft law guidance to structure the exercise of discretion in the making of protection visa decisions. This thesis contends that discretion 'can and ought to be constrained by filling gaps in statutory standards and by using legal control instruments.'[45] This may be achieved by a variety of methods, including the use of 'hard' legal rules such as legislative instruments, directions and regulations. The focus of this thesis however is the development, specifically by tribunals, of 'soft' law measures to 'fill the gaps' in statutory standards and thereby structure and control administrative discretion.

[42] Mascini (n38) 123.

[43] Ibid 121.

[44] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge, Louisiana State University Press, 1969).

[45] Mascini (n38) 124.

3. Soft law

3.1 Definition and use of the term

The nature and character of 'soft' law and its potential use to structure administrative discretion is detailed in Chapter One. Soft law may be defined by distinguishing it from 'hard' law which encompasses Acts, regulations, and other forms of delegated legislation,[46] and judicial decisions. Hard law is binding, enforceable and 'conclusively determinative of legal outcomes'.[47] Soft law is a residual category of regulation which comprises all the other instruments which are developed and issued by the executive to guide its administrative decision-making, including policies, guidelines, codes, manuals, circulars, and directives. Soft law does not have the binding effect of hard law, and as Greg Weeks explains, it 'relies on its influence to be effective.'[48]

3.2 Soft law for protection visa decision-making

The category of soft law considered in this thesis is that designed to structure and control the exercise of discretion by administrative decision-makers. Chapter Two describes the two specific types of soft law examined in the thesis. First are the guidelines, rules and manuals produced by government departments for use by decision-makers in making primary decisions. In the protection visa context, the Department of Home Affairs (DHA) produces 'Refugee Law Guidelines' and 'Complementary Protection Guidelines' contained in its Procedures Advice Manual (PAM3) which DHA decision-makers must apply in assessing protection visa applications. Second are the decisions made by the AAT in determining individual review applications. This thesis argues that AAT decisions are appropriately categorised as soft law, as they are not binding precedents but may, and often do, have persuasive influence on subsequent primary and review decision-making. In addition to the soft law status of individual AAT decisions, the AAT has the capacity to *develop* soft law

---

[46] Delegated legislation comprises instruments of legislative effect made pursuant to the authority of Parliament as is 'hard' law: Greg Weeks, 'Soft Law and Public Liability: Beyond the Separation of Powers (2018) 39(2) *Adelaide Law Review* 303, 306-307 citing Dennis C Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis, 5th ed, 2017) 1-2; approved in *Latitude Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 110 ALR 209, 228-29 (French J).

[47] Weeks (n46) 306.

[48] Ibid.

guidance in the exercise of its merits review function, including for the specific purpose of structuring discretion and reducing the prevalence of inconsistent decision-making. As explained in Chapter Two, the ability of the AAT to develop soft law was recognised more than four decades ago in a decision of Brennan J, the first President of the AAT.

3.3 Development of soft law guidance by the AAT

Since the decision of Brennan J in *Drake (No 2),*[49] it has been accepted that the AAT should *apply* government policy unless there are cogent reasons for it not to do so. What has been less certain is whether the AAT is able to *formulate* its own policy. In *Drake (No 2)* Brennan J recognised that the formulation by the AAT of 'policy' in a progressive manner through its decision-making in individual cases is not inconsistent with its merits review function. Whereas Brennan J made clear it is not the AAT's role to formulate 'broad policy',[50] its reasons in an individual case 'inevitably spins out threads of policy'.[51] Accordingly, it is acceptable, and indeed desirable, for the AAT to identify 'non-statutory criteria for the exercise of particular statutory decision-making powers,'[52] to be followed by decision-makers in subsequent cases to promote consistent administrative decision-making. These non-statutory criteria are not 'hard' law; they 'fill the gap' in statutory standards. The term 'soft law guidance' is used in this thesis to describe non-statutory criteria developed by the AAT when performing its merits review function, so as to distinguish it from the executive 'policy' guidelines produced by government departments for use by their decision-makers.[53]

This thesis argues that Brennan J's judgment in *Drake (No 2)* provides the jurisprudential foundation for the potential development by the AAT of soft law guidance to structure

---

[49] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 ('*Drake (No 2)').*

[50] Ibid 644. Brennan J stated (644) 'this is essentially a political function, to be performed by the Minister who is responsible to the Parliament for the policy he (sic) adopts. The very independence of the Tribunal demands that it be apolitical ... The Tribunal is not linked into the chain of responsibility from Minister to Government to Parliament, its membership is not appropriate for the formulation of broad policy and it is unsupported by a bureaucracy fitted to advise upon broad policy. It should therefore be reluctant to lay down broad policy, although decisions in particular cases will impinge on or refine broad policy emanating from a Minister'.

[51] Ibid.

[52] Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2010) 152.

[53] However, as explained in Chapter Two, they are functionally the same.

discretion to promote the consistency of administrative decision-making without compromising the requirement for an individualised assessment of the merits of each case.

Moreover, it contends that the development by the AAT of soft law guidance would be consistent with its intended, although largely unrealised, normative role within the administrative justice system.[54] The Guidance Decision provision of the *Migration Act*[55] provides express legislative authority for the exercise by the AAT of its soft law-making function, specifically in the context of protection visa decisions.

3.4 Comparative soft law-making practices

Chapters Five and Six detail the protection status functions of the Canadian Immigration and Refugee Board (IRB) and the United Kingdom Upper Tribunal (Immigration and Asylum Chamber) (UTIAC). Both tribunals are authorised by legislation to develop guidance which is used by decision-makers tasked with protection status determination in their respective jurisdictions. This guidance identifies risk groups and individuals with a risk profile in specified countries that are recognised as prima facie entitling them to the protection of the relevant State. In Canada, the IRB Chairperson is authorised by legislation to identify Jurisprudential Guides which IRB members assessing claims involving the same issues and similar facts are encouraged to follow.[56] In the United Kingdom, the UTIAC produces Country Guidance which is authoritative in any subsequent appeal and incorporated into the policy guidance of the Home Office.[57] The primary objective of the development of guidance by these tribunals is to promote consistency and predictability in protection status decision-making. The superior courts in both jurisdictions have endorsed the guidance practices of the UTIAC and IRB, subject to certain safeguards and compliance with

---

[54] See discussion in Chapter Two. Cane, McDonald and Rundle observe that 'the tribunal understands its prime function in terms of doing justice in individual cases, not establishing general norms of good decision-making.' Peter Cane, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (3rd edition, OUP, 2018), 282 citing *Re Presmint Pty Ltd and Australian Fisheries Management Authority* (1995) 39 ALD 625.

[55] Section 420B *Migration Act 1958 (Cth).*

[56] Section 159(1)(h) *Immigration and Refugee Protection Act* 2002 SC 2001, c.27. See discussion in Chapter Five.

[57] Section 107(3) of the *Nationality, Immigration and Asylum Act 2002.* See discussion in Chapter Six.

administrative law norms, and have recognised their role in promoting consistent and efficient protection status decision-making.

4. Research questions

The thesis addresses the following research questions:

1. What are the theoretical, legal and jurisprudential foundations for the potential development by the AAT of soft law guidance to structure the discretions associated with protection visa decision-making?

2. What procedures should the AAT adopt to facilitate the development by it of soft law guidance, specifically Guidance Decisions in its protection visa jurisdiction under section 420B *Migration Act*?

3. What is the legal status of Guidance Decisions and how should they be developed and applied consistently with administrative law norms and broader conceptions of legitimacy?

5. Methodology and motivation for the research

5.1 Research method

The methodology adopted in this thesis is primarily doctrinal research. Its focus is the powers and functions of the AAT and the jurisprudence relevant to the AAT's capacity to develop soft law guidance for administrative decision-making, specifically in its protection visa jurisdiction. It examines the legal framework and processes for the determination of protection status in Australia, with particular attention to the discretions associated with the gathering and assessment of evidence to determine whether an applicant for protection faces a risk of persecution or serious harm on return to their country. These matters are considered in the broader theoretical framework in Chapter One, namely the extent to which discretion can and should be structured so as to limit the potential for inconsistent, arbitrary or capricious decision-making. The specific normative tool to structure administrative discretion that is studied in this thesis is soft law. This thesis undertakes reform-oriented research and analysis in that it examines the potential for the AAT to

develop soft law guidance to structure the discretions relevant to the making of protection visa decisions. It proposes a procedure for the production by the AAT of Guidance Decisions to promote consistency and efficiency in protection visa decision-making, and to facilitate its intended normative role within the Australian administrative justice system.

Whereas the development and use of guidance by the UTIAC in the United Kingdom and the IRB in Canada are the subject of analysis in Chapters Five and Six, the thesis does not employ a comparative methodology as such. That is, the aim is not to compare the legal framework for the assessment of protection status in these jurisdictions with those in Australia, nor the practices and procedures of these two tribunals with those of the AAT. The consideration in this thesis of the powers and functions of these tribunals is for the limited purpose of considering the range of methods that have been adopted by these tribunals for the production of soft law guidance for protection status decision-making. The IRB and UTIAC are differently situated to the AAT both in their respective places in the constitutional systems and in the protection status decision-making processes of each country. The IRB is a primary decision-maker constitutionally located in the executive branch, and the UTIAC is an appellate body situated within the judicial branch of government.[58] However, both tribunals have been invested by legislation with the authority to produce soft law guidance to guide decision-makers tasked with making assessments of claimants' eligibility for protection status that closely resembles the power conferred on the AAT by the *Migration Act* to identify Guidance Decisions. This thesis examines the guidance practices of the UK and Canadian tribunals primarily for reason that they provide a useful model for the development of a procedure for the identification of Guidance Decisions under the *Migration Act,* and highlight the potential legal issues with respect to their formulation and application.

5.2 Motivation for the research

My interest in this research topic first arose during the term I served as a Senator for South Australia in the Commonwealth Parliament from 2002-2008. I was a member of the Senate Legal and Constitutional Affairs Committee and participated in the Committee's broad-

[58] See discussion in Chapters Five and Six.

ranging inquiry in 2006 into the *Administration and Operation of the Migration Act*.[59] During the hearings for this inquiry I became aware of the shortcomings in the protection visa decision-making processes of the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) and the Refugee Review Tribunal (RRT). Submissions made to the Committee drew attention to these deficiencies, particularly the practices for gathering and assessing country information, and the concerning inconsistencies in decisional outcomes for applicants with similar protection claims.

Another experience that contributed significantly to the research is my five-year appointment as a Senior Member of the Migration Review Tribunal and Refugee Review Tribunal (MRT-RRT) from 2009 to 2014. During this period, I conducted numerous reviews of primary protection visa decisions made in relation to applicants from a range of countries including China, India, Egypt, Syria, Sierra Leone, Rwanda, Cameroon, Democratic Republic of Congo, Myanmar, Malaysia, Indonesia, Fiji and Tonga. My role as a Tribunal Member sparked my interest in measures for addressing decisional inconsistencies, particularly between Tribunal decision-makers. I became aware from reading RRT decisions, discussions with Members, and feedback from applicants and representatives of a perceived if not actual lack of consistency in decisional outcomes for applicants with similar claims. I found it surprising that the Tribunal had not adopted measures or established systems to identify and address decisional inconsistencies. I became curious about how similar jurisdictions have tackled what my inquiries revealed is a common criticism of protection status determination processes.

To build on my knowledge and understanding of the protection status systems in Canada and the United Kingdom I observed hearings and met with staff and Members of the IRB and UTIAC Judges. In February 2013, I observed the UTIAC hearing of the Country Guidance decision in *GJ and Others (post-civil war: returnees) Sri Lanka (CG)* at Field House in London. I had the opportunity to informally discuss the proceedings with two of the presiding Upper Tribunal Judges, Judge Judith Gleeson and Judge Bernard Dawson. In May 2017, I visited the IRB in Toronto and met with senior legal officers including David Vinokur, General Counsel

[59] Senate Legal and Constitutional References Committee *Administration and Operation of the Migration Act 1958*, Report, March 2006.

and John Hutchings, Legal Counsel, to discuss the development and use by the IRB of Jurisprudential Guides. I also observed a hearing of the Refugee Protection Division involving claims by applicants from Serbia.

6. The contribution of this research

This thesis fills a gap in the existing academic literature by examining the legal basis and jurisprudential foundations for the potential development by the AAT of soft law guidance to structure the discretions associated with protection visa decision-making, and situating these within the theoretical framework and legal scholarship in relation to the law-discretion dichotomy. There is considerable academic literature which examines the jurisprudence and legal principles relevant to the *application* by the AAT of government policy in making decisions on review.[60] The related but different issue of the *development* by the AAT of its own soft law guidance has received very limited academic attention.[61] This thesis is the first to examine the legality and legitimacy of the development of soft law by the AAT, specifically Guidance Decisions, to structure the wide discretions conferred on protection visa decision-makers so as to reduce inconsistent outcomes and enhance efficiency and predictability in this critical area of administrative decision-making. The primary contribution of the thesis to the existing scholarship and to the practical operations of the AAT is the proposal outlined in Chapter Seven of a procedure for the AAT to identify Guidance Decisions as it is authorised to do under the *Migration Act,* which will both facilitate the performance of its normative function and withstand judicial scrutiny.

7. Structure of the thesis

Chapter One locates the thesis within the theoretical framework and legal scholarship in relation to the law-discretion dichotomy, which regards discretion with suspicion and as requiring control by the imposition of rules. It reviews the existing academic literature in relation to the nature, development and use of soft law as a means by which discretion can be structured and controlled in order to reduce inconsistent and unpredictable

---

[60] See literature cited in Chapter Two [4.1].

[61] See literature cited in Chapter Two [4.3].

administrative decision-making. Chapter Two outlines the jurisprudence and existing legal scholarship in relation to the potential for development by the AAT of soft law norms for administrative decision-making, and identifies the gaps that exist in this legal knowledge which the thesis seeks to fill. Chapter Three examines the legal framework and processes under the *Migration Act* for the assessment and determination of the eligibility of applicants for the grant of a protection visa. Chapter Four details the nature and extent of the inconsistencies that empirical research confirms are prevalent in protection visa decision-making, and the 'top-down' measures which have been imposed by government in an attempt to reduce inconsistent decision-making. The most recent of these measures is the 2015 amendments to the *Migration Act* to permit the AAT President or Migration and Refugee Division Head to direct that a decision be a Guidance Decision.

Chapters Five and Six examine the guidance practices adopted by the IRB in Canada and the UTIAC in the United Kingdom. Chapter Five outlines the soft law measures the IRB has utilised to promote consistent decision-making in its protection jurisdiction, specifically Lead Cases, Persuasive Decisions and Jurisprudential Guides. The recent Federal Court litigation challenging IRB Jurisprudential Guides is analysed, particularly the observations made by the Federal Court of Appeal in relation to the consistency of Jurisprudential Guides with administrative law norms. Chapter Six describes the system of Country Guidance (CG) in the United Kingdom established by the UTIAC in 2001, and given a statutory basis in 2004, to address concerns about inconsistent outcomes in appeals involving applicants with similar claims for protection. It outlines the process by which CG is produced, the content of CG, and its application in subsequent cases. It examines the jurisprudence which has recognised the legal validity of CG, and the legal scholarship which has assessed the effectiveness and legitimacy of soft law-making by the UTIAC.

Chapter Seven details a procedure for the identification by the AAT of Guidance Decisions under the power conferred by s 420B *Migration Act*. It makes recommendations for the various stages of the production of Guidance Decisions including selection of the review to be the vehicle for the Guidance Decision, composition of the AAT panel, conduct of the review, including the hearing process, participation in the proceedings by the Minister, the applicant's entitlement to legal representation and to call and cross-examine witnesses, lay and expert evidence, and the involvement of interested third parties. It makes suggestions

for the substantive content of Guidance Decisions, and how they may be applied in subsequent reviews and incorporated into DHA policy manuals. The potential for legal challenges to Guidance Decisions is explored, particularly whether they are consistent with administrative law norms. Finally, the legitimacy of AAT Guidance Decisions is assessed, particularly whether the process for their production can provide adequate opportunity to those interested in and affected by Guidance Decisions to participate in their development.

8. Limits of the research

The thesis examines the on-shore protection visa system in Australia, but does not include the 'fast track system' and reviews by the Immigration Assessment Authority of primary protection visa decisions.[62] It does not purport to be a comprehensive examination of the legislation and jurisprudence surrounding protection visa decision-making in Australia, or the principles of international refugee law. The theoretical framework for the study of AAT soft law guidance to structure administrative discretion is the law-discretion dichotomy, and accordingly the thesis is grounded in administrative law theory, principles and practice. It does not attempt to consider the contribution of soft law guidance developed by the AAT, UTIAC or IRB to international refugee law, including whether it is consistent with the requirement for an individualised assessment of protection claims. Nor does it consider soft law developed by international bodies and organisations such as UNHCR and EASO for use by protection status decision-makers.

9. Significance of the research

This thesis is the first to comprehensively examine and firmly anchor in administrative law theory and jurisprudence the AAT's potential function to develop soft law guidance, specifically to structure discretion to promote consistent administrative decision-making. This is undertaken through an analysis of protection visa decision-making under the *Migration Act*. With reference to the guidance practices of tribunals in the United Kingdom and Canada, the thesis develops a structured procedure for the identification and use of AAT Guidance Decisions, which is both functional and well-insulated against legal challenge.

[62] Under Part 7AA *Migration Act*.

Chapter One

Soft Law to Structure Administrative Discretion:

Theoretical Context and Academic Literature

This Chapter situates the thesis within the theoretical framework and legal scholarship in relation to the 'law-discretion dichotomy'.[1] The conferral of discretion on public officials is central to the effective functioning of a contemporary government. The Diceyan view that discretion is incompatible with the rule of law[2] does not reflect the realities of the modern state,[3] and it is now well understood that 'discretion can be exercised other than arbitrarily.'[4] However, under a strict legal paradigm, 'discretion is considered as behaviour that is unpredictable because it is not directed by rules and [it] therefore poses a threat to the consistency and legitimacy of judgments.'[5] The broad consensus amongst legal scholars, influenced by the important contribution of Kenneth Culp Davis in his highly influential work, *Discretionary Justice*,[6] is that 'discretion can and should be avoided as much as possible by filling gaps in statutory standards and by using legal control instruments.'[7] This thesis largely adopts the views of Davis, who argued discretion should be structured so as to control its exercise in an orderly fashion. He proposed this be achieved by the incremental development of a body of 'rules'.[8] The Chapter outlines the legal scholarship in relation to

---

[1] The term 'law-discretion dichotomy' is used in this Chapter to refer to the 'clear distinction made between rules and discretion that is made in the legal paradigm.' Peter Mascini, 'Discretion from a Legal Perspective' in Tony Evans and Peter Hupe (eds) *Discretion and the Quest for Controlled Freedom* (Springer, 2019) 121, 126. Harry Arthurs describes this as the 'juxtaposition of law and discretion' which underlies the Diceyan antipathy to discretion. HW Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17 *Osgoode Hall Law Journal* 1, 23. Thomas observes that the 'rules and discretion' debate is central to administrative law: Robert Thomas, 'Agency rule-making, rule-type, and immigration administration' [2013] *Public Law* 135, 135 citing Carol Harlow and Richard Rawlings, *Law and Administration*, (3rd edition, Cambridge, Cambridge University Press, 2009) chapter 5.

[2] See discussion in [2.1].

[3] As Weeks explains, 'the functions of government have long since moved beyond what the legislature has the capacity to handle alone.' Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016) 32 ('Soft Law').

[4] Ibid 30.

[5] Mascini (n1) 124.

[6] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge, Louisiana State University Press, 1969).

[7] Mascini (n1) 124.

[8] Davis (n6) 60.

the nature and use of soft law, which this thesis argues is a useful tool by which discretion can be structured and thereby controlled. In the Chapters that follow, the thesis details the jurisprudential foundations and legislative provisions which authorise the AAT to develop soft law guidance to structure the discretions associated with protection visa decision-making. It argues that soft law guidance, specifically Guidance Decisions under the *Migration Act 1958 (Cth),* should be identified or produced by the AAT to promote consistent and predictable outcomes for protection visa decisions.

1. The Nature and Uses of Discretion

Administrative discretion is 'a central and inevitable part' of a modern government.[9] Governments rely on express grants of discretionary power to administrative officials to implement their legislative programs and policy priorities.[10] Discretion is the 'decision space'[11] within the limits of the powers conferred on administrative officials in which they have autonomy to choose from a range of permissible outcomes.[12]

---

[9] Keith Hawkins, 'The Use of Legal Discretion; Perspectives from Law and Social Science' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1992) 11. Margaret Allars writes that '[t]he modern state is characterised by the increased conferral of discretionary powers upon administrators and a growth in state regulation of human affairs.' These powers are conferred 'on account of the difficulty of the subject matter or the need for flexibility in adapting policy to rapidly changing social conditions or case-by-case adjudication of claims.' Margaret Allars, *Introduction to Australian Administrative Law* (Butterworths, 1990) 10.

[10] As Geneviève Cartier explains administrative discretion was 'a relatively minor phenomenon' at the turn of the twentieth century. However, this changed with the emergence and growth of the welfare state, and the proliferation of legislation aimed at alleviating social inequality, which required decisions to be made in a context of distributive justice. As state intervention in the lives of citizens increased, governments 'needed a variety of flexible tools and considerable leeway for action in order to give concrete expression' to its policy priorities. Decision-making authority was conferred on administrative officials on the basis of vague or open-ended criteria, which resulted in 'a dramatic expansion' in the exercise of discretionary power. See Geneviève Cartier, 'Administrative Discretion: Between Exercising Power and Conducting Dialogue' in Colleen Flood and Lorne Sossin (eds) *Administrative Law in Context* (2nd edition, Emond Montgomery Publications, 2013) 385 ('Administrative Discretion'); Geneviève Cartier, 'Administrative Discretion and the Spirit of Legality: From Theory to Practice' (2009) 24(3) *Canadian Journal of Law and Society* 214, 215 ('Spirit of Legality').

[11] Mascini (n1) 122. Keith Hawkins refers to discretion as 'the space … between legal rules in which legal actors may exercise choice' which may be formally granted or assumed: Hawkins (n9) 11.

[12] Ibid.

1.1 The uses of administrative discretion

Parliament invests discretion in administrative decision-makers for two primary purposes: first, to decide individual cases and secondly, to develop rules or norms.[13] In relation to the first use of discretion, Parliament may confer discretion on decision-makers so that they have the flexibility required to implement a legislative scheme to the range of individual circumstances and conduct to be regulated within a field of regulation. As Geneviève Cartier explains, Parliament cannot always foresee the range of situations that may arise for decision within the relevant field, and therefore it chooses to confer on decision-makers the authority they require to determine each individual matter according to their own understanding and appreciation of the particular circumstances.[14] In *Discretionary Justice,* KC Davis outlined this 'individualised justice' justification for the conferral of discretion:

> Even when rules can be written, discretion is often better. Rules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases. The justification for discretion is often the need for individualized justice. This is so in the judicial process as well as in the administrative process.[15]

A second reason for the conferral by Parliament of discretion on administrative decision-makers is because it may not have the necessary expertise or knowledge required 'to craft the norms that should apply in any given area of activity'.[16] In these circumstances, Parliament may confer authority to develop appropriate norms on administrative decision-makers who possess the required knowledge and expertise.[17] These two uses by Parliament of the conferral of discretion on administrative decision-makers are the focus of this thesis, specifically in the context of the implementation of a government's international non-refoulement obligations through the recognition of the protection status of eligible

---

[13] Cartier 'Administrative Discretion' (n10) 384. Schneider terms these 'two large categories of discretion' as 'discretion to decide cases' and 'discretion to make rules': Carl E Schneider, 'Discretion and Rules A Lawyer's View in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1992) 51.

[14] Ibid 385.

[15] Davis (n6) 17. Groves overserves that '[t]his reasoning conceives of discretion as a vehicle to reach individual justice and tacitly suggests the rationale for judicial and administrative discretion is one and the same – fairness in the case at hand: Matthew Groves, 'The Return of the (Almost) Absolute Statutory Discretion' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 131.

[16] Cartier 'Administrative Discretion' (n10) 383.

[17] Ibid.

applicants. The particular discretions conferred on decision-makers tasked with making protection status determinations are outlined in Chapter Three. Chapters Five, Six and Seven describe the development by tribunals of soft law guidance to structure discretion in the context of protection status determination. The next sections of this Chapter examine the nature and limits of discretion, and why contemporary legal scholars have argued that it should be structured and thereby controlled.

1.2 Discerning the boundaries of discretion

The classic description of the nature of discretion is that expounded by the legal philosopher, Ronald Dworkin, who described discretion as 'like the hole in a doughnut': it 'does not exist except as an area left open by a surrounding belt of restriction.'[18] This description emphasises that discretion is a 'relative concept', which 'takes its meaning from a context of rules or standards'.[19] As Anna Pratt and Lorne Sossin observe, Dworkin's 'doughnut analogy' encapsulates the 'conventional paradigm of discretion'.[20] According to this construct, 'where the law ends, discretion begins.'[21] Embedded in it are three key assumptions: first, that law is the primary instrument of social regulation, secondly that discretion is a residual category of law, and thirdly, that discretion is exercised by decision-makers who are essentially autonomous.[22]

In *Discretionary Powers: A Legal Study of Official Discretion*,[23] Denis Galligan argued that Dworkin's doughnut metaphor 'can misleadingly convey' the impression there is a clear boundary between discretion and its surrounding legal standards.[24] Galligan explained that

---

[18] Ronald Dworkin, *Taking Rights Seriously* (Duckworth, London 2005), 31. The dough represents decisions prescribed by rules; the hole is the area where decisions relate to situations where the rules do not apply: Mascini (n1) 123.

[19] Dworkin wrote, 'It is therefore a relative concept. It always makes sense to ask, Discretion under which standards? or Discretion under which authority?'. Discussed in Hawkins (n9) 14.

[20] Anna Pratt and Lorne Sossin, 'A Brief Introduction of the Puzzle of Discretion', (2009) 24(3) *Canadian Journal of Law and Society* 301, 302.

[21] Ibid.

[22] Ibid 301. Matthew Groves writes that Dworkin's description 'defines discretion by the absence of other things. Where there is no restriction, there is discretion. On this view, discretion is the public law equivalent of dark matter.' Groves (n15) 129.

[23] Denis Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, 1986).

[24] Hawkins (n9) 14 citing Galligan (n23) 32.

'discretion occurs at a variety of points within any exercise of power.'[25] He pointed out that even when legal standards are prescribed, multiple decisions may be possible. It follows that whereas 'in the clearest and strongest cases of discretion' the division between rules and discretion is apparent, 'more typically the two are interwoven, with discretion occurring where there are gaps in the standards, or where the standards are vague, abstract, or in conflict.'[26] Galligan argued that, in its broadest sense, discretion denotes 'a sphere of autonomy' within which decisions are 'in some degree a matter of personal judgment and assessment.'[27] The decision-maker has 'significant scope for settling the reasons and standards according to which that power is to be exercised, and for applying them in the making of specific decisions.'[28] As explained in Chapter Three, Galligan's account of the core elements of discretion aptly describes the process and the autonomy exercised by protection status decision-makers when making the assessments necessary for determining an applicant's eligibility for protection status.

1.3 Types of discretion

According to Dworkin, there are three types of discretion; two 'weak' and one 'strong'.[29] The first 'weak' sense is 'discretion as judgment', which occurs 'where the decision-maker applies a standard which cannot be applied mechanically because it contains open-textured or vague words.'[30] Discretion is 'attributed to the imprecision or ambiguity of law' and

---

[25] Galligan (n23) 32. See also Jowell who argued '[d]iscretion is rarely absolute, and rarely absent. It is a matter of degree, and ranges along a continuum between high and low. Where he (sic) has a high degree of discretion, the decision-maker will normally be guided by reference to such vague standards as 'public interest' and 'fair and reasonable'. Where his (sic) discretion is low, the decision-maker will be limited by rules that do not allow much scope for interpretation.' Jeffrey Jowell, 'The Legal Control of Administrative Discretion' [1973] *Public Law* 178, 201.

[26] Galligan (n23).

[27] Ibid 6. Discussed in Nicola Lacey, 'The Jurisprudence of Discretion' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1992) 366.

[28] Ibid 21. Goodin suggests, 'an official may be said to have discretion if and only if he (sic) is empowered to pursue some social goal(s) in the context of individual cases in such a way as he (sic) judges to be best calculated in the circumstances to promote those goals': Robert Goodin, 'Welfare Rights and Discretion' (1986) 6 *Oxford Journal of Legal Studies* 232, 233.

[29] Dworkin (n18) 31-33.

[30] Ibid 31; Discussed in Allars (n9) 13; Schneider (n13) 50

requires the decision-maker to make a choice between alternatives.[31] A second type of 'weak' discretion is 'discretion as finality' where the decision-maker has the final authority to make a decision which thereafter cannot be altered or set aside by another authority.[32] The third type of discretion is 'strong' discretion where the decision-maker is not bound by the standards set by any authority and 'may choose from amongst a number of norms the rule or policy to be applied to the facts.'[33]

Galligan explained that a decision-maker not only has discretion at the end of a decision-making process when the outcome is determined, but also at various points throughout the process. The finding of facts and the application of standards to those facts are key aspects of the decision-making process and often involve discretionary judgements. In relation to factual findings, Galligan wrote:

> Findings of fact are a mixture of evidence and perceptions and understandings about the world, and the characterization of that evidence into concepts and categories which are themselves often imprecise. The drawing of factual inferences from the evidence is itself, therefore, an imprecise and variable process.[34]

In relation to the application of standards to findings of fact, Galligan observed that this 'is also a matter of assessment and judgment, and … open to variable conclusions.'[35] He conceded that '[i]t might be considered inappropriate to describe as discretionary the

---

[31] This sense of discretion is recognised by HLA Hart in *The Concept of Law* (Oxford University Press, 1969) 124-132. Hart views discretion as inevitable because the language on which law is based is sometimes indeterminate, rules cannot predict everything and it is not possible to objectively weigh goals: Mascini (n1) 125 citing Geoffrey C Shaw (2013) 'HLA Hart's lost essay: Discretion and the Legal Process School' (2013) *Harvard Law Review*, 666, 703.

[32] Dworkin (n18) 31-32. Discussed in Vijaya Nagarajan, 'Discourses on Discretion and the Regulatory Agency' in *Discretion and Public Benefit in a Regulatory Agency* (ANU Press, 2013) 133.

[33] Galligan suggests that for Dworkin, 'discretion in this sense does not exist as there are always existing principles, such as rationality and fairness, that govern any decision: Galligan (n23) 20. Allars (n9) 13 states it is arguable that Dworkin's strong discretion is not distinct from weak discretion as judgment' citing Kent Greenwalt, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges' (1975) 75 *Columbia Law Review* 359, 366 and Galligan (n23) 14-20.

[34] Ibid 33.

[35] Ibid.

finding of facts and the application to them of given standards.[36] However, whereas the decision-maker is not entitled to choose or select facts,

> facts can be ascertained only by imperfect means, relying on imperfect procedures – the evidence of others, one's own perceptions and understandings, and the classification of those perceptions.[37]

He concluded that it therefore makes sense 'to accept that any decision requires assessment and judgment, both in fixing the methods for eliciting the facts and in deciding how much evidence is sufficient.'[38] Accordingly, there is some justification for referring to 'discretion in settling the facts.'[39] Similarly, in relation to the application of standards to the facts, Galligan explained that the decision-maker must 'settle both the meaning of the standard and the characterization of the facts in terms of that meaning.'[40] Therefore, 'it is not inapt to detect in this an element of discretion' in that 'there is finally no criterion of correctness other than the tutored judgment of reasonable persons.'[41] Consequently,

> [i]n so far as it is appropriate to talk of discretion here, it is discretion that results from the inherent qualities, and in a sense imperfections, of human decision-making, as well as the elements of subjective judgment and evaluation that are irremovably part of the search for facts and the application of standards.[42]

This thesis is concerned with the types of discretion exercised by administrative officials identified by Dworkin and Galligan, particularly in the context of protection status decision-making. As explained in Chapter Three, the fact finding and evidentiary and risk assessment tasks associated with determining protection status claims encompass wide discretions which allow decision-makers considerable autonomy to determine outcomes.[43] The next section considers the debates in the academic literature surrounding discretion to discern

---

[36] Galligan stated that Dworkin's second send of weak discretion is suitable in this context since there is discretion only in the sense that whatever decision is made is likely to be regarded as final: Ibid 34.

[37] Ibid.

[38] Ibid 34-35

[39] Ibid 35.

[40] Ibid.

[41] Ibid.

[42] Ibid.

[43] See discussion in Chapter Three.

the limits, if any, that constrain decision-makers' autonomous choice when exercising discretion.

2. The Debate on Discretion

Academic debate in relation to discretion is broadly divided between those scholars who associate it with arbitrariness and inimical to the rule of law, and those who regard it as acceptable provided that it is controlled, including by structuring its exercise according to pre-determined norms or standards developed by the administrative branch.

2.1 Discretion as arbitrariness

The classic scholarly view critical of discretion was articulated by A.V Dicey in his seminal work, *Introduction to the Study of the Law of the Constitution*, first published in 1885.[44] Dicey associated discretion with arbitrary power and regarded it as the 'antithesis of law'.[45] Discretion was incompatible with his conception of the rule of law which meant,

> … the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, or prerogative, or even of wide discretionary authority on the part of the government.[46]

In Dicey's view, 'wherever there is discretion there is room for arbitrariness … discretionary authority on the part of the government must mean insecurity for legal freedom on the part

---

[44] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (1915; reprint, MacMillan, 1975). Dicey's views in relation to the dangers of discretionary power have been highly influential. HW Arthurs (n1) 23. Greg Weeks observes that they 'had the effect of making suspicion of discretionary power a cornerstone principle of administrative law, in both England and America.' Weeks observes that they 'had the effect of making suspicion of discretionary power a cornerstone principle of administrative law, in both England and America.' Weeks 'Soft Law' (n3) 26 citing John Dickinson, *Administrative Justice and the Supremacy of Law* (Cambridge MA, Harvard University Press, 1927), 35. According to Stebbings, Dicey's views and influence 'undermined' non-judicial administrative adjudication and delayed the development of English administrative law by at least 50 years: Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth Century England* (Cambridge University Press, 2009) 108 cited in Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2009) 36 ('Administrative Tribunals'). Wade and Forsyth go further, arguing that Dicey's criticisms resulted in 'generations of lawyers … being brought up to believe … that administrative law was repugnant to the British constitution': HWR Wade and C Forsyth, *Administrative Law*, (11th edition, Oxford University Press, 2014) 14.

[45] Dicey 188. See also Arthurs (n1) 22; Weeks 'Soft Law' (n3) 26; Cartier 'Administrative Discretion' (n10). See further Carol Harlow and Richard Rawlings, *Law and Administration*, (3rd edition, Cambridge University Press, 2009) 17 ('Law and Administration'*).*

[46] Ibid 202.

of its subjects.'[47] F.A Von Hayek added his voice in support of the Diceyan view in *The Road to Serfdom* published in 1944.[48] He argued that discretion, with its absence of pre-announced rules, prevented citizens from knowing how the state will use its coercive power and was therefore contrary to the rule of law.[49]

Contemporary scholars also have highlighted 'the lack of transparency and opportunities for arbitrariness in discretionary decision-making.'[50] Robert Goodin, for example,[51] argued that discretion allows decision-makers to act improperly, encouraged error, and permits substitution of the decision-maker's own personal standards for 'public, legal standards', 'opening the way to the "corrupting influences" of naked power.'[52] Academics also have identified the potential for the subjectivism inherent in discretion to lead to inconsistency in decisional outcomes; apparently similar cases not being treated alike by decision-makers, as contributing to injustice. As Harvard legal scholar Robert Mnookin has observed, '[i]ndeterminate standards … pose an obviously greater risk of violating the fundamental precept that like cases should be treated alike.'[53]

2.2 Controlling 'necessary' discretion

Most prominent amongst scholars concerned with the potential injustice of discretion is KC Davis. His influential work, *Discretionary Justice,* first published in 1969*,* provided a critique of the extent and exercise of discretionary power, particularly the 'fundamental justice' of discretionary determinations.[54] Davis described Dicey's approach to discretionary powers

---

[47] Ibid 188.

[48] FA Von Hayek, *The Road to Serfdom* (University of Chicago Press, 1944) 80ff.

[49] Ibid 72, 80.

[50] Harlow and Rawlings 'Law and Administration' (n45) 208 citing Michael Partington, 'Rules and discretion in British social security law' in Franz Gamillsheg et al (ed), *In Memoriam Sir Otto Kahn Freund* (Stevens, 1980) 621.

[51] Goodin (n28) 242ff.

[52] Carol Harlow, 'Law and Public Administration: Convergence and Symbiosis' (2005) 79(2) *International Review of Administrative Sciences* 279, 285 citing Goodin (n28). See also Carl Schneider (n13) 74.

[53] Robert Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) *Law and Contemporary Problems* 226, 263 cited in Schneider (n13) 74.

[54] Davis (n6) cited in Hawkins (n9) 16.

as 'the extravagant version of the rule of law',[55] and while accepting the value of discretion, he was highly sceptical of it and consistently warned of its dangers.[56] Davis was 'more of a realist'[57] in that he recognised that officials require a degree of discretion, but was concerned with what he regarded as the significant amount of 'unnecessary discretionary power'.[58] The degree of this discretion depended not only on that granted to administrators 'but also on what they do to enlarge their powers.'[59]

Davis argued that broad discretionary power be 'confined' according to procedural standards,[60] 'structured' by recourse to rules so as to control its exercise in an orderly fashion,[61] and 'checked' by means of the review of the decisions of one administrative decision-maker by another 'as a protection against arbitrariness'.[62] Davis recognised that the acts of confining and structuring discretion 'may overlap'.[63] But he explained that they serve different objectives, because the 'purpose of confining is to keep discretionary power *within* designated boundaries' and the 'purpose of structuring is to control the *manner* of the exercise of discretionary power *within* the boundaries'.[64] Davis' concern was with the control of discretion to achieve 'justice' in the individual case.[65] Matthew Groves points out that the use of the word 'possible' in Davis' often cited statement that an official has discretion 'whenever the effective limits of power leave him free to make a choice among possible courses of action and inaction' equates discretion with choice, but requires that

---

[55] Ibid 28, 29.

[56] Ibid 3, 25. Davis argued that perhaps ninety percent of injustice flowed from discretion; cited in Robert Thomas, 'Agency Rule-making, Rule-type, and Immigration Administration' [2013] Public Law 135, 135.

[57] Groves (n15) 130.

[58] Davis (n6) 3-4, 217. Davis conceded that discretion is valuable but considered that much of the discretion that existed was unnecessary and should be eliminated. He stated that 'half the problem to cut back *unnecessary* discretionary power. The other half is to find effective ways to control *necessary* discretionary power.' (51, emphases in the original) cited in Groves (n15) 130. See also discussion in Aileen McHarg, 'Administrative Discretion, Administrative Rule-making, and Judicial Review' (2017) 70 *Current Legal Problems* 267, 268.

[59] Ibid 215.

[60] Ibid 55.

[61] Ibid 97ff.

[62] Ibid 142.

[63] Ibid, 97.

[64] Ibid emphases added cited in Weeks 'Soft Law' (n3) 33.

[65] Ibid 142.

choices are made within (undefined) limits.[66] Viewed in this way, discretion 'is not freedom at large. It is controlled freedom, even if those controls are not easily visible …'.[67]

As Hawkins observed, the impact of Davis' work was amplified by his recognition of 'the reality that justice to individual parties is administered more outside courts that in them.'[68] Davis was concerned to shine a light in the 'dark and windowless' areas of administration and 'to penetrate the unpleasant areas of discretionary determinations' including by police and immigration officials, 'where huge concentrations of injustice invite drastic reforms.'[69] As Galligan recognised, Davis' primary concerns lay in the potential unfairness and arbitrariness of discretion: 'unfairness in the sense that similar situations are treated differently; and arbitrariness in the sense that extraneous matters are take into account.'[70]

More than five decades since its publication, two of Davis' recommendations for the tripartite control of discretion are well-established features of many administrative justice systems. As Weeks points out, Davis' proposal that discretion should be 'checked' is 'moot in the Australian federal context'[71] as a consequence of the extensive merits review jurisdiction of the Administrative Appeals Tribunal, discussed in Chapter Two. Furthermore, the well-established mechanisms for judicial review of administrative decisions ensures that discretionary power is 'confined' within designated boundaries and is exercised in accordance with legal limits. The third element of Davis' proposal for the control of discretion, namely that it be 'structured' by 'rules', has received less attention.

---

[66] Groves (n15) 130. Groves suggests that these limits are 'most probably … lawfulness (in the sense of being consistent with all applicable laws) and perhaps relevance or rationality (in the sense of each permissible choice being based upon relevant material.'

[67] Ibid 130.

[68] Davis (n6) 215 cited in Hawkins (n9) 16.

[69] Ibid cited in Harlow and Rawlings 'Law and Administration' (n45) 201.

[70] Galligan (n23) 167.

[71] Weeks 'Soft Law' (n3) 33. As Weeks explains, the AAT's jurisdiction in addition to 'super' tribunals in most States, 'means that there are institutionalised checking measures over executive discretionary decisions in addition to whatever internal review processes an administrative agency may have.'

2.3 Structuring discretion with rules

Davis regarded rules and discretion as occupying positions on a 'spectrum' of decision-making authority 'rather than being two mutually exclusive options'.[72] Unlike Dworkin who viewed discretion and rules as relational, Davis conceived of them in linear terms, believing it was possible 'not merely to choose between rules and discretion but to find the optimum point on the rule-to-discretion scale.'[73] Davis rejected the Diceyan preference for external judicial control of administrative discretion, and advocated for 'internal, administrative controls and the technique of rule-making'.[74] He argued for the incremental development by the executive of rules[75] or guidelines, if necessary on a case by case basis, characteristic of 'judicial' rule-making through precedents and the doctrine of *stare decisis*.[76] Davis contended that as rules are general, rule-making encourages 'comprehensive solutions' to problems that 'go beyond the facts of individual cases'.[77] It permits 'broader participation by stakeholders' and provided 'opportunities for public participation.'[78] Davis described bureaucratic rule-making as 'a miniature democratic process.'[79]

Whereas he recognised there is a role for the legislature to restrict discretion, Davis considered that this task should be performed primarily by the administration itself,

---

[72] Ibid citing Davis (n6) 15. Davis wrote '[l]aw and discretion are not separated by a sharp line but by a zone, much as night and day are separated by dawn.' Davis (n6) 106. See also France Houle and Lorne Sossin, 'Tribunals and Policy-Making: From Legitimacy to Fairness' in Laverne Jacobs and Anne Mactavish (eds), *Dialogue between Courts and Tribunals: Essays in Administrative Law and Justice 2001-2007* (Les Éditions Thémis, 2008) 93, 97. As Thomas observes, the 'rules and discretion' debate is central to administrative law: Robert Thomas, 'Agency Rule-making, Rule-type, and Immigration Administration' [2013] Public Law 135, 135 citing Harlow and Rawlings, 'Law and Administration' (n45*)* chapter 5.

[73] Davis (n6) 15 cited in Harlow and Rawlings 'Law and Administration' (n45) 203.

[74] Carol Harlow and Richard Rawlings, 'Proceduralism and Automation: Challenges to the Values of Administrative Law' in Elizabeth Fisher, Jeff King, Alison L Young (eds) *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press, 2020) 283 ('Proceduralism and Automation') point out that Davis was '[w]riting against the backdrop of the American Administrative Procedure Act with its emphasis on procedures for openness and stakeholder participation.'

[75] This was to be done in the form of 'rules', a word whose 'imprecision' Davis found 'unsatisfactory' but 'which limitations of the language compelled him to use.' Weeks 'Soft Law' (n3) 32 citing Davis (n6) 56 footnote 4.

[76] Weeks 'Soft Law' (n3) 30 citing Davis (n6) 57-60.

[77] Harlow and Rawlings 'Proceduralism and Automation' (n74) 283.

[78] Harlow and Rawlings 'Law and Administration' (n45) 201.

[79] Ibid; Harlow and Rawlings 'Proceduralism and Automation' (n74) 283.

encouraging it to 'structure' its discretion by formulating its policies as rules.[80] These rules would be used not only for use internally by decision-makers, but would also be made available to the public for its evaluation.[81] Davis envisaged a role for the courts 'to declare the appropriate extent to which administrative discretion should be structured by rules in order to satisfy the rule of law'.[82] Further, he saw a role for the courts 'to compel administrators to formulate rules which supply "the desired standards" if they fail to do so as a matter of their own initiative.'[83]

Davis 'created a new vocabulary of reform'[84] in his tripartite formula for the 'confining, structuring and checking' of discretionary power. His approach was regarded by administrative lawyers 'as advantageous in terms of both individual and collective fairness and effective policy development.'[85] Carol Harlow and Richard Rawlings observe that Davis' emphasis on rules could be readily reconciled with a model of 'rational administration'.[86] Rule-making was considered more efficient than individualised decision-making, thereby allowing agencies to 'accomplish their statutory objectives more expeditiously than incremental policy development through individuated, adjudicated decisions.'[87] The use of rules to structure discretion facilitated the implementation of policies that had received public approval and amounted to 'a more effective weapon for the control of administrative

---

[80] Davis (n6) 15. Discussed in Harlow and Rawlings 'Law and Administration' (n45) 202.

[81] Harlow and Rawlings 'Law and Administration' (n45) 202. As Harlow and Rawlings explain, '[b]ecause they were written down, rules could be made accessible to the public (transparent), allowing stakeholders to know their rights and the public to participate in change and reform. Davis believed not only that rule-making could be used to open up the administrative process to help eradicate illegal practices and procure fairer, more consistent decisions (accountability) but also, because rules were general, to encourage comprehensive solutions to problems that 'go beyond the facts of individual cases'. Harlow and Rawlings 'Proceduralism and Automation' (n74) 283.

[82] Weeks 'Soft Law' (n3) 32 citing Davis (n6) 50-51; 58.

[83] Ibid.

[84] Hawkins (n9) 17.

[85] Harlow and Rawlings 'Law and Administration' (n45) 201 citing William West, 'Administrative rule-making: An old and emerging literature' (2005) 65 *Public Administration Review* 655.

[86] Ibid 202 citing Herbert Simon's model of rational administration as outlined in his book *Administrative Behavior* (1947) discussed in Hawkins (n9) 21ff. See further Harlow and Rawlings 'Proceduralism and Automation' (n75) 280.

[87] Harlow and Rawlings 'Law and Administration' (n45) 202 citing Jerry Mashaw, *Bureaucratic Justice* (Yale University Press, 1983).

discretion' than supervision by the courts.[88] At a practical level, Davis 'saw the potential of rule-making for the internal and hierarchical control of bureaucracy and as a more consistent and effective control technique than the peripheral forays of courts.'[89]

Davis' proposals for the structuring of administrative discretion are central to the arguments made in this thesis. It contends that the wide discretions associated with fact finding, the evaluation of evidence and risk assessment in protection visa decision-making contribute to inconsistent and unpredictable outcomes. It argues that these can and should be structured by the incremental development of 'rules', specifically in the form of soft law guidance produced by tribunals, in the manner proposed by Davis.

2.4 Rules may augment discretion

Davis' approach has been criticised for being 'highly legalistic',[90] and preoccupied with individual justice at the expense of wider social justice concerns and collective interests.[91] Robert Baldwin was critical of Davis' hypothesis that pre-announced rules 'are the most appropriate way of regulating discretion':

> to structure or confine discretion at one point without attention to the shaping of that discretion often leads to the phenomenon of displacement. Squeeze in one place and, like a tube of toothpaste, discretion will bulge at another.[92]

According to Baldwin, the imposition of rules on the exercise of discretionary power to provide greater structure may have the effect of increasing rather than limiting discretion.[93]

---

[88] Ibid. Hawkins notes that Davis' writings reflected the civil rights and legal movements occurring at the time in the United States, which were concerned with 'the establishment and clarification of the rights for citizens in their dealings with government: Hawkins (n9) 17. The reduction in bureaucratic discretion was a central element of this strategy, making decision-makers accountable to rules which should be consistently applied: Hawkins (n9) 17 citing Joel F Handler *The Conditions of Discretion: Autonomy, Community, Bureaucracy* (Russell Sage Foundation, 1986) 194-195.

[89] Harlow and Rawlings 'Proceduralism and Automation' (n75) 283.

[90] Robert Baldwin, *Rules and Government* (Clarendon Press, 1995) 21.

[91] Robert Baldwin and Keith Hawkins, 'Discretionary Justice: Davis Reconsidered' [1984] *Public Law* 570; Fleming (n34) 68; Robert Baldwin, 'Governing with Rules: The Developing Agenda' in Genevra Richardson and Hazel Genn (eds) *Administrative Law and Government Action* (Oxford University Press, 1994), 160.

[92] Baldwin (n90) 26, cited and discussed in Weeks 'Soft Law' (n3) 33.

[93] Ibid 23 discussed in Weeks 'Soft Law' (n3) 34.

As Weeks observes, this is because the development of 'a highly detailed, fact-specific body of rules' allows decision-makers to choose between applicable rules, thereby augmenting their discretion.[94] Accordingly, Weeks contends:

> Davis' proposal that a body of rules should be built up in the smallest increments necessary is flawed to the extent that it relies on the same factual scenarios recurring. Unless there is a high degree of factual recurrence in a particular area, the capacity to develop rules and also the value of those rules will be impaired by this method.[95]

As Weeks recognises, Davis' proposal for the incremental development of rules is best suited to administrative decision-making in jurisdictions where there are similar and recurring fact situations. One such jurisdiction is protection status decision-making in which, as Chapter Three explains, applicants from refugee-producing countries regularly present the same or similar claims for protection based on recurring factual scenarios.

In the next section, attention shifts to the concept of 'soft' law and how it can be developed and used to structure the exercise of administrative discretion. This thesis argues that soft law is an appropriate tool for the structuring of discretion in protection status determination systems which are characterised by recurring claims and factual scenarios. Further it contends that the tribunal process is a suitable forum for the production of soft law in the form of guidance for protection status decision-makers, specifically in relation to the individuals and groups at prima facie risk of refoulement.

3. Soft law to structure administrative discretion

Davis advocated that rules and guidelines designed to structure discretion could increase accountability and transparency in the decision-making process. He envisaged a 'spectrum of governance measures' applicable to discretionary authority, which were to be generated primarily by the executive. Writing in 2008, Canadian scholars Lorne Sossin and France Houle observed that Davis' 'bottom-up view of norm-production' is a 'phenomenon that is

---

[94] Weeks 'Soft Law' (n3) 34 contends that there is considerable support for this view including empirical evidence cited by Baldwin (n90) 23.

[95] Ibid, citing Davis (n6) 60 and Daniel J Gifford, 'Decisions, Decisional Referents and Administrative Justice' (1972) 37 *Law and Contemporary Problems* 3 cited in Baldwin (n90) 24.

increasingly apparent in the functioning of today's administrative tribunals.'[96] This thesis demonstrates that this phenomenon is also evident in the current tribunal practice in the United Kingdom and Canada of the development of soft law guidance to structure the discretions associated with protection status decision-making. The concept of soft law is central to this thesis which argues that it is a useful tool for structuring the discretions associated with protection status decision-making to address endemic inconsistencies. The particular type of soft law guidance examined in the thesis is protection visa Guidance Decisions, which the AAT is authorised to identify by section 420B of the *Migration Act*.

3.1 Defining soft law

Whereas soft law is 'an integral part of modern governance',[97] its role in domestic contexts has only become the subject of close attention in the academic literature relatively recently.[98] The concept was recognised as long ago as 1944 by English barrister, Robert Megarry. He wrote that whereas legal practitioners had been able to 'live with reasonable comfort and safety in a world bounded by Acts of Parliament, Statutory Rules and Orders

---

[96] Lorne Sossin and France Houle, 'Tribunals and Guidelines: Exploring the Relationships between Fairness and Legitimacy in Administrative Decision-Making' (2006) 46 *Canadian Public Administration* 283, 284.

[97] Greg Weeks and Linda Pearson, 'Planning and Soft Law' (2018) 24 *Australian Journal of Administrative Law* 252, 253.

[98] Greg Weeks, 'Soft Law and Public Liability: Beyond the Separation of Powers (2018) 39(2) *Adelaide Law Review* 303, 303 ('Separation of Powers'). Greg Weeks and Linda Pearson observed in their article published in 2018 that soft law 'has received only intermittent attention, almost entirely within the last decade.' Weeks and Pearson (n92) 253. For a comprehensive analysis of soft law see Greg Weeks 'Soft Law' (n3). The growing collection of academic publications on domestic soft law includes: Greg Weeks (n3), Greg Weeks, 'The Use and Enforcement of Soft Law by Australian Public Authorities' (2014) 42 *Federal Law Review* 181; Sas Ansari and Lorne Sossin, 'Legitimate Expectations in Canada: Soft Law and Tax Administration' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 293; Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1; Robin Creyke and John McMillan, 'Soft Law Versus Hard Law' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 377; Richard Rawlings, 'Soft Law Never Dies' in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015) 215; Jessika van der Sluijs, 'The Infrastructure of Normative Legitimacy in Domestic Soft Law - Sketching the Field' (2017) *62 Scandinavian Studies in Law* 245*;* Lorne Sossin and Charles W Smith, 'Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government' (2003) 40 *Alberta Law Review* 867. There is a broader literature on the growth and importance of soft law in international governance which is beyond the scope of this thesis: see for example, Joel Trachtman who defines soft law as 'rules ... that ... are: (i) nonbinding under formal international law ...; (ii) prepared in contexts similar to those in which binding international law is prepared; (iii) prepared in a form similar to that in which binding international law is prepared; and (iv) expected to affect state behavior.': Joel P Trachtman, *The Future of International Law: Global Government* (2013), 32; and Steven Schwarcz 'Soft Law as Governing Law' (2020) 104 *Minnesota Law Review* 2471.

and judicial decisions', this had become an 'expanding universe' due to the emergence of what he termed 'administrative quasi-legislation'.[99] This fell into two categories: 'the State-and-subject type, consisting of announcements by administrative bodies of the course which it is proposed to take in the administration of particular statutes',[100] and the 'subject-and-subject type, consisting of arrangements made by administrative bodies which affect the operation of the law between one subject and another.'[101] Megarry predicted that 'this kind of near-law will be with us for some years to come; in its benign form, that is to be hoped for, in its malignant form feared.'[102] As this thesis is concerned with administrative decision-making, its focus is Megarry's second category of 'administrative quasi-legislation', namely 'the State-and-subject type, consisting of announcements by administrative bodies of the course which it proposed to take in the administration of particular statutes'.[103]

A starting point for defining the modern concept of soft law is to contrast it with the 'hard' law that governs administrative decision-making and authorises administrative officials to make decisions or take action. Hard law encompasses Acts, regulations, and other forms of delegated legislation,[104] and judicial decisions.[105] Statutes and delegated legislation (primary and secondary legislation)[106] and court rulings are binding, enforceable and 'conclusively determinative of legal outcomes'[107] for administrative decision-makers. Soft

---

[99] Robert E Megarry, 'Administrative Quasi-Legislation' (1944) 60 *Law Quarterly Review* 125, 125-126. Paul Craig has traced the use of the term 'quasi-legislation' to the nineteenth century: Paul P Craig *Administrative Law* (Sweet & Maxwell, 8th ed, 2016) 469. Harry Arthurs gives examples of its use in Victorian England: HW Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press, 1985) 137. Discussed in Weeks 'Separation of Powers' (n98) 307. The term 'soft law' first entered the legal lexicon in England in 1986 with the publication of Robert Baldwin and John Houghton, 'Circular Arguments: The Status and Legitimacy of Administrative Rules' [1986] *Public Law* 239.

[100] Ibid 126.

[101] Ibid.

[102] Ibid 128.

[103] Weeks 'Soft Law' (n3) 19-20 citing Megarry (n99) 126. Harlow and Rawlings 'Law and Administration' (n45) 190–91.

[104] Delegated legislation comprises instruments of legislative effect made pursuant to the authority of Parliament: Weeks 'Separation of Powers' (n98) 306-307 citing Dennis C Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis, 5th ed, 2017) 1-2; approved in *Latitude Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992*)* 110 ALR 209, 228-29 (French J).

[105] Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press, 2016) 204 ('Controlling Administrative Power').

[106] Baldwin (n90) 80, cited in Weeks 'Separation of Powers' (n98) 307.

[107] Weeks 'Separation of Powers' (n98) 306.

law is a residual category of regulation which represents 'everything else that shapes the resulting exercise of the discretion created by hard law.'[108] As Weeks explains, soft law occupies 'a broad section of the spectrum between unstructured discretion and legislation.'[109] It comprises all the other instruments which are developed and issued by the executive to guide its administrative decision-making, including policies, guidelines, codes, manuals, circulars, directives, bulletins and other forms of decision-making guidance.[110] Lorne Sossin and Chantelle van Wiltenburg observe that the 'number, variety, complexity and impact of soft law dwarfs that of statutes and regulations.'[111]

3.2 Development and use of soft law for administrative decision-making

Soft law is intended to be 'flexible, easily updated and revised, and often with little or no process associated with it.'[112] Daniel Greenberg has characterised soft law as 'the third bite of the cherry', through which the 'executive attempts continuously to control the interpretation of primary and secondary legislation by means of guidance that can be revised or replaced at will.'[113] Paul Daly explains that soft law allows an administrative decision-maker's position in relation to the considerations relevant to the making of a

---

[108] Ansari and Sossin (n98) 300.

[109] Weeks 'Soft Law' (n3) 17 citing Gabriele Ganz, *Quasi-legislation* (Sweet and Maxwell, 1987) 1; Michelle Cini, 'From Soft Law to Hard Law?' (2000) *Working Paper 35*, European University Institute 4.

[110] Creyke and McMillan (n98) 379-380. Creyke and Groves refer to this 'soft law' as encompassing codes, guidelines, manuals, circulars etc 'that have no legally binding force but are designed to influence official behaviour': Robin Creyke and Matthew Groves, 'Administrative Law Evolution: An Academic Perspective' (2010) 59 *Administrative Review* 20, 26. Lorne Sossin defines soft law as 'informal guidelines, circulars, operational memoranda, directives, codes and oral instructions' that may be given to communicate judicial standards to front line decision-makers: Lorne Sossin 'The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada' in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact* (Cambridge University Press, 2004) 130. Lorne Sossin and Charles Smith refer soft law as including '[r]ules, manuals, directives, codes, guidelines, memoranda, correspondence, circulars, protocols, bulletins, employee handbooks and training materials (n98) 871. Baldwin and Houghton list eight categories of soft law: procedural rules, interpretative guides, instructions to officials, prescriptive/evidential rules, commendatory rules, voluntary codes, rules of practice, management or operation, and consultative devices and administrative pronouncements: Baldwin and Houghton (n99) 241–5.

[111] Lorne Sossin and Chantelle van Wiltenburg, 'The Puzzle of Soft Law' (unpublished paper, 14 November 2020) 1.

[112] Ibid; Andrew Green, 'Delegation and Consultation: How the Administrative State Functions and the Importance of Rules' in Colleen Flood and Paul Daly (eds) *Administrative Law in Context* (4th ed, Emond Publishing, 2021) 103, 105ff.

[113] Daniel Greenberg, 'Dangerous Trends in Modern Legislation' [2015] *Public Law* 96, 99–100.

particular type of decision to be made public.[114] This enables 'members of the public to predict how [a decision-maker] is likely to exercise its statutory discretion and to arrange their affairs accordingly'.[115] Richard Rawlings highlights the importance of soft law for administrative decision-making:

> Cast in terms of competing demands for flexibility and responsiveness, and consistency and coherence, official business could not sensibly be carried on without, to adopt a generous working definition, rules of conduct or pointers and commitments which are *not directly legally enforceable but which may be treated as binding in particular legal or institutional contexts*.[116]

The italicised words in this quotation identify an important feature of soft law, namely that whereas it is not legally enforceable, it may be treated as binding in some contexts and therefore may have normative consequences.

3.3 The normative effect of soft law

Soft law is a norm or rule 'which has no legally binding force but which is intended to influence conduct.'[117] Lorne Sossin and Charles Smith describe soft law as 'any written or unwritten rule which has the purpose or effect of influencing bureaucratic decision-making in a non-trivial fashion.'[118] Robin Creyke and John McMillan observe that the term 'soft law' is a *non sequitur* from a traditional legal perspective, as '[a] norm that lacks formal consequences is foreign to the lexicon applied to describe a domestic legal system' because law that is not enforceable is not considered 'law'.[119] Although the consequences of soft

---

[114] Paul Daly, *Understanding Administrative Law in the Common Law World* (Oxford University Press, 2021) 59.

[115] Ibid citing *Thamotharem v Canada (Minister of Citizenship and Immigration* 2007 FCA 198; [2008] 1 FCR 385 [55].

[116] Rawlings (n98) 215 emphasis added.

[117] Robin Creyke, 'Soft Law' and Administrative Law: A New Challenge' (2010) 61 *AIAL Forum* 15, 15 citing Cini (n109) 4; Commonwealth Interdepartmental Committee on Quasi-regulation, *Grey-letter Law* (December 1997) provided the following definition: 'Soft law is concerned with rules of conduct or commitments. Second, these rules or commitments are laid down in instruments which have no legally binding force as such, but are nonetheless not devoid of all legal effect. Third, these rules or commitments aim at, or lead to, some practical effect or impact on behaviour' ix; this definition was adopted by the Administrative Review Council for an Issues Paper on 'Administrative Accountability in Areas where Business Activities are Subject to Complex Regulation' (2008) xi, 5. Stephen Daly describes soft law as 'a type of imperfect norm': Stephen Daly, 'The Rule of (Soft) Law' (2021) 32(1) *King's Law Journal* 3, 4.

[118] Sossin and Smith (n98) 871.

[119] Creyke and McMillan (n98) 380. See also Linda Pearson 'Policy, Principles and Guidance: Tribunal Rule-Making' (2012) 23 *Public Law Review* 16, 17.

law are not formal, it nevertheless has an impact through its influence on behaviour. As Weeks writes, 'soft law is not conclusively determinative of legal outcomes but relies on its influence to be effective.'[120] Its effectiveness derives from 'the fact that people generally believe that soft law represents an officially-sanctioned norm.'[121] This thesis is concerned with soft law made by the executive and addressed to administrative decision-makers which, although influential in decision-making, cannot directly affect the legal rights and obligations of citizens in the manner of 'hard' law.[122]

3.4 The non-canonical nature of soft law

Peter Cane explains that a key distinguishing feature of soft law is that it is not canonical.[123] 'Hard' law is canonical in that 'the precise words, grammar, punctuation and other linguistic features of the text are authoritative.'[124] Decision-makers 'bound' by canonical law are obliged to interpret, apply and implement it.[125] By contrast, the obligation of a decision-maker vis-à-vis non-canonical law 'is to take it into account in making decisions and not to act inconsistently with it without good reason.'[126] As Cane explains 'non-canonical law is provisional and open to be changed (*not merely* interpreted) at the point of application if there are good reasons for doing so.'[127]

This description of the status of soft law and the obligation of administrative decision-makers with respect to its application is adopted in this thesis. It contends that guidance produced by tribunals to structure the administrative discretion of protection status decision-makers, being non-canonical in nature, is soft law. As explained in Chapters Five

---

[120] Weeks 'Separation of Powers' (n98) 306; Weeks 'Soft Law' (n3) 13.

[121] Weeks and Pearson (n98) 253. Stephen Daly (n117) 4 (footnotes omitted) explains that both domestic and international soft law instruments generally share the following broad characteristics: they seek to change or guide the behaviours of their addressees in arousing by leading to their adherence; they do not create by themselves rights or obligations for the addressees; they represent, by their content and the way that they are structured, a degree of formalisation and structure which brings them closer to looking like rules of law.

[122] Cane 'Controlling Administrative Power' (n105) 203.

[123] Ibid 205.

[124] Ibid.

[125] Ibid.

[126] Ibid.

[127] Ibid emphasis in original.

and Six, the Country Guidance promulgated by the Upper Tribunal (Immigration and Asylum Chamber) in the United Kingdom and Jurisprudential Guides identified by the Immigration and Refugee Board in Canada are non-canonical for reason that decision-makers are obliged to take them into account and not act inconsistently with them unless there is a good reason to do so. Regardless of the constitutional location of the tribunal within the judicial or the executive branch, guidance of this nature is soft law. In other words, both judicial and administrative tribunals are capable of producing soft law guidance, including for protection status decision-makers.

The manuals, guidelines, directives and other guidance produced by the executive for its primary decision-makers is generally termed 'policy'. In the protection visa context, the DHA produces 'Refugee Law Guidelines' and 'Complementary Protection Guidelines' contained in its Procedures Advice Manual (PAM3), which DHA decision-makers must apply in assessing protection visa applications. In the following section the distinction between 'policy' and 'soft law' is examined.

3.5 Distinguishing soft law from policy

As Creyke and McMillan recognise, '[p]olicy, like soft law, comes in many guises.'[128] Policy takes a wide range of forms and a variety of labels may be attached to it including ministerial directions, ministerial statements, departmental practice, guidelines, general guidance, instructions, and policy manuals.[129] It may be developed by the relevant portfolio department or agency, or at a higher level in the administrative hierarchy.[130] The spectrum of policy instruments and documents ranges from the informal to the formal with varying degrees of binding effect or influence.

[128] Creyke and McMillan (n98) at 391.

[129] David Clark, 'Informal Policy and Administrative Law' (1997) 12 *AIAL Forum* 30, 31; Pearson (n118), 17.

[130] Pearson (n119) 17; Andrew Edgar, 'Tribunals and administrative policies: Does the high or low policy distinction help?' (2009) 16 *Australian Journal of Administrative Law* 143.

A legislative regime will often require the application of policy by decision-makers when making certain administrative decisions.[131] Executive or ministerial policy embodied in legislation or a statutory instrument must be applied by all decision-makers, including primary decision-makers and administrative tribunals, in the making of decisions under the legislation, and is therefore effectively 'hard' law. This type of policy is not 'soft law' as the term is used in this thesis because it more closely resembles a legislative norm that dictates rather than influences the exercise of administrative discretion.

A second variety of policy is a non-statutory rule or guideline devised by the executive to provide decision-making guidance in administering legislation. [132] Examples of this type of policy is the 'Refugee Law Guidelines' and 'Complementary Protection Guidelines' (the Protection Guidelines) contained in the DHA Procedures Advice Manuals (PAMs).[133] The PAMs have no legislative basis however they purport to be 'a comprehensive document providing advice on the exercise of many provisions of the Act and Regulations.'[134] The Protection Guidelines contain the Department's interpretation of relevant provisions of the *Migration Act* and set out examples of circumstances which may or may not fall within the protection visa criteria. They cover practice and procedural issues and contain directions on the exercise of discretionary powers by primary decision-makers. Alan Freckleton explains that the purpose of such executive policy is:

> … to prescribe, or perhaps impose, a particular way of interpreting a subjective consideration or discretionary power, in order to provide some uniformity in the approach of decision makers.[135]

---

[131] Creyke and McMillan (n98) 391. See discussion in Kerrie O'Callaghan and Michelle Howard, 'Promoting Administrative Justice: The Correct and Preferable Decision and the Role of Government Policy in the Determination' (2013) 32 *University of Queensland Law Journal* 169 at 177-178.

[132] Ibid. The Department of Home Affairs policy manuals are used to guide primary decision-makers in determining visa applications under the *Migration Act* and *Migration Regulations*. Relevant policy is consolidated in the Procedures Advice Manuals ('PAMs') whose primary aim is to provide direction to departmental officers.

[133] Department of Home Affairs, 'Policy: Refugee and humanitarian – Refugee Law Guidelines', re-issued 1 July 2017, and 'Policy: Refugee and Humanitarian – Complementary Protection Guidelines', re-issued 29 February 2020.

[134] Alan Freckelton, *Administrative Decision-Making in Australian Migration Law* (ANU Press, 2015), 96.

[135] Ibid 100.

According to Freckleton, in practice many junior Departmental decision-makers 'rely exclusively on the PAMs and other policy instructions to make their decision', and 'the pressure on junior decision-makers to follow policy is immense'.[136] The Protection Guidelines are a form of soft law that put 'flesh on the bones' of the eligibility criteria, but do not identify groups or individuals recognised by the Department as 'at risk' in refugee-producing countries. This type of policy is used by the executive to enunciate the considerations to be taken into account by decision-makers in exercising administrative discretions.[137] As Cane explains, these policies are:

> rules that govern decision-making … by providing 'relevant considerations' to be taken into account in making individual decisions rather than peremptory instructions about how individual cases are to be dealt with. Soft law (often called 'policy') plays an extremely important part in structuring and guiding the making of [primary] decisions … which are (perhaps typically) based on a combination of hard law and soft law criteria.[138]

Executive policy of this kind may also be developed for the purpose of providing guidance for decision-makers in the interpretation of vague or ambiguous legislation and open-textured statutory terms, for example, 'in the public interest'.[139] These policies provide decision-making guidance in circumstances when the 'legislation provides a decision-maker with a discretionary power, but no defined criteria or considerations are specified for the exercising of that discretion.'[140] This type of policy is termed 'executive policy' in this thesis and is examined in Chapter Two in the context of its application by the AAT in the exercise of its merits review function.

A third category of executive policy at the far end of the spectrum are policies which are merely aspirational, or which seek to regulate behaviour within agencies, for example,

---

[136] Ibid 91.

[137] Cane 'Administrative Tribunals' (n44) 152; Pearson (n119) 16; Fiona McKenzie, 'The Immigration Review Tribunal and Government Policy: To follow or not to follow?' (1997) 4 *Australian Journal of Administrative Law* 117, 126 observes that 'it is not always easy to identify the types of decisions where discretion is required.' It is 'to some extent … a subjective analysis whether discretion is required or whether a certain decision automatically flows from the application of legislation to a situation.'

[138] Ibid 9.

[139] Sharpe, Jennifer, *The Administrative Appeals Tribunal and Policy Review* (Law Book Company, 1986) 195; Pearson (n118) 16.

[140] Cane 'Administrative Tribunals' (n44) 152.

detailing lines of communication and consultation within the agency,[141] or prescribing codes of conduct for officers. These policies are intended to influence conduct and may have employment-related consequences if not followed,[142] but they do not directly impact on the decision-making under a legislative scheme. For this reason, they are not relevant to the issues considered in this thesis.

Creyke and McMillan recognise that 'policy and soft law cover the same spectrum of documents, and are often created, adopted and published in the same way.'[143] They contend that 'soft law *is* a form of policy, but … it is a special form of non-legislative instrument that warrants special recognition and an alternative label.'[144] They suggest soft law, being 'partially enforceable, occupies a half-way house between 'hard law' and policy.'[145] Weeks states that policy is 'a subset of soft law where it is developed to modify or direct behaviour.'[146] With respect to these distinctions between executive policy and soft law, in this thesis the label 'soft law' is attributed to the range of non-legislative guidelines that occupy the field between unstructured administrative discretion and legislation.[147]

The type of soft law examined in this thesis is that which is produced by the executive and is designed to structure and control the exercise by decision-makers of administrative discretion. Soft law of this type that is developed by government departments and agencies, such as the Protection Guidelines, is referred to as 'executive policy' in this thesis. Soft law produced by a tribunal, including the AAT, is labelled 'soft law guidance'. Soft law guidance is *functionall*y the same as the 'executive policy' in that it prescribes 'non-statutory general criteria for the exercise of particular statutory decision-making powers.'[148] Soft law

---

[141] Creyke and McMillan (n98) 391.

[142] For example, *Public Service Act 1999 (Cth)* s 13, cited in Robin Creyke, 'Book Review 'Soft Law and Public Authorities: Remedies and Reform' (2017) 24 *Australian Journal of Administrative Law* 63, 63.

[143] Creyke and McMillan (n98) 392.

[144] Ibid 390-391.

[145] Ibid 391.

[146] Weeks 'Separation of Powers' (n98) 311.

[147] See further discussion in Daly (n114) 57 citing Lorne Sossin, 'Discretion Unbound: Reconciling the *Charter* and Soft Law' (2002) 45 *Canadian Public Administration* 465, 466–467.

[148] Cane 'Administrative Tribunals' (n44) 152. Paul Daly describes policy as representing 'a considered memorialisation of the considerations relevant to making a particular type of decision': Daly (n114) 59.

of both types is used by administrative decision-makers to assist them to make decisions under a legislative scheme, in circumstances when the 'legislation provides a decision-maker with a discretionary power, but no defined criteria or considerations are specified for the exercising of that discretion.'[149]

The final section of this Chapter introduces the issue of the consistency of soft law with administrative law norms. This is important for this thesis as it is relevant to how soft law can be used and applied by administrative decision-makers. This issue is explored in detail in Chapters Five and Seven in the context of the development of soft law guidance by the Immigration and Refugee Board and the Administrative Appeals Tribunal.

3.6 Soft law and administrative law norms

Creyke and McMillan note that the impact of administrative law on policy and soft law is 'much the same'.[150] Policy must not be inconsistent with the legislation to which it relates, and although the application of policy promotes consistency and fairness, it must not be applied inflexibly to the exclusion of the merits of the individual case.[151] Subject to these limitations, a decision-maker is permitted to take policy guidelines into account when exercising discretion. These same principles have been recognised in relation to soft law.[152] In *Port Stephens Council v Sansom*,[153] Spigelman CJ commented that the formulation of

---

[149] For further discussion of executive and administrative policies, see O'Callaghan and Howard (n131), 178. Aronson (n98) 3; AS Blunn, 'Administrative Decision-Making: An Insider Tells' (2003) 37 *AIAL Forum* 35, 37; and Edgar (n130).

[150] Creyke and McMillan (n98) 391.

[151] Ibid; See further Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases & Commentary* (LexisNexis Butterworths, 2019) [12.2.6].

[152] Ibid. For example, in *Vero Insurance Ltd v Gombac Group Pty Ltd* [2007] VSC 117 [29] Gillard J noted the following in relation to the use of guidelines:

> A guideline is often laid down in respect to particular proceedings based upon previous applications and leading to particular results. In other words, if a similar application is made, then, based upon experience in previous similar matters, one would expect the same result. The advantage and benefit of such a guideline is that it provides a degree of certainty as to the outcome of a proceeding, and importantly, provides guidance to the parties concerned and their advisers. However, any such guideline is subject to different circumstances and it is important that the decision-making body concerned bears in mind that the guideline is nothing more than a guideline and must give way if circumstances dictate. In other words, it does not shut out any party arguing that the guideline should not be applied.

Discussed in Creyke and McMillan (n98) 391-392; Creyke (n117) 16 and Pearson (n119) 27.

[153] *Port Stephens Council v Sansom* (2007) 156 LGERA 125. Discussed in Pearson (n119) 27. In this case the NSW Court of Appeal considered the principles applied by the NSW Land and Environment Court in

principles or guidelines for the exercise of the broad discretion conferred by the merits review jurisdiction of the NSW Land and Environment Court was permissible, subject to the qualification that it may not adopt a principle or guideline of presumptive or determinative weight. His Honour stated:

> Principles or guidelines for the process of formulating such a statutory judgment may be developed, particularly in order to promote consistency of decision-making, so long as those principles or guidelines are not treated as rules and accepted to be indicative only.[154]

These authorities demonstrate that it is accepted that courts with a merits review function have the capacity to develop soft law in the form of guidelines to influence the exercise of discretion so as to promote consistency and predictability of outcomes, subject to legal limits. This thesis is concerned with the legality and legitimacy of the potential development by the AAT of soft law guidance to structure the exercise of administrative discretion, particularly that associated with the making of protection visa decisions.

The next Chapter outlines the merits review function of the AAT and its obligation to make the 'correct or preferable' decision. Whereas AAT decisions are not binding, its decisions are authoritative and have considerable potential to shape and structure the exercise of discretion by administrative decision-makers. So conceived, AAT decisions are a form of soft law as the term is used in this thesis. From its inception it was envisaged that AAT decisions would have a normative effect, but processes to facilitate this objective have largely not been devised or implemented. This thesis argues that the AAT has the capacity to develop soft law guidance and thereby allow it to perform its intended normative function. The Chapter explains that in so far as the relevance of soft law has featured in the decisions of the AAT and the jurisprudence, it has related to when and how the AAT should *apply* executive policy in the making individual decisions. Due to its reluctance to develop *its own* soft law guidance to structure administrative discretion, this aspect of the AAT's powers has been the subject of limited consideration in the jurisprudence and academic scholarship.

---

determining whether to make an order for costs in merits review proceedings, where the applicable rule provided that no order was to be made unless the court considered that the making of an order was "fair and reasonable".

[154] Ibid [53]-[54].

Chapter Two

The Administrative Appeals Tribunal:

Merits Review, the Normative Goal and Soft Law Guidance

This Chapter examines the composition, powers and functions of the AAT with a focus on how these authorise it to develop soft law guidance to structure administrative discretion in order to promote consistent and predictable decisional outcomes in the fields within its jurisdiction. It shows that, whereas the AAT's powers and functions locate it within the executive branch of government, it is not functionally part of the executive. The membership of the AAT, which consists of Federal Court judges and non-judicial specialist members who are statutory office-holders, is quite distinct from the Federal government departments and agencies[1] whose decisions it has jurisdiction to review. The primary function of the AAT is to conduct 'merits review' of primary administrative decisions,[2] and reach the 'correct or preferable' decision.[3] This merits review function includes the power to make findings in relation to legal issues and determine how discretions conferred on administrative decision-makers should be exercised. Whereas AAT decisions have 'hard' legal consequences for the parties to the review, they are only authoritative not binding on decision-makers in subsequent matters, and may therefore be considered soft law as described in Chapter One.

From the AAT's inception in 1976, it was intended that a wider objective of its merits review function was to achieve the 'normative' goal of improving the quality and consistency of administrative decision-making.[4] However, in the more than four decades of its operation the AAT has adopted limited measures to allow this normative goal to be realised. This Chapter argues that the AAT should exercise its capacity to develop norms, principles and

[1] The full list of Federal Government departments and agencies can be viewed on the Australian Government Australian Business Register as at 12 October 2021.

[2] Primary decisions are those made at first instance by the administrative decision-maker.

[3] The AAT's merits review function is explained in section 2.

[4] The nature of the AAT's normative function is explained in [2.2].

standards to structure the exercise of administrative discretion that have an effect *beyond* the outcomes of individual reviews.

The Chapter examines Brennan J's important judgment in *Drake (No 2)*,[5] in which His Honour considered the application by the AAT of executive policy when undertaking merits review. He held that, although the Tribunal is not obliged to adopt or follow a policy in reaching the preferable decision, it is in the interests of consistency for it to do so. His Honour also observed that the formulation by the AAT of its own 'policy' in a progressive manner through its decision-making in individual cases is not inconsistent with its merits review function. He recognised that the AAT's 'practice of giving reasons for decisions inevitably spins out threads of policy from the facts of the cases' and that 'policy developed in this way originates in the need to ensure that justice is done in individual cases.'[6] Adopting Brennan J's approach in *Drake (No 2)*, this Chapter argues that the AAT can and should formulate norms to structure its own exercise of administrative discretions and that of primary decision-makers subject to its jurisdiction. This can be achieved incrementally as an 'incidental by-product' of its determination of individual review applications.[7] By this incremental method, the AAT can develop soft law guidance to structure administrative discretion in the manner proposed by KC Davis, outlined in Chapter One.[8]

1. The Realisation of a Bold Vision

The 1970s marked the beginning of a 'remarkable transformation' of Australian administrative law.[9] Under the 'enlightened guidance' of the 1971 report of the

---

[5] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 ('*Drake (No 2)')*.

[6] Ibid 644.

[7] Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2009) 157 ('Administrative Tribunals') 157.

[8] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge, Louisiana State University Press, 1969) 60 discussed in Chapter One.

[9] Robin Creyke, 'Administrative Justice in Australia' in Michael Adler (ed) *Administrative Justice in Context* (Hart Publishing, 2010) 272 ('Administrative Justice'). Margaret Allars has observed that 'the AAT represents the realisation of a bold vision for a key part of the structure of the system of review of administrative decisions in Australia.' cited in Margaret Allars, 'The Nature of Merits Review: A Bold Vision Realised in the Administrative Appeals Tribunal' (2013) 41 *Federal Law Review* 197, 197.

Commonwealth Administrative Review Committee (the Kerr Committee),[10] and supplemented by the reports of two other committees,[11] 'a comprehensive new approach to administrative law' emerged in Australia.[12] The system, which exists largely unchanged to the present day, provides 'a comprehensive and integrated package of institutions and principles.'[13]

1.1 Establishment and purpose

The Kerr Committee recognised that the existing system of common law judicial review did not provide for an adequate review of Commonwealth administrative decisions and needed to be supplemented by review 'on the merits.'[14] The most 'far reaching and innovative' recommendation of the Committee was the establishment of a generalist Administrative Review Tribunal,[15] which could conduct review of primary administrative decisions, with an

---

[10] Ibid. Justice JR Kerr et al, *Commonwealth Administrative Review Committee Report*, Parliamentary Paper No 144 (14 October 1971) ('Kerr Committee Report'). The Committee was established to examine whether there should be a further avenue of judicial review by a Commonwealth superior court, and whether Australia should introduce legislation akin to the *Tribunals and Inquiries Act 1958 (UK):* Kerr Committee Report, [71], 25. Groves and Weeks observe that whereas the 'resulting AAT may have been entirely different from anything known in Britain … that country's legislation was the first point of reference … [and] the problems experienced in the UK were as influential as the reforms it had adopted.' Matthew Groves and Greg Weeks, 'The Creation of Australian Administrative Law: The Constitution and its Judicial Gatekeepers' in Swati Jhaveri and Michael Ramsden (eds), *Judicial Review of Administrative Action Across the Common Law World Origins and Adaptation*, (Cambridge University Press, Cambridge, 2021) 309, 313.

[11] *Interim Report of the Committee on Administrative Discretions,* Parliamentary Paper No 53 (Commonwealth Parliament, 1973) (Bland Committee Interim Report) and *Final Report of the Committee on Administrative Discretions,* Parliamentary Paper No 316 (Commonwealth Parliament, 1973) (Bland Committee Final Report); and *Prerogative Writ Procedures: Report of Committee of Review*, Parliamentary Paper 56 of 1973 (Canberra, Commonwealth Parliament, 1973) (Ellicott Committee Report).

[12] Creyke 'Administrative Justice' (n9) 272.

[13] Ibid 273.

[14] Kerr Committee Report (n10) [29], 86. Discussed Cane 'Administrative Tribunals (n7) 61. Cane notes that this concept does not appear in the Committee's terms of reference and is 'apparently, an invention of the legal imagination of the members of the Committee.' The Committee stated, '[t]he basic fault of the entire structure is, however that review cannot as a general rule, in the absence of special statutory provisions, be obtained "on the merits" - and this is really what the aggrieved citizen is seeking' Kerr Committee Report (n10) [58], 20. Cited in Allars (n9) 203; and Robin Creyke, 'Administrative Tribunals' in Matthew Groves and H.P. Lee, *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007), ('Administrative Tribunals') 82; and Robin Creyke, 'Tribunals and Merits Review' in Matthew Groves (ed) *Modern Administrative Law in Australia* (Cambridge University Press, 2014) ('Tribunals and Merits Review') 407.

[15] Robin Creyke, 'Tribunals - "Carving Out the Philosophy of Their Existence": The Challenge for the 21st Century' (2012) 71 *AIAL Forum* 19, ('Carving Out the Philosophy') 19. The Kerr Committee 'contemplated a new body, a tribunal with the same powers as the initial decision-maker, that was to have government-wide jurisdiction. The body was also to have expert, independent members, and was to work quickly, informally,

objective to 'achieve balance between justice to the individual and efficient administration.'[16] The Committee's recommendation for the creation of this generalist tribunal was based on pragmatic considerations and constitutional dictates, the latter of which meant that the merits review function could not be invested in a Federal court.[17] However, it nevertheless recommended that the chair of the proposed Tribunal be a Federal judge.[18] The Kerr Committee's proposals were implemented by a series of legislative measures starting in 1975,[19] and included the establishment of the Administrative Appeals

---

efficiently and cheaply, with procedures attuned to the particular jurisdiction and free of the restrictions inherent in the adversary process.' Creyke 22. The Kerr Committee provided the following justification for the proposed reform: ... [t]he objective fact, in the modern world, ... that administrators have great power to affect the rights and liberties of citizens and, as well, important duties to perform in the public interest.' at [361], 106. See further Kerr Committee Report (n10) [291], 8. Discussed in Cane 'Administrative Tribunals' (n7) 62. The subsequent Bland Committee report recommended there be three tribunals – a General Administrative Tribunal, a Medical Appeals Tribunal, and a Valuation and Compensation Tribunal: Bland Committee Report (n10).

[16] Kerr Committee Report (n10) [12], 3 cited in Allars (n9) 204.

[17] Ibid [68], 24. Discussed in Cane 'Administrative Tribunals' (n7) 61-62. The Committee argued that as a matter of constitutional law, Chapter III federal courts could not be invested with jurisdiction to review the 'merits' of a decision that raised 'non-justiciable' issues because this jurisdiction involved the exercise of non-judicial power: Peter Cane, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (3rd edition, OUP, 2018), 259 citing Kerr Committee Report at [68], 24. As Cane notes, '[t]his argument is obviously based on the understanding of the principle of separation of judicial power that underpins the decision in the *Boilermakers'* case' Cane 'Administrative Tribunals' (n7) 62 referring to *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. The Kerr Committee considered that the 'general practice under Commonwealth law of committing review on the merits to tribunals rather than to courts has, apart from constitutional considerations, in our opinion, been wise' (n10) [289], 86. Weeks, Boughey and Rock note that 'constitutional considerations' was a concession that, regardless of the wisdom of placing merits review in the hands of tribunals, Chapter III courts had no jurisdiction to perform that function in any case.' Greg Weeks, Janina Boughey and Ellen Rock, *Government Liability: Principles and Remedies* (Lexis Nexis, Butterworths, 2019), 162.

[18] Kerr Committee Report (n10) [292], 86. Cane, McDonald and Rundle (n17) 259. The Kerr Committee noted the view of the Franks Committee on Administrative Tribunals and Inquiries (1957) that 'tribunals should be regarded as machinery for adjudication rather than as part of the machinery of administration'. The Kerr Committee recognised that although the tribunal it proposed had to be non-judicial it 'envisaged that it would operate, in effect, as a court substitute.' Cane, McDonald and Rundle (n17) 259.

[19] The 'new administrative law package' consisted of a series of Commonwealth legislative measures. In addition to the AAT, a codified form of judicial review was introduced by way of the *Administrative Decisions (Judicial Review) Act 1975 (Cth)*, and the Federal Court was established as a second-tier judicial body below the High Court to administer nationally the judicial review jurisdiction. Also introduced were a statutory right to reasons *ADJR Act* s 13; *AAT Act* s 28); an Ombudsman (*Ombudsman Act 1976 (Cth)*); and later the *Freedom of Information Act 1982 (Cth)*, and the *Privacy Act 1988 (Cth*). The package allowed for specialist tribunals and the new structure was monitored by an Administrative Review Council. This new structure was established alongside existing common law rights of judicial review offered by courts, including the entrenched jurisdiction of the High Court to grant the prerogative remedies of mandamus, prohibition and injunction. Howard and Callaghan note that the reforms in the 1970s saw the dawning of a 'new era' for Australian administrative law: Kerrie O'Callaghan and Michelle Howard, 'Promoting Administrative Justice: The Correct and Preferable

Tribunal (AAT),[20] with power to conduct reviews of, and affirm, set aside, or vary, primary administrative decisions.[21] As Weeks and Groves observe, the establishment of the AAT 'was a radical step into a new age of administrative review.'[22]

1.2 Location within government

In Australia, the location of tribunals within the tri-partite system of government 'is a vexed issue.'[23] This is in contrast to the United Kingdom, where it is well-established that tribunals are situated within the judicial branch.[24] Primarily for constitutional reasons, federal administrative tribunals in Australia, including the AAT, are viewed as part of the executive arm of government.[25] While the AAT is not part of the judicial system, it does not sit easily within the executive branch.[26] The first President of the AAT, Sir Gerard Brennan, sought to

---

Decision and the Role of Government Policy in the Determination' (2013) 32(1) *University of Queensland Law Journal* 169, 169.

[20] The Administrative Appeals Tribunal (AAT) was established by the *Administrative Appeals Tribunal Act 1975 (Cth)* (*AAT Act*) and commenced operations on 1 July 1976.

[21] See discussion in 2.1 below.

[22] Groves and Weeks (n10) 312.

[23] Creyke 'Administrative Tribunals' (n14) 81. See also Robin Creyke, Matthew Groves, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (5th edition, LexisNexis, Butterworths, 2019) ('Control of Government Action') [3.2.18].

[24] The tribunal system in the United Kingdom developed through two separate reviews conducted four decades apart: the Committee on Administrative Tribunals and Enquiries, *Report of the Committee on Administrative Tribunals and Enquiries*, Command Paper No 218, 1957, ('Franks Report') and Sir A Leggatt, *Tribunals for Users: One System, One Service*, 2001, ('Leggatt Review'). Its current statutory basis is found in the *Tribunals, Courts and Enforcement Act 2007 (UK*). Lord Justice Carnwath regarded tribunals as being 'part of the judicial system, rather than as an appendage of the administration': Lord Justice R Carnwath, 'Tribunal Justice: Judicial Review by Another Route' in Christopher Forsyth et al (eds), *Executive Judicial Review: a Cornerstone of Good Governance*, (Oxford University Press, 2010) 143, 145. See also Lord Justice Carnwath, 'Tribunals under the Constitutional Reform Act' (2006) 13 *Journal of Social Security Law* 58 at 62. See further discussion in Chapter Six [1.1].

[25] Crekye 'Tribunals and Merits Review' (n14) 395 citing Kerr Committee Report (n10) [61], 21-22 and [89], 29. AAT decisions on questions of law are not binding due to the limits of the AAT's constitutional function. As an administrative tribunal, the AAT cannot conclusively decide legal questions as this is an exclusively judicial function which can only be invested in a Federal court which exercises judicial power. Cane 'Administrative Tribunals' (n7) 163. See also discussion in Cane, McDonald and Rundle who state, 'the fact that merits review tribunals in general, and the AAT in particular, cannot conclusively decide questions of law reflects their second-class status as adjudicators.' (n17) 272.

[26] Creyke 'Administrative Tribunals' (n14) 81. Robin Creyke, 'Where Do Tribunals Fit into the Australian System of Administration and Adjudication?' in Grant Huscroft and Michael Taggart (ed), *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan*, (University of Toronto Press, Canada, 2006) 81, 110 ('Where Do Tribunals Fit?'). Creyke et al observe that tribunals are 'neither the lower rung in the judicial system nor the upper rung in the hierarchy of executive decision-making.' Creyke et al 'Control of Government

place the Tribunal on a 'quasi-judicial footing' within the framework of the Australian constitutional arrangements.[27] However, the powers and functions of the AAT, outlined in section 2 of this Chapter, 'at least technically' locate it as part of the executive branch of government.[28] At the same time, it has long been recognised that tribunals are not functionally part of the executive.[29] As explained in the next sections, the membership of the AAT consists of judicial and non-judicial members who are quite distinct from the public officials, including Ministers and their delegates, who make the primary decisions the AAT is tasked to review. Furthermore, as detailed in [4.1] of this Chapter, the AAT is exempt from the requirement that public officials comply with executive policy.

1.3 Composition and membership

The Kerr Committee recommended that the Tribunal it proposed would be constituted by the President who would be a federal judge, and two other members, one of whom would be 'an officer of the Commonwealth department or authority responsible for administering the decision under review', another a member of the agency the decision of which was being reviewed, and a third, lay person 'drawn preferably from a panel of persons chosen for their character and experience in practical affairs'.[30] The inclusion of a person with

---

Action' (n22) [3.2.19]. Lindsay Curtis described tribunals as 'occupying the no-man's land': Lindsay Curtis, 'Crossing the Frontiers Between Law and Administration' (1989) 58 *Canberra Bulletin of Public Administration* 55 at 56. Creyke refers to the range of perspectives on the location of tribunals, including that they be considered their own 'fourth' branch of government: Creyke et al 'Control of Government Action' (n22) 166. Weeks, Boughey and Rock (n16) state that 'the current orthodoxy is to view tribunals as part of the notional 'fourth' or 'integrity' branch of government' citing John McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Federal Law Review* 423; Robin Creyke, 'Integrity in Tribunals' (2013) 32 *University of Queensland Law Journal* 45; Gabrielle Appleby, 'Horizontal Accountability: the Rights-Protective Promise and Fragility of Executive Integrity Institutions' (2017) 23 *Australian Journal of Human Rights* 168; cf Justice Stephen Gageler, 'Three is Plenty' in Greg Weeks and Matthew Groves (eds), *Administrative Redress In and Out of the Courts: Essays in Honour of Robyn Creyke and John McMillan*, (Federation Press, 2019) 12.

[27] Weeks, Boughey and Rock (n17) 167 referring to Brennan J in *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 32 FLR 469 at 472–73; see also Creyke et al 'Control of Government Action' (n23) [3.2.19], 165. Weeks, Boughey and Rock observe that '[t]here is now significant force to the argument that such a 'quasi-judicial model' no longer describes the AAT, and the early endeavours of Brennan J are now better understood as steps taken to ensure the fledgling tribunal's survival.' (n17) 167 citing Creyke et al 'Control of Government Action' (n23) 165.

[28] Ibid 168.

[29] Ibid citing Greg Weeks, 'Attacks on Integrity Offices: a Separation of Powers Riddle' in Greg Weeks and Matthew Groves (eds), *Administrative Redress In and Out of the Courts: Essays in Honour of Robyn Creyke and John McMillan* (Federation Press, 2019) 25, 35–6.

[30] Kerr Committee report (n10) [292], 86-87.

public sector experience, was to ensure that 'departmental policies and points of view were known and understood', and 'the majority were to be drawn from outside the legal fraternity.'[31] The Committee recognised that the ability to include members with specialist expertise on tribunal panels would lead to better, more informed decision-making.[32]

The *Administrative Appeals Tribunal Act 1975 (Cth)* requires that the President of the AAT be a Justice of the Federal Court.[33] The membership of the AAT also includes judicial Deputy Presidents, and non-judicial Deputy Presidents, Senior Members and Members.[34] Non-judicial members, who are not required to have legal qualifications, are statutory officeholders formally appointed by the Governor-General on the advice of the Executive Council for fixed terms of up to seven years with the possibility of reappointment.[35] Appointments are made on the advice of the relevant Minister, who is the Attorney-General. The appointment process is not governed by legislation and is entirely at the discretion of government.[36]

---

[31] Creyke 'Carving Out the Philosophy' (n15) 21 citing Kerr Committee report (n10) [293], 87.

[32] Bernard McCabe, 'Perspectives on Economy and Efficiency in Tribunal Decision-Making' (2016) 85 *AIAL Forum* 40, 42 citing Kerr Committee Report (n10) 86–8.

[33] Section 6(2) *Administrative Appeals Act 1975 (Cth)* ('*AAT Act*'). Section 72 *Australian Constitution*. Note here that the separation of judicial powers under the Constitution has been interpreted as requiring that federal judges not perform functions that are inconsistent with the exercise of Chapter III judicial power. However membership of merits review tribunals has been held to not infringe this requirement because 'independently of any instruction, advice or wish of the Executive Government …[t]he tribunal must give what it considers to be the correct or preferable decision': *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 18. See discussion in Cane 'Administrative Tribunals' (n7) 96.

[34] Section 5A *AAT Act*. Members may have legal qualifications or other 'specialist knowledge or skills': section 7 *AAT Act*. This includes expertise in accountancy, medicine, social welfare and migration. In his 2018 report, former High Court judge, Ian Callinan, recommended that AAT members be required to have legal qualifications: IDF Callinan AC, *Review: Section 4 of the Tribunals Amalgamation Act 2015* (*Cth)* (2018), measure 6, 9. See discussion in Robin Creyke, 'Australian Tribunals: Impact of Amalgamation' (2020) 26 *Australian Journal of Administrative Law* 206, 218 ('Impact of Amalgamation') who states that, if implemented, this recommendation 'would ignore one of the signal benefits of tribunals as compared to courts.'

[35] Sections 6 and 8 *AAT Act*. Appointment terms vary from between three, five and seven years. Section 8(3) *AAT Act* provides that a member holds office for the period specified in the instrument of appointment for such period, of at most seven years, but is eligible for re-appointment. Discussed in Cane 'Administrative Tribunals' (n7) 102. Members of the AAT may be removed from office at the behest of Parliament for 'proved misbehaviour or incapacity' (section 13(1) *AAT Act*) and must be dismissed for other reasons, for example bankruptcy and also on grounds unrelated to competence, such as undisclosed conflicts of interest and unapproved absence from work – section 13(2) *AAT Act*. See also section 13(3) *AAT Act*.

[36] A Protocol for Appointments to the Administrative Appeals Tribunal was concluded between the President of the AAT and the Attorney-General in November 2015. This was reviewed and re-issued in 2019: Protocol: Appointments to the Administrative Appeals Tribunal 2019.

Following its amalgamation with a number of specialist tribunals from 1 July 2015,[37] the AAT's review caseload is divided among nine Divisions.[38] Members are assigned to one or more Division by the Attorney-General in consultation with the President of the AAT.[39] The AAT may be constituted by one member or multiple member panels depending upon the needs and complexity of the instant case and the direction of the President.[40]

The diversity of the AAT's membership and its mixture of judicial and non-judicial, legal and non-legal specialist members gives its decisions 'authority both within government and among those applicants affected by [them].'[41] As Robin Creyke has observed, 'specialist, usually non-legally trained members' with 'expertise in the matters being reviewed', 'provide greater legitimacy to the [AAT's] decision-making in areas which are technical, often complex or which have policy or other features which make particular understanding of the context important.'[42] This thesis argues that the specialist expertise and knowledge of AAT members is an important factor relevant to its capacity to develop soft law guidance when performing its merits review function in relation to the exercise of administrative discretions. Before explaining the nature of the AAT's merits review function, it is necessary to briefly outline its jurisdiction to review administrative decisions, and the powers conferred on it by the *AAT Act.*

---

[37] The Migration and Refugee Tribunal and the Social Security Appeals Tribunal were amalgamated into the AAT from 1 July 2015: *Tribunals Amalgamation Act 2015 (Cth).*

[38] Freedom of Information Division, General Division, Migration and Refugee Division, National Disability Insurance Scheme Division, Security Division, Small Business Taxation Division, Social Services and Child Support Division, Taxation and Commercial Division, and Veterans' Appeals Division.

[39] Section 17C *AAT Act*. Prior to assigning a Member to the MRD or appointing a person as Head or Deputy Head of the MRD, the Attorney-General is required to consult with the Minister for Immigration and Border Protection: section 17D *AAT Act*. This requirement is said to be 'appropriate given the need for members exercising powers in [that Division] to have specific subject-matter expertise.' The Act provides for the appointment of Division Heads and Deputy Division Heads *AAT Act* ss 17K, 17L who are to be appointed by the Attorney General. Discussed in Robin Creyke, 'Tribunal Amalgamation 2015: An Opportunity Lost?' (2016) 84 *AIAL Forum* 54 ('An Opportunity Lost?') 64-65.

[40] Gary Downes, 'Case Management in the Administrative Appeals Tribunal' (unpublished paper, February 2007) 14.

[41] Creyke 'Carving Out the Philosophy'(n15) 26.

[42] Ibid 26 and Creyke 'Tribunals and Merits Review' (n14) at 396. Creyke's observations were made in the context of tribunals generally and not specifically in relation to the AAT.

1.4 Jurisdiction and powers

The AAT is invested with jurisdiction to review decisions made under more than 450 Commonwealth laws covering a diverse range of governmental activities, including protection visa decision-making under the *Migration Act* and *Migration Regulations*.[43] Its statutory objective is to provide a mechanism of review that is 'accessible'; 'fair, just, economical, informal and quick'; 'proportionate to the importance and complexity of the matter'; and 'promotes public trust and confidence in its decision-making'.[44] In reviewing a decision the AAT 'is not bound by technicalities, legal forms or rules of evidence; and must act according to substantial justice and the merits of the case.'[45] The powers of the AAT when conducting reviews of protection visa decisions under the *Migration Act* are comprehensively detailed in Chapter Three. The next section describes the characteristics of the AAT's merits review function.

2. The merits review function

The nature of merits review is not defined in the AAT's governing legislation.[46] The *AAT Act* confers on the AAT wide remedial powers to affirm or vary the decision under review, or set it aside and make a substitute decision, or remit the matter to the decision-maker for reconsideration.[47] In conducting reviews it 'may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision'.[48]

Merits review is a function that allows all aspects of an administrative decision to be reviewed, including the findings of fact and the exercise of any discretions by the primary decision-maker.[49] There is no requirement that the AAT find legal error in order for it to exercise its remedial powers. In determining the relevant facts in the context of the review,

---

[43] *Migration Act 1958 (Cth)* ('*Migration Act*') and *Migration Regulations 1994 (Cth) ('Migration Regulations')*

[44] Section 2A *AAT Act*.

[45] s420 *Migration Act.*

[46] *AAT Act*. For a discussion of the concept of merits review generally and the AAT's merits review function see Greg Weeks, Janina Boughey and Ellen Rock (n17) [6.2] 166ff; and Cane, McDonald and Rundle (n17) [7.6] and Allars (n9).

[47] Section 43(1) *AAT Act.*

[48] Ibid.

[49] David Bennett 'Balancing Judicial Review and Merits Review' (2000) 53 *Administrative Review* 3.

the AAT is not as a general rule limited to the evidence that was available to the decision-maker.[50] It conducts reviews on the basis of the relevant facts as they are at the date of the review, and it has various powers to obtain new evidence relating to factual findings made by the decision-maker, as well as taking into account evidence of changes in relevant factual circumstances.[51] The AAT is not bound by technicalities, legal forms or rules of evidence.[52] It may take into account any material it considers relevant, as long as it acts according to 'substantial justice and the merits of the case'.[53] It may draw on evidence from any relevant source, including information that was not available to the primary decision-maker.

The phrase 'stands in the shoes of the decision-maker' is often used to describe the AAT's statutory function.[54] This is apt to mislead because although the Tribunal 'cloaks itself in the jurisdiction' of the primary decision-maker and uses the same legal tools, it can make its own factual findings and form a different view as to the interpretation and application of the law, and the 'nature, extent and discretionary content' of the powers.[55] At an early stage, it was recognised that the question for determination by the AAT when conducting a review of an administrative decision is whether it was 'the correct or preferable one'.[56]

---

[50] *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 ('*Shi*'). This general rule was originally established in *Re Greenham and Minister for Capital Territory* (1979) 2 ALD 137. In *Sh*i, the High Court held that generally the Tribunal will be able to take into account facts and circumstances as they were not only at the time of the primary decision but at the time of review: see *Shi* at [46] per Kirby J; [101] Hayne and Heydon JJ and [143]; [151] per Kiefel J (as her Honour then was). But depending on the nature of the decision that is under review, there will be some cases where the Tribunal is required to limit itself to the circumstances as they were at a particular time: see *Shi* at [44]-[46] Kirby J; [99] per Heydon J and [142]-[144] per Kiefel J. See also *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 at [14]-[15] per Kiefel CJ, Keane and Nettle JJ and by Bell, Gageler, Gordon and Edelman JJ at [51].

[51] Cane, McDonald and Rundle (n17) 285-286.

[52] Section 420 *Migration Act*.

[53] Ibid.

[54] Cane 'Administrative Tribunals' (n7) 145; Juliet Lucy, Core Principles of Merits Review (Legalwise Seminar, 4 September 2013) 3 notes that the 'stands in the shoes' metaphor' may also obscure some of the differences between the positions of the tribunal and that of the administrator, including that the primary focus of the tribunal is review (not original decision-making), that the applicable processes of decision-making are different for an agency and a tribunal, and that each has different institutional allegiances.

[55] Matthew Groves, 'The Return of the (Almost) Absolute Statutory Discretion' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020), 132.

[56] The phrase 'correct or preferable' was first mentioned in *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158 and was later endorsed by the Federal Court in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589. These cases are examined in O'Callaghan and Howard (n19) 171-172.

2.1 'Correct or preferable' decision

This defining feature of merits review recognised in the early decisions of the AAT was endorsed by the High Court some three decades later in *Shi v Migration Agents Registration Authority.*[57] In considering the merits review function of the AAT, all members of the High Court referred to its obligation to make the 'correct or preferable' decision.[58] Justice Kiefel explained:

> The term 'merits review' does not appear in the AAT Act, although it is often used to explain that the function of the tribunal extends beyond a review for legal error, to a consideration of the facts and circumstances relevant to the decision. The object of the review undertaken by the tribunal has been said to be to determine what is the 'correct or preferable decision'. 'Preferable' is apt to refer to a decision which involves discretionary considerations. A 'correct' decision, in the context of review, might be taken to be one rightly made, in the proper sense. It is, inevitably, a decision by the original decision-maker with which the tribunal agrees. Smithers J, in *Brian Lawlor Automotive*, said that it is for the tribunal to determine whether the decision is acceptable, when tested against the requirements of good government. This is because the tribunal, in essence, is an instrument of government administration.[59]

As Her Honour recognises in this passage, when only one possible decision is open on the facts as found and when applying the law, the AAT must make the 'correct' decision.[60] However, if the relevant legislative provision requires the exercise of discretion, and if there is more than one possible outcome, the decision must be the 'preferable' one having regard to the 'limits imposed by the legislation under which the decision is made and the facts of the case'.[61] The potential for the AAT to make the 'preferable' decision therefore only arises where the legislation confers a discretion.[62]

---

[57] *Shi* (n50). Discussed in Allars (n9) 205-213 and O'Callaghan and Howard (n19) 172.

[58] Ibid 398-399 [33]-[38] (Kirby J); 412, [96]-[98] (Hayne and Heydon JJ); 415-416, [116]-[117] (Crennan J); 419-422, [131]-[146] especially 422/[140] nn 139-142 (Kiefel J).

[59] Ibid [140] nn 139-142 (Kiefel J) emphasis added.

[60] The Tribunal is also required to make what is the 'correct or preferable' decision as at the time of the review. If the circumstances have changed since the original decision was made, the tribunal must generally make its decision in the context of those new circumstances: Discussed in Lucy (n54) 3.

[61] DP Forgie in *Re Zheng and Minister for Immigration and Citizenship* (2011) 121 ALD 372, 377 – 378 [24] cited in Callaghan and Howard (n19) 176 and Cane, McDonald and Rundle (n17) 237 and *Tascone and Australian Community Pharmacy Authority and Katsavos and Katsavos and Kouzas (Parties Joined*) [2011] AATA 724, Forgie DP at [121].

[62] Callaghan and Howard (n19) 173.

Peter Cane, Leighton McDonald and Kirsten Rundle explain that the 'correct or preferable' standard, refers 'in abstract terms, to norms of good decision-making, departure from which triggers the remedial jurisdiction of the AAT and application of which underpins exercise by the AAT of its various remedial powers.'[63] The capacity for the AAT to make the 'preferable' decision where the legislation confers a discretion allows it to state its view as to the considerations relevant to the exercise of that discretion in the factual circumstances of the individual case. By the enunciation of these norms[64] in individual cases, the AAT can provide guidance to decision-makers as to the considerations and factors relevant to the exercise of that discretion in similar factual scenarios arising in the future. This 'normative goal' of merits review as it applies to the AAT is referred to as its 'normative function'.[65]

2.2 The 'normative goal'

The normative goal 'is often cited as a fundamental rationale' for the inclusion of merits review within a particular administrative justice system.[66] From its inception, in addition to determining the 'correct or preferable' decision in individual cases, it was envisioned that the AAT would play a role in improving the quality and consistency of administrative decision-making. According to Kerr Committee member, Sir Anthony Mason, the Committee's preference for a generalist tribunal over a number of separate specialist tribunals was based on its belief this would lead to the development of 'a coherent body of principles and greater consistency of decision making.'[67] Peter Cane observes that the Kerr Committee understood merits review to have a normative 'forward-looking' function of

---

[63] Cane, McDonald and Rundle (n17) 280.

[64] Ibid.

[65] Reference is also made to the 'normative effect' of tribunal decisions. The terms 'normative goal', 'normative function' and 'normative effect' are used in this thesis to refer to the role of the AAT to develop norms for 'good' administrative decision-making. What is considered 'good' in relation to protection visa decision-making is detailed in Chapter Three.

[66] Gabriel Fleming, *Rival Goals and Values in Administrative Review: A Study of Migration Decision-Making*, (PhD thesis, University of Sydney, July 2001) 42 ('Rival Goals').

[67] Anthony Mason, 'The Kerr Report of 1971: Its Continuing Significance' (Speech delivered at the Inaugural Whitmore Lecture at the Council of Australasian Tribunals NSW Chapter – Annual General Meeting, Unknown, 19 September 2007) 4 In addition to the creation of a 'general' review tribunal, the Committee also contemplated that existing specialist tribunals might continue to operate and that new specialist tribunals might be created 'in special circumstances'. Kerr Committee Report (n10) [280], 82-83. See also Bland Committee Report (n10) [185]-[190]. Discussed in Cane 'Administrative Tribunals' (n7) 63.

promoting good decision-making, in addition to its 'backward-looking' function of ensuring that the correct or preferable decision was made in individual cases.[68]

Sir Gerard Brennan, the first President of the AAT, writing extra-judicially in 1980, remarked that merits review is 'normative, improving primary administration by defining the nature and extent of the administrator's function …'.[69] Nearly two decades later, Federal Court Justice Robert Nicholson, a former Deputy President of the AAT, observed that the normative goal of merits review is its overarching objective and the means through which AAT decisions attain their authority:

> Indeed it may be that the ultimate goal of merits review is not the production of correct and preferable decisions in individual instances, but the attainment of correct and preferable decisions in a much wider application through the normative effect of those decisions made by the tribunal. In this respect the normative effect seeks to attain an importance for tribunal decisions that the doctrine of precedent attains for decisions of courts.[70]

Peter Bayne, former Senior Member of the AAT, described the manner in which tribunal decisions have a normative effect:

> A decision of a tribunal … has a normative role to the extent that it has an effect on agency behaviour which travels beyond the case at hand and shapes the way an agency deals in the future, not only with cases of that kind, but with other cases where, by analogy, it would be appropriate to apply the tribunal's statement of principle to justify its decision in an earlier case.[71]

---

[68] Discussed in Cane 'Administrative Tribunals' (n7) 182. Creyke states that, 'although there was limited focus on this issue in the initial Kerr Committee report, largely because examination of the extent of wrong-doing was outside its terms of reference, some, but minimal, attention was given to this issue.' Creyke 'Carving Out the Philosophy' (n15) 22.

[69] F.G. Brennan, 'Comment: The Anatomy of an Administrative Decision' (1980) *Sydney Law Review* 1, 10. See also discussion in RD Nicholson, 'Better Decisions: Commonwealth Administrative Review at the Crossroads' in John McMillan (ed) *The AAT — Twenty Years Forward* (Canberra, Australian Institute of Administrative Law, 1998) 318ff.

[70] Nicholson (n69) 319. In *Williams and Members of the Companies Auditors and Liquidators Disciplinary Board* [2019] AATA 504 at [25] Deputy President McCabe stated, 'The Tribunal is assigned a unique role in Australia's system of administrative law. It is not simply a dispute resolution mechanism. It is a cultural institution designed to promote a bureaucracy-wide commitment to better decision-making for the benefit of all Australians. The Tribunal does that by modelling good decision-making behaviour in particular cases. Its decision-making creates norms and educates primary decision-makers and other stakeholders dealing with similar issues in the future.'

[71] Peter Bayne, 'Tribunals in the System of Government' (Papers on Parliament No.10, October 1990), 4

Bayne identified the three ways in which the AAT can improve primary decision-making. First, 'in relation to the process followed to reduce the possibility of error or injustice', secondly, 'in relation to the correct application of the law', and thirdly, 'in relation to the kinds of considerations and policies which inform the making of discretionary judgments.'[72] The latter two means by which the AAT can contribute to the decision-making of government departments and agencies are the focus of this thesis. It argues that the AAT should adopt processes to facilitate the adoption by decision-makers of the guidance contained in selected AAT decisions, specifically in relation to the correct application of the law to recurring factual scenarios, and the considerations which should inform the making of discretionary judgements. It contends that this can be achieved by the AAT attaching authoritative status to existing decisions, and by the development of soft law guidance as a by-product of its merits review function. Both these methods are explained further in section 3 of this Chapter.

Gabriel Fleming identified three elements of the normative goal of merits review, each of which 'extends a little further into the corpus of government administration and the process of public policy making.'[73] The first is that 'similar cases should be treated in a similar way' or like cases treated alike, which is 'fundamental to the question of fairness in the treatment of individuals by government.'[74] The second element concerns 'improvement in the quality and consistency of decision-making, beyond the individual case, to the whole of the agency whose decision has been reviewed.'[75] This promotes review 'as a model of fair and open decision-making'.[76] The third aspect of the normative goal is the 'systemic improvement of the administration across government by the gradual adoption of values seen as inherent in administrative review'.[77] The adoption by the AAT of the methods identified in this thesis,

---

[72] Peter Bayne, 'The Proposed Administrative Review Tribunal: Is there a Silver Lining in the Dark Cloud?' (2000) 7 *Australian Journal of Administrative Law* 86, 89.

[73] Fleming 'Rival Goals' (n66) 231

[74] Ibid; Gabriel Fleming, 'Administrative Review and the 'Normative Goal' - Is Anybody Out There?' (2000) 28 *Federal Law Review* 61 ('Normative Goal').

[75] Ibid. This element of the normative goal 'encompasses not only issues of procedural fairness but also the allocation of resources and the organisation and management of individual public agencies.'

[76] Ibid, citing Administrative Research Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (Australian Government Publishing Service, 1995) (*'Better Decisions'*) [2.11].

[77] Ibid citing Brennan (n69).

by which it can publicise and disseminate to decision-makers its authoritative findings in individual cases, would promote these key elements of the normative goal.

Fleming recognised that 'a complex mix of values underlies the normative goal'.[78] These include the 'legal values of consistency, predictability, rationality, certainty and lawfulness in administrative decision-making'.[79] However the normative goal also reflects 'managerial' values or the 'values of good administration'.[80] It emphasises the contribution of openness and participation to 'good government' achieved through accessible decision-making. The normative goal also reflects the values of efficiency and timeliness to 'good administration'.[81] This mixture of legal and administrative values that underlie the normative goal of merits review reflect the hybrid character of the AAT and its 'uneasy straddling' of the executive and judicial arms of government.[82]

The normative function of the AAT is a key element of the central argument of this thesis. It proposes that the AAT should develop soft law guidance, particularly to structure the discretions of decision-makers tasked with making protection visa decisions. The method by which the AAT can develop this guidance is through the merits review process, and the means for its dissemination is through its written reasons for decision.[83] In a speech

---

[78] Ibid 42.

[79] Ibid.

[80] Gabriel Fleming, 'Review of Migration Decision-Making — Rival Goals and Values' (1999) 10 *Public Law Review* 131, 135.

[81] Fleming 'Rival Goals' (n66) 42 and 230. The normative goal of merits review was a central theme of the first large-scale public review of merits review tribunals conducted in 1995 by the Administrative Research Council *'Better Decisions'*. The ARC found that whereas the merits review system 'has gone a significant way towards meeting the overall objective of ensuring that all administrative decisions of government are correct and preferable', it 'had not been as successful as it could be in improving the quality and consistency of government decision-making.' (n76) [2.26].

[82] Sir Gerard Brennan, 'The AAT — Twenty Years Forward' (Speech delivered at the Administrative Appeals Tribunal Twentieth Anniversary Conference, Canberra, 1 July 1996).

[83] This was eloquently explained by Deputy President Stephanie Forgie in *Confidential and Commissioner of Taxation* [2013] AATA 112 [203].

> [R]easons also promote consistency of administrative decision-making by enunciating the principles upon which that decision is made. That may involve an explanation of the law that the courts would know and might, in their supervisory role consider unnecessary, but might, aid the understanding of the parties in the particular case and assist future administrative decision-makers in formulating their policies. Principles identified by the Tribunal in one case as relevant in making a particular decision can be discarded or shaped and refined in later cases as other factual circumstances present themselves. Over time a body of principles is developed and tested in a particular jurisdiction if decisions come to the Tribunal to be reviewed. Even if they do not, those principles may assist administrative decision-makers in making future

delivered at a conference to mark the twentieth anniversary of the AAT, Brennan explained that '[a]ny effect that the AAT might produce in primary administration would depend on the reasoning expressed in the reasons for AAT decisions.[84] The AAT's reasons must clearly state its findings in relation to the application of the law to factual scenarios, and the considerations which should inform the making of discretionary judgements.[85] However, for the guidance contained in these reasons to influence the decisions of department and agency decision-makers, they must regard them as authoritative and adopt the norms and standards they contain in their own decisions. The extent to which AAT decisions currently impact primary decision-making is considered next.

3. AAT decisions as soft law

3.1 Impact on decision-making

Where the primary decision of a department or agency is varied or set aside by the AAT on review, it must either accept the AAT's decision and implement it in the instant case, or challenge the decision if there are avenues available to appeal it or seek judicial review.[86] Even in circumstances in which the primary decision-maker disagrees with the decision reached by the AAT, it may decide not to challenge it for a range of reasons, including because the resources involved in doing so outweigh the importance of the outcome.[87] While AAT decisions must be adopted in the circumstances of the instant case, they do have any binding affect *beyond* this case. This allows the department or agency to respond to an AAT decision by informing its decision-makers that it is of the view that the decision is not correct and should not be applied by them in future similar cases.[88] As a consequence, there is considerable scope for differences to emerge between the department or agency's

---

decisions, to test their policies against them and to adapt and revise. They will assist their legal advisers in giving advice about their prospects of success either in the Tribunal or on any appeal. They will assist those engaged in alternative dispute resolution processes to have an indication of the boundaries within which the decision will be reviewed if it should go to a hearing.

[84] Brennan (n82).

[85] Section 43 *AAT Act*.

[86] Similarly, if the decision is remitted with a direction that certain criteria are satisfied, the primary decision-maker is bound to adopt those findings when remaking the decision.

[87] Fleming 'Rival Goals' (n66) 188.

[88] See discussion in *Better Decisions* (n76) [6.38]ff and Recommendations 73 and 74.

interpretation of relevant legislation or policies and the AAT's interpretation of the same.[89] This can lead to inconsistency and potential injustice as between those citizens who have the resources to access merits review and those who do not.[90]

This discussion raises the question as to whether AAT decisions are best described as 'hard' or 'soft' law. On the one hand, AAT decisions may be regarded as 'hard' law in so far as they must be followed by the agency or department in the instant case, and therefore have 'hard' legal consequences for both it and the individual to whom the decision applies. However the views expressed by the AAT in that instant case in relation to interpretation and application of relevant legislation and policies, and its findings in relation to the considerations relevant to the exercise of discretionary powers may be disregarded by a decision-maker in a subsequent case, even when the facts are identical. The binding effect of AAT decisions is therefore extremely limited, unlike judicial decisions which must be applied by administrative decision-makers in subsequent matters. As AAT decisions only impact the parties to the decision and have no prospective effect, they lack characteristics that are typical of 'hard' law.

While the findings in AAT decisions are not binding on subsequent decision-makers they may be, and often are, followed in later cases.[91] They are also regarded as authoritative by the AAT's users, including legal practitioners and others who wish to have knowledge of the 'law' in the areas of the AAT's jurisdiction. As Mark Aronson, Matthew Groves and Greg Weeks observe:

> [Tribunal] decisions are widely published, and read not just by anyone who is to appear before them, but also by anyone wanting to discover and study the substantive law with which they deal ... In any practical sense, their decisions are surely authoritative.[92]

---

[89] Ibid [6.36].

[90] Fleming 'Rival Goals' (n66) 89.

[91] According to Fleming, many review tribunals, particularly those in high volume jurisdictions, 'are seen as providing Rolls Royce review incapable of application in the primary agency, either in terms of procedural fairness, policy choices, cost or consistency.' Some agency decision-makers are said to view Tribunal members 'as naive or uninformed about the reality of the department's day-to-day business.' Fleming 'Normative Goal' (n74) 63.

[92] Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action*, 6th edn (Sydney, Thomson Reuters, 2017) [4.70]; cited in Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016) 38.

To the extent that earlier AAT decisions are considered by a primary decision-maker in a subsequent matter, even if they are ultimately disregarded, they shape and influence the decision-making process in a manner which warrants them being labelled soft law. What soft law affects 'it affects by influence.'[93] As AAT decisions do not have binding legal affect beyond the instant case and yet are often treated as authoritative and regularly followed by decision-makers in subsequent cases, this thesis terms them 'soft' law, while acknowledging that they have 'hard' legal consequences for the parties to the decision. As Weeks recognises, soft law has 'variable degrees of "softness".'[94]

3.2 Precedential value of AAT decisions

A related issue is the precedential weight that is attached to AAT decisions in subsequent reviews. The concept of binding precedent 'is considered to be inconsistent with [the AAT's] basic task', namely to make the correct or preferable decision in the individual case before it.[95] As the AAT is tasked with identifying the 'correct or preferable' decision in the particular circumstances, it must not fetter itself to a reduced 'range of discretion' by following an earlier decision which may cause it to reach anything other than the 'correct or preferable' decision.[96] The Federal Court has held that Tribunal members cannot be bound to follow earlier AAT decisions. In *Nowicka v Superannuation Complaints Tribunal*, Sundberg J distinguished between the obligation of a federal tribunal to follow the decisions of the Federal Court from the proper approach to its own decisions:

> In the use of its own precedents the Tribunal is in a different position from a court. A court may be bound by the rules of precedent to decide a case in accordance with an earlier decision, whether or not the result accords with the court's own opinion. But an administrative body which

38. Weeks contends that, 'tribunals … set precedents which might well be included in a functionalist definition of "law"'. See also DP Forgie *Confidential and Commissioner of Taxation* (n83) [203].

[93] Weeks (n92).

[94] Ibid 19.

[95] Cane 'Administrative Tribunals' (n7) 195-196. Weeks, Boughey and Rock (n17) [6.3.1] point out that tribunals are not subject to the doctrine of *stare decisis* citing *Babaniaris v Lutony Fashions Proprietary Limited* (1987) 163 CLR 1 at 32 (Brennan and Deane JJ).

[96] Weeks (n92) 48 citing *Drake (No 2)* (n5) 641.

> acts in that way in deference to an earlier decision of its own may thereby commit reviewable error. It is not allowed to pursue consistency at the expense of the merits of individual cases.[97]

Despite not having the effect of a binding precedent, it has been recognised that at least some of the AAT's decisions should have precedential value and it should endeavour to take a consistent approach.[98] In *Re Ganchov and Comcare* Deputy President Robert Todd observed:

> The Tribunal is not legally required to apply a strict doctrine of precedent. It is not a court, and is not of last resort. ... It is, however, I believe time to say that unless decisions of the President are followed by all within the Tribunal, and unless decisions of presidential members (which of course includes deputy presidents) clearly dealing with a point in issue are followed within the Tribunal, the Tribunal could gain a reputation for inconsistency and disarray. ... [I]t could be

---

[97] *Nowicka v Superannuation Complaints Tribunal* [2008] FCA 939 at [23]. Deane J cautioned that 'while consistency may properly be seen as an ingredient of justice, it does not constitute a hallmark of it' *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639 at 646-647. See also Flick J who stated that 'a like result reached upon the basis of factually diverse materials may be the hallmark of injustice and not justice': *SZMIP v Minister for Immigration and Citizenship* [2009] FCA 217 [30]. In *Minister for Home Affairs v Brown* [2020] FCAFC 21 [113] the Full Court of the Federal Court stated that '[w]hilst consistency can be seen as part, or an ingredient, of rationality and justice, it is not a hallmark of either.'

[98] In *Re Scott and Commissioner for Superannuation* (1986) 9 ALD 491, 499–500 three members of the AAT stated what should be the approach to previous decisions:

> One effect of the tribunal's decisions is to establish administrative norms; they enable legislation to be administered consistently. For the tribunal to make decisions inconsistent with its own previous decisions adversely affects that process. Doubtless, in some instances, where a matter has been decided by the tribunal without full argument or full consideration and it is necessary for the tribunal in later proceedings to examine the matter fully, it may then properly reach a conclusion different from the previous decision. In that event, because the later decision is the first made upon a full consideration of the matter, it is clear to administrators that that decision should be followed rather than the previous decision. More rarely there may be instances where, notwithstanding that the tribunal has reached a decision on a certain matter after full consideration, it is nevertheless manifest that there was an error in the reasoning which led to that decision. To adapt what was said by Isaacs J in *Australian Agricultural Co v Federated Engine Drivers Association* (1913) 17 CLR 261 at 278; 19 ALR 509, it is not better that the tribunal should be persistently wrong than that it should be ultimately right. Nevertheless, where a matter has been decided by the tribunal after full consideration of competing arguments, the decision is one which is reasonably tenable and there have been no changes to the legislation and no new decisions of the High Court of Australia or the Federal Court which may be relevant, it seems to us that it would be extremely unhelpful for the tribunal in subsequent proceedings to decide the matter in a manner inconsistent with that decision, particularly when the arguments advanced are substantially the same as those advanced in the previous case … In our view, where a decision-maker is strongly of the view that a fully considered decision of the tribunal in relation to any matter is wrong, he should appeal to the Federal Court against that decision or, if it is not possible to do so, take the first opportunity to appeal against a decision in subsequent proceedings which follows and applies it, rather than attempt to persuade the tribunal to make a decision inconsistent with its previous decision and so create a situation in which those relying on the tribunal's normative function to make administrative decisions or to advise their clients with regard to the correctness or otherwise of such decisions are cast into confusion.

added that decision-makers at lower levels can hardly be expected to treat Tribunal decisions as precedents if the Tribunal itself does not.[99]

Weeks contends that the 'realities of tribunal justice' require recognition that tribunals 'strive for consistency' and endeavour to meet the expectation that they decide like cases alike and that 'any variation from a previous like case will need to be explained'.[100] He argues that tribunal decisions may be said to 'have at the very least the *de facto* status of precedent'.[101] He concludes that, '[t]hese realities point persuasively to the fact that tribunals are now a source of "hard law"'.[102] With all due respect to Weeks' conclusion, tribunal decisions, including those of the AAT, are not regarded as 'hard law' in this thesis. As explained above, whereas AAT decisions are binding on the primary decision-maker and the individual in relation to the instant decision and thereby have 'hard' legal consequences, they only have influence in subsequent primary decisions and in later AAT reviews involving the same issues. The degree of this influence may vary from insignificant to highly persuasive according to the nature of the issues involved and the constitution of the AAT panel which made the decision. Consequently, as AAT decisions have the potential to influence the outcomes of future administrative decisions, they are soft law according to the definition adopted in this thesis.

Noting the concerns expressed by some agencies that AAT decisions are inconsistent,[103] Dennis Pearce observes that if decision-makers decide not to follow a particular AAT decision for reason that they believe that the Tribunal 'is likely to say something different or decide the same set of facts another way' when it next conducts a review involving the

---

[99] *Re Ganchov and Comcare* (1990) 19 ALD 541, 542-543. In a recent decision, *Alstom Transport Australia Pty Ltd and Comptroller-General of Customs* [2021] AATA 3816 [34] Deputy President Brian Rayment QC stated:

> … while the tribunal is not bound by previous tribunal decisions, unless persuaded that those decisions are contrary to a binding precedent or wrong, the Tribunal should defer to those decisions. This is especially so where the previous decisions represent a settled view of the law that can be regarded as having been consistently applied, and in respect of individual decisions, where the Tribunal is constituted by presidential members or a judge of the Federal Court …

[100] Weeks (n92) 50.

[101] Ibid. Creyke states that '[t]he reality is that even though tribunal decisions do not in theory have precedential effect, in practice it is their decisions that are the substantial source of interpretation and administrative law principle applying to and accepted by citizens and by the executive.' Robin Creyke, 'Tribunals and Merits Review' (n14) 414.

[102] Weeks (n92) 50.

[103] Dennis Pearce *Administrative Appeals Tribunal* (5th edition, LexisNexis, Butterworths, 2020) 390.

same issues, then the AAT's 'standing' will be 'greatly damaged'.[104] Pearce suggests that this can be addressed by the AAT 'listing hearings before a strong AAT that includes the President or another Federal Court judge to hear a case that enables the competing views to be considered.'[105] A decision made by this process, he argues, although not binding, 'is very persuasive.'[106] Pearce's suggestion for the constitution of a panel comprising of judicial members of the AAT to hear and determine a review where there are concerns about inconsistent approaches is considered further in Chapter Seven which proposes a procedure for the production of the AAT of Guidance Decisions under section 420B of the *Migration Act.* The next section of this Chapter examines the application and potential for development by the AAT of 'policy' or soft law guidance as it is termed in this thesis.

4. Application and development of soft law

4.1 Nature of 'policy' in the merits review context

Cane observes that alongside the concept of 'merits review' itself, 'the least analysed of the concepts central to the federal administrative law system is that of 'policy'.[107] He notes that the term is used 'in at least three quite distinct senses in the literature'.[108] It is 'sometimes used to mean an administrative (internal governmental) rule, principle or guideline which does not have the status of either primary or secondary legislation.'[109] As explained in Chapter One, this soft law developed by the executive branch, specifically by government departments and agencies, to provide their primary decision-makers with assistance in applying legislative provisions, is termed 'executive policy' in this thesis. Soft law that is developed by a tribunal, including the AAT, to provide the same type of functional guidance

---

[104] Ibid 391.

[105] Ibid.

[106] Ibid citing *Re Littlejohn and Secretary, Department of Social Security* (1989) 17 ALD 482, 486.

[107] Peter Cane, 'Merits Review and Judicial Review - The AAT as Trojan Horse' (2000) 28(2) *Federal Law Review* 213 ('Trojan Horse').

[108] This section discusses Cane's description of 'policy' in its first and third senses. Cane notes that 'policy' in its second sense 'is sometimes used in contradistinction to 'law' on the one hand and 'fact' on the other [and] is roughly synonymous with the 'purpose' of, or 'reason' for, a decision or rule.' Cane 'Trojan Horse' (n107) 232-233.

[109] Ibid 232.

to administrative decision-makers is termed 'soft law guidance' in this thesis to distinguish it from 'executive policy'.

The relevance of executive policy in AAT decision-making was settled in two early decisions of the AAT by its first President, Sir Gerard Brennan.[110] In his important decision in *Drake (No 2*), His Honour considered the capacity for the AAT to develop what he termed 'policy' in the process of conducting merits reviews.

4.2 Application by the AAT of executive policy

The appropriate approach by the AAT to executive policy was considered in the context of its deportation jurisdiction in *Drake v Minister for Immigration and Ethnic Affairs*.[111] The Federal Court considered an appeal by Mr Drake of an AAT decision which affirmed a Ministerial decision to deport him from Australia on the ground that he had been convicted of a criminal offence. One of the grounds of appeal was that the AAT had given too much weight to a relevant 'policy statement' by the Minister. Bowen CJ and Deane J held that the AAT was entitled to treat a lawful policy 'as a relevant factor in the determination of an application for review', but that it was not 'entitled to abdicate its function of determining whether the decision made was, on the material before the Tribunal, the correct or preferable one in favour of a function of merely determining whether the decision made conformed with whatever the relevant general government policy might be.'[112] Their Honours noted that 'the consistent exercise of discretionary administrative power in the absence of legislative guidelines will, in itself, almost inevitably lead to the formulation of some general policy or rules relating to the exercise of the relevant power.'[113]

This issue was further considered by Brennan J in *Drake (No 2)*[114] following the remittal by the Federal Court of the matter to the AAT for its redetermination of the question of

---

[110] *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158; *Re Drake (No 2)* (n5).

[111] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60; (1979) 24 ALR 577.

[112] Ibid. Having found that the Tribunal failed to make an independent assessment of the propriety of the relevant policy and an independent determination of the merits (591), the Federal Court remitted the matter to the AAT for reconsideration. The policy in question was a Ministerial policy concerning the deportation of aliens.

[113] Ibid.

[114] *Re Drake (No 2)* (n5).

whether Mr Drake should be deported. His Honour devoted a considerable amount of his reasons to examining the nature of the AAT's role in reviewing executive policy. Brennan J observed that, '[n]ot only is it lawful for the Minister to form a guiding policy; its promulgation is desirable'.[115] This, he said, is consistent with the views of KC Davis who stated:

> When legislative bodies delegate discretionary power without meaningful standards, administrators should develop standards at the earliest feasible time, and then, as circumstances permit, should further confine their own discretion through principles and rules.[116]

Brennan J remarked that this 'is a commendable approach. It is not a rule of law, but it is none the less valuable as a principle of discretionary decision-making.'[117]

His Honour endorsed 'the Tribunal's adoption of a practice of applying lawful ministerial policy, unless there are cogent reasons to the contrary'.[118] In so doing, Brennan J identified the benefits of the application of government policy as including consistency in tribunal decision-making[119] but was mindful of the Federal Court's warning that policy could not

---

[115] Ibid 642.

[116] KC Davis, *Administrative Law Treatise* (2nd edition, 1979) volume 2 [8.8] cited by Brennan J in *Drake (No 2)* (n5) 642.

[117] Brennan J in *Drake (No 2)* (n5) 642.

[118] Ibid 645. An example of such a reason is when the application of a policy would lead to an injustice in a particular case: See, for example, *Teekay Shipping (Aust) Pty Ltd v Australian Maritime Safety Authority* [2012] AATA 519 at [84]; *Re Sahin and Minister for Immigration and Citizenship* (2012) 129 ALD 345 at 347 [19]; *Wang v Migration Agents Registration Authority* [2012] AATA 463 at [16]. A distinction is also made between 'high' and 'low' policies; Ministerial policy being 'high' and agency guidelines and practice being 'low'. In the 1980s, the AAT developed a view that 'high policies' are 'to be given great weight': *Re Aston and Secretary, Department of Primary Industry* (1985) 8 ALD 366, at 380. By contrast, departmental policies are relevant only as part of the 'background of facts': *Re Lumsden and Secretary, Department of Social Security* (1986) 10 ALN 225 at 227. In *Re MT and Secretary, Department of Social Security* (1986) 4 AAR 295; 9 ALD 146, 150, the AAT held that it should 'adopt a guarded approach to" departmental guidelines, lest they be allowed to supplant the legislation itself.' See discussion in Cane 'Administrative Tribunals' (n7) 160; Lucy (n54) 10; Callaghan and Howard (n19) 178ff; Andrew Edgar, 'Tribunals and administrative policies: Does the high or low policy distinction help?' (2009) 16 *Australian Journal of Administrative Law* 143; and Jeffrey Asimow and Michael Lubbers, 'The Merits of 'Merits Review': A Comparative Look at the Australian Administrative Appeals Tribunal' (2011) 67 *AIAL Forum* 58 at 69-70. See also discussion in Bayne (n72) 96-97 about different weight accorded to non-Ministerial policies and reluctance of the AAT to give weight to policy guidelines in Departmental manuals.

[119] Brennan J stated, 'If the Tribunal applies ministerial policy, it is because of the assistance which the policy can furnish in arriving at the preferable decision in the circumstances of the case as they appear to the Tribunal. One of the factors to be considered in arriving at the preferable decision in a particular case is its consistency with other decisions in comparable cases, and one of the most useful aids in achieving consistency is a guiding policy.' (642-643). See discussion in Bayne (n72) 97 about the application of policy manuals:

bind a decision-maker to decide other than on the merits of a case. He noted that an important factor in reaching the preferable decision in a particular case is its consistency with other decisions in comparable cases.

Brennan J recognised the 'strong link' between consistent decision-making and justice, stating:

> Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice.[120]

His Honour however noted that there were several reasons why consistent decision-making would be particularly difficult to achieve in the Tribunal's deportation jurisdiction. First, the deportation powers conferred by the *Migration Act* were very broad and required the decision-maker to consider a variety of different factors.[121] Whereas some of these were dependent on ascertainable facts, others involved the decision-maker making an assessment of what is in the best interests of Australia. These matters are 'not generally matters of logical proof or evidentiary demonstration.'[122] Accordingly, 'the degree of inconsistency in decision-making will depend upon the extent of the disparity in the respective decision-makers' perceptions' in this regard.[123] It followed that consistency would be difficult to achieve where broad value judgements are involved 'unless decision-makers placed a high value on consistency by agreeing to follow a common approach in each case.'[124] The second factor contributing to a lack of a consistent approach was the fact that a number of different members were assigned to determine deportation matters, each of whom 'may perceive Australia's interests differently.'[125]

'[t]hey promote consistency in decision-making, they give some assurance of the integrity of decision-making in a particular case, and they 'diminish the importance of individual predilection' *Drake (No 2)* (1979) 2 ALD 634 at 639-640. 'Generally speaking, they will have been formulated with an understanding of the policies of the government, and with a view to the limitations of the budget.' Bayne (n72) 97.

[120] *Drake (No 2)* (n5) 639.

[121] Ibid.

[122] Jennifer Sharpe, *The Administrative Appeals Tribunal and Policy Review* (Law Book Company, 1986) 160 citing *Drake (No 2)* 639.

[123] *Drake (No 2)* (n5) 639.

[124] Sharpe (n122) 160.

[125] *Drake (No 2)* (n5) 639.

Despite these difficulties in achieving consistency in deportation decisions, Brennan J considered that their effect on the individual concerned and their family and the relevance to the community, were such that 'inconsistency born of the application of differing standards and values should be reduced as far as possible.'[126] He suggested that 'one of the most appropriate ways of achieving consistency was by the adoption of a policy setting out the values by which the decision-maker would be guided.'[127] He stated:

> By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process.[128]

His Honour noted that, although the AAT was not obliged to adopt or follow a policy in reaching the preferable decision, it would be in the interests of consistency for it to do so.[129] For this reason, the AAT should follow the Minister's deportation policy 'unless there are cogent reasons to the contrary'.[130] The standards and values expressed in a statement of

---

[126] Sharpe (n122) 160 citing *Drake (No 2)* 639.

[127] Ibid citing *Drake (No 2)* (n5) 640**.**

[128] *Drake (No 2)* (n5) 640. This approach has been consistently adopted by the High Court since *Drake (No 2)*. In *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 French CJ, Bell, Keane and Gordon JJ at [54] explained the role of executive policy in administrative decision making as follows:

> Policy guidelines ...promote values of consistency and rationality in decision- making, and the principle that administrative decision-makers should treat like cases alike. In particular, policies or guidelines may help to promote consistency in "high volume decision-making", such as the determination of applications for Subclass 202 visas. Thus in *Drake v Minister for Immigration and Ethnic Affairs* [No 2] [(1979) 2 ALD 634 at 642] Brennan J, as President of the Administrative Appeals Tribunal, said that "[n]ot only is it lawful for the Minister to form a guiding policy; its promulgation is desirable" because the adoption of a guiding policy serves, among other things, to assure the integrity of administrative decision-making by "diminishing the importance of individual predilection" and "the inconsistencies which might otherwise appear in a series of decisions".

Gageler J stated at [68]:

> It is open to the Minister in the exercise of non-statutory executive power to lay down a policy for the guidance of his or her delegates in making those determinations. Indeed, it is inconceivable that the Minister would not do so. In *Nevistic v Minister for Immigration and Ethnic Affairs*, Deane J emphasised the importance of the adoption and consistent application of policy to the avoidance of substantial injustice in administrative decision-making, which involves 'competition or correlativity between rights, advantages, obligations and disadvantages'. Each applicant must always be entitled to have his or her application for the exercise of a decision-making power determined on its merits. But the merits of an application cannot always adequately be considered by reference to the circumstances of the applicant alone.

[129] *Drake (No 2)* (n5) 643.

[130] Ibid 645. The amount of deference that tribunals show to government policies depends on the political level at which the policy is made. It is commonly said that tribunals give more weight to policies that are made at the ministerial level than to those developed at the departmental level. In *Re Becker and Minister for Immigration & Ethnic Affairs,* Brennan J drew the distinction between ministerial and departmental policies to

policy can be the 'constant reference point' for AAT members in exercising their deportation discretion in individual cases.[131] Accordingly, the AAT should apply relevant lawful government policies unless doing so would 'work an injustice in a particular case'.[132]

In *Drake (No 2)* Brennan J was concerned generally that the AAT adopt a consistent approach to its administrative decision-making and that *one* of the ways this could be achieved is by following lawful executive policy. In his reasons, Brennan J also considered the potential for the Tribunal to *formulate* policy in the course of deciding individual reviews which would be followed in subsequent cases in order to promote consistent decision-making.

4.3 Development by the AAT of soft law guidance

While Brennan J in *Drake (No 2)* made clear it was not the AAT's role to formulate 'broad policy',[133] he saw no reason why the AAT 'could not contribute the benefit of its experience to the growth or modification of general policy.'[134] His Honour recognised that consistency in the Tribunal's deportation decision-making would be enhanced if it developed its own

---

support his finding that former should be reviewed by the AAT only in exceptional circumstances. The implication that follows from this is that the same restraint is not required for departmental policies. Departmental guidelines are generally afforded a lower status than ministerial policies and tribunals may therefore be more justified in departing from them. Such guidelines have been described by the AAT as being 'relevant only as forming part of the background of facts of which the AAT should be informed in making its decision'. However, if the policy is sound, it is desirable that it be followed 'for the sake of consistency.' Yee-Fui Ng, 'Tribunal Independence in an Age of Migration Control' (2012) 19 *Australian Journal of Administrative Law* 203, 214 citing *Re Becker and Minister for Immigration & Ethnic Affairs* (1977) 1 ALD 158. See generally Sharpe, (n122) Ch IV (review of ministerial policy), Ch V (review of policy made by departments and statutory authorities); Edgar (n119) 143 notes that this is often referred to as the distinction between 'high' and 'low' level policies citing Cane and McDonald , *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, Melbourne, 2008) 241; John McMillan, *Review of Government Policy by Administrative Tribunals* (Law and Policy Papers No 9, Centre for International and Public Law, 1998) 36. Pearce [16.29].

[131] Sharpe (n122) 161.

[132] *Drake (No 2)* (n5) 645. The role of executive policy in administrative decision-making was recently endorsed by the High Court in In *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (n126).

[133] Ibid. Brennan J stated that 'this is essentially a political function, to be performed by the Minister who is responsible to the Parliament for the policy he (sic) adopts. The very independence of the Tribunal demands that it be apolitical ... The Tribunal is not linked into the chain of responsibility from Minister to Government to Parliament, its membership is not appropriate for the formulation of broad policy and it is unsupported by a bureaucracy fitted to advise upon broad policy. It should therefore be reluctant to lay down broad policy, although decisions in particular cases will impinge on or refine broad policy emanating from a Minister'.

[134] Sharpe (n122) 128.

policy, which all members followed. Brennan J explained that the formulation by the AAT of policy in a progressive manner through its decision-making in individual cases is not inconsistent with its merits review function:

> Although the practice of giving reasons for decisions inevitably spins out threads of policy from the facts of the cases, the policy developed in this way originates in the need to ensure that justice is done in individual cases, and it is a different development from a Ministerial declaration of broad policy relating to the generality of cases.[135]

This endorsement by Brennan J in *Drake (No 2)* of a role for the AAT to engage in soft law-making is significant and central to the arguments of this thesis. It recognises that the AAT can lawfully develop soft law guidance for primary decision-makers and its members, to structure the exercise of administrative discretion and the application of legal provisions to recurring factual scenarios so as to promote consistent decision-making.[136] Brennan J's judgment is also important as it highlights one of the potential limits to the effectiveness of soft law-making by the AAT. As the decisions reviewed by the AAT represent only a proportion of the decisions made pursuant to a legislative scheme,[137] if the soft law guidance it develops differs from the executive policy applied by the primary decision-maker, outcomes in individual cases will depend on whether the individual sought merits review of the decision. This point is examined further in Chapter Seven which proposes a procedure for the AAT to develop soft law guidance in the form of Guidance Decisions under the *Migration Act*. These Guidance Decisions could be applied by both by primary decision-makers and the AAT on review thereby promoting consistency between first instance and review decisions. The next section provides a brief overview of the existing academic scholarship that has considered the potential benefits and limits of the AAT assuming a soft law-making role in its fields of jurisdiction and identifies the gaps in the literature that this thesis seeks to fill.

---

[135] *Drake (No 2)* (n5*)* 644.

[136] Cane, McDonald and Rundle observe that the AAT 'has always shied away from laying down general norms unrelated to the facts of particular cases.' (n17) [7.6.3] citing *Re Australian Metal Holdings Pty Ltd and Australian Securities Commission and Others* (1995) 37 ALD 131, 144. See also Cane, 'Trojan Horse' (n107) 237–8; and Sharpe (n122) Ch VI.

[137] *Drake (No 2)* (n5) 645. Brennan J observed it would be 'a regrettable anomaly if the decisions which were not reviewed revealed different standards and values from those made on review.'

4.4 Consideration of AAT soft law guidance in the academic literature

In *The Administrative Appeals Tribunal and Policy Review* published in 1986,[138] Jennifer Sharpe argued there was 'no reason why the Tribunal could not contribute the benefit of its experience to the growth or modification of general policy' by way of 'incremental changes in the context of particular cases.'[139] Citing Brennan J in *Re Drake (No 2)*, Sharpe observed that 'formulation of policy in this step-by-step fashion was not inconsistent with [the AAT's] adjudicative role.'[140] She argued that 'consistency between Tribunal decisions can be enhanced if members of the Tribunal adopt a common approach.'[141] Her study of AAT decisions in its deportation jurisdiction in the period 1978 to 1980 showed that it had developed guidelines designed to structure or confine the broad discretion conferred by the *Migration Act*.[142] She concluded that '[t]he development of policies incrementally in the context of resolving individual disputes is the method of policy formulation' best suited to the AAT.[143]

Sharpe recognised the limitations of the merits review process for the development by the AAT of what this thesis terms soft law guidance. The information before the AAT in considering a review application is generally limited to that which relates to the decision under review.[144] It is also usually restricted to the evidence presented by the parties and any experts called by them. This may not necessarily present the diversity of views that may be relevant to the development of soft law guidance. Unless the tribunal has access to all relevant information, 'the policies it develops or modifies … may not be consistent with or helpful in the general administration of the statutory provisions.'[145] Soft law guidance

---

[138] Sharpe (n122) 128.

[139] Ibid.

[140] Ibid.

[141] Ibid 175.

[142] Ibid Chapter IX.

[143] Ibid 129.

[144] Discussed in Murray Gleeson, 'Outcome, Process and the Rule of Law' (2006) 65(3) AJPA 5 at 6; Michael Kirby, 'Administrative Review: Beyond the Frontier Marked "Policy – Lawyers Keep Out"' (1981) 12 *Federal Law Review* 121, 150.

[145] Sharpe (n122) 128-129; Edgar notes that 'the information and administrative experience that are available at the policy-development stage will not necessarily be at hand in the merits review proceedings' Edgar (n119) 143.

developed by the AAT through individual decisions may therefore be *ad hoc* by addressing an 'immediate problem at the expense of a consistent and overall picture.'[146] Sharpe's observations about the limitations of the merits review process to have regard to all relevant information necessary to develop comprehensive soft law guidance is considered further in Chapter Seven.

In her 2004 article 'The Special Place of Tribunals in the System of Justice: How Can Tribunals Make a Difference?', Robin Creyke highlighted the importance of tribunals demonstrating 'they can add value to agency decision-making.'[147] She pointed out that this can be achieved by tribunals publishing their output, including extrapolating principles from individual cases and developing standards that can be applied by decision-makers.[148] Writing extra-judicially in 2008, Justice Stuart Morris argued that tribunals often have high levels of skill, experience and independence that enable them to formulate, or at least develop, policies, and provide leadership for decision-makers whose decisions they review.[149] Other academics, for example, Roger Douglas have argued that the formulation of policy requires skills that the AAT's membership lacks. He pointed out that the AAT is incapable of carrying out necessary consultation with industry groups and the community, and that ministers are better able to take into account the political variables that are part of policy formulation.[150] The specialist expertise of members of the AAT and the limits to that expertise to develop soft law guidance is examined in Chapter Seven.

In her 2012 article, 'Policy, Principles and Guidance: Tribunal Rule-Making', Linda Pearson noted the advantages in tribunals 'adopting a coordinated approach to identifying significant decisions and to formulating general guidance' not least for reason that it 'provides a mechanism for ensuring that "the fruits of administrative law adjudication" can

---

[146] Ibid 129. Referring to the potential for the AAT to contribute to the development of policy, Sharpe cautioned, '[u]nless the AAT has a high level of expertise, experience and informational input, its contribution to the development of policy may be *ad hoc* and disruptive.'

[147] Robin Creyke, 'The Special Place of Tribunals in the System of Justice: How Can Tribunals Make a Difference?' (2004) 15 *Public Law Review* 220 ('Special Place').

[148] Ibid 234.

[149] Stuart Morris 'Tribunals and Policy' in Creyke (ed) *Tribunals in the Common Law World* (Federation Press, 2008) 149.

[150] Roger Douglas, *Administrative Law*, (5th ed, Federation Press, 2006) 365.

filter through government agencies.'[151] She further recognised that '[e]nabling the capturing of expertise within tribunals, and enhancing consistency of decision-making in a context where volume and complexity of decisions may otherwise inhibit it, are valuable outcomes.[152] She recognised that while the skills and experience of tribunal members supports the formulation of policy, she cautioned that the capacity of a tribunal to undertake this function may be limited by the adjudicative task itself, particularly 'the duration of the inquiry … and the evidence that might be called.'[153] In a tribunal process, those whose interests are represented and whose views are heard are limited to the parties, the experts called by them, and any permitted intervenors, thereby excluding the views of other interested parties. The resolution of the particular dispute limits the possibility of the tribunal considering 'broader considerations' in developing policies or guidelines.[154] Pearson's observations about the limits of the tribunal process are discussed in Chapter Seven.

The particular focus of this thesis is the development by the AAT of soft law guidance in its protection visa jurisdiction, specifically the use of s420B *Migration Act* which empowers the AAT to identify Guidance Decisions. Consideration of this in the academic literature has been limited to a short piece in an online publication by Douglas McDonald-Norman in July 2016, and an article I published in the *Journal of Immigration Asylum and Nationality Law* in 2017.[155] In his piece, McDonald-Norman outlined the Guidance Decision provision of the *Migration Act* and the country guidance system in the United Kingdom, examined in Chapter Six of this thesis,[156] and concluded that '[t]here are undeniable advantages to the use of

---

[151] Linda Pearson 'Policy, Principles and Guidance: Tribunal Rule-Making' (2012) 23 *Public Law Review* 16, 32 citing Robin Creyke and John McMillan 'Executive Perceptions of Administrative Law – An Empirical Study' (2002) 9 *Australian Journal of Administrative Law* 163, 163.

[152] Ibid, citing Trevor Buck, 'Precedent in Tribunals and the Development of Principles' (2006) 25 *Civil Justice Quarterly* 458, 483.

[153] Ibid 20.

[154] Ibid 21, citing David Galpin, 'Planning Principles: Policy-Making by the Land and Environment Court' (2005) 11 *Local Government Law Journal* 94, 101-102 and Brian Preston, 'The Role of Courts in Relation to Adaptation to Climate Change' in Tim Bonyhady, Andrew Macintosh and Jan McDonald (eds), *Adaptation to Climate Change: Law and Policy* (Federation Press, 2010) 88.

[155] Linda Kirk, 'Improving Consistency in Protection Status Decisions in Australia: Looking to the United Kingdom for "Guidance"?' (2017) 31(2) *Journal of Immigration Asylum and Nationality Law* 151.

[156] Douglas McDonald-Norman 'Country Guidance Decisions in the UK and Australia' AUSPUBLAW, 7 July 2016.

country guidance decisions.' However, in his view, the 'procedural advantages are countered by the potential substantive injustices resulting from the use of country guidance decisions (or equivalents).'[157]

This survey of the existing academic literature shows that there has been very limited examination of the legality and legitimacy of the AAT assuming a soft law-making role to structure administrative discretion, and almost no consideration of this in the context of protection visa decision-making. The gap in the academic scholarship that this thesis seeks to fill is therefore substantial, Fortunately, there are examples of tribunals in other jurisdictions assuming a soft law-making function in the context of the determination of protection claims, specifically the Immigration and Refugee Board in Canada and the Upper Tribunal (Immigration and Asylum) Tribunal in the United Kingdom, examined here in Chapters Five and Six. The soft law-making practices and procedures of these tribunals have been the subject of judicial scrutiny and academic consideration. This thesis draws on this body of legal knowledge to develop a structured process for the development by the AAT of Guidance Decisions in its protection visa jurisdiction in Australia, which is detailed in Chapter Seven.

The next Chapter outlines the powers conferred by the *Migration Act 1958 (Cth)* on primary decision-makers to grant eligible applicants a protection visa, and the jurisdiction invested in the AAT (MRD) to conduct merits reviews of negative primary decisions. It explains the task of assessing whether an applicant is entitled to protection, and why it is widely recognised that these are 'hard' decisions. It shows that the wide discretions invested in protection status decision-makers to evaluate evidence and make risk assessments creates a large 'decision space'. Whereas decision-makers must exercise their discretion within legal boundaries, the extent of the 'decision space' is such that they can, and often do, make lawful but inconsistent and unpredictable decisions.

[157] Ibid.

Chapter Three

Making Hard Decisions:

Assessing Eligibility for the Grant of a Protection Visa under the *Migration Act*

As explained in Chapter One, Parliaments regularly confer wide discretions on administrative officials, the exercise of which can result in arbitrary and inconsistent decision-making. This thesis adopts KC Davis' proposal that discretion should be structured by 'rules' developed incrementally by the executive and argues that tribunals should develop soft law for this purpose. Chapter Two demonstrated that the Administrative Appeals Tribunal (AAT) has the capacity to formulate soft law guidance to structure discretion as a by-product of its merits review function. This Chapter describes the universal task of assessing whether an applicant is entitled to international protection and explains why it is widely recognised that this involves the making of 'hard' decisions.

In addition to the application of the 'hard' law rules contained in the relevant domestic legislation, decision-makers also exercise a range of wide discretions which leave them 'free to make a choice among possible courses of action or inaction.'[1] As discussed in Chapter One, Galligan recognised that discretion does not exist only at the very end of the decision-making process when the outcome is determined, but at various points throughout.[2] Furthermore, 'discretion is not only related to the interpretation of legal rules or to the way rules expand or confine the space for discretion.'[3] It also is central to establishing the material facts.[4] These facts include those relevant to the applicant's individual circumstances and the relevant and current country of origin information (COI). Once the material facts are identified, the decision-maker must assess the credibility of the applicant's claims and evaluate their risk on return, and determine whether this risk meets the requisite standard of proof. Each of these steps is critical to the assessment of an

---

[1] KC Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge, Louisiana State University Press, 1969), 4.

[2] Tone Maia Liodden, 'Who is a Refugee? Uncertainty and Discretion in Asylum Decisions' (2020) 32(4) International Journal of Refugee Law 645, 652.

[3] Ibid.

[4] Ibid citing Denis Galligan who states, 'any decision requires assessment and judgment, both in fixing the methods for eliciting the facts and in deciding how much evidence is sufficient.': DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, Oxford, 1986) 34-35.

applicant's eligibility for protection. However, their deliberation is left largely to the autonomous choice of the decision-maker, and thereby involve the exercise of discretion in the senses outlined in Chapter One. The nature and extent of these discretions and the open-textured nature of the applicable standard of proof are such that decision-makers often reach different conclusions in relation to whether applicants with the same or similar claims are at risk on return to their country of origin and therefore are eligible for protection.[5]

Australia's international non-refoulement obligations under the *Refugee Convention*[6] and other international instruments[7] have been incorporated into domestic law in the *Migration Act* and *Migration Regulations 1994 (Cth)*.[8] This legislative scheme provides the legal and procedural framework for the conferral by Australia of protection status on eligible non-citizens. Decision-makers must apply these 'hard' law rules to assess whether an applicant meets the eligibility criteria for the grant of protection. However, like their international counterparts, decision-makers are also invested with wide discretion to find facts, evaluate evidence and make risk assessments in determining an individual's eligibility for protection. The Chapter describes the process for primary decision-making and merits review of

---

[5] Robert Thomas, *Administrative Justice and Asylum Appeals* (Hart Publishing, 2011) 44. Gregor Noll, 'Credibility, Reliability and Evidential Assessment' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) and Liodden (n2).

[6] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('Refugee Convention') and the 1967 *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('Protocol'). Australia acceded to the Refugee Convention in 1954 and the Protocol in 1973, thereby undertaking to apply their substantive provisions.

[7] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'), the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991) ('Second Optional Protocol'), the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CROC') and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT'). Australia ratified the ICCPR in 1980, the Second Optional Protocol in 1990, the CAT in 1989 and the CROC in 1990. Like the Refugee Convention, these instruments have not been formally incorporated into Australia's migration legislation. The ICCPR is referenced in the Act in relation to 'significant harm' for the purposes of the complementary protection criterion, but generally speaking, its provisions have not been drawn into the Act.

[8] *Migration Act 1958 (Cth) ('Migration Act')* and *Migration Regulations 1994 (Cth) ('Migration Regulations').* See discussion in Linda Kirk, 'Island Nation: The Impact of International Human Rights Law on Australian Refugee Law' in David Cantor and Bruce Burson (eds) *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill Nijoff, 2016), 53ff.

protection visa decisions and shows that the wide discretions invested in decision-makers make inconsistent decisions inevitable. The inconsistencies in decision-making which result from the exercise of these wide discretions are examined in Chapter Four.

1. Making hard decisions

This section outlines the legislative framework in the *Migration Act* and *Migration Regulations* for the assessment of whether an applicant satisfies the eligibility criteria for a protection visa. It shows that in addition to satisfying themselves that the legal criteria for the grant of the visa are met, decision-makers are invested with considerable discretion to make findings of fact, evaluate evidence and assess risk. Moreover, the exercise of these discretions is largely beyond the scrutiny of the Federal Court, unless the decision-maker makes a jurisdictional error.

1.1 Primary decision

Asylum-seekers who wish to make protection claims must complete and lodge an application for a protection visa with the Department of Home Affairs (Department).[9] In addition to providing an account of the applicant's residence history, family ties, employment and education, the application must explain the basis for the applicant's claims for protection in Australia.[10] Once a valid application for a protection visa is lodged, a primary decision-maker delegated by the Minister for Home Affairs (Minister) determines under section 65 of the *Migration Act* whether they are satisfied that the criteria for the grant of a protection visa under section 36 of the Act and Schedule 2 of the *Migration Regulations* are met.[11] This primarily involves an assessment of whether the applicant is a

---

[9] Department of Home Affairs, Protection visa application, Form 866.

[10] The precise class of protection visa, and the forms used to apply, may vary based upon the legal status of the asylum seeker and whether leave is required or has been afforded by the Minister to apply for particular classes of visa: *Migration Act* ss 35A, 46A. The term 'protection visa application' will be used to refer to applications for each of these classes of visa. This Chapter examines only onshore applications for a protection visa and excludes the process for the assessment of applicants under Part 7AA (the 'fast track' provisions) of the Act and review of decisions by the Immigration Assessment Authority.

[11] Section 65 Decision to grant or refuse to grant visa

(1) After considering a valid application for a visa, the Minister:

(a) if satisfied that:

refugee, as defined,[12] or meets the complementary protection criteria in the Act.[13] In making the decision the delegate may, but need not, interview the applicant, and must give them the opportunity to respond to any adverse material which may be taken into account when the decision is made.[14] The evidence before the delegate is the applicant's claims and submissions, and information provided by the applicant or sourced by the decision-maker in relation to conditions in the applicant's country. Once a decision is made, it is provided in writing to the applicant.[15]

(i) the health criteria for it (if any) have been satisfied; and

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and

(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

(iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa.

[12] The definition of a refugee in Article 1A(2) of the Refugee Convention is codified in the 'refugee' definition in s 5H(1) of the *Migration Act*. Under s 5H(1), a person is a refugee if, in the case of a person who has a nationality, they are outside the country of their nationality and, owing to a well-founded fear of persecution, are unable or unwilling to avail him or herself of the protection of that country; or, in the case of a person without a nationality, they are outside the country of their former habitual residence and, owing to a well-founded fear of persecution, are unable or unwilling to return to it. The relevant country of nationality or former habitual residence is referred to as a 'receiving country'. See discussion in Kirk (n8) 76ff.

[13] A protection visa may be granted on the basis that the non-citizen meets either the refugee (s 36(2)(a)) or the complementary protection criteria (s 36(2)(aa) *Migration Act*). Section 36(2) provides that the decision maker must be satisfied that the applicant is a non-citizen in Australia and is: a person in respect of whom Australia has protection obligations as a refugee (s 36(2)(a), the 'refugee criterion'); or if not a person who meets the refugee criterion, a person in respect of whom Australia has protection obligations on complementary protection grounds (s 36(2)(aa), the 'complementary protection criterion'); or a member of the same family unit as a person in respect of whom Australia has protection obligations and who holds a protection visa (ss 36(2)(b) and (c)).

Section 36(2)(aa) *Migration Act* specifies the 'refugee criterion'. The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014 (Cth*) (No 135 of 2014) amended s 36(2)(a) of the Act to remove reference to the Convention and instead refer to Australia having protection obligations in respect of a person because they are a 'refugee'.

Section 36(2)(aa) *Migration Act* provides 'complementary' grounds for protection for persons who are not 'refugees' but in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.

[14] See discussion in Douglas McDonald-Norman, 'Young's "Fact finding made easy" in Refugee Law: A Former Practitioner's Perspective' (2018) 92 *Australian Law Journal* 349, 351.

[15] In the financial year 2019-2020, the Department of Home Affairs granted 1650 protection visas of a total 23,266 applications lodged. The grant rate was 9.8%: Department of Home Affairs Onshore Humanitarian Program 2019–20 Delivery and outcomes for Non–Irregular Maritime arrivals as at 30 June 2020.

1.2 Merits review

An applicant who is refused a protection visa by the Department may apply for review of the primary decision by the Migration and Refugee Division (MRD) of the AAT.[16] The AAT conducts a full *de novo* review of the primary decision, and can receive and refer to information not before the primary decision-maker.[17] Unless the AAT is able to make a favourable decision for the applicant 'on the papers', it must provide the applicant with the opportunity to appear before it,[18] to give evidence and present arguments on the issues relevant to the review.[19] An applicant is not entitled to be represented by any person or to cross-examine any person appearing before the AAT unless granted leave to do so.[20] The AAT arranges for an interpreter to be present to assist the applicant if required.[21] The Minister nor her representative attends the hearing or makes submissions.[22]

The central task for the AAT, 'standing in the shoes' of the primary decision-maker, is to determine whether the applicant satisfies the eligibility criteria for the grant of a protection

---

[16] *Migration Act* ss 411-412. Part 7 Div 4 of the *Migration Act* purports to amount to an 'exhaustive statement of the requirements of natural justice in refugee cases in the AAT (MRD): *Migration Act* s 422B. The AAT (MRD) is required to put to applicants (whether during the hearing or in writing) information that it considers would be the reason, or part of the reason, for affirming the delegate's decision and to invite the applicant to comment on or respond to it: *Migration Act* ss 424A, 424AA.

[17] *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286*; Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250. See discussion in Chapter Two, section 2.

[18] There are also formal requirements as to how the Tribunals may invite, orally or in writing, an applicant to comment on adverse information: s423A and s423AA *Migration Act*. These requirements place an obligation on the Tribunals to provide particulars of the information, and to explain why it is relevant.

[19] s425 (1) *Migration Act*. Unless the decision can be made on the papers and the applicant consents to this course s425(2) *Migration Act*. See discussion in Ros Germov and Francesco Motta, *Refugee Law in Australia* (Oxford University Press, Melbourne, 2003), 75ff.

[20] s427(6) *Migration Act*. An applicant may be assisted by registered migration agent or another person who may attend the hearing. See discussion in Matthew Groves, 'Administrative Justice Without Lawyers? Unrepresented Parties in Australian Tribunals' in Sarah Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (University of Wales Press, Cardiff, 2017) 346, 357; see also Melinda Richards SC, 'Accessibility, Merits Review and Self-represented Litigants' in Debra Mortimer (ed) *Administrative Justice and its Availability* (Federation Press, 2015) 116, 119.

[21] Section 427(7) *Migration Act.*

[22] Mary Crock and Laurie Berg note that this 'has been promoted on many occasions as a model that obviates the need for an applicant to have legal representation.' Mary Crock and Laurie Berg, *Immigration, refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2011) [18.44] citing *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, Senate Legal and Constitutional Committee (June 2000) 149.

visa.[23] Once its decision is made, the AAT must provide written reasons for its decision.[24] It may affirm the decision under review, or remit it to the Department with a direction that the applicant meets the eligibility criteria.[25]

The Member will typically have access to the Department's file, including the original interview of the applicant by the delegate in the form of an audio file, the applicant's original protection visa application form and supporting documents, and the delegate's written decision record. The AAT file contains any further evidence or submissions from the applicant, and information obtained from the Member's own inquiries or from the Department's Country Advice Unit.[26] The former Refugee Review Tribunal (RRT) and the former Migration Review Tribunal (MRT) were 'overtly designed as "inquisitorial" tribunals'.[27] This characteristic was carried forward into the amalgamated AAT to place the

---

[23] For protection visa applications made prior to 16 December 2014, s 36(2)(a) *Migration Act* effectively draws into domestic law the Refugee Convention definition of 'refugee' contained in Art 1. However, for applications made on or after that date, the Act does not refer to the Convention, but instead defines 'refugee' for the purpose of s 36(2)(a) *Migration Act*, drawing on concepts from the Convention definition. The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014 (Cth)* (No 135 of 2014) amended s 36(2)(a) of the Act to remove reference to the Refugee Convention and instead refer to Australia having protection obligations in respect of a person because they are a 'refugee'. 'Refugee' is defined in s 5H, with related definitions and qualifications in ss 5(1) and 5J–5LA. These amendments commenced on 18 April 2015 and apply to protection visa applications made on or after 16 December 2014: table items 14 and 22 of s 2 and item 28 of sch 5 and Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Commencement Proclamation dated 16 April 2015 (FRLI F2015L00543). Despite this 'de-linking' of protection visas from the Convention, the protection visa remains the principal mechanism by which Australia offers protection to persons who are 'refugees'.

[24] s430(1) *Migration Act.*

[25] The Migration and Refugee Division (MRD) finalised a total of 5,558 protection visa reviews in the 2020-21 year. In the past five financial years, the MRD has received sustained, high levels of lodgements relating to decisions about protection visas. This has resulted in a gradual but substantial increase in protection visa review applications on hand to 32,064 as at 30 June 2021. In the year 2020-21 the active protection visa caseload increased by 18% when compared to 30 June 2020 and constituted 57% of all cases on hand in the MRD. Protection visa applications comprised 66% of all lodgements in 2020–21 and remains the largest single caseload within the MRD: Administrative Appeals Tribunal *Annual Report 2020-2021* 58-59.

[26] In late 2013 the Migration Review Tribunal and the Refugee Review Tribunal (MRT-RRT) and the Department of Immigration and Border Protection (DIBP) finalised arrangements relating to the transfer of the MRT-RRT Country Advice section to DIBP. From this time onwards, provision of Country of Origin information is provided by DIBP to the Tribunals under a Service Level Agreement. Country of Origin information is no longer published on the Tribunals' website: Minutes of the MRT-RRT NSW Community Liaison Meeting, 13 November 2013.

[27] Robin Creyke, 'Pragmatism v Policy: Attitude of Australian Courts and Tribunals to Inquisitorial Process' in Sasha Baglay and Laverne Jacobs, *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Routledge, 2013) 36 citing Narelle Bedford and Robin Creyke, *Inquisitorial Process in Australian Tribunals* (Australian Institute of Judicial Administration, Melbourne 2006) 5.

MRD at the inquisitorial end of the inquisitorial/adversarial spectrum.[28] The procedure is 'active', 'enabling' and 'investigative'[29] with the AAT member being responsible 'for identifying all the relevant issues [and] thoroughly testing the evidence.'[30] The procedures of the MRD are codified,[31] however the Member has a very broad statutory power to determine what occurs during the hearing, including the lines of questioning of the applicant, and whether witnesses who wish to provide supporting evidence for the applicant are heard.[32]

There is no right of appeal from a decision of the MRD to a Federal court.[33] The only avenue available to challenge a MRD decision is by way of an application for judicial review to the Federal Circuit Court under section 476 of the *Migration Act,* and to the High Court under section 75(v) of the Australian Constitution.[34] Judicial review is limited to the identification of jurisdictional error.[35] If the reviewing Court finds error, the decision is set aside, and the matter is remitted to the MRD for reconsideration.

---

[28] In *Minister for Immigration & Citizenship v SZIAI* (2009) 240 CLR 611 the High Court noted that the RRT had many inquisitorial features but found that it was not inquisitorial in the full sense that required it to 'inquire, examine or investigate' the issues before it [18]. French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ acknowledged that the RRT has an inquisitorial function in one sense, but said that it had no duty to make inquiries (at 430 [1] and 432 [10]). See further Robin Creyke (n27) 36. See also Mark Smyth, 'Inquisitorial Adjudication: The Duty to Inquire in Merits Review Tribunals' (2010) 34 *Melbourne University Law Review* 230, 239ff and Matthew Groves, 'The Duty to Inquire in Tribunal Proceedings' (2011) 33 *Sydney Law Review* 177, 180ff. See also discussion in *Administration and Operation of the Migration Act 1958*, Legal and Constitutional References Report, March 2006 [3.37] and *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, Senate Legal and Constitutional Committee, June 2000 [5.22]ff.

[29] Terms used by Robert Thomas in 'From 'Adversarial v Inquisitorial' to 'Active, Enabling and Investigative': Developments in UK Administrative Tribunals' in Sasha Baglay and Laverne Jacobs (eds) *The Nature of Inquisitorial Processes in Administrative Regimes*: *Global Perspectives* (Routledge, 2013) 51-70.

[30] Creyke (n27) 36 citing Committee for the Review of the System for Review of Migration Decisions, *Non-Adversarial Review of Migration Decisions: The Way Forward* (1992) [7.1.2] describing the inquisitorial features of the Immigration Review Tribunal (IRT), a forerunner of the AAT (MRD).

[31] See Division 4 Part 7 *Migration Act*.

[32] Discussed in Gerald Heckman, 'Inquisitorial Approaches to Refugee Protection Decision-making: The Australian Experience and Possible Lessons for Canada' in Laverne Jacobs and Sasha Baglay (eds), *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Routledge, 2013), 146.

[33] Compare s44 *AAT Act* which provides that a party to a merits review proceeding may appeal to the Federal Court from any decision of the AAT, on a question of law. Section 43C *AAT Act* excludes migration decisions.

[34] While there is no right of appeal from the MRD AAT to the Federal Courts, the right to judicial review is constitutionally entrenched and is invoked regularly, and this therefore ensures that jurisdictional errors are identified.

[35] In Australia the distinction between jurisdictional and non-jurisdictional continues to be maintained.

2. Legal criteria for the grant of a protection visa

2.1 Eligibility criteria

The 'hard law' tests which must be applied by the delegate and the evidence required to substantiate a protection claim at both the primary stage and on review by the AAT are prescribed in the *Migration Act* and *Migration Regulations*.[36] The eligibility criteria for a protection visa are whether the applicant meets the statutory definition of a 'refugee'[37] or the complementary protection criterion under section 36 of the *Migration Act*.[38] A 'refugee' is defined in the Act as a non-citizen who has a 'well-founded fear of persecution' for a Convention reason.[39] In *Chan v MIEA* the High Court held that 'well-founded fear' involves both a subjective and objective element. This requirement will be satisfied if an applicant can show genuine fear founded upon a 'real chance' of persecution for a Convention reason.[40] The complementary protection criteria require the demonstration of a 'real risk' of serious harm.[41]

---

[36] There are other criteria contained in the Act including the disentitling character requirements.

[37] The definition of a refugee in Article 1A(2) of the Refugee Convention is codified in the 'refugee' definition in s 5H(1) *Migration Act* – see footnote 12 above.

[38] Section 36(2)(aa) *Migration Act* – see footnote 13 above. This criterion is subject to a number of qualifications. The types of harm that will amount to 'significant harm' are exhaustively defined in ss 36(2A) and 5(1) of the Act, and s 36(2B) sets out circumstances in which there is taken not to be a real risk that a non-citizen will suffer significant harm. Section 36(2C) further provides for circumstances in which a non-citizen is taken not to satisfy the criterion in s 36(2)(aa), and s 36(3) sets out circumstances in which Australia is taken not to have protection obligations in respect of a non-citizen. The threshold for the 'real risk' element in the complementary protection criterion is the same as that for the 'real chance' test in the refugee criterion: *MIAC v SZQRB* (2013) 210 FCR 505. The Court rejected the submission that 'real risk' was a higher threshold which required that the possibility of harm be more likely than not: per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342]; reflected in the Complementary Protection Guidelines: see Department of Home Affairs, *Complementary Protection Guidelines*, section 3.5.1, as re-issued 29 February 2020.

[39] The concept of 'well-founded fear of persecution' is defined in s 5J *Migration Act*. It provides that a person has a well-founded fear of persecution if: the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned above; and the real chance of persecution relates to all areas of a receiving country. In addition to these threshold requirements, s 5J *Migration Act* qualifies the concept of 'persecution' and prescribes circumstances in which a person will be taken not to have a well-founded fear of persecution. Furthermore, it prevents a decision-maker from having regard to certain factual matters in determining an applicant's well-founded fear of persecution. Together, these elements of s 5J form the meaning of 'well-founded fear of persecution'.

[40] *Chan v MIEA* (1989) 169 CLR 379 at 396. See also *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 263.

[41] The threshold for the 'real risk' element in the complementary protection criterion in s 36(2)(aa) is the same as that for the 'real chance' test in the refugee criterion in s 36(2)(a): *MIAC v SZQRB* (2013) 210 FCR 505. The

2.2 State of satisfaction

The courts have emphasised that 'concepts such as onus and burden of proof have no role to play' before the AAT.[42] The relevant question under the *Migration Act*[43] is 'not one of onus but one of satisfaction.'[44] Decision-makers are required to satisfy themselves that the eligibility criteria for the grant of a visa are met and, if they are so satisfied, they must grant a protection visa to the applicant.[45] Although an applicant does not bear the legal onus of proof, as Mary Crock and Laurie Berg point out, 'the reality is that … refugee claimants … are expected to make out a case for the visa class sought.'[46] The 'inability to persuade a decision-maker will most often be fatal to a person's claim.'[47] Accordingly, an applicant has at least an evidentiary burden to provide sufficient evidence to substantiate his or her claims so as to allow a decision-maker to reach the required state of satisfaction.[48]

Court rejected the submission that 'real risk' was a higher threshold which required that the possibility of harm be more likely than not: per Lander and Gordon JJ [246], Besanko and Jagot JJ [297], Flick J [342].

[42] *MIMA v Hughes* (1999) 86 FCR 567 per Merkel J at [35] Carr J agreeing. The Full Federal Court has stated the burden of proof is a 'concept buried in common law rules of evidence and the practice and procedure of superior courts of law entrusted with resolving disputes between parties to litigation' and as 'a general proposition', does not apply to administrative decision-making: *Sun v Minister for Immigration and Border Protection* [2016] FCAFC 62 [63], [65] (Flick and Rangiah JJ with whom Logan J generally agreed). See also *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [10] (French CJ) and *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1 at [34] (Hayne J).

[43] Section 65 (n11) provides, in effect, if the Minister is satisfied that if an applicant meets all criteria for the grant of a visa it must be granted, and otherwise must be refused. The Minister's satisfaction depends on the submission of evidence by an applicant that they do in fact meet all legislative criteria for the grant of a visa.

[44] Mary Crock and Laurie Berg, *Immigration, refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2011) [18.116]

[45] As Justice Roger Derrington explains, section 65 is structured such that the precondition to the exercise of the power to grant a visa is the Minister's satisfaction that a visa applicant has met the specified statutory criteria. Once that state of satisfaction is reached, the power is enlivened, and the grant of the visa is mandated. If the state of mind is one of non-satisfaction that the statutory criteria have been met, the delegate is empowered, and obligated, to refuse the visa. Roger Derrington, 'Migrating towards a Principled Approach to Reviewing Jurisdictional Facts' (2020) 27 *Australian Journal of Administrative Law* 70, 72. As Derrington explains '[b]y this technique the legislature has translocated the substantive deliberative consideration relating to visa applications to the precondition or jurisdictional fact stage of the process, leaving the actual exercise of power devoid of any meaningful decisional relevance.'

[46] Crock and Berg (n44).

[47] Ibid.

[48] In *Sun v Minister for Immigration and Border Protection* [2016] FCAFC 62 [69] Flick and Rangiah JJ stated the obligation on '... the claimant to present evidence and advance arguments adequate to enable the decision-maker to make a decision favourable to the claimant. There is no burden upon the decision-maker to make out a case that the claimant has failed adequately to advance' citing Middleton J in *SZLVZ v Minister for Immigration and Citizenship* [2008] FCA 1816 [24] where his Honour observed that it 'is for an applicant to

By making the meeting by the applicant of the eligibility criteria for the grant of a protection visa a matter for the satisfaction of decision-makers, the Parliament has invested in them considerable discretion, and limited judicial scrutiny of the process by which this state of satisfaction is reached.[49] This is significant because, as discussed in section 3 of this Chapter, determining whether the eligibility criteria for a protection visa are met involves a 'multifaceted deliberative process' involving a range of difficult questions, 'the answers to which will differ between reasonable minds.'[50] Furthermore, as explained in the next section, whereas the lower standard of proof applicable to protection claims alleviates the evidentiary burden on the applicant, its open-textured nature allows for its inconsistent application by decision-makers.[51]

2.3 Standard of proof

The 'real chance' test is the risk threshold or 'standard of proof' to which the decision-maker must be satisfied that the applicant meets the refugee criteria.[52] The required threshold for the complementary protection criteria is 'real risk'.[53] The standard of proof in

---

provide evidence and arguments in sufficient detail to enable the decision maker to establish the relevant facts' and that the 'decision maker is not required to make the applicant's case for him or her'.

[49] On judicial review, a court's capacity to review 'is effectively restricted to ascertaining whether the putative state of mind relied upon by the decision-maker is within a range of subjective conclusions, the scope of which is defined by the implicit requirements of the legislature.' Derrington (n45) 76-77. The required state of mind will generally be found to exist if it has been formed following compliance with any procedural requirements and is devoid of any relevant vitiating factors. The vitiating factors are broadly of two types, first, unsoundness of reasoning which is characterised as being irrational or illogical, and which apparently relates to the manner in which the concluded state of mind was reached, and secondly, erroneous fact-finding in the course of reaching the state of mind. See also discussion in Esther Pearson, 'Finding Fairness in Fact Finding: Material Mistake of Fact Review in Asylum Cases' (2019) 26 *Australian Journal of Administrative Law* 100, 104.

[50] Derrington (n45) 80.

[51] In Australia the courts have not endorsed a free standing 'benefit of the doubt' obligation on decision-makers and various judgments have expressed doubts as to its existence under Australian law: See *SZNRZ v MIAC* [2010] FCA 107 at [19]–[21]; *SZLPN v MIAC* [2010] FCA 202 at [16]–[17]; *MZAKQ v MIBP* [2016] FCCA 1186 [50]–[61]; *SZRGE v MIAC* [2013] FMCA 18 [52]–[60]; *SZQMB v MIAC* [2012] FMCA 24 [48]–[51]. In particular, it is questionable whether such an approach is consistent with the statutory requirement for a decision-maker to be 'satisfied' of the matters in s 65 of the *Migration Act*: see *SZNRZ v MIAC* [2010] FCA 107 [20].

[52] *Chan v MIEA* (1989) 169 CLR 379 at 396. See also *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 263. A 'real chance' is a substantial chance, as distinct from a remote or far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below fifty per cent. A fear may be well-founded for the purpose of the Convention even though persecution is unlikely to occur.

[53] The threshold for the 'real risk' element in the complementary protection criterion in s 36(2)(aa) is the same as that for the 'real chance' test in the refugee criterion in s 36(2)(a): *MIAC v SZQRB* (2013) 210 FCR 505.

protection claims is set at a level below the civil level of the balance of probabilities in recognition of the problems associated with proving future risk, and 'the difficulties of proof and disproof of the allegations which, by their nature, underlie asylum claims.'[54] The lower standard also acknowledges 'the gravity of the possible consequences of a wrong determination',[55] namely returning a person to persecution, serious harm or even death.[56] The setting of the standard of proof lower than the civil standard promotes the humanitarian objectives of the Convention, which would be undermined by the imposition on the applicant of an unreasonably high evidentiary burden.[57]

The application of the standard of proof and how far it departs from the civil standard are contested matters. Robert Thomas observes that the standard of proof is 'problematic' as the amount of proof required to discharge it has never been specified, nor is it apparent how it could be better defined.[58] Consequently, there is 'fundamental ambivalence' in relation to the standard of proof by decision-makers, among whom it is regarded as 'a pretty nebulous concept.'[59] As Thomas points out, whereas the lower standard of proof assists the applicant to establish his or her claim, 'it does not provide much assistance to the

---

[54] Thomas (n5) 42. The UNHCR Handbook notes that the 'requirement of evidence should … 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 or herself: UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (first published in 1979 and re-issued in 1992 and in 2019) ('*UNHCR Handbook'*) [197].

[55] Madeline Garlick, 'Introduction to the Credo Project' in Carolus Grütters, Elspeth Guild, and Sebastiaan de Groot (eds), *Assessment of Credibility by Judges in Asylum Cases in the EU* (Wolf Legal Publishers, 2013) 57.

[56] As the UTIAC recently observed, the lower standard of proof 'helps insure against the particularly grave consequences of 'getting it wrong' in a context in which the stakes are high.' *KS (benefit of the doubt*) [2014] UKUT 00552 (IAC) [59]–[60].

[57] Hilary Evans Cameron *Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake* (Cambridge University Press, 2018) 84; Arthur Glass, 'Subjectivity and Refugee Fact-Finding' in Jane McAdam (ed) *Forced Migration, Human Rights and Security* (Hart Publishing, 2008) 213, 216; Ida Staffans, *Immigration and Asylum Law and Policy in Europe: Evidence in European Asylum Procedures* (Brill Nijoff, 2012) 104 citing Brian Gorlick, 'Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status' (2003) 15 *International Journal of Refugee Law* 357, 367-370. Gorlick states 'If we accept that the concept of 'persecution' should be interpreted and applied in a generous manner, then there is an inherent logic in not setting too high a standard in order for a victim of persecution to prove his or her claim.' Gorlick, 360; James Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edition, Cambridge University Press, 2014) 113–15.

[58] Thomas (n5) 43.

[59] Ibid.

decision-maker who must make a decision on the basis of fragmentary and uncertain evidence.'[60]

The open-textured nature[61] of the standard of proof in protection claims, invests in decision-makers a discretion which, as explained in Chapter One, Dworkin terms 'discretion as judgment'.[62] This exists 'where the decision-maker applies a standard which cannot be applied mechanically because it contains open-textured or vague words.'[63] Discretion is 'attributed to the imprecision or ambiguity of law' and requires the decision-maker to make a choice between alternatives. The degree of discretion infused within the standard of proof inevitably creates 'considerable scope for differential assessments of the evidence between different decision-makers.'[64] It permits decision-makers to take variable approaches to its application, with some requiring applicants to prove their claim to a higher standard than others. The fact that decision-makers may adopt differential approaches to the application of the standard of proof makes it difficult, if not impossible, to ensure consistency in the assessment of risk in a protection status determination system constituted by multiple decision-makers. This in turn creates the possibility, if not probability, of inconsistent decisional outcomes between decision-makers for applicants with similar protection claims. As detailed in Chapter Four, the AAT and its predecessor, the RRT, have been widely criticised for their inconsistent decision-making. However, as Davis and other scholars recognised, when wide discretions are invested in decision-makers, inconsistent and unpredictable decision-making is inevitable. This thesis argues that these consequences can and should be addressed by development by tribunals of soft law guidance that enunciates the considerations relevant to the exercise of these discretions.

---

[60] Ibid.

[61] Ibid 44. In *The Concept of Law,* 1994, HLA Hart famously claimed that the law is open-textured (123, 128–36). Hart borrowed the term from his Oxford colleague Friedrich Waismann whom he duly acknowledged as the inspiration for the conclusion that law as well as language is open-textured. See discussion in Brian Bix, 'Waismann, Wittgenstein, Hart, and Beyond: The Developing Idea of 'Open Texture' of Language and Law' in Dejan Makovec and Stewart Shapiro (eds) *Friedrich Waismann: History of Analytic Philosophy* (Palgrave Macmillan, 2019)

[62] Ronald Dworkin, *Taking Rights Seriously* (Duckworth, London 2005), 31-33. Discussed in Chapter One, section 1.3.

[63] Ibid 31.

[64] Thomas (n5) 44.

3. The discretionary elements of a protection visa decision

The assessment by decision-makers of whether an applicant for a protection visa meets the eligibility criteria is a 'multifaceted deliberative process'.[65] The decision-making task consists of a number of stages, each of which involves the exercise of broad discretion. As this section demonstrates, the decision-maker has considerable choice or autonomy in relation to the material to which they refer in their deliberations, and the conclusions they reach in relation to whether the applicant is at risk on return. These discretions pervade the 'hard' law rules contained in the eligibility criteria prescribed in the *Migration Act* and *Migration Regulations*.

There are four distinct stages of the protection visa decision-making task, each of which involves the exercise of discretion in the senses recognised by Dworkin and Galligan outlined in Chapter One.[66] These stages are first, identifying the material facts relevant to the applicant's claims, secondly, assessing the credibility of the claims, thirdly, accessing and evaluating current and reliable country of origin information, and finally, evaluating the applicant's risk of harm on return and deciding whether it meets the applicable standard of proof. The next section examines each of these decision-making stages and explains how they involve the exercise of discretion.

3.1 Finding facts relevant to the individual's circumstances

A protection claim consists of two distinct, although related, factual elements: the individual and the country.[67] The individual element of the claim is the applicant's account of his or

---

[65] Derrington (n45) 80.

[66] Chapter One [1.3]. Dworkin's first 'weak' sense is 'discretion as judgment', which occurs 'where the decision-maker applies a standard which cannot be applied mechanically because it contains open-textured or vague words.' Discretion is 'attributed to the imprecision or ambiguity of law' and requires the decision-maker to make a choice between alternatives. His second type of 'weak' discretion is 'discretion as finality', where the decision-maker has the final authority to make a decision which thereafter cannot be altered or set aside by another authority. The third type of discretion is 'strong' discretion where the decision-maker is not bound by the standards set by any authority, and 'may choose from amongst a number of norms the rule or policy to be applied to the facts.

[67] Hugo Storey, 'Consistency in Refugee Decision-Making: A Judicial Perspective' (2013) 32(4) *Refugee Survey Quarterly* 112, 116. See also Thomas who observes that fact-finding in asylum claims consists of 'two discrete aspects': being 'an assessment of both the *particular* circumstances of the individual's case and the *general* social and political situation in the country from which refuge is being sought in order to determine whether an individual would be at risk on return.' (n5) 37 emphasis in original.

her personal circumstances and includes their background, identity, and past experiences including of persecution or serious harm. The evidentiary assessment for the decision-maker in relation to the individual element is to verify the identity of the applicant and determine whether his or her claim is credible, that is whether it is a reliable and accurate account of their circumstances and relevant events. The country element of the claim is the human rights and other conditions in the applicant's country of origin. The evidentiary assessment required for this element of the claim is whether the country information is current and reliable, and a basis on which to assess whether the applicant will be at risk on return. The discussion in this section focuses on the difficulty of the fact-finding process, specifically in relation to the applicant's individual circumstances.

Fact-finding is the process of determining what the facts are in a given case, upon which the decision-maker determines whether an applicant meets the relevant statutory criteria. These facts are distilled from the evidence before the decision-maker, being the information provided by the applicant, and that obtained independently by the decision-maker.[68] Fact-finding in a decision-making process is generally a difficult process and 'necessarily operates under some degree of evidential uncertainty.'[69] As Galligan explained it requires considerable judgement and interpretation by the decision-maker; it is not simply a matter of 'weighing' the stones once they have been located.[70] The fact-finding process is particularly acute in protection claims, which are 'distinguished by the paucity, changeability, and unreliability of evidence which corroborates or contradicts the claimant's case.'[71] The evidence presented by applicants in support of their claims is most often 'of variable quality and frequently contain little that is either firm or objectively verifiable.'[72] Consequently, decision-makers 'must make findings of fact where the evidence presented is often uncertain, limited or unsatisfactory in terms of its extent, quality, and presentation'.[73]

---

[68] Discussed in Nicholas Green and Natalie Blok, 'Facts and Evidence in Administrative Law: Does it Matter?' unpublished paper, 24 March 2017.

[69] Thomas (n5) 38.

[70] Glass (n57) 240. See discussion of Galligan's description of discretion in this context in Chapter One [1.3]

[71] Thomas (n5) 38.

[72] Ibid.

[73] Ibid.

Protection visa applicants frequently do not have identification documents, which can make it difficult for the decision-maker to verify basic facts, including their name, date of birth and country of citizenship.[74] Most applicants do not have documentary evidence of their claimed experiences of persecution and serious harm, and therefore their own written or oral testimony is the basis on which they seek to substantiate their claims. It is rarely the case that the applicant can present corroborative evidence in support of their claims. Witnesses are usually either unavailable or unwilling, sometimes due to fear for themselves or their families, to provide statements or oral evidence confirming the applicant's statements.[75] It is this frequent lack of corroborative evidence that led Lord Justice Schiemann to describe the fact-finding process in protection claims as 'inherently one of the most challenging in the legal world.'[76]

The fact that in most cases the oral or written testimony of the applicant is the only basis on which decision-makers can make findings of fact in relation to their individual circumstances sets protection status determination apart from most other proceedings. The fact-finding task is made even more difficult by the vulnerabilities of applicants themselves. The capacity of many applicants 'to recall, and to accurately relate, particular events' is often 'adversely affected by the lasting effects of torture and trauma' which impacts, through no fault of their own, the accuracy and reliability of their evidence.[77] Consequently, as Thomas recognises, fact-finding in protection claims is 'a highly problematic endeavour' due to:

---

[74] Ibid. Douglas McDonald-Norman explains, 'Even in circumstances where the state does function effectively, it cannot be assured that every state action will be documented, or that applicants for asylum (residing in other countries) will be able to access state records confirming their accounts – especially where they fear harm from the state itself. This is particularly the case where asylum seekers come from groups who have suffered substantial official discrimination; some asylum seekers lack even official proof of their identity. Other asylum seekers, fleeing their nations under assumed identities or in secrecy, may have concrete, practical reasons for not taking documents proving who they really are with them when they flee.' Douglas McDonald-Norman (n14) 352.

[75] Ibid. McDonald-Norman states, 'It is unusual (although by no means impossible) for a person seeking asylum in Australia to have access to eyewitnesses present in Australia who can attest to the truth or falsity of their claims as to what happened in other nations. Even where witnesses may be theoretically reachable to give evidence (whether by telephone, Skype, or by providing written statements), these witnesses may still be present in the countries from which individual applicants have fled and, hence, may lack faith in the security of any mechanism by which they can send information to Australia about compatriots' experiences of abuse and persecution.'

[76] *Kacaj v Secretary of State for the Home Department* [2002] EWCA Civ 314 [7] cited in *Re DS (Iran)* [2016] NZIPT 800788 [1].

[77] McDonald-Norman (n14) 353.

> … the higher than normal level of indeterminacy relating to the finding of 'facts' which concern the stories presented by people about what happened elsewhere in the world and the conditions that prevail in the relevant countries. There are very few asylum cases in which there are no areas of doubt and uncertainty.[78]

These conditions of 'radical uncertainty'[79] mean there is inevitably a considerable degree of subjectivity involved in the fact-finding process for protection claims.[80] As Thomas observes,

> [g]iven the scope for judgmental assessment of the evidence, facts can be just as much created or constructed as they are found. What decision-makers make of the evidential material placed before them is ultimately a matter for their own conscientious judgment.[81]

As a result, '[t]here is a constant risk that evidence accepted by one decision-maker as reasonably likely to be true can be rejected by another as reasonably unlikely.'[82]

This discussion demonstrates that, as Galligan recognised, the finding of facts in relation to the individual circumstances of an applicant for a protection visa is a task that is imbued with discretion. The Federal Court has held that findings of fact are generally not subject to judicial review; the only qualification being that findings of fact or opinion must be supported by logically probative evidence and not be illogical or irrational.[83] Accordingly, protection decision-makers have wide, if not unlimited, discretion to make findings of fact which can only rarely be challenged on judicial review.[84] Adopting Dworkin's taxonomy

---

[78] Thomas (n5) 38.

[79] Audrey Macklin has described refugee status determination as occurring under conditions of 'radical uncertainty': Audrey Macklin, 'Coming between Law and the State: Church Sanctuary for Non-Citizens' (2005) 49 *Nexus* 49, 51.

[80] Glass (n57).

[81] Thomas (n5) 41.

[82] Ibid 44.

[83] *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1. In *ARG15 v Minister for Immigration and Border Protection* [2016] FCAFC 174, the Full Court of the Federal Court referred to recent authority, at [47] and held that to constitute jurisdictional error, the illogicality or irrationality must be *extreme,* measured against the standard that it is not enough that the question of fact is one on which reasonable minds may differ. It may also relate to fact-findings other than the ultimate finding (state of satisfaction), albeit these must lead to, or be sufficiently serious to affect, the outcome: Discussed in Green and Blok (n68) [32], 14; Pearson (n49) 105-106.

[84] Alan Robertson explains that, unlike in England, judicial review for fundamental error of fact is not recognised: Alan Robertson, 'Is Judicial Review Qualitative?' in John Bell, Mark Elliott, Jason NE Varuhas and

outlined in Chapter One, fact-finding in protection decision-making involves 'discretion as finality'[85] which is where the decision-maker has the final authority to make a decision which thereafter cannot be altered or set aside by a court. As fact-finding in relation to an individual's circumstances is a key element of the determination of his or her eligibility for a protection visa, variable approaches by decision-makers to this task will invariably result in inconsistent outcomes for similarly-situated applicants. The nature and extent of these inconsistencies, particularly in the protection visa decision-making of the AAT, are outlined in Chapter Four.

In addition to making factual findings in relation to the applicant's individual circumstances, the decision-maker must also make an assessment of the credibility of the applicant's account. The nature and significance of the discretion exercised in performing this task is explained in the next section.

3.2 Assessing credibility

The biggest obstacle faced by an applicant for protection is whether his or her account is considered credible by the decision-maker.[86] Rosemary Byrne refers to studies indicating that between 48 to 90 per cent of rejected claims are based on credibility findings.[87] As

---

Philip Murray (eds) *Public Law Adjudication in Common Law Systems: Process and Substance: Process and Substance* (Hart Publishing, Oxford, 2016) 263 citing *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044. See also discussion in Pearson (n49) 108ff.

[85] Dworkin (n62) 31-32.

[86] The AAT Migration and Refugee Division has published *Guidelines on the Assessment of Credibility* (July 2015). See discussion in Laura Smith-Khan, 'Telling stories: Credibility and the Representation of Social Actors in Australian Asylum Appeals' (2017) 28(5) *Discourse and Society* 512, 515ff.

[87] Rosemary Byrne, 'Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals', (2007) 19 *International Journal of Refugee Law* 609, 611. Byrne writes, '[a]lthough there has been an absence of work that systematically examines the role of credibility in asylum determinations, existing studies indicate that somewhere between 48 and 90 per cent of all asylum claims are rejected on findings of adverse credibility in regions as diverse as North America and Northern Africa citing Michael Kagan 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2003) 17 *Georgetown Immigration Law Journal* 367, 367-69; Deborah Anker 'Determining Asylum Claims in the United States: An Empirical Case Study' (1992) 19 *New York Journal of Law and Social Change* 433. 90% of rejections in the sample of a recent empirical study of Canadian refugee decisions were on grounds of non-credibility of the claimant; Cécile Rousseau et al, The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board (2002) 15 Journal of Refugee Studies 1, 22. Gregor Noll (ed) *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Leiden, 2005).

Michael Kagan observes, 'being deemed credible may be the single biggest substantive hurdle' facing applicants for refugee status.[88]

The assessment of credibility 'is a determination of whether [the applicant's] testimony should be accepted as evidence when eventually determining whether [he or she has] met the burden of proof to show that he or she is a refugee'.[89] The credibility of the applicant's account is normally assessed by the decision-maker examining a number of factors including the reasonableness of the factual basis of the claim, the overall consistency and coherence of the applicant's story, corroborative evidence adduced by the applicant in support of his or her claims, and consistency with common knowledge or generally known facts, including the known situation in the country of origin.[90] As Brian Gorlick explains, credibility is established 'where the applicant has presented a claim that is coherent and plausible and does not contradict generally known facts and is therefore, on balance, capable of being believed.'[91] If the decision-maker finds the applicant's account not to be credible, he or she invariably will not be recognised as a refugee.[92]

---

[88] Kagan (n87) 368. The *UNHCR Handbook* (n54) [195] recognises the obligation of the applicant to present his or her account and the duty of the decision-maker to assess its credibility:

> The relevant facts of the individual case will have to be furnished in the first place by the applicant himself (sic). It will then be up to the person charged with determining his (sic) status (the examiner) to assess the validity of any evidence and the credibility of the applicant's statements.

[89] Ibid 371.

[90] Gorlick (n57) 371.

[91] Ibid.

[92] The vast array of problems with assessing credibility in protection claims the subject of considerable academic literature. For example Anthony Good, 'The Benefit of the Doubt in British Asylum Claims and International Cricket' in Daniela Berti, Anthony Good, and Gilles Tarabout (eds), *Of Doubt and Proof: Ritual and Legal Practices of Judgment* (Ashgate Publishing 2015); Jane Herlihy and Stuart Turner, 'Untested Assumptions: Psychological Research and Credibility Assessment in Legal Decision-Making' (2015) 6 *European Journal of Psychotraumatology* 27380; Trish Luker, 'Decision Making Conditioned by Radical Uncertainty: Credibility Assessment at the Australian Refugee Review Tribunal' (2013) 25 *International Journal of Refugee Law* 502; Anthony Good, 'Witness Statements and Credibility Assessments in the British Asylum Courts' in Livia Holden (ed), *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives* (Routledge, 2011); Hilary Evans Cameron, 'Refugee Status Determinations and the Limits of Memory' (2010) 22 International Journal of Refugee Law 469; Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 *International Journal of Human Right*s 391; Jenni Millbank, 'The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 *International Journal of Refugee Law* 1; James A Sweeney, 'Credibility, Proof and Refugee Law' (2009) 21 *International Journal of Refugee Law* 700; Steve Norman, 'Assessing the Credibility of Refugee Applicants: A Judicial Perspective' (2007) 19 *International Journal of Refugee Law* 273; Gregor Noll (n87) Kagan (n87); Catherine Dauvergne and Jenni Millbank, 'Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers' (2003) 31 *Federal Law Review* 299; Guy Coffey,

The assessment of the credibility of an applicant's protection claims is largely a matter for the decision-maker's evaluative judgement. As Gregor Noll observes, the legal process for credibility assessment 'provides little constraint on the subjective discretion of decision-makers.'[93] The Australian courts have recognised that credibility findings are generally the exclusive province of the decision-maker. In the often quoted words of McHugh J in *Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham,* a finding on credibility 'is the function of the primary decision-maker *par excellence*.'[94] However, this does not mean that they are not susceptible to judicial review.[95] In *DAO16 v Minister for Immigration and Border Protection*,[96] the Full Court of the Federal Court restated and reaffirmed the limited role of judicial review in relation to credibility findings. Nevertheless it recognised that adverse credibility findings may involve jurisdictional error on recognised grounds, such as legal unreasonableness or reaching a finding without a logical, rational or probative basis.[97] Accordingly, adopting Dworkin's nomenclature, the assessment of credibility is largely an exercise of 'discretion as finality' which is where the decision-maker has the final authority to make a decision that thereafter cannot be altered or set aside by another authority.[98]

'The Credibility of Credibility Evidence at the Refugee Review Tribunal' (2003) 15 *International Journal of Refugee Law* 377; Rousseau (n87); Sean Rehaag ''I Simply do not Believe...' A Case Study of Credibility Determinations in Canadian Refugee Adjudication'(2017) 38 *Windsor Review of Legal and Social Issues* 38; Rebecca Dowd, Jill Hunter, Belinda Liddell, Jane McAdam, Angela Nickerson, and Richard Bryant, 'Filling Gaps and Verifying Facts: Assumptions and Credibility Assessment in the Australian Refugee Review Tribunal' (2018) 30(1) *International Journal of Refugee Law* 71; Sean Rehaag and Hilary Evans Cameron, 'Experimenting with Credibility in Refugee Adjudication: Gaydar' (2020) 9(1) *Canadian Journal of Human Rights* 1.

[93] Noll (n5).

[94] *Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 [67] cited in *SZSBR v Minister for Immigration and Border Protection* [2013] FCA 1208 [9] per Farrell J; *MZZSH v Minister for Immigration and Border Protection* [2014] FCA 1292 [20] per Murphy J; *SZSFS v Minister for Immigration and Border Protection* [2015] FCA 534 [20] per Logan J.

[95] Discussed in Alan Robertson, 'The Federal Court and Administrative Law: How Does the Court Deal with Findings of Fact on Judicial Review?' in Pauline Ridge and James Stellios (eds) *The Federal Court's Contribution to Australian Law: Past, Present and Future* (Federation Press, 2018) 83, 97-98.

[96] *DAO16 v Minister for Immigration and Border Protection* (2018) 258 FCR 175; see also *BJO18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 189 [71].

[97] Ibid 184 [30(4)].

[98] Dworkin (n62) 31-32. Discussed in Vijaya Nagarajan, 'Discourses on Discretion and the Regulatory Agency' in *Discretion and Public Benefit in a Regulatory Agency*, (ANU Press, 2013) 133.

From the above discussion it can be concluded that protection decision-makers exercise wide discretion in relation to the key tasks of making factual findings and undertaking credibility assessment in relation to applicants' individual circumstances. As discussed in Chapter One, it is well-recognised that such wide discretion can contribute to inconsistent, if not arbitrary, decision-making. Chapter Four outlines empirical research reported in the academic literature that reveals the prevalence in Australia, and in other countries, of inconsistent protection status decision-making.

3.3 Accessing and evaluating country of origin information

To meet the refugee criteria for a protection visa under the *Migration Act*, an applicant who has a subjective fear of Convention persecution must also show his or her fear is objectively well-founded. This is done within the broader context of an examination of the prevailing social, political and human rights conditions in his or her country of origin.[99] Country of origin information (COI) is 'a critical means of both putting an applicant's evidence into context, and more generally of ensuring a complete understanding of relevant risks.'[100]

COI must be reliable and current as the conditions in many countries are constantly changing.[101] The range and quality of COI is often vast and variable, and its value will differ in each individual case. As Audrey Macklin observes, COI including that from 'reliable' government sources and NGOs 'usually paint[s] a canvas with broad, crude brush strokes.'[102] It rarely provides the detailed information that is required to corroborate

---

[99] Thomas (n5) 40. Country of Origin Information (COI) can be defined as information regarding the human rights and security situation in a country of origin that serves to support the assessment of a claim to refugee status or other forms of international protection: Femke Vogelaar, *Country of Origin Information: The Essential Foundation for Fair and Credible Guidance for Decision-making on International Protection Needs* (PhD thesis, Faculty of Law, Vrije Universiteit Amsterdam, 2020) 243.

[100] Hathaway and Foster (n57) 122. Femke Vogelaar explains that COI 'is not determinative of a claim for international protection. Its use is in establishing the existence of a *possible* risk. Thus, [COI] should be weighed against the evidence put forward by an applicant in support of his or her claim to establish whether there is a *real* risk upon return to the country of origin. Depending on the credibility of the applicant's evidence, a decision maker may give greater weight to the [COI] if it proves more persuasive.': Vogelaar (n99) 243.

[101] Thomas (n5) 164.

[102] Audrey Macklin, 'Truth and Consequences: Credibility Determination in the Refugee Context' in *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (Haarlem, Netherlands: International Association of Refugee Law Judges, 1999) 137.

particular aspects of an applicant's account. Lord Justice Laws once observed that often 'the in-country evidence does not speak with an entirely single voice, and certainly does not provide an entirely unequivocal picture of the risk of future events'.[103] The COI before the decision-maker, although 'reliable' may be contradictory.[104] As Thomas notes, '[a]ssessing which accounts are reasonably likely to be true may often come down to intuitive evaluation, the language used, and the reputation of the provider.'[105]

In Australia, there are limited guidelines for the access and use of COI by primary decision-makers and the AAT. Other than a Ministerial Direction that requires decision-makers to have regard to Department of Foreign Affairs and Trade (DFAT) Country Information Reports, discussed in Chapter Four, individual decision-makers have discretion to source and assess COI to supplement that provided to them by the applicant.[106] AAT Members have access to the services of the Department's Country Information Unit, which also provides COI to primary decision-makers. This Unit only provides decision-makers with COI and does not evaluate it against the eligibility criteria for a protection visa in the *Migration Act*. Decision-makers must decide what weight to give COI, and to determine whether it supports a finding that the applicant meets the eligibility criteria.

The Federal Court has held that the AAT has wide discretion to determine the COI on which it relies in making protection visa decisions. In *WADA v Minister for Immigration and Multicultural Affairs*,[107] the appellant argued that the RRT's reliance on a *Lonely Planet* guidebook on Iran and other materials dated between 1996 and 1998, without attempting

---

[103] *MH (Iraq) v Secretary of State for the Home Department* [2007] EWCA Civ 852 [17] (Laws LJ).

[104] Thomas (n5) 168. As Thomas notes, this is particularly when it is presented as part of a 'contest' between the State and applicant as to whether he or she is entitled to international protection.

[105] Ibid 170. James Hathaway and Michelle Foster emphasise that, 'a conscientious effort must … be made to consider country of origin information in as full and value-neutral a way as possible, giving weight to inconvenient and politically awkward information that is nonetheless demonstrative of a real possibility of forward-looking harm.' Hathaway and Foster (n57) 126.

[106] Until 2013, the RRT had an in-house Country Information and Research Unit, which collected and provided to Members, information from a wide range of sources about the conditions in countries of origin. The Unit also provided Members with a Q&A service for specific questions in relation to individual claims. From 2009 to 2015, a selection of this COI was made available on the RRT's website. See description of this service in Michael Lavarch, *Report on the Increased Workload of the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT)* (2012), 30-31.

[107] *WADA v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 202.

to corroborate these materials with more up to date country information available from DFAT and the Iranian authorities amounted to an error of law. The Full Federal Court rejected this argument, noting that while '[i]t does seem odd that the Tribunal would rely on a travel guide for information about the Iranian government's treatment of racial minorities, … the selection of the material on which it relies is a matter for the Tribunal.'[108]

The discretion invested in decision-makers to draw on any source of COI for the assessment of claims extends to that within their own knowledge and the results of their own research.[109] Some decision-makers admit they rely upon 'their own personal knowledge about the conditions in countries of origin' in assessing protection claims.[110] There is no obligation on decision-makers to obtain COI from authoritative sources.[111] Due to time pressures, decision-makers will often conduct their own research as it is the quickest way of gathering information. There are inherent difficulties with this approach, including the variable quality of available COI on the internet, and the skills of the decision-maker to undertake the research and assess the reliability of its results. It also raises issues of fairness for the applicant who may not be given the opportunity to comment on COI which he or she did not provide, but which may form the basis on which an assessment is made by the decision-maker of the 'well-foundedness' of their fear.[112]

---

[108] Ibid [40].

[109] Trish Luker, 'Decision Making Conditioned by Radical Uncertainty: Credibility Assessment at the Australian Refugee Review Tribunal' (2013) 25(3) *International Journal of Refugee Law* 502, 526.

[110] Ibid 525-526 citing RRT member interviewed.

[111] The European Court of Human Rights has provided examples of sources of COI it considers authoritative. These include information in recent reports from independent international human-rights-protection organisations such as Amnesty International, or governmental sources, including the US State Department. It attaches greater importance to reports which consider the human rights situation in the country of destination and directly address the grounds for the alleged real risk of ill-treatment in the matter before it.
In assessing such material, consideration must be given to its source, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant consideration: *NA v the United Kingdom,* Appl. No. 25904/07, Council of Europe: European Court of Human Rights, 17 July 2008, [119]-[120].

[112] The effect of s 424A(3)(a) is that the Tribunal is not obliged to give an applicant written particulars of 'information about the social, political, religious and other conditions prevailing in a country relevant to an applicant's claim for refugee status' that is relevant only for the purpose of 'assessing whether other individuals who share his or her racial, religious, political, social or other attributes suffer treatment of a kind amounting to persecution on Convention grounds in that country.' *VHAJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 80, 95 (Kenny J). As s424A and s424AA complement each other, the Tribunal is not generally required to put adverse 'country information' to an applicant for comment at all (whether in writing or orally): *SZMCD v Minister for Immigration and Citizenship* (2009) 174 FCR 514 at

Another issue is the currency of the information on which the AAT relies in its decision-making. In *Minister for Immigration and Border Protection v MZYTS*,[113] the Full Court of the Federal Court considered whether the RRT's decision to refuse a protection visa was affected by jurisdictional error because of its failure to consider the most recent country information available. The RRT considered earlier country information in relation to the risk of harm faced by the applicant, but its reasons disclosed no evaluation, as opposed to an acknowledgement of the existence of, the most current COI and material before it. The Full Court stated that in the context of protection visa decision-making, attention to current COI 'is not merely preferable, it is a core aspect of lawful formation of a state of satisfaction.'[114] This is because of 'the predictive and speculative nature of the task involved in determining whether a person's fear of persecution for a Convention reason on return to her or his country of nationality is well founded.'[115] The Full Court did not find that decision-makers were disallowed from relying on COI 'which is several years old'.[116] It found that they could lawfully do so 'as part of a weighing process after considering all information available to them, and deciding which information best and most reliably supports the prediction of future risk they are called on to make.'[117] Provided the Tribunal's reasons disclose its evaluation process, the conclusion it reaches will be within jurisdiction.

This consideration of the scope and limits on the access and use of COI by protection visa decision-makers shows that they have wide discretion as to the source, nature and quality

---

432 [91]-[93] (Tracey and Foster JJ). See also *BXK15 v Minister for Immigration and Border Protection* (2018) 261 FCR 515 at 534 [72] (Logan J). Discussed in Jon Bayly, 'Common Grounds of Jurisdictional Error in Applications for Judicial Review of Decisions Made Under Part 7 of the Migration Act 1958 (Cth)' (unpublished paper 16 December 2019).

[113] *Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 114; (2013) 230 FCR 431 (Kenny, Griffiths and Mortimer JJ).

[114] Ibid [73].

[115] Ibid.

[116] Ibid [74].

[117] The Court continued, 'Perhaps more recent information simply confirms older and more detailed information. Perhaps the older information is more specific to the visa applicant's circumstances. Perhaps more recent information is from less reliable, or tainted, sources. There are many possibilities about why a decision-maker may choose, lawfully, to rely on older information and still perform the task required by s 36(2)(a) and Art 1. In such cases, one would expect the Tribunal's reasons to disclose this kind of evaluation process, and the conclusion it reached would be within its jurisdiction.' at [73]-[75]. Their Honours expressed their agreement with the approach taken by Rares J in *SZJTQ v Minister for Immigration and Citizenship* [2008] FCA 1938; (2008) 172 FCR 563 [36]-[42].

of information on which they rely to evaluate whether the applicant's claim to fear persecution or serious harm on return is well-founded. In Dworkin's taxonomy, protection decision-makers exercise 'discretion as finality' when using COI to assess an applicant's eligibility for protection. The wide discretion invested in decision-makers in relation to the sourcing and use of COI allows the adoption of variable approaches by them to this crucial aspect of the fact-finding process. This in turn can lead to inconsistencies in decisional outcomes for applicants with similar claims, because country information is a key element of the factual matrix against which the applicant's risk on return is evaluated.

3.4 Evaluating risk on return

The factual matrix that must be distilled from the evidence by the decision-maker consists of the individual and country elements of the applicant's protection claim. Whereas identifying the factual matrix is an essential stage of the decision-making process, it is only the first step in determining an applicant's entitlement to protection status. As Lord Justice Sedley once observed, the issues in asylum cases 'are evaluative, not factual. The facts, so far as they can be established, are signposts on the road to a conclusion on the issues; they are not themselves conclusions'.[118] The conclusion that must ultimately be reached by the decision-maker is whether he or she is satisfied that the applicant is at risk of persecution or serious harm on return, and thereby meets the eligibility criteria for the grant of a protection visa.[119]

Protection status decisions are by their nature risk assessments as the decision-maker must predict the likelihood the applicant will face a risk of persecution or serious harm on return to their country of origin, and determine whether this risk meets the applicable standard of proof.[120] This task differentiates protection status determination from most decision-making processes, which seek to apportion blame or impose responsibility with reference to

---

[118] *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449 at 479 (Sedley LJ) cited in Thomas (n5) 45.

[119] Section 65 *Migration Act* (n11).

[120] Guy Goodwin-Gill and Jane McAdam remark that 'a decision on the well-foundedness or not of a fear of persecution is essentially an essay in hypothesis, an attempt to prophesy what might happen to the applicant in the future, if returned to his or her country of origin.' Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th edition, 2021, Oxford University Press) Chapter 3, [3].

past events or existing circumstances.[121] Unlike a judge deciding a civil claim, who generally must choose between two different versions of the facts, the protection status decision-maker must make factual findings on past events and also 'prognosticate the possibility of future events', specifically whether the applicant is at risk on return to the requisite standard of proof.[122] The decision-maker must determine whether the evidence 'in the round' supports a finding that the applicant faces a real chance of persecution or a real risk of serious harm on return.[123] He or she must 'assemble the factual findings into an evaluation of the degree of risk, if any, facing the individual on return.'[124] This decision-making process is necessarily speculative, in that it is not only backward-looking with a view to determining what probably or possibly occurred in the past; but is also forward-looking in that it requires the decision-maker to make an 'educated guess' as to the risks that may confront the applicant on his or her return.[125]

Assessing whether the degree of risk is 'real' as opposed to merely fanciful 'requires an essentially evaluative appraisal of the relevant evidence'.[126] The task for the decision-maker is to measure the entirety of the applicant's case 'against the threshold for acceptable risk exposure'.[127] The questions he or she must answer are first, taking all the evidence into account, what is the risk that the applicant will be persecuted or seriously harmed, and secondly, does this degree of risk meet the requisite standard of proof? In relation to both these questions the decision-maker has a considerable degree of autonomy or choice as to the conclusions they reach. Subject to them applying the correct legal tests and making findings based on probative evidence, and which are not irrational or illogical, the decision-

---

[121] Discussed in Robert Gibb and Anthony Good, 'Do the Facts Speak for Themselves? Country of Origin Information in French and British Refugee Status Determination Procedures (2013) 25(2) *International Journal of Refugee Law* 291, 292.

[122] Thomas (n5) 41-42.

[123] Ibid 40. *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 [26] and *Karanakaran* (n117). See Allan Mackey and John Barnes, 'Assessment of Credibility in Refugee and Subsidiary Protection Claims under the EU Qualification Directive: Judicial Criteria and Standards' (International Association of Refugee Law Judges, 2013) and Evans Cameron (n57) 198.

[124] Ibid 45.

[125] Glass (n57) 214.

[126] Thomas (n5) 46.

[127] Evans Cameron (n57) 141.

maker's state of satisfaction in relation to whether the applicant meets the eligibility criteria is largely immune from judicial review. Consequently, as Chapter Four demonstrates, inconsistent decision-making is a common feature of protection status determination systems. However, as inconsistency is not recognised as a ground of judicial review,[128] the lack of consistency between protection decisions cannot be the subject of legal challenge.

As discussed in Chapter One, the inherent subjectivism of discretion has been recognised as presenting a potential threat to individualised justice if it is uncontrolled and unstructured. Davis advocated the development of rules or guidelines to control the manner of the exercise of discretion so as to avoid arbitrary and inconsistent decision-making. Whereas in other fields decision-makers who are required to exercise discretion, including to make risk assessments, are provided with standards or guidelines to structure their decision-making, similar soft law guidance is generally not made available to those tasked with determining protection claims.

4. Soft law guidance for risk assessments

Risk assessments are frequently required to be undertaken by decision-makers, including courts and tribunals. As 'law and risk' scholars have observed, 'handling risk has been a key function of the courts for centuries, when risk is taken to mean "uncertainty."'[129] Criminal courts are required to assess the risk of recidivism in criminal offenders, and the civil courts make retrospective risk assessments in negligence claims. In these areas, fact-finding and risk assessment 'is based implicitly on the assumption that judges and juries will bring their common sense and reason to the table and do the best they can with what they have.'[130] It is however recognised that 'decision-makers are not omniscient' and there is 'no

[128] Noll observes that '[t]he considerable legal space for discretion … is consonant with these patterns of outcome variation': Noll (n5). As discussed in Chapter Four, consistency is not a ground of judicial review. Matthew Groves and Greg Weeks, 'The Ongoing Quest to Define a Duty of Consistency' (2020) 27 *Australian Journal of Administrative Law*, 3-4 who refer to the United Kingdom Supreme Court's judgement in *R (on the application of Gallaher Group Ltd and others) v The Competition and Markets Authority* [2019] AC 96; [2018] UKSC 25 which rejected consistency as a ground of review. See also Emily Johnson, 'Should 'Inconsistency' of Administrative Decisions Give Rise to Judicial Review?' (2013) 72 *AIAL Forum* 50.

[129] Evans Cameron (n57) 31 citing Law Commission of Canada (ed) *Law and Risk* (UBC Press, 2005).

[130] Ibid 35.

expectation that they will be experts' in making assessments of risk.[131] Accordingly, 'assessing risk has become the sovereign domain of experts'.[132] Decision-makers tasked with assessing risk increasingly make reference to 'formal risk-based instruments', including 'statistics, charts, and models' that provide them with guidance.[133] Hilary Evans Cameron gives the example of the Parole Board Member tasked with assessing the likelihood of a criminal reoffending, having recourse to a range of 'checklists' and 'guides', namely the Hare Psychopathy Checklist, the Violence Risk Appraisal Guide, the Sex Offender Risk Appraisal Guide, the Spousal Assault Risk Assessment Guide, and the Sexual Violence Risk Guide.[134] She remarks that '[w]hether or not these expert tools make decisions any more accurate, they give them a "sciency" feel that is reassuring.'[135] However, as Cameron points out, rarely are decision-makers required to make risk assessments in circumstances such as those undertaken in the context of protection claims where 'there is so much room for doubt: where they have so little information and no expert tools with which to analyse it.'[136]

Benjamin Lawrance and Galya Ruffer note within the international refugee status determination (RSD) context, the 'expanding role of a variety of forms of expertise – ranging from country conditions reports, to biomedical and psychiatric evaluations, to the emerging field of forensic linguistic analysis.'[137] What is less common in RSD is production of authoritative guidance on the individuals and groups at risk of refoulement if returned to their countries, which can be relied on by decision-makers to make risk assessments in individual cases. Guidance equivalent to that which helps decision-makers responsible for assessing the likelihood of a criminal reoffending has not routinely been produced by determining authorities for RSD decision-makers. The lack of 'expert tools' to which

[131] Ibid.

[132] Ibid.

[133] Ibid 37.

[134] Ibid.

[135] Ibid.

[136] Ibid 31.

[137] Benjamin N Lawrance and Galya Ruffer, 'Introduction: Witness to the Persecution? Expertise, Testimony, and Consistency in Asylum Adjudication' in Benjamin N Lawrance and Galya Ruffer (eds) *Adjudicating Refugee and Asylum Status: The Role of Witness, Expertise, and Testimony* (Cambridge University Press, 2015) 1.

protection visa decision-makers can refer contributes to the perception if not reality of the RSD system being a 'lottery'.

The next Chapter explains that protection visa decision-making in Australia has been the subject of wide-ranging criticism for more than two decades, including for the inconsistencies between primary and AAT decision-making and for divergent outcomes between AAT members. This thesis argues that the field of protection visa decision-making is one which would greatly benefit from the development by the AAT of soft law guidance, akin to the rules and guidelines proposed by Davis, to structure discretion and reduce the potential for individual injustice associated with inconsistent decisions.

Chapter Four

'Treating Like Cases Alike':

Protection Visa Decision-Making by the Administrative Appeals Tribunal and Measures to Address Inconsistencies

The previous Chapter outlined the elements of the difficult task of determining protection status, with a particular focus on the process for determining eligibility for a protection visa under the *Migration Act.* This Chapter details the criticisms that have been levelled against the Administrative Appeals Tribunal (AAT) and its predecessor the Refugee Review Tribunal (RRT) by applicants, agencies and successive governments in relation to its inconsistent decision-making, which is supported by recent empirical research. These criticisms have focused on two related aspects of the AAT's decision-making. First, the wide divergencies between the recognition rates for protection visa applicants by the AAT and those of the Department of Home Affairs (Department) particularly for applicants from certain countries. Secondly, the inconsistent decision-making by AAT members resulting in different outcomes for applicants with the same or similar protection claims. This Chapter examines the range of measures that have been imposed by Ministerial Direction in the past two decades to curtail discretion, and thereby seek to address inconsistent protection visa decision-making and divergent recognition rates. It shows that these 'top down' measures have been largely unsuccessful in achieving their intended purpose.

The Chapter considers the potential for the AAT to develop soft law guidance to structure the wide discretions conferred on protection visa decision-makers. While a selection of individual AAT decisions recognising 'at risk' groups or individuals in refugee-producing countries are published online, they are not treated as having any precedential effect, and are therefore rarely followed in subsequent primary decisions or AAT reviews. The soft law guidance contained in individual protection visa decisions is submerged in the AAT's voluminous decision archive, and its potential to influence subsequent decisions is all but lost. As a consequence, the AAT's potential normative function in its protection visa jurisdiction is not being fully realised. Amendments made to the *Migration Act* in April 2015 introduced a new section 420B, which authorises the AAT President or Migration and

Refugee Division Head (MRD Head) to direct that a decision is a Guidance Decision. Section 420B requires the AAT in subsequent reviews to follow a relevant Guidance Decision, unless the facts or circumstances of the decision under review are clearly distinguishable from those in the Guidance Decision. This thesis argues that this provision authorises the AAT to develop soft law guidance that authoritatively identifies individuals and groups who will be 'at risk' on return to their country of origin and therefore prima facie meet the eligibility criteria for a protection visa. However, to date, neither the AAT President nor the MRD Division Head have invoked the soft law-making authority that this provision provides to identify a Guidance Decision.

This Chapter sets the scene for the examination in the next two Chapters of the practice of the Immigration and Refugee Board in Canada and the Upper Tribunal (Immigration and Asylum Chamber) in the United Kingdom of promulgating soft law guidance. This guidance is required to be followed by decision-makers in subsequent cases in determining whether an applicant is entitled to protection. These soft law-making functions performed by the IRB and UTIAC are examples of the crafting of soft law norms to promote consistency and predictability in protection status decision-making. These comparative examples provide a useful guide for the design of a procedure by which s 420B of the *Migration Act* can be utilised, as well as highlighting the potential and limitations of the development by tribunals of soft law guidance.

1. Consistency and individual justice in protection decision-making

1.1 'Treating like cases alike'

If a decision-making process produces inconsistent outcomes in cases involving essentially similar claims, then some of the decisions are likely to be substantially incorrect. This is either because genuine claims were found not to meet the relevant criteria, or because non-genuine claims were found to meet these criteria.[1] In the context of protection status determination, incorrect outcomes have significant consequences. A wrong decision may lead to the return of an individual to persecution, torture, or even death in their country of

[1] Robert Thomas, 'Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom' (2008) *International Journal of Refugee Law* 489, 490.

origin. On the other hand, the erroneous recognition of protection status to a person who does not meet the eligibility criteria has implications for the integrity of and public confidence in the determination system.[2]

The principle of 'treating like cases alike' is recognised as an essential aspect of fundamental justice and the rule of law.[3] Two applicants who are 'situated identically in all legally relevant respects' should receive the same outcome regardless of the decision-maker who makes the determination.[4] The outcome should not depend on the biases of whichever decision-maker the individual has the good or bad fortune to have assigned to determine their application.[5] Whereas the principle of consistency is well-established in administrative law, it has not been 'elevated to the status of a legal rule, ground or duty.'[6] Whereas the

---

[2] Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication*, (Hart Publishing, 2011) 26.

[3] David A. Strauss, 'Must Like Cases Be Treated Alike?' (University of Chicago, Public Law & Legal Theory, Working Paper No. 24, 2002); Karen Steyn, 'Consistency – A Principle of Public Law?' (1997) 2 *Judicial Review* 22, 22 cited in Emily Johnson, 'Should 'Inconsistency' of Administrative Decisions Give Rise to Judicial Review?' (2013) 72 *AIAL Forum* 50, 50. Matthew Groves and Greg Weeks, observe that '[c]onsistency has been recognised for decades in Australian cases as an ideal to be encouraged.' Matthew Groves and Greg Weeks, 'The Ongoing Quest to Define a Duty of Consistency' (2020) 27 *Australian Journal of Administrative Law*, 3. See also Paul P Craig, *Administrative Law* (8th edition, 2016, Sweet and Maxwell) 23-002 who notes, whereas formal equality or equality as consistency 'is integral to equality law in most legal systems', this does not 'dictate any particular substantive result. Mark Symes and Peter Jorro state that the making of inconsistent decisions is contrary to 'the well-established principle of administrative law, that 'persons should be uniformly treated unless there is some valid reason to treat them differently' (Carnwath LJ for the majority in *AA (Somalia) v Secretary of State for the Home Department* [2007] EWCA Civ 1040 at [66]) being a principle that 'is one of the building blocks of democracy and necessarily permeates any democratic constitution … treating like cases alike and unlike cases differently is a general axiom of rational behaviour' (*Matadeen v Pointu* [1998] 1 AC 98 PC (per Lord Hoffmann), referencing Jeffrey Jowell QC, 'Is Equality a Constitutional Principle?' [1994] *Current Legal Problems* 1, 12–14); 'the circumstances of the two individuals, though not identical, may be so similar as to call for a rational explanation for the different treatment to be given, if the unfavourable treatment given to one is to stand.' (David Richards LJ in *Chirairo, R (on the application of) v Secretary of State for the Home Department* [2016] EWCA Civ 77 at [25]: although cf *Otshudi v Secretary of State for the Home Department* [2004] EWCA Civ 893: Mark Symes and Peter Jorro, *Immigration Appeals and Remedies Handbook* (2nd ed, Bloomsbury Publishing, 2021), 1033 (m).

[4] Stephen H. Legomsky, 'Learning to Live with Unequal Justice: Asylum and the Limits to Consistency' (2007-2008) 60 *Stanford Law Review* 413, 425. See also Stephen H. Legomsky,'Learning to Live with Unequal Justice: Asylum and the Limits to Consistency' in Jaya Ramji-Nogales, Andrew I. Schoenholtz and Philip G. Schrag, (ed), *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press, 2009).

[5] Ibid. Robert Thomas writes in the context of tribunal decision-making in the United Kingdom: 'Beneath the frequent tendency to idealise law as the embodiment of rational and impersonal legal principle lies the reality that the identity of the individual judge will typically play an important role in the outcome of cases.' Robert Thomas, 'Administrative Justice and Tribunals in the United Kingdom: Developments; Procedures; and Reform' (2020) 26 *Australian Journal of Administrative Law* 255, 271.

[6] Matthew Groves and Greg Weeks, 'The Ongoing Quest to Define a Duty of Consistency' (2020) 27 *Australian Journal of Administrative Law*, 3-4 who refer to the United Kingdom Supreme Court's judgement in *R (on the*

failure to 'treat like cases alike' will generally not amount to jurisdictional error, inconsistent cases 'will almost inevitably look ridiculous and consequently reduce confidence in the process under which similar decisions are made in future and consequently reduce confidence in the process under which similar decisions are made in future.'[7]

1.2 Quantitative and qualitative research into the 'asylum lottery'

The prevalence of inconsistent decisional outcomes in protection status determination systems, termed the 'asylum lottery' or 'refugee roulette', has been the topic of a growing body of legal scholarship which reports the findings of empirical research. Major studies have been conducted, particularly in North America, of the wide divergences in decisional outcomes between protection status decision-makers. In their significant study, the results of which were published in 2009 in a book titled *Refugee Roulette*,[8] Jaya Ramji-Nogales, Andrew Schoenholtz and Philip Schrag examined 140,428 asylum cases adjudicated in the United States between 1 January 2000 and 31 August 2004 and found wide disparities between adjudicators at all levels of decision-making. They concluded most of the disparities were related to the decision-maker's judgements about the applicant's credibility, and the 'degree of scepticism that they bring to the task of judging credibility based on an applicant's imperfect recollection or inconsistent retellings of personal history.'[9] They found that as a result of their prior work experience and particular personal histories, backgrounds and philosophies, 'different officers and judges may bring to their

---

application of Gallaher Group Ltd and others) v The Competition and Markets Authority [2019] AC 96; [2018] UKSC 25 which rejected consistency as a ground of review. See also Emily Johnson, 'Should 'Inconsistency' of Administrative Decisions Give Rise to Judicial Review?' (2013) 72 *AIAL Forum* 50.

[7] Greg Weeks, Janina Boughey and Ellen Rock, *Government Liability: Principles and Remedies* (Lexis Nexis, Butterworths, 2019) [6.3.1], 182; Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016) 155-156; and Weeks and Groves (n6) 4, citing S*egal v Waverley Council* (2005) 64 NSWLR 177.

[8] Jaya Ramji-Nogales, Andrew Schoenholtz and Philip G Schrag (eds), *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press, 2009); Jaya Ramji-Nogales, Andrew I. Schoenholtz and Philip G. Schrag, 'Refugee Roulette: Disparities in Asylum Adjudication' (2007) 60(2) *Stanford Law Review* 295. See also Andy J Rottman, Christopher J Fariss, and Steven C Poe, 'The Path to Asylum in the US and the Determinants for Who Gets In and Why' (2009) 43 *International Migration Review* 3. In a 2018 machine-learning study of some 21 million records of US asylum decisions, affecting some 800,000 cases, using information on the identity of the judge and the applicant's nationality, the researcher's algorithm could predict the outcome of the asylum claim with 80 per cent accuracy: Daniel L Chen, Matt Dunn, Levent Sagun, and Hale Sirin, 'Early Predictability of Asylum Court Decisions' Toulouse School Economics, Working Paper, n. 17-781, March 2017.

[9] Ibid 99.

task quite different presuppositions about the degree to which inconsistencies or lapses in the telling or retelling of a personal history prove that an applicant is committing fraud.'[10]

In a study that has spanned more than a decade, Canadian legal scholar, Sean Rehaag has identified significant disparities in acceptance rates in the decisions of Immigration and Refugee Board (IRB) members.[11] He has concluded that 'differing approaches to credibility – does the decision-maker generally believe claimants or are they generally sceptical of claimants – are the main cause of large recognition rate variation.'[12] In her statistical analysis published in 2013 of over 68,000 refugee claims adjudicated by 264 members of the IRB from 2006 to 2011, Innessa Colaiacovo found that the 'probability of acceptance is associated with individual members' characteristics including education, gender, and professional experience, when holding constant the applicant's country of origin, gender, and the year and regional office of adjudication.'[13] Like Rehaag, she recommended measures be implemented to change the selection process for Members, that they be provided with additional training, and avenues for appeal of decisions be introduced.[14]

Reliance by Members on different country information (COI) or variable assessments of the same COI, is another factor that contributes to divergent recognition rates. Sule Tomkinson gives the example of two IRB Members who reached conflicting conclusions based on the same country information in relation to two similar claims made by Chinese Christians from Indonesia.[15] One Member, a lawyer with extensive practice in administrative law, took into

---

[10] Ibid 99. See further Michelle Foster, Book review: *Refugee Roulette* (2012) 24(1) *International Journal of Refugee Law* 168-172.

[11] Sean Rehaag has obtained datasets from the Immigration and Refugee Board (IRB) through Access to Information (ATI) requests and made the data publicly available. He has also undertaken statistical analysis of this data to discern patterns in outcomes, the results of which have been published in several peer reviewed journals: Sean Rehaag, 'Troubling Patterns in Canadian Refugee Adjudication' (2008) 39(2) *Ottawa Law Review* 335 ('Troubling Patterns'); Sean Rehaag, 'Judicial Review of Refugee Determinations: The Luck of the Draw? (2012) 38 *Queen's Law Journal* 1 ('Luck of the Draw'); Sean Rehaag, '2018 Refugee Claim Data and IRB Member Recognition Rates' (19 June 2019); Sean Rehaag, '2020 Refugee Claim Data and IRB Member Recognition Rates' (5 August 2021) Refugee Law Lab.

[12] Sean Rehaag, Brief Submitted to the Standing Committee on Citizenship and Immigration (12 April 2018), 6.

[13] Innessa Colaiacovo, 'Not Just the Facts: Adjudicator Bias and Decisions of the Immigration and Refugee Board of Canada (2006-2011)' (2013) 1(4) *Journal on Migration and Human Security* 122.

[14] Ibid 144. See similar conclusions reached by Sean Rehaag, 'Troubling Patterns' (n11) 358.

[15] Sule Tomkinson, 'Who are you afraid of and why? Inside the black box of refugee tribunals' (2018) 61(2) *Canadian Public Administration* 184, 192. Both decision-makers relied on the same IRB National

account reports that documented 'historical and continuing bias and discrimination against Chinese Indonesians,' and indicated that while the same reports underlined improved conditions for this group, they 'remain legally and socially vulnerable.'[16] She concluded there was a serious possibility of persecution for the claimants. Another Member, a former refugee lawyer, gave greater weight to reports that underlined the increased rights and freedoms that the Chinese community in Indonesia currently enjoyed, indicating the Indonesian Government's promotion of racial and ethnic tolerance.[17] Recognising the occurrence of localised attacks and incidents, the Member concluded, 'even though incidents could still arise between extremist Muslim individuals or groups and Christian or Chinese individuals or groups, the analysis of the evidence as a whole does not show that the claimants would face a serious possibility of persecution.'[18]

These quantitative and qualitative analyses by Canadian scholars of IRB decision-making document the wide variations in recognition rates between IRB Members. In seeking to explain why such disparities in protection status grant rates exist, it has been posited that the political patronage and sociological characteristics of the Members are the primary bases for the divergencies.[19] There is little doubt that these personal characteristics of Members contribute to their propensity to find that an individual meets the eligibility criteria for protection. However, the capacity of the protection status determination system to accommodate the individual predilections of decision-makers is largely a consequence of the wide discretion invested in Members in relation to the identification, assessment and evaluation of material relevant to an applicant's protection claim, and the open-textured standard of proof for the assessment of risk that was highlighted in Chapter Three.[20] As Chapter One explained, the investment in decision-makers of wide and unstructured discretion inevitably leads to inconsistent if not arbitrary outcomes. In the absence of rules

---

Documentation Package (NDP). These are lists of public documents that provide information on country conditions to support the refugee determination process.

[16] Ibid.

[17] Ibid.

[18] Ibid.

[19] Sule Bayrak, 'Contextualizing Discretion: Micro-dynamics of Canada's Refugee Determination System' (PhD Thesis, University of Montreal, 2016) 17.

[20] Gregor Noll, 'Credibility, Reliability and Evidential Assessment' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP, 2021).

or guidelines to structure these discretions, protection status decision-makers will invariably reach differing outcomes, including for applicants with the same or similar claims.

In the following sections, the nature and extent of inconsistent protection visa decision-making in Australia is outlined, and the 'top down' measures that have been introduced by governments to address inconsistencies are examined. In comparison to the United States and Canada, until recently there has been little empirical evidence to support the widely held view that there is a high degree of inconsistency among Australian decision-makers at the various stages of the protection status determination process.[21] Whereas recent empirical research reveals that inconsistent decision-making between primary decision-makers and the AAT and between individual AAT members exists, the reasons for it and various measures that have been adopted to address it have been the subject of little academic analysis.

2. Inconsistencies between primary and review decisions

2.1 AAT set-aside rates of primary decisions

According to the Australian Government Department of Immigration and Border Protection publication *Asylum Trends* 2012-13, during this period the RRT reached the opposite conclusion to the Department in relation to whether the applicant satisfied the eligibility criteria for protection in one in four cases.[22] However, the percentage of decisions for which the AAT reached a different outcome for applicants from certain countries of origin departed significantly from this average.[23] For example, the AAT reached a different conclusion to the Department in relation to whether the applicant satisfied the eligibility criteria for almost three quarters of applicants from Iran. More recent information obtained from the AAT by way of a Freedom of Information (FOI) Request by Daniel Ghezelbash for the period January 2015 to December 2019 shows that applicants were found to meet the

[21] Thomas (n2) 137.

[22] The 'average overall remittal rate' of primary decisions during this period was 25.4%. This refers to the percentage of total decisions remitted back to the Department by the AAT with a direction that the applicant meets the eligibility criteria for a protection visa: Department of Immigration and Border Protection *Asylum Trends Australia* 2012-13, 16.

[23] Ibid 18. The set-aside rates for the following countries were considerably higher than the average: Iran (73%); Pakistan (57%); Egypt (50%) and Iraq (76%). The set-aside rate for other countries was much lower than the average during this period: India (6%) and China (19%).

criteria for the grant of a protection visa in 13.2% of cases.[24] In the remaining 86.8% of cases the primary decision was affirmed or the application was withdrawn. [25] The information obtained by Ghezelbash shows that there continues to be vast differences in the recognition rates between the Department and the AAT for applicants from particular countries of origin.[26]

As Ghezelbash observes, '[w]hile some variation is to be expected across countries, based on varying conditions and the likelihood of persecution, the very high rates of decisions being overturned for certain countries raises concerns about the quality of decision-making at the department level.'[27] He asks, '[w]hy are the decision-makers at first instance getting it wrong 90% of the time when it comes to Libyans? Or more than 75% of the time for applicants from Afghanistan?'[28] The fact that the AAT remits the primary decision on review does not necessarily mean that the primary decision-maker 'got it wrong'. As outlined in Chapter Three, the AAT has the benefit of hearing from the applicant and considering new information that was not before the primary decision-maker, which will often include different or more up-to-date country of origin information (COI). However, the vast differences between recognition rates between the Department and the AAT for some countries, strongly suggests that the risk assessments conducted by primary and review decision-makers are the product of the consideration of very different COI and/or the application of a considerably higher risk threshold by primary decision-makers in determining whether the criteria for the grant of protection are satisfied. However, as outlined in Chapter Three, differences in approach by primary and review decision-makers

---

[24] Daniel Ghezelbash, 'How to Succeed in Visa Reviews: New Research Reveals the Factors that Matter', *The Conversation*, 10 March 2020. The database was 18,196 protection visa reviews decided by the AAT (MRD) between during the period 1 January 2015 and 5 December 2019.

[25] Ibid. The reduction in the average recognition rate compared to the 25% rate in 2012-13 is attributed to the high volume of review applications from Malaysian nationals. Malaysian applicants constituted more than one-third of the protection visa caseload for the period (6,488 applications) and the recognition rate for these applicants was only 3% - AAT Annual Report 2018-19.

[26] Ibid. Of those countries from whom 20 or nationals made applications for protection, applicants from Libya (91%), Afghanistan (76%), Ethiopia (61%), stateless individuals (43%), Iraq (53%) and Iran (47%) were recognised by the AAT on review as meeting the protection visa criteria. For applicants of other nationalities, the success rate was much lower: for Ireland and Tonga (0%), Taiwan and Korea (1%) and Malaysia (3%).

[27] Ibid.

[28] Ibid.

to the COI sourced and relied upon, and the application of the standard of proof are an inevitable by-product of exercise of the wide discretions invested in protection visa decision-makers.

These wide variations in recognition rates between primary and review decisions have been of concern to, and have sought to be addressed by, successive governments. The response has been to implement a range of 'top down' measures to promote consistency in primary and review decision-making, which are detailed in the next section.

2.2 Ministerial Direction to address inconsistent primary and review decisions

A Ministerial Direction (Direction) issued under section 499 of the *Migration Act* is a direction that takes precedence over all other executive policy.[29] Directions have been described as 'a flexible mechanism by which the government can shape policy, to reflect its broader social objectives.'[30] Whereas Directions are binding on both primary decision-makers and the AAT, and may therefore be described as 'hard' law, they 'cannot force decision makers … to arrive at a particular conclusion in particular cases.'[31] Despite Government policy that Directions be issued sparingly, Ministers have used them for a broad range of situations, including to influence tribunal decision-making practices.[32] Ministerial Direction No.56 'Consideration of Protection visa applications' was introduced on 21 June 2013 and was substituted by Direction No. 84 on 24 June 2019 (the Direction).[33] The 'Objectives' of the Direction include the following statement:

---

[29] Alan Freckleton describes it as an 'uber-policy direction': Alan Freckleton, *Administrative Decision-Making in Australian Migration Law* (ANU Press Textbooks, 2015), 92. Sub-section 499(1) provides that '[t]he Minister may give written directions to a person or body having functions or powers under this Act if the directions are about: (a) the performance of those functions; or (b) the exercise of those powers'. Sub-section 499(2A) provides that '[a] person or body must comply with a direction under subsection (1)'. The reference to 'a body' is significant, it requires all administrative decision-makers, including the AAT, to follow all relevant s 499 directions.

[30] Chantal Bostock, 'The Effect of Ministerial Directions on Tribunal Independence' (2011) 66 *AIAL Forum* 33, 35 citing *Toro Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337, 356.

[31] Ibid 36.

[32] Yee-Fui Ng, 'Tribunal Independence in an Age of Migration Control' (2012) 19 *Australian Journal of Administrative Law* 203, 218.

[33] Ministerial Direction No 84 – 'Consideration of Protection visa applications' was made under s 499 on 24 June 2019 and has effect from 25 June 2019. It replaced Ministerial Direction No 56 (dated 21 June 2013) to reflect changes to the citation of guidelines but did not make any substantive changes.

> It is undesirable for first instance and review decision makers to take inconsistent approaches to the decision-making task where there is no rational basis for these inconsistencies. Accordingly, it is desirable that subject to the Migration Act and Regulations and other applicable laws, decision-makers take as a starting point a common set of guidelines and country information.

The political background to the issuing of the Direction was a concern expressed by Government Ministers in early 2013 in relation to the divergence between the recognition rates for protection visa applicants by the Department and the RRT in the 2011-12 period.[34] In March 2013 the then Foreign Minister referred to statistics from 2011-12 showing that 64% of applicants for protection were granted a visa by the primary decision-maker, and following merits review by the RRT, the approval rate rose to 94%. According to the Foreign Minister, these figures indicated that the RRT has too much discretion in making its assessments. He stated:

> people who head tribunals making decisions about the status of someone seeking asylum ought to have some hard, solid, sourced material that tells them whether there is persecution or not. It can't be left vague with a lot of discretion left to the person heading the tribunal.[35]

The Direction requires decision-makers, including the AAT, to take account of the Department's 'Refugee Law Guidelines' and 'Complementary Protection Guidelines' contained in its Procedures Advice Manual (PAM3) (the Protection Guidelines) to the extent that they are relevant to the decision under consideration. As explained in Chapter Two, the Protection Guidelines contain the Department's interpretation of provisions of the *Migration Act* and set out examples of circumstances which may or may not satisfy the eligibility criteria. The Protection Guidelines are executive policy that 'fill the gaps' in the eligibility criteria to be used by Department decision-makers to determine individual protection visa applications. They do not identify groups or individuals recognised by the Department as 'at risk' in the relevant countries.[36]

---

[34] See for example, *The Australian,* 20 March 2013.

[35] Senator the Hon. Bob Carr cited in William Maley, Opinion, 'Asylum Process Stands Up', *Canberra Times* (Canberra, 19 July 2013).

[36] The Department's policy manuals are used to guide primary decision-makers in determining visa applications under the *Migration Act* and *Migration Regulations*. Relevant policy is consolidated in the Procedures Advice Manuals ('PAMs') whose primary aim is to provide direction to departmental officers.[36] The PAMs have no legislative basis however they purport to be 'a comprehensive document providing advice on the exercise of many provisions of the Act and Regulations.' They cover practice and procedural issues and

Where relevant to the decision under consideration, the AAT must 'take account' of the Protection Guidelines. The Direction does not require the AAT to take account of any aspects of the Guidelines that are inconsistent with the Act and its interpretation by the courts.[37] The Full Federal Court has stated that it is highly desirable, if not essential, that a decision-maker's reasons clearly expose consideration of the Direction to demonstrate that the Guidelines have been taken into account. Merely adhering to the statutory scheme does not, of itself, establish that there has been compliance with the Direction, which ensures an additional safeguard to those claiming protection.[38]

The Direction also requires decision-makers to take into account where relevant Department of Foreign Affairs and Trade (DFAT) Country Information Reports (CIRs). These reports 'provide a general, rather than an exhaustive country overview.'[39] They are prepared by DFAT 'with regard to the current caseload for decision-makers … without reference to individual applications for protection visas.'[40] They 'take into account relevant and credible open source reports, as well as information obtained on the ground.'[41] CIRs

---

contain directions on the exercise of discretionary powers by primary decision-makers. Freckleton explains that the purpose of Departmental policy is:

> … to prescribe, or perhaps impose, a particular way of interpreting a subjective consideration or discretionary power, in order to provide some uniformity in the approach of decision makers.

According to Alan Freckleton, in practice, many junior Departmental decision-makers 'rely exclusively on the PAMs and other policy instructions to make their decision', and 'the pressure on junior decision-makers to follow policy is immense'. Alan Freckleton, *Administrative Decision-Making in Australian Migration Law* (ANU Press Textbooks, 2015) 91.

[37] As the Minister cannot make a direction under s 499 that is inconsistent with the Act or the Regulations, the Direction does not require the Tribunal to take account of any aspects of the Guidelines which are inconsistent with the Act and its interpretation by the Australian courts: section 499(2) Migration Act; *SZTCV v MIBP* [2015] FCCA 1677 at [70] (upheld on appeal: *SZTCV v MIBP* [2015] FCA 1309) and *SZTCU v MIBP* [2014] FCCA 1600 at [40].

[38] *BQL15 v MIBP* [2018] FCAFC 104 [19] Collier, Flick and Perry JJ.

[39] The Department of Foreign Affairs and Trade (DFAT) website states that Country Information Reports are prepared by the DFAT 'for protection status determination purposes only. They provide DFAT's best judgment and assessment at time of writing and are distinct from Australian Government policy with respect to the countries in question.' These reports 'provide a general, rather than an exhaustive country overview. They are prepared with regard to the current caseload for decision makers in Australia without reference to individual applications for protection visas. Reports do not contain policy guidance for decision makers': https://www.dfat.gov.au/about-us/publications/country-information-reports

[40] Ibid.

[41] Ibid. In *KK and RS (Sur place activities: risk) Sri Lanka CG* [2021] UKUT 130 (IAC) (27 May 2021) the Upper Tribunal (IAC) considered the DFAT Country Information Report (CIR) on Sri Lanka dated 4 November 2019. It found 'serious methodological shortcomings' in the CIR noting that 'none of the sources are identified, there is no explanation as to how the information from these sources was obtained, and there is no annex containing,

provide a generalised assessment of the risk on return for groups and individuals to the relevant country. They do not and cannot provide an evaluation of this information against the protection visa eligibility criteria to determine whether they are satisfied by individuals or groups in the relevant country. This task is the exclusive domain of protection visa decision-makers.

DFAT Country Information Reports must be considered by the AAT where relevant,[42] but the decision-maker is not precluded from considering other relevant information about the country. Although decision-makers must take CIRs into account, they still need to determine whether a CIR is relevant to the case before them, and determine what weight to give the CIR in evaluating the risk on return for the individual applicant. It is open to a decision-maker to decide to give little weight to a CIR, or to give greater weight to another source of COI which the decision-maker considers to be applicable to the applicant's particular circumstances. The wide discretion invested in protection decision-makers to assess and use COI, discussed in Chapter Three, is therefore only marginally constrained by the requirements of the Direction.

---

for example, records of any interviews… Indeed, it is unclear whether any formal interviews took place. The report does not provide direct quotes from any source. In light of these matters, it is difficult to gauge the reliability of the sources which have informed the "judgement and assessment" applied to them by the authors of the report.' [302]. Following this decision, a number of Australian organisations issued a Joint Media Release demanding the suspension of the use of the DFAT CIR on Sri Lanka for the assessment of protection claims: 'Human rights groups demand suspension of reports on Sri Lanka to assess refugee applications following rejection by a UK court'.

[42] It is for the Tribunal to determine whether the Guidelines or country information are relevant to the decision, and if a decision does not expressly refer to the Guidelines or country information, a court might infer that the Tribunal did not consider them to be relevant. However, this inference may not always be drawn, and in some circumstances a failure to expressly engage with the Guidelines may lead to error: *SZTMD v MIBP* [2015] FCA 150 at [20]. A court might also infer from language used in the decision that the Tribunal has in fact had regard to the Guidelines. The Federal has held that the Tribunal's statement that it was required to take into account the Guidelines should in itself be sufficient to conclude that the Tribunal had done so: *AJW15 v MIBP* [2016] FCA 197 at [46]: Administrative Appeals Tribunal *Guide to Refugee Law in Australia* [12.7].

2.3 Impact of the Ministerial Direction

The statistical information obtained and analysed by Ghezelbash of AAT decisions from January 2015 to December 2019 covers the period during which the Direction was in effect and binding on the AAT. This information shows that, despite primary and review decision-makers having regard to the same Protection Guidelines and identical CIRs, the AAT continued to set aside a high proportion of the refusal decisions made by the Department.[43]

This analysis demonstrates that the Direction has not achieved its stated purpose of reducing inconsistent decision-making between the Department and the AAT. Nor has it had the effect the Foreign Minister intended of directing decision-makers 'whether there is persecution or not.' The Foreign Minister's concern was to reduce the discretion of protection visa decision-makers, and his proposed solution was to provide them with 'hard, solid, sourced material' on which to base their decision. As decision-makers retain a considerable degree of discretion in deciding what weight, if any, to give to a CIR, and need only take into account the Protection Guidelines, the Direction provides only very limited structure to the exercise of the wide discretions associated with protection visa decision-making outlined in Chapter Three. The Protection Guidelines and the CIRs do not assist decision-makers in applying the eligibility criteria for a protection visa to the factual matrix relevant to the claims to determine whether the applicant is at risk of persecution or serious harm on return. The failure of the Direction to reduce inconsistencies between primary and AAT decisions is therefore far from surprising.

3. Divergent recognition rates between AAT decision-makers

3.1 Available evidence

There has long been anecdotal evidence that there is a considerable divergence between the recognition rates for applicants between AAT decision-makers.[44] The AAT does not publish information about the decision-making outcomes of its Members, and until very

[43] For example, during the relevant period the AAT set aside 90% primary decisions in relation to claims made by nationals from Libya, 80% of decisions for Afghani nationals and 60% of decisions for nationals of Ethiopia: Ghezelbash (n24).

[44] See for example, Maria Psihogios-Billington, *A Case for Justice: Position Paper on the Legal Process of Seeking Asylum in Australia* (Asylum Seeker Resource Centre, 2009), 4.

recently there has been no independent research to reveal the extent of any such variance. From the data obtained from the AAT, Ghezelbash was able to compile and document significant variation in the recognition rates across individual AAT members.[45] Data from Members who had decided 50 or more cases was analysed to ensure the sample was large enough to be statistically relevant. The results reveal substantial differences in the recognition rates of AAT members. Two members did not find in favour of an applicant in a single case, in other words, their affirm rate was 100%. At the other end of the spectrum, applicants whose review was conducted before another Member had a success rate of 86%.[46]

Ghezelbash recognises that 'it is important to caution against drawing conclusions as to the cause of this variation.'[47] While 'the individual preferences and bias of the Member may contribute to this variation, it could also be caused by the allocation of cases.'[48] Some Members may specialise in countries that are not generally refugee-producing, and therefore their recognition rates would be expected to be much lower than those Members whose caseloads consist primarily of claims from a high-volume refugee-producing country. As Ghezelbash recognises, more detailed data and statistical analysis is required to differentiate between these different factors.[49]

While not conclusive, this evidence does provide support for the belief amongst protection visa applicants and their representatives that the outcomes of protection visa reviews are inconsistent.[50] This concern also has been held by successive governments which have introduced measures to address inconsistent protection visa decision-making by the AAT on review.

---

[45] Ghezelbash (n24).

[46] Ibid. In response to questions about this, the AAT stated, 'to construct any meaningful comparison concerning the variation of outcomes across individual members, there should be more analysis of the nature of the reviews undertaken by those members sampled. For instance, the country of origin of applicants and the nature of the claims made by those applicants are generally the most significant factors in determining the outcome of a review.'

[47] Ibid.

[48] Ibid.

[49] Ibid.

[50] See for example, Psihogios-Billington (n44).

3.2 Ministerial Direction to Promote Consistency of Tribunal decisions

On 1 June 1999, the Minister for Immigration, the Hon. Philip Ruddock, issued six Ministerial Directions under section 499 of the *Migration Act*.[51] Ministerial Direction No 15, 'Refugee Review Tribunal Role and Responsibility of Members', included instruction on consistent decision-making by RRT Members:

> 8. In reaching their own decisions, members are to give significant weight to leading decisions by fellow members and to the importance of maintaining consistency of interpretations across different review applications. Consistency of decision-making is of great importance in ensuring that the objective of a fair and just mechanism of review is met. The Government's view is that a fair review system should not result in applicants with similar circumstances obtaining different outcomes from the Tribunal.[52]

Despite the issuing of this Direction, there is no evidence that the RRT introduced a system for the identification of 'leading decisions' to be followed by Members in reviews to maintain 'consistency of interpretations'. The Direction was in effect from June 1999 until it was revoked in March 2014. A search of the RRT decision database shows that there are no

---

[51] Three of these Directions were for the RRT and three for the MRT with mirror provisions, namely Direction No. 11 and 14 concerning the role and responsibilities of the Principal Member, Directions No. 12 and 15 concerning the responsibilities of Members and Directions No. 13 and 16 concerning streamlining measures.

[52] Ministerial Direction No 15, 'Refugee Review Tribunal Role and Responsibility of Members' 1 June 1999 https://www.legislation.gov.au/Details/F2006B11696 The motivation for the issuing of this Direction is unclear. However, a few days after the Direction was issued, the Minister delivered a speech to mark the launch of the Migration Review Tribunal on 4 June 1999 in which he stated:

> There is no doubt that tribunals are meant to be independent decision-making bodies. It is undeniably the role of all members to be impartial and free from bias. It is equally true that it is not the role of tribunals to determine migration policy. That is a matter for the government of the day. It is essential that each and every member of the tribunal is aware of and acts on government policy as expressed in the migration legislation, has full regard to ministerial policy directions, and gives due weight to supporting policy guidelines.

This suggests that the Minister was concerned that some Members were departing from government policy in their decisions, and the Direction may have been designed to address these concerns. This is supported by reports that a few years earlier the Minister was publicly critical of decisions of the RRT decisions which overturned Department decisions refusing to recognise as refugees two women whose claims were based on spousal abuse. The Minister's criticism extended to the Members who made the decisions, including pointedly stating that they were 'highly unlikely' to have their terms renewed. Minister's speech quoted in *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, Senate Legal and Constitutional Committee (June 2000) [5.120]; Ng (n32) citing Stephen Legomsky, 'Refugees, Administrative Tribunals and Real Independence: Dangers Ahead for Australia' (1998) 76 *Washington University Law Quarterly* 243, 250; See also Susan Kneebone, 'Is the Australian Refugee Review Tribunal "Institutionally" Biased?' in Francois Crepeau et al (eds), *Forced Migration and Global Processes* (Lexington Books, 2006) Chapter 10; Susan Kneebone, 'The Australian Story: Asylum Seekers Outside the Law' in Susan Kneebone (ed), *Refugees, Asylum-Seekers and the Rule of Law* (Cambridge University Press, 2009) Chapter 4.

decisions in which this Direction is referenced. As the statistics compiled by Ghezelbash cited above demonstrate, in the absence of a system for identifying 'leading decisions' to provide guidance for Members, inconsistencies between decision-makers have persisted.

This discussion demonstrates that 'top down' measures imposed by Ministerial Direction have been unsuccessful in increasing consistency of protection visa decision-making. Faced with ongoing concerns in relation to inconsistent decisions being made by AAT members, in 2014 the RRT supported the introduction of amendments to the *Migration Act* to permit the AAT to identify 'guidance decisions' (Guidance Decisions). The background to and impetus for these amendments is discussed in the next section.

4. Guidance Decisions provision of the *Migration Act*

Section 420B *Migration Act* empowers the AAT President or the MRD Head, to direct in writing that a decision of the AAT (or a decision of the former RRT) (the 'guidance decision') be complied with by the AAT in undertaking a review, unless it 'is satisfied that the facts or circumstances of the decision under review are clearly distinguishable from the facts or circumstances in the guidance decision.'[53] Non-compliance with a Guidance Decision does not render the AAT's decision invalid.[118] The Explanatory Memorandum to the Bill stated that the purpose of Guidance Decisions is 'to promote consistency in decision-making between different members of the [AAT] in relation to common issues and/or the same or similar facts or circumstances.'[120]

---

[53] **Guidance decisions**

1) The President of the Tribunal, or the head of the Migration and Refugee Division of the Tribunal, may, in writing, direct that a decision (the ***guidance decision***) of the Tribunal, or of the former Refugee Review Tribunal, specified in the direction is to be complied with by the Tribunal in reaching a decision on a review of a Part 7-reviewable decision of a kind specified in the direction.
2) In reaching a decision on a review of a decision of that kind, the Tribunal must comply with the guidance decision unless the Tribunal is satisfied that the facts or circumstances of the decision under review are clearly distinguishable from the facts or circumstances of the guidance decision.
3) However, non-compliance by the Tribunal with a guidance decision does not mean that the Tribunal's decision on a review is an invalid decision.

Sections 353B and s473FC of the *Migration Act* also permit the identification of Guidance Decisions for migration decision reviews and reviews conducted by the Immigration Assessment Authority respectively. These provisions were introduced into the Act with effect from 18 April 2015.

4.1 Background to the provision

The impetus for this reform came from concerns internal to the leadership of the Migration Review Tribunal and Refugee Review Tribunal (MRT-RRT) that inconsistent decisions in similar cases undermined efficiency and certainty and contributed to public perceptions of the unfairness of its decision-making processes.[54] The purpose of s 420B was explained in the MRT-RRT's submission to the Senate Legal and Constitutional Affairs Committee (Senate Committee) inquiry into the Bill that introduced the provision:

> The proposal will help ensure consistency between tribunal decisions on similar subject matters. This will contribute to public perceptions of fairness and justice in Tribunal decision-making, as like cases will be treated alike. It will increase Tribunal efficiency and certainty in dealing with common questions that arise frequently.[55]

In her oral evidence to the Senate Committee in September 2014, the Principal Member of the MRT-RRT, Kay Ransome, described her understanding of the purpose of the provision and how the system would work in practice:

> the intention of such a system is to guide fact-finding tribunal members who have busy hearing schedules and matters with very variable representation coming before them, sometimes with poor documentation. The intention is that a decision that is marked as a guidance decision is one where there has been a thorough and exhaustive examination of all the relevant material to give guidance on the circumstances and risks in a particular country in question on a particular date … the intention would be that a guidance decision would thoroughly examine all available material to provide guidance to tribunal members around the risk factors associated with those particular groups in those countries.[56]

The Principal Member explained to the Senate Committee how Guidance Decisions would have the status of 'factual precedents' and aid consistency in decision-making:

---

[54] These concerns were related to both migration and protection visa decisions.

[55] Migration Review Tribunal and Refugee Review Tribunal Submission to Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014, Submission No.5 (MRT-RRT Submission), 3; See also Department of Immigration and Border Protection, Submission No.14, 14.

[56] Hansard, Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014, Public Hearing, 5 September 2014, 49.

> The guidance decisions are to aid consistency in decision making so that cases that have like circumstances within a particular factual matrix – it is really a factual precedent rather than a legal precedent. One of the things that we are all anxious to avoid is that persons who have like circumstances can obtain a different outcome … [P]art of the aim … is also that five people do not have to reinvent the wheel on a daily basis.[57]

4.2 Idle opportunity

More than six years since s 420B *Migration Act* came into effect in April 2015, it has not been used to identify a single protection visa decision as a Guidance Decision.[58] Meanwhile, as documented by Ghezelbash, between the period January 2015 and December 2019 there continued to be significant variations in the recognition rates between AAT Members. As discussed above, these variations are not necessarily an indication that different Members are making different decisions for applicants with similar claims or that like cases are not being treated alike. In the absence of more detailed data and statistical analysis this conclusion cannot be firmly drawn. However, as the MRT-RRT's submission to the Senate Committee stated, the provision was intended to 'ensure consistency between tribunal decisions on similar subject matters.'[59] This strongly suggests that at the time there was an awareness that there were inconsistencies in the outcomes for applicants with the same or similar claims for protection.

This thesis argues that the Guidance Decision provision in s 420B *Migration Act* authorises the AAT to develop soft law guidance to structure the wide discretions invested in protection visa decision-makers outlined in Chapter Three. This guidance should identify 'at risk' individuals and groups in particular countries who prima facie satisfy the eligibility criteria for a protection visa. The identification of Guidance Decisions would assist AAT Members to make consistent and predictable decisions as their wide discretion to identify facts, evaluate evidence and make risk assessments would be constrained by the conclusions in the Guidance Decision. These decisions could be followed not only by the

---

[57] Ibid at 54.

[58] Nor has the power in sections 353B or s473FC of the *Migration Act* been used by the AAT to identify a Guidance Decision for migration decision reviews or reviews conducted by the Immigration Assessment Authority respectively.

[59] MRT-RRT Submission (n56)

AAT in subsequent review applications as the provision requires, but also by primary decision-makers. A proposed procedure for the identification and use by the AAT of Guidance Decisions is outlined in Chapter Seven. The next two Chapters describe the methods and processes that have been adopted by the Immigration and Refugee Board in Canada and the Upper Tribunal (Immigration and Asylum Chamber) in the United Kingdom respectively to produce soft law guidance to assist protection status decision-makers to make these hard decisions.

Chapter Five

Soft Law Guidance for Protection Status Decision-making by the Canadian Immigration and Refugee Board

The previous two Chapters outlined the legal framework and processes under the *Migration Act* for the assessment and determination of whether applicants for a protection visa meet the eligibility criteria. Chapter Three showed that whereas this task is constrained by the legal tests contained in the legislation, primary decision-makers and the AAT on review exercise wide discretions to find facts, evaluate evidence and assess risk on return. Chapter Four demonstrated that these wide discretions have contributed to divergent outcomes for applicants with similar protection claims. The range of 'top-down' measures which have been imposed by Ministerial Directions in an attempt to limit decision-making discretion have largely been unsuccessful, and the power invested in the AAT President and Migration and Refugee Division Head under the *Migration Act* to direct that a decision be a Guidance Decision has not been exercised on a single occasion since its introduction in April 2015.

This Chapter examines the powers and functions of the Immigration and Refugee Board (IRB), the largest administrative tribunal in Canada.[1] The particular focus is the exercise by the IRB of its powers to develop soft law guidance for its decision-makers tasked with the determination of protection claims. The IRB has a practice of identifying Persuasive Decisions and Jurisprudential Guides that Members are encouraged to follow to promote consistent decision-making. This soft law-making practice of the IRB is examined in this Chapter as it demonstrates the benefits and limitations of the production by tribunals of soft law guidance for protection status decision-making. The IRB's practice is an example of Davis' proposal, detailed in Chapter One, for the development of rules and guidelines to structure discretionary power to decrease the incidence of inconsistent and arbitrary decision-making. It provides a guide for the development of a procedure for the identification of Guidance Decisions under s420B *Migration Act*, which is the subject of

[1] The IRB is made up of four divisions: the Refugee Protection Division (RPD), the Refugee Appeal Division (RAD), the Immigration Division (ID) and the Immigration Appeal Division (IAD). Each Division is headed by a Deputy Chairperson, with Assistant Deputy Chairpersons and Members who make decisions.

Chapter Seven. It also highlights the legal limitations and wider legitimacy of the use of tribunal soft law guidance to structure the discretions associated with the making of protection status decisions.

Before the soft law-making practice of the IRB is examined, it is necessary to briefly describe the system for protection status determination in Canada, particularly the central role of the IRB as the primary decision-maker.

1. Protection Status Determination in Canada

1.1 International obligations and domestic implementation

The In-Canada Asylum System (ICAS)[2] has developed over the last five decades since 1969 when Canada signed the *Convention on the Status of Refugees* and its *Protocol*.[3] Canada first implemented its non-refoulement obligations through domestic legislation under the *Immigration Act* 1976. It established a 'paper process'[4] with limited appeal rights to the Immigration Appeal Board, the precursor to the IRB. In 1995 Canada ratified the *UN Convention Against Torture*.[5] The legislative framework which provides protection for individuals under these UN Conventions were brought together in successor legislation, the *Immigration and Refugee Protection Act* 2002 (IRPA).[6]

---

[2] The Canadian refugee system has two constituent parts: the Refugee and Humanitarian Resettlement Program, for people who need protection from outside Canada; and the In-Canada Asylum Program for people making refugee protection claims from within Canada. This Chapter focuses on the second element of the system. For an overview of the Canadian system see Audrey Macklin and Joshua Blum, *Country Fiche, Canada* (Asile Project, January 2021); Deborah Anker, 'Regional Refugee Regimes: North America' in Cathryn Costello, Michelle Foster, and Jane McAdam (eds) *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021).

[3] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('Refugee Convention') and the 1967 *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('Protocol').

[4] Neil Yeates, *Report of the Independent Review of the Immigration and Refugee Board: A Systems Management Approach to Asylum* (Immigration and Refugee Board, April 2018) ('Yeates Report') 7 referring to a decision-making process that was undertaken with reference only to documentary evidence and without a hearing.

[5] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

[6] *Immigration and Refugee Protection Act* 2002 (SC 2001, c27) ('*IRPA*').

1.2 The Immigration and Refugee Board

The IRB was created by legislation in 1989 as an independent administrative tribunal that reports to Parliament through the Minister of Immigration, Refugees and Citizenship.[7] The creation of the IRB institutionalised a quasi-judicial body that would hear claims by applicants for protection in a non-adversarial hearing. Following the Supreme Court's decision in *Singh v Minister for Employment and Immigration*, the newly created Convention Refugee Determination Division of the IRB ensured procedural fairness to the person making the claim by providing them with an oral hearing.[8]

The IRB is headed by a Chair who serves 'during good behaviour' as a Governor-in-Council appointee, typically mandated with a five-year term.[9] The initial determination of protection claims is undertaken by the Refugee Protection Division (RPD).[10] RPD members

---

[7] While Immigration, Refugees and Citizenship Canada (IRCC) has overall responsibility for immigration and refugee matters, the IRB operates at arms-length from the government. It reports to Parliament through the Minister of Immigration, Refugees and Citizenship: https://www.irb-cisr.gc.ca/en/board/Pages/index.aspx

Bill C-55 the Refugee Reform Bill, that amended the 1976 *Immigration Act* was introduced in the House of Commons in 1986, passed in June 1988 and came into force in January 1989, replacing the Immigration Appeal Board with the Immigration and Refugee Board of Canada. Ninette Kelley and Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (University of Toronto Press, 1998) 415-16 cited in James C. Simeon, 'How Other Countries Do It – Canada The Evolution and Development of the Refugee Status Determination System in Canada and the Balanced Refugee Reform Act' in Geoffrey Care, *Migrants and the Courts: A Century of Trial and Error?* (Routledge, 2013) 244ff. For a description of the Canadian system from 1976 to 1989 see Christopher J Wydrzynski, 'Refugees and the Immigration Act' (1979) 25(1) *McGill Law Journal* 154, 160-66.

[8] In 1985, the Supreme Court of Canada delivered its landmark decision in *Singh v Minister for Employment and Immigration* [1985] 1 SCR 177 in which it held that Canada's existing RSD procedures breached the principles of fundamental justice contained in section 7 of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights* by failing to grant applicants an oral hearing before a decision-maker at any stage in the decision-making process. Justice Wilson, writing on behalf of Chief Justice Dickson and Justice Lamer, held that 'where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing.' The existing system, which consisted of review *in camera* of written statements, did not satisfy this requirement. For a comprehensive explanation of the Supreme Court's decision see Audrey Macklin, 'Asylum and the Rule of Law in Canada: Hearing the Other (Side)' in Kneebone (ed) *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives*, (Cambridge University Press, 2009) 85-89.

[9] The IRB Chairperson is appointed to the Board by the Governor in Council, to hold office during good behaviour for a term not exceeding seven years, subject to removal by the Governor in Council at any time for cause: *IRPA* s 153(1).

[10] The RPD is responsible for making decisions on refugee claims in Canada. Refugee claims are made at the border or inland at Canada Border Services Agency (CBSA) and IRCC offices where they are determined eligible to be heard and then are referred to the IRB.

are civil servants and are appointed to one of four regions.[11] An internal review of a RPD decision may be conducted by the Refugee Appeal Division (RAD). RAD members are Governor-in-Council appointees and 10% of them are required to be lawyers.[12]

1.3 Eligibility for protection status

When a person claims protection in Canada, a determination must first be made as to whether the claim is eligible to be referred to the RPD.[13] An applicant whose claims are referred to the RPD must submit required documentation detailing biographical information

---

[11] *IRPA*, s 169.1(2). https://irb.gc.ca/en/members/Pages/list-of-members-liste-des-membres.aspx Previously, RPD members were Governor in Council appointees and were similar to contract employees. Discussed in Pia Zambelli, 'Paradigm Shift: Towards a New Model for Refugee Status Determination in Canada' (2018) 51(1) *University of British Columbia Law Review* 229, 232. For a description of the appointment processes see Report of the Standing Committee on Citizenship and Immigration, House of Commons (Canada) *Responding to Public Complaints: A Review of the Appointment, Training and Complaint Processes of The Immigration and Refugee Board* (September 2018) 15ff.

[12] *IRPA*, ss 153(1)(a), 153(4). https://irb.gc.ca/en/members/Pages/list-of-members-liste-des-membres.aspx The IRPA provides that only 10% of members of the RAD need to be members of at least five years standing of the bar of a province and does not impose similar requirements for members of the RPD tasked with deciding refugee protection claims at first instance.

[13] Chantal Desloges and Cathryn Sawicki, *Canadian Immigration and Refugee Law: A Practitioner's Handbook*, (3rd Edition, 2020, Emond Publishing) 545-550; section 100-101 *IRPA*. Where a person claims refugee protection at a port of entry, an officer with the Canada Border Services Agency ('CBSA') first determines whether the claim is eligible to be referred to the RPD. Grounds for ineligibility include where a prior claim by the claimant has been rejected by the RPD or determined to be ineligible, the claimant has come directly from a safe third country designated under regulations or for grounds of security, violation of human or international rights and serious or organized criminality: s 101. Eligible claimants are provided with a 'Basis of Claim' (BOC) form requesting information about their identity and about the basis of their protection claim, including a description of the harm they believe they would experience if returned to their country, harm they have experienced, whether they sought protection in their country and the reasons for and details about their flight: Rule 3 *Refugee Protection Division Rules* SOR/2012-256, s 1, annex 1 ('RPD Rules'). Claimants must complete and return the form no later than 15 days after the day their claim is referred to the RPD, failing which an abandonment hearing is scheduled no later than five working days after the due date. *IRPA*, s 100(4); *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 159.8(2) ('IRP Regulations'); RPD Rules, s 65(2). Where a claim is not referred by the officer to the RPD within three days of receipt, it is deemed to be referred, unless suspended or determined to be ineligible: *IRPA*, s 100(3). A person claiming refugee protection inside Canada other than at a port of entry (making an 'inland claim') receives an appointment for an eligibility determination with an Immigration, Refugees and Citizenship Canada ('IRCC') officer and must provide the officer with a completed BOC form no later than the day of that appointment: *IRPA*, s 99(3.1); IRP Regulations, s 159.8(1). See discussion in Gerald Heckman, 'Inquisitorial Approaches to Refugee Protection Decision-making: The Australian Experience and Possible Lessons for Canada' in Laverne Jacobs and Sasha Baglay (eds), *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Routledge, 2013) 143 and Desloges and Sawicki, 551.

and their account of the feared persecution or harm. Applicants must also provide acceptable documents to prove their identity and their claim.[14]

Section 96 *IRPA* defines who is a Convention refugee, consistently with the refugee definition in the Refugee Convention.[15] Section 97 *IRPA* extends complementary protection to a 'person in need of protection' as defined.[16] As in Australia, it is accepted in Canada that the phrase 'well-founded fear' in s 96 *IRPA* includes both a subjective and objective requirement.[17] In making an assessment of well-founded fear, the IRB must determine

---

[14] RPD Rules, s 11. Claimants must provide any documentary evidence they wish to rely on in support of their claim at least 10 days before the date fixed for the hearing. RPD Rules, s 34(3)(a). The RPD may, in its discretion, allow the use of documents not disclosed in a timely way, taking into account their relevance and probative value, new evidence they bring to the hearing and whether the claimant could have with reasonable effort provided the document in a timely manner. Similarly, the RPD may allow the submission of documents after the hearing but before a decision takes effect, s 32. Claimants wishing to call witnesses must provide witness information at least 10 days before the hearing date. A hearing before the RPD is scheduled no later than 60 days following the date the claim is referred to the RPD; IRP Regulations, s 159.9(1)(b). Other documents, including IRB National Documentation Packages (NDPs) and notes taken by immigration officers at the eligibility stage, also are usually added to the record by the RPD.

[15] **Convention refugee**

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

[16] **Person in need of protection**

97(1) A person in need of protection is a 'person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally:

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article I of the Convention Against Torture, or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

- (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
- (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
- (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
- (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

[17] The objective component considers whether the fear is reasonable in the circumstances and considers the circumstance in which the fear arises, such as the conditions in the claimant's country of origin. The subjective

whether there is evidence of a relevant risk to the applicant. If it is found such a risk exists, the IRB must also determine whether the person is able to avail themselves of the protection of their country of nationality and whether there is a safe location within the country of nationality where they could be protected.[18]

1.4 Hearing by the Refugee Protection Division

The Refugee Protection Division (RPD) is the primary decision-maker in relation to the determination of protection claims in Canada, and it is therefore the equivalent of the delegate of the Minister for Home Affairs who makes primary protection visa decisions in Australia. The RPD conducts a hearing at which it considers an applicant's claims and then determines whether he or she is entitled to protection in Canada. Although the RPD is a primary decision-maker, its hearing processes are very similar to those of the AAT when conducting merits reviews of primary decisions. Whereas the legal tests applied to determine eligibility and the processes to be followed by the RPD are detailed in the *IRPA*, the universal tasks of identifying material facts, and evaluating evidence to determine whether the applicant is at risk of harm on return, do not relevantly differ between the two jurisdictions.[19]

1.5 Appeals to the Refugee Appeal Division

The *Balanced Refugee Reform Act 2010* and the *Protecting Canada's Immigration System Act 2012* came into force in December 2012 and made several changes to the IRB, including the introduction of the Refugee Appeal Division.[20] Tight timelines were introduced for both

---

component considers the personal perspective of the claimant—does the claimant actually experience fear? Desloges and Sawicki (n13) 465; Sharon J Aiken et al, *Immigration and Refugee Law* (Emond Publishing, 3rd ed, 2020) 939.

[18] For an overview of the relevant legal principles see *Interpretation of the convention refugee definition in the case law* (Immigration and Refugee Board, March 2019).

[19] For an analysis of the deference by Canadian courts to administrative decision-makers and the recent Supreme Court decision in *Vavilov* see Paul Daly, 'The *Vavilov* Framework and the Future of Canadian Administrative Law' (2020) University of Ottawa, Faculty of Law, Working Paper No 2020–09.

[20] *Balanced Refugee Reform Act* SC 2010, c8 and *Protecting Canada's Immigration System Act* SC 2012, c.17.Discussed in Angus Grant and Sean Rehaag, 'Unappealing: An Assessment of the Limits on Appeal Rights in Canada's New Refugee Determination System' (2015) 49(1) *University of British Columbia Law Review* 203, 212. The Refugee Appeal Division (RAD), first proposed in 2002, was introduced to 'make the asylum system faster and fairer' by providing for full merits reviews of RPD decisions on matters of both law and fact 'and providing coherent and consistent jurisprudence.' The RAD was intended to be 'part of a dramatically

the process and finalisation of decisions.[21] The RAD process is intended to be 'a fast, paper-based review', not a *de novo* or new hearing, with limited allowance for the admission of 'new evidence not reasonably available at the time of the RPD hearing.'[22] It is empowered to either affirm the RPD decision, or set it aside and substitute its own determination, or refer it back to the RPD and order a rehearing and provide whatever directions it considers appropriate.[23] RAD decisions can be the subject of judicial review.[24] Access to the Federal Court of Appeal is limited to serious questions of general importance.[25] Access to the

---

expedited refugee determination system'. Tight timelines were introduced for both the process and finalisation of decisions. The RAD process was intended to be 'a fast, paper-based review', not a *de novo* or new hearing, with limited allowance for the admission of 'new evidence not reasonably available at the time of the RPD hearing.' See Grant and Rehaag (n20) 212; Yeates Report (n4) at 13; Emily Bates, Jennifer Bond and David Wiseman, 'Troubling Signs: Mapping Access to Justice in Canada as Refugee System Reform' (2015–16) 47 *Ottawa Law Review* 1.

[21] The introduction of the RAD 'was expected to improve consistency of refugee decision making by developing coherent national jurisprudence in refugee law'. This in turn 'would contribute to robust and high quality RPD adjudication and help RPD members make their decisions more expeditiously.' It also was expected that the RAD would 'reduce the number and proportion of cases proceeding to the Federal Court.' Despite these expectations, since its inception the RAD has not proven to be 'particularly fast', and in 2015 and 2016 its determination of cases took longer than the RPD. The figures for the period 2015 to 2017 show that a higher proportion of refused claims by the RPD proceeded to review than in the pre-2012 period when only judicial review was available. Further, the RAD is substituting relatively few decisions, and sending a considerable proportion of them back to the RPD for redetermination. Sean Rehaag's analysis of the most recent data finds that '[t]he overall success rates in RAD appeals are remarkably high.' Almost one third of cases (32.3%) involving claimant appeals were decided in the claimant's favour in 2020: Sean Rehaag, '2020 Refugee Claim Data and IRB Member Recognition Rates' 5 August 2021) <https://refugeelab.ca/refugee-claim-data-2020/>

[22] *IRPA*, s110(3), (4); Discussed in Grant and Rehaag (n20) 213-214; Heckman (n13) 148. Not all refugee claimants who have their claims denied have automatic access to the RAD. There are four groups of claimants who cannot appeal an RPD decision: designated foreign nationals; claimants from designated countries of origin; those whose claims were found to have no credible basis and those whose claims are found to be manifestly unfounded or clearly fraudulent; and those whose claims are heard as exceptions to Safe Third Country Agreements (ie persons who have family in Canada): *IRPA* s110(2)(a)-(f).

[23] *IRPA* s111(1); Grant and Rehaag (n20) 214; Heckman (n13) 147. The Federal Court of Appeal in *Canada (Citizenship and Immigration) v Huruglica* 2016 FCA 93 held that as an appellate body the RAD should assess RPD decisions on a standard of correctness, where there is no issue of credibility of oral evidence [103]. The Court explicitly left it to the RAD to develop its own jurisprudence on the degree of deference that it should afford the RPD in respect of its credibility assessments, noting that this jurisprudence will need to develop on a case-by-case basis [74]: see discussion in Sean Rehaag, ''I Simply do not Believe...': A Case Study of Credibility Determinations in Canadian Refugee Adjudication' (2017) 38 *Windsor Review of Legal and Social Issues* 38, 64-65.

[24] The Federal Court does not typically allow new evidence, nor does it hear oral testimony. If the judicial review is successful, the matter is referred back to the RPD for re-determination: Yeates Report (n4) 74. The Yeates Report notes that '[c]ontrary to expectations, the Federal Court is accepting a slightly higher proportion of leave requests and granting a much higher proportion of judicial reviews from the RAD than it did with just the RPD.' Yeates Report (n4) 77. This indicates that the Federal Court shows 'limited, if any, deference to the RAD [which] suggests a need to further assess the contribution of the RAD to the refugee determination process'. Yeates Report (n4) 77. See further discussion in Grant and Rehaag (n20) 214-219.

[25] *IRPA* s74(d).

Federal Court for those applicants not satisfied with a RPD decision remains, and/or an application for judicial review (with leave) to the Federal Court.[26]

2. The policy-making function of Canadian administrative tribunals

By contrast to Australia, in Canada it is widely recognised and accepted that administrative tribunals have a policy-making role, including by developing soft law guidance to structure administrative decision-making.[27] The IRB has embraced its soft law-making function, and has adopted a range of measures over the past two decades which are intended to enhance consistency of decision-making in its protection jurisdiction.[28] Whereas some measures have not survived judicial scrutiny, the use by the IRB of Jurisprudential Guides has been endorsed by the superior courts as a useful tool to promote consistency and predictability of outcomes.[29] The formulation of soft law guidance by the IRB for protection status decision-making is an example of 'bottom-up' norm production to structure discretion envisaged by KC Davis, outlined in Chapter One.

2.1 Judicial and scholarly recognition of tribunal policy-making

In its 2001 decision in *Ocean Port v British Columbia*,[30] the Supreme Court of Canada recognised that administrative tribunals are created by Parliament for the purpose of

---

[26] Prior to the Refugee Reform measures, appeals of RPD decisions could only be made to the Federal Court through the leave process. The introduction of the Refugee Appeal Division (RAD) provided a new appeal body, but left access to the Federal Court for those not satisfied with a RAD decision: Yeates Report (n4) 25.

[27] See for example, Lorne Sossin and Chantelle van Wiltenburg, 'The Puzzle of Soft Law' (unpublished paper, November 2020, provided by the author) and the decisions of the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov* [2019] SCC 65 ('Vavilov') discussed in section 2.2 and the Federal Court of Appeal in *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugee and Citizenship)* [2020] FCA 196 discussed in section 3.2.

[28] See the IRB Quality Assurance Framework for Decision-Making (QAF) (April 2021) [2.3] which refers to the 'adjudicative strategies' that guide the IRB and 'drive consistency and quality in decision-making by ensuring decision-makers (members) keep the IRB's "raison d'être" front of mind.' The Board's adjudicative strategy initiatives are grouped into two categories:

- soft law instruments, for example guidelines, policies and practice notices; and
- adjudicative instruments, such as jurisprudential guides, persuasive decisions, three-member panel decisions and reasons of interest, which consist of individual decisions that are utilized for strategic adjudicative purposes.

[29] See discussion in [3.2].

[30] *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch*) [2001] 2 SCR 781.

implementing government policy and that they have a policy-making function. Chief Justice McLachlin observed:

> Administrative tribunals … are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it.[31]

In a jointly authored contribution to an edited volume published in 2008, France Houle and Lorne Sossin observed in relation to the policy-making function of tribunals, that Canadian administrative law 'has yet to account for this crucial aspect of tribunal action.'[32] They described the then current practice of tribunal policy-making:

> Tribunals may engage in policy-making by issuing norms to guide decision-making. These may take the form of guidelines, directives, a code or rulebook or a manual of some other kind, and may be published or unpublished. These instruments may perform several different, important roles in the policy-making process, including shaping the interpretation of law, constraining the exercise of broad discretion, and demarcating procedures before the tribunal.[33]

As Houle and Sossin recognised, constraining the exercise of broad discretion is one of the purposes for which soft law may be developed by administrative tribunals. They referred to Davis' writings on administrative discretion, examined here in Chapter One, and noted his advocacy for 'rule-making as an important tool both for confining discretionary power and for structuring it.'[34] They described Davis' proposal for the development of rules and guidelines to constrain discretionary power as a 'bottom-up view of norm production'.[35] They remarked that it 'is illuminating for it is a phenomenon that can be observed more and

---

[31] Ibid [24].

[32] France Houle and Lorne Sossin, 'Tribunals and Policy-Making: From Legitimacy to Fairness' in Laverne A. Jacobs and Justice Anne L. Mactavish (eds), *Dialogue between Courts and Tribunals: Essays in Administrative Law and Justice 2001-2007* (Les Éditions Thémis, 2008) 93, 97.

[33] Ibid 98.

[34] Ibid 98.

[35] France Houle and Lorne Sossin, 'Tribunals and guidelines: Exploring the relationship between fairness and legitimacy in administrative decision-making' (2006) 49(3) *Canadian Public Administration* 282, 284; see also Houle and Sossin (n32) 97.

more in the daily functioning of today's administrative tribunals.'[36] In the more than a decade since Houle and Sossin made these observations, the development and use by Canadian administrative tribunals of soft law has expanded, and has received the endorsement of the superior courts.

2.2 Soft law norms for consistent decision-making

As discussed in Chapter One, the exercise of wide and unstructured discretion is highly likely to result in inconsistent decision-making, particularly in circumstances where multiple decision-makers are involved. Davis' proposal for a body of rules 'built up in the smallest increments' is particularly suited to tribunal decision-making in high volume jurisdictions, such as the determination of protection claims, where there are recurrent and similar fact situations.[37] As explained in this section, Davis' approach to the structuring of discretion through what Houle and Sossin term 'bottom-up' norm production by decision-makers themselves, in the words of Justice Brennan in *Drake (No 2),* 'diminishes the importance of individual predilection', and promotes consistent decision-making.[38]

In its 2019 decision *Canada (Minister of Citizenship and Immigration) v Vavilov*,[39] the majority of the Supreme Court of Canada explained why consistency should be an important objective of administrative decision-making:

> Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*. As this Court noted in *Domtar*, 'a lack of unanimity is the price to pay for the decision-making freedom and independence' given to administrative decision makers, and the mere fact that some conflict exists among an administrative body's decisions does not threaten the rule of law … Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.[40]

---

[36] Houle and Sossin (n32) 98-99.

[37] Chapter One, [2.4].

[38] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 640.

[39] *Canada (Minister of Citizenship and Immigration) v Vavilov* [2019] SCC 65 ('*Vavilov*').

[40] Ibid [129] citing *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles*) [1993] 2 S.C.R. 756, 800.

The Court recognised that '[f]ortunately, administrative bodies generally have a range of resources at their disposal to address these types of concerns'.[41] Amongst these are 'access to past reasons and summaries of past reasons', which 'enables multiple individual decision makers within a single organization (such as administrative tribunal members) to learn from each other's work, and contributes to a harmonized decision-making culture.'[42] Their Honours noted that many administrative institutions also rely on other measures to encourage decision-making consistency:

> [i]nstitutions also routinely rely on standards, policy directives and internal legal opinions to encourage greater uniformity and guide the work of frontline decision makers … Where disagreement arises within an administrative body about how to appropriately resolve a given issue, that institution may also develop strategies to address that divergence internally and on its own initiative.[43]

These passages of the Court's judgment in *Vavilov* endorse the practice by administrative bodies, including tribunals, of the formulation of soft law. The development and use of soft law by the IRB in its protection jurisdiction is examined in section 3. The next section outlines the limits on the use of soft law that have been recognised by the Canadian courts. It shows that soft law must not be used in a manner that fetters discretion or interferes with adjudicative independence. These limitations mirror those that exist in the Australian context discussed in Chapter Two.[44] They are relevant to the development of soft law guidance by the AAT, and their implications for the identification of Guidance Decisions are examined Chapter Seven.

2.3 Limitations on the development and use of soft law

As the Supreme Court cautioned in *Vavilov*, decision-makers must be careful not to allow soft law norms to fetter their decision-making discretion.[45] They must not treat soft law as

---

[41] Ibid [130].

[42] Ibid [130]. See discussion in Sossin and van Wiltenburg (n27).

[43] Ibid [130]. Discussed in Jamie Chai Yun Liew, 'The Good, the Bad and the Ugly: A Preliminary Assessment of Whether the *Vavilov* Framework Adequately Addresses Concerns of Marginalized Communities in the Immigration Law Context' (2020) 98(2) *The Canadian Bar Review* 398, 418ff.

[44] Chapter Two [3.6].

[45] *Vavilov* (n39) [130].

a binding rule or use it 'to justify the exclusion of choices provided by the law.'[46] Lorne Sossin and Charles Smith explain that this may occur when a decision-maker adopts 'fixed rules of policy in the absence of specific statutory rule-making authority', or in circumstances where guidelines are 'treated as rules to be applied in every case.'[47] When soft law is treated 'as determinative of the decision' rather than as a decision-making 'tool', the Canadian courts have shown their willingness to intervene to invalidate either the resulting decision, or the soft law guideline itself, based on the principle that decisions will be found unreasonable and therefore invalid where a decision-maker's discretion is unduly fettered.[48] In its 2015 judgment in *Kanthasamy v. Canada (Citizenship and Immigration),*[49] the Supreme Court considered guidelines developed to assist decision-makers with exercising their broad discretion to exempt people on humanitarian and compassionate grounds from the consequences of the *IRPA*. Justice Abella, writing for the Court, acknowledged the role of guidelines in promoting reasonable administrative decision-making.[50] However, she emphasised that guidelines are not legally binding and are not intended to be exhaustive or restrictive. While decision-makers may consider the guidelines, '[t]hey should not fetter their discretion by treating these informal Guidelines as if they were mandatory requirements'.[51] The Court found that the decision-maker erred by treating the guidelines as a 'distinct legal test' that 'limit[ed] [her] ability to consider and give weight to *all* relevant … considerations in a particular case'.[52] Accordingly, the Supreme Court found the decision under review to be unreasonable on the basis that the decision-maker fettered her discretion.[53]

---

[46] Lorne Sossin and Emily Lawrence, *Administrative Law in Practice: Principles and Advocacy* (Emond Publishing, 2018) 30.

[47] Lorne Sossin and Charles Smith, 'Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government' (2003) 40 *Alberta Law Review* 867, 888. Sossin and Lawrence explain that guidelines must be used to provide guidance to decision-makers when they choose to exercise their discretion rather than treated 'as a strict legal standard': Sossin and Lawrence (n46) 30.

[48] Sossin and van Wiltenburg (n27) 9.

[49] *Kanthasamy v Canada (Citizenship and Immigration*) [2015] 3 SCR 909.

[50] Ibid [32].

[51] Ibid.

[52] Ibid [33] emphasis in original.

[53] Ibid [45].

Another restriction on the use of soft law relates to the requirement of adjudicative independence by decision-makers.[54] This requires that 'individual adjudicators are at liberty to hear and decide cases before them, without interference in the way in which a case is conducted or the manner in which a final decision is made.'[55] Lorne Sossin and Chantelle van Wiltenburg explain that the standard for adjudicative independence in the context of soft law is 'whether the wording of a guideline or the reliance by a decision-maker on a guideline gives rise to a reasonable apprehension of bias.'[56]

The advantages and limitations of the development and use by tribunals of soft law guidelines to structure administrative discretion are explored in further detail in the following sections. These examine the various soft law measures the IRB has implemented in the past two decades to promote consistent decision-making in its protection jurisdiction.

3. Soft law-making by the Immigration and Refugee Board

In Chapter Two, it was observed that the potential for the AAT to engage in policy or soft law-making in the course of its conducting merits review has received limited attention by the courts and legal scholars, largely because the AAT has not exercised this aspect of its statutory functions. By contrast, in Canada the soft law-making functions of administrative tribunals, including the IRB, are well accepted and indeed encouraged by the courts, which recognise the potential for soft law-making by tribunals to contribute to consistency and predictability in administrative decision-making. The IRB began experimenting with the development of soft law guidance in the late 1990s. The next section examines the IRB's unsuccessful attempt to produce a 'Lead Case' which was found by the Federal Court of Appeal to give rise to a reasonable apprehension of bias.

---

[54] Sossin and van Wiltenburg (n27) 16 citing *Beauregard v Canada* [1986] 2 SCR 56 at 69 and *IWA v Consolidated-Bathurst Packaging Ltd* [1990] 1 SCR 282, 332–335; For a discussion of *Kanthasamy* see Andrew Green, 'Delegation and Consultation: How the Administrative State Functions and the Importance of Rules' in Colleen Flood and Paul Daly (eds) *Administrative Law in Context* (4th ed, Emond Publishing, 2021) 103, 124-25.

[55] Ibid.

[56] Ibid.

3.1 Lead Cases

In response to an increasing flow of Roma asylum-seekers from Central and Eastern Europe, the IRB developed the 'Lead Case' initiative.[57] Its stated purpose was to 'encourage consistent, expeditious and informed decision-making among the large and dispersed body of IRB decision-makers without compromising the adjudicative autonomy of any individual adjudicator.'[58] Audrey Macklin explains that the methodology of the Lead Case involved the identification of 'an asylum claim that was more or less typical in its facts, and where asylum claims from that country displayed a pattern of inconsistent outcomes.'[59] The two person panel of the IRB conducted a hearing into a Hungarian Roma family's refugee claims over 14 days in October and November 1998.[60] The Minister was invited to participate in the proceedings.[61] The IRB received extensive documentation in relation to the country conditions for Hungarian Roma, and received evidence from expert witnesses called by both parties.[62] Following the hearing, the panel produced 'a written, comprehensive, detailed set of reasons that could guide subsequent decision-makers hearing substantially similar [Roma] cases.'[63] The IRB rejected the family's claims on the grounds that they lacked

---

[57] Discussed in David Vinokur, 'Institutional Independence and Bias in the Context of the Immigration and Refugee Board of Canada' (2015) 28 *Canadian Journal of Administrative Law and Practice* 169, 191-194; Audrey Macklin, 'Refugee Roulette in the Canadian Casino' in Jaya Ramji-Nogales, Andrew I. Schoenholtz, Philip G. Schrag (eds) *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press, 209) ('Canadian Casino') 151ff; and Audrey Macklin, 'A safe country to emulate? Canada and the European refugee' in Hélène Lambert, Jane McAdam, Maryellen Fullerton (eds) *The Global Reach of European Refugee Law* (Cambridge University Press, 2013) 99, 106ff ('Safe Country'); Rebecca Hamlin, *Let Me Be A Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada and Australia* (Oxford University Press, 2014), 90-91; Sean Rehaag, Julianna Beaudoin, and Jennifer Danch, 'No Refuge: Hungarian Romani Refugee Claimants in Canada' (2015) 52(3) *Osgoode Hall Law Journal* 705, 719-720.

[58] Macklin, 'Safe Country' (n57) 106. Vinokur states the purpose was to 'identify a refugee claim in which to create a full evidential record on which the hearing panel could make informed findings of fact and provide a complete analysis of the relevant legal issues.' It was intended that 'the factual findings and legal conclusions in the lead case would provide guidance to future panels hearing similar cases.' Vinokur (n57) 191.

[59] Ibid 106-107.

[60] Joint hearing of the *Geza* and *Smajda* cases discussed in Vinokur (n57) at 191; Macklin 'Canadian Casino' (n57) 153.

[61] Macklin explains that although the IRPA permits a Minister's representative to appear for purposes of opposing any refugee claim, this very rarely occurs: Macklin 'Canadian Casino' (n57) 152. Vinokur explains that the Minister was invited to participate in this case: Vinokur (n57) 191.

[62] Macklin 'Canadian Casino' (n57) 152. Vinokur notes that this was 'the most distinctive feature of the hearing' Vinokur (n57) 191.

[63] Ibid; Macklin 'Safe Country' (n57) 107. The decision was 'intended to operate as persuasive, if not formally binding, authority.'

credibility, and that what they feared was discrimination which did not amount to persecution and/or that the State was able and willing to provide adequate State protection.[64] The claimants sought judicial review of the decision in the Federal Court on the grounds it 'disclosed a reasonable apprehension of bias towards a negative outcome.'[65]

The Federal Court dismissed the judicial review application, but certified for appeal the question whether the IRB had jurisdiction under the *Immigration Act* to conduct a Lead Case.[66] In *Geza v. Canada (Minister of Citizenship and Immigration)*,[67] the Federal Court of Appeal did not answer the certified question, but held that 'the specific steps taken by the IRB to organize the Lead Case gave rise to a reasonable apprehension of bias and a loss of decisional independence.'[68] The Court considered that the process would lead a reasonable observer to believe that the decision-makers had been influenced by an 'extraneous or improper consideration', resulting in an 'improper' surrender of decision-making autonomy.[69]

The Court sympathised with the IRB's difficult task of 'maintaining and enhancing the consistency and quality of its decisions, which is of critical importance to its ability to perform its statutory functions and to retain its legitimacy.'[70] However, it cautioned that the goal of consistency cannot be pursued 'at the expense of the duty of each panel to afford to the claimant before it a high degree of impartiality and independence.'[71] The Court found that the cumulative effect of the evidence cast doubt on the impartiality of the decision-makers.[72] First, the evidence indicated that very few Hungarian Roma cases had been decided at the time of the launch of the Lead Case and that the overwhelming

---

[64] Ibid 153; *Geza v. Canada (Minister of Citizenship and Immigration)* [2005] 3 FCR 3; 2004 FC 1039 (Federal Court) ('Geza') [10].

[65] Macklin 'Safe Country' (n57) 108.

[66] *Geza* (n64) discussed in Macklin 'Canadian Casino' (n57) 154 and Vinokur (n57) 192.

[67] *Geza v. Canada (Minister of Citizenship and Immigration)* [2006] FCA 124 ('*Geza v. Canada'*).

[68] Macklin 'Canadian Casino' (n57) 154 and Vinokur (n57) 192-193.

[69] *Geza v. Canada* [57].

[70] Ibid [56].

[71] Ibid.

[72] Ibid [60]-[61].

majority of these had been accepted, suggesting that 'inconsistency' was not in fact a problem.[73] The Court considered that a reasonable person could infer from this that,

> the lead case strategy was not only designed to bring consistency to future decisions and to increase their accuracy, but also to reduce the number of positive decisions that otherwise might be rendered in favor of the 15,000 Hungarian Roma claimants expected to arrive in 1998, and to reduce the number of potential claimants.[74]

Secondly, the Court noted that there had not been wide consultation in relation to the selection of the claims for the Lead Case which 'would also trouble the reasonable observer.'[75] Thirdly, one member of the panel had been involved in the management team that devised the Lead Case strategy. This led the Court to find that 'the panel may have reasonably be seen to have been insufficiently independent from Board management and thus tainted by the Board's motivation for the leading case strategy.'[76] Finally, news of the outcome of the Lead Case was leaked to the Hungarian media before it was communicated to the parties.[77] The Court considered this would lead to a reasonable suspicion that even before the decisions were finalised, IRB officials had ensured the decision was made public 'in order to deter Hungarian Roma from coming to Canada to claim refugee status.'[78]

Although the Lead Case strategy for the Hungarian Roma claims did not withstand legal challenge, the effect of the Lead Case decision had a significant impact on the acceptance rate of claimants by the IRB. During the seven years it took for the litigation surrounding the Lead Case to be concluded, decisions in this period continued to be made by the IRB in conformity with the Lead Case decision.[79] In December 1998, prior to the Lead Case, the acceptance rate for Hungarian Roma claimants was 71%. By March 1999 it had fallen to

---

[73] Ibid [61] discussed in Macklin 'Canadian Casino' (n57) 155 and Macklin 'Safe Country' (n57) 108 and Vinokur (n57) 193.

[74] Ibid.

[75] Ibid [63].

[76] Ibid [65].

[77] Ibid. Discussed in Macklin 'Canadian Casino' (n57) 155; Macklin 'Safe Country' (n57) 107.

[78] Ibid. Discussed in Macklin 'Canadian Casino' (n57) 155.

[79] Macklin 'Safe Country' (n57) 108.

27%, and by June 1999 it had dropped to 9%,[80] and it remained low at around 25% from 1999 to 2002.[81]

Although the Federal Court of Appeal declined to determine whether the IRB's Lead Case strategy was unlawful, the IRB nevertheless abandoned it in favour of the development of other soft law measures. These are functionally similar to the Lead Case but do not involve the IRB management in identifying a claim for the purpose of producing an authoritative decision. This has allowed the IRB to 'pursue the general strategy of developing an inventory of precedential decisions' while avoiding the fatal legal errors identified by the Federal Court of Appeal in the Hungarian Roma Lead Case.[82]

3.2 Persuasive Decisions

In January 2003 the Refugee Protection Division (RPD) issued the first Persuasive Decision. These are decisions that have been identified by the Division Head of the RPD or RAD as 'being of persuasive value in developing the jurisprudence' of the Division.[83] Persuasive Decisions are decisions that 'should be regarded as persuasive because they clearly and succinctly address basic principles to be applied by Members in considering claims'.[84] These decisions are 'well written, provide clear, complete and concise reasons with respect to the particular element that is considered to have persuasive value, and consider all of the relevant issues in a case.'[85] Members 'are encouraged to rely upon' Persuasive Decisions 'in the interests of consistency and effective decision-making.' They are not however 'required

---

[80] Hamlin (n57) 91.

[81] Rehaag, Beaudoin and Danch (n57) 720.

[82] Macklin 'Canadian Casino' (n57) 155.

[83] The Deputy Chairperson of the Refugee Protection Division, the Refugee Appeal Division, the Immigration Division or the Immigration Appeal Division.

[84] IRB *Policy Note on Persuasive Decisions* (May 2009). In the introduction of a Persuasive Decision, the RPD will identify the particular element of the decision that it believes has persuasive value. The introduction is accomplished through the issuance of a *Notice of Identification*, signed by the Deputy Chairperson. In the Notice, the RPD identifies the persuasive decision being introduced, along with an effective date of introduction, and provides a brief commentary as to the reason for the introduction: *Policy Note Persuasive Decisions* https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/NotePersuas2009.aspx

[85] Information about Persuasive Decisions can be found on the IRB website: https://irb-cisr.gc.ca/en/decisions/Pages/index.aspx Although Members are not expected to follow these decisions, 'they are offered to Members as models of sound reasoning that may be adopted in appropriate circumstances.'

to explain their decision not to apply a persuasive decision.' The IRB website describes how these decisions promote consistency and efficiency:

> The use of persuasive decisions enables the IRB to move toward a consistent application of the law in a transparent manner. Their designation promotes efficiency in the hearing and reasons writing process by making use of quality work done by colleagues.[86]

The IRB has identified a number of Persuasive Decisions over the past two decades, most recently in February 2019.[87] Persuasive Decisions have a limited life span as they are subject to becoming either out of date or superseded by subsequent judicial authority and must then be revoked.[88] They are distinguishable from Jurisprudential Guides, discussed in the next section, in that they 'are a more informal instrument.'[89] Persuasive Decisions are identified by the IRB in the absence of any express legislative authorisation. This demonstrates the inherent capacity of the IRB to identify these soft law measures and thereby promote consistent and efficient decision-making. Chapter Two argued that the AAT also has the capacity to identify its decisions as soft law guidance, and moreover to formulate soft law as a by-product of its merits review function.

The next section outlines the statutory authority conferred on the Chairperson by section 159(1)(h) *IRPA* to identify decisions as Jurisprudential Guides. These are functionally identical to Persuasive Decisions however they are expressly authorised by the IRB's enabling legislation and the process for their identification is more formalised. Whereas they are not binding, Members are encouraged to consider the reasoning of a Jurisprudential Guide when determining a similar claim. Jurisprudential Guides are a further example of soft law guidance developed and used by the IRB to promote consistency in its

---

[86] Ibid.

[87] In February 2019 the Acting Deputy Chairperson of the RAD identified a Persuasive Decision relevant for RPD and RAD Members who are presented with Basis of Claims (BOC) forms 'that bear a striking resemblance to those of unrelated refugee claimants.' The decision 'addresses a question of mixed fact and law' and 'outlines the steps that can be taken in an analysis of similar BOC narratives in a transparent and fair manner: Notice of Identification of Persuasive Decision – RAD TB7-16268. https://irb.gc.ca/en/decisions/Pages/persuasive-decision-boc.aspx

[88] As at 2008, seven PDs had been identified: Macklin, 'Canadian Casino' (n57) 157. Another was identified in December 2010, but it and the other PDs have since been revoked.

[89] The IRB refers to Persuasive Decisions and Jurisprudential Guides as 'adjudicative instruments': IRB *Quality Assurance Framework* (n28).

protection jurisdiction.[90] As explained in the next section, the Federal Court of Appeal has recently strongly endorsed the use by the IRB of Jurisprudential Guides, and has detailed how they can be developed and used consistently with administrative law norms.

3.3 Jurisprudential Guides

Jurisprudential Guides are country specific and provide *conclusions* from designated IRB decisions on issues such as whether the treatment of certain groups and individuals in a specified country amounts to persecution, the availability of internal flight alternatives within the country, and whether there is adequate state protection available to individuals and groups seeking refugee status.[91] Section 159(1)(h) *IRPA* authorises the Chairperson of the IRB '… to identify decisions of the Board as Jurisprudential Guides, after consulting with the Deputy Chairpersons, to assist members in carrying out their duties.'[92] Jurisprudential Guides are described as 'policy instruments that support consistency in adjudicating cases which share essential similarities.'[93]

According to the IRB *Policy on the Use of Jurisprudential Guides*, 'identification of a decision as a Jurisprudential Guide aims to focus the Board's attention because they are exceptional cases that have the potential to shape the Board's jurisprudence.'[94] The Chairperson may decide to identify a decision as a Jurisprudential Guide in order to 'address an issue of importance to the Board', 'address an emerging issue', 'resolve an ambiguity in the law', or 'resolve inconsistency in decision-making'.[95] The criteria for designating a decision as a Jurisprudential Guide are the quality the writing, the consideration of all relevant issues, the persuasiveness of its reasoning, and the clarity and thoroughness of its analysis.[96] The identification of a Jurisprudential Guide is communicated by its posting on the IRB website

---

[90] Ibid.

[91] Laverne Jacobs, 'The Architecture of Fairness: Independence, Impartiality, and Bias' in Colleen Flood and Paul Daly (eds) *Administrative Law in Context* (4th ed, Emond Publishing, 2021) 247, 284-85.

[92] Section 159(1)(h) *IRPA*.

[93] IRB *Policy on the Use of Jurisprudential Guides* (Policy no. 2003-01) Effective date: March 2003; amended December 2016; amended December 2019) https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/PolJurisGuide.aspx [4].

[94] Ibid.

[95] Ibid.

[96] Ibid [5].

with an accompanying policy note.[97] Parties and their counsel are 'expected to know which decisions have been identified as Jurisprudential Guides.'[98] They are an example of soft law as they have an impact through their influence on IRB member decision-making when an applicant's claims are the subject of a Jurisprudential Guide. In the period June 2016 to July 2018 five IRB decisions were identified as Jurisprudential Guides.[99] In 2019 the Canadian Association of Refugee Lawyers (CARL) successfully challenged the validity of four of these Jurisprudential Guides in the Federal Court.[100] An appeal against this decision to the Federal Court of Appeal was allowed in November 2020.[101]

---

[97] As at 2008, the Chairperson had designated two decisions as Jurisprudential Guides, both concerning the availability of State protection in Costa Rica. These were both revoked in 2011. There are currently three Jurisprudential Guides identified:

MB8-00025 (November 2020)
MB8-00025 confirms that the preferred interpretation of the Refugee Convention is that allegations of risk in a country of residence are to be taken into consideration in the analysis of whether a refugee claimant is excluded from refugee protection under Article 1E (paragraphs 22-71).

TB7-01837 (May 2017)
This Jurisprudential Guide looks at whether the treatment experienced by Ahmadis in Pakistan amounts to persecution, whether state protection is available and whether there is a viable internal flight alternative.

TB4-05778 (June 2016)
The issue in this decision is whether a claimant/appellant who is a citizen of the Democratic People's Republic of Korea (North Korea) is deemed to be a citizen of the Republic of Korea (South Korea).

[98] IRB *Policy on the Use of Jurisprudential Guides* (n93) [6].

[99] TB4-05778 (June 2016) The issue in this decision that forms the basis of the Jurisprudential Guide is whether a claimant/appellant who is a citizen of the Democratic People's Republic of Korea (North Korea) is deemed to be a citizen of the Republic of Korea (South Korea); MB6-01059/60 (India – Internal flight alternative for claimants from Punjab (revoked November 2018); TB7-01837 Pakistan – Whether the treatment experienced by Ahmadis amounted to persecution and whether state protection and an internal flight alternative are available (May 2017); TB6-11632 China – Analysis of whether a person wanted by the authorities can exit China via an airport using a genuine passport (revoked June 2019); TB7-19851 Nigeria - Internal flight alternatives in major cities in south and central Nigeria for claimants fleeing non-state actors (revoked April 2020)

[100] *Canadian Association of Refugee Lawyers v Minister of Citizenship and Immigration* [2019] FC 1126, 4 September 2019. Discussed in Paul Daly, 'Consistency in Administrative Adjudication: *Canadian Association of Refugee Lawyers v. Canada (Citizenship and Immigration)*, and *Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals)*, Administrative Law Matters, 30 September 2019; and Paul Daly, 'Waiting for Godot: Canadian Administrative Law in 2019' Ottawa Faculty of Law Working Paper No. 2020-20 (2 December 2019).

[101] *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugee and Citizenship* [2020] FCA 196 delivered on 13 November 2020 ('*CARL v Canada*').

3.4 Legal challenge to Jurisprudential Guides

The Jurisprudential Guides[102] were the subject of challenge on four grounds. First, that s 159(1)(h) *IRPA* does not authorise the Chairperson to issue a Jurisprudential Guide with respect to issues of fact. Secondly, that they unlawfully fetter Board Members' discretion and improperly encroach on their adjudicative independence. Thirdly, they unfairly enhance the burden of proof on claimants for refugee protection. Fourthly, the challenged Jurisprudential Guides were issued without any external consultation.[103]

In his judgment, the Chief Justice of the Federal Court, Crampton CJ, dismissed the first and fourth grounds of challenge.[104] In relation to the second ground, the Chief Justice accepted that three of the four Jurisprudential Guides unlawfully fettered the discretion of the Board Members. In His Honour's view, the language of the *Policy on the Use of Jurisprudential Guides*, the Policy Note accompanying the Guides, and an internal email communication from the Chairperson, conveyed to Members 'an explicit expectation to adopt the [findings in the Jurisprudential Guide] unless they were prepared to provide reasoned justifications for failing to do so.'[105] Following the Federal Court's decision, the IRB amended its *Policy on the Use of Jurisprudential Guides* and removed the offending statement of expectations. The Policy clarifies that IRB's Members' discretion to make factual findings and determine individual cases is not constrained by the existence of a relevant Jurisprudential Guide,

---

[102] Nigeria, Pakistan, India and China. The India and China JGs were revoked prior to the delivery of the Court's decision.

[103] *Canadian Association of Refugee Lawyers v Minister of Citizenship and Immigration* [2019] FC 1126 [18] delivered on 4 September 2019.

[104] Ibid. Crampton CJ found that the Chairperson's interpretation of s159(1)(h) IRPA, that it authorises the identification of decisions as jurisprudential guides not only with respect to issues of law and issues of mixed fact and law, but also in relation to issues of fact, accorded with the plain language of the provision and was consistent with its legislative history, apparent purpose and statutory context [61]-[86], specifically [68] His Honour further found that the Chairperson is not required to engage in public consultation prior to identifying a decision as a jurisprudential guide [190]-[196]. The provision itself makes clear that the only consultation required prior to the identification by the Chairperson of a jurisprudential guide is with the Deputy Chairpersons [192].

[105] Accordingly, in cases involving similar facts, His Honour found, it is reasonable to expect that some Board members who might be unable or unwilling to provide such justifications may very well feel pressured to adopt the factual findings in question because of the instruction that this is what Board members are expected to do. Crampton CJ [133].

while encouraging them to consider the reasoning contained in the Guide and explain any departures from it.[106]

The Federal Court's decision was appealed by CARL and heard and determined by the Federal Court of Appeal. In its unanimous decision in *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugee and Citizenship)* ('*CARL v Canada'*) the Court allowed the appeal.[107] It found Crampton CJ erred when he held that parts of three Jurisprudential Guides were unlawful and inoperable for improperly pressuring IRB Members into adopting as their own factual determinations made in RAD decisions designated as Jurisprudential Guides. The Court held that the challenged Jurisprudential Guides were not unlawful fetters on the adjudicative independence of IRB Members. De Montigny JA wrote the Court's reasons with which Near JA and Leblanc JA concurred.

There was a preliminary issue relating to the IRB Chairperson's authority to issue Jurisprudential Guides under s 159(1)(h) *IRPA*. CARL argued that the provision could not be interpreted to permit the issuing of guidelines relating to particular factual situations which interfere with the adjudicative independence of members. Assessing s 159(1)(h) *IRPA* in its context, de Montigny JA was satisfied that it 'conferred in the broadest terms' the power to issue guidelines.[108] His Honour found that CARL's argument conflated the existence of statutory authority with its exercise. The Chairperson does not need express statutory

---

[106] The IRB *Policy on the Use of Jurisprudential Guides* (n93) provides:

> Jurisprudential guides are not binding, and members remain free to reach their own conclusions, based on the facts of each particular case.
>
> Members are encouraged to consider the reasoning in a decision identified as a jurisprudential guide to the extent set out in the accompanying policy note, where the facts underlying the decision are sufficiently close to those in the case being decided.
>
> Members are encouraged to explain in their reasoning why they are not adopting the reasoning that is set out in a jurisprudential guide when, based on the facts of the case, the jurisprudential guide would otherwise seem to apply.

[107] *CARL v Canada* (n101) delivered on 13 November 2020. Discussed in Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th edition, 2021, Oxford University Press) Chapter 11, [4.3]; and Paul Daly, Ensuring Consistency in Administrative Adjudication: *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugee and Citizenship)*, Administrative Law Matters, 13 November 2020.

[108] Ibid [46].

authority to issue guidelines, such that any dispute about the scope of s 159(1)(h) *IRPA* was moot.[109]

The central issue was therefore whether the Jurisprudential Guides interfered with Members' adjudicative independence. Of central importance were two earlier Supreme Court decisions, *IWA v Consolidated-Bathurst Packaging Ltd*[110] and *Ellis-Don Ltd v Ontario (Labour Relations Board)*.[111] CARL argued that these decisions establish that outside interference in factual determinations made by IRB Members is unlawful, and any policy guidance or internal discussion of decision-making can only focus on issues of law and policy and not on questions of fact. CARL argued that the challenged Jurisprudential Guides provided starting points on factual issues, from which any divergence by an IRB Member had to be justified which, it argued, is unlawful.

De Montigny JA rejected CARL's submissions. His Honour noted that consistency is a 'legitimate goal'[112] for administrative tribunals and is particularly important for the IRB. He stated:

> [T]he IRB is a high-volume tribunal that annually receives and decides thousands of claims and appeals. There are hundreds of decision-makers across various regions of the country. Moreover, judicial review is subject to leave from the Federal Court. In that context, the need for consistency is even more obvious, and as this Court recognised in [*Thamotharem v. Canada (Minister of Citizenship and Immigration*) [2008] 1 FCR 385], the use of guidelines and other soft law techniques to achieve an acceptable level of consistency is particularly important for large tribunals exercising discretion such as the IRB.[113]

His Honour noted that in its recent decision in *Vavilov*, the Supreme Court 'found that administrative bodies may resort to guidelines and other soft law techniques to address' concerns about consistency.[114] Indeed it 'went so far as stating that a departure from

---

[109] Ibid [50].

[110] *IWA v Consolidated-Bathurst Packaging Ltd* [1990] 1 SCR 282.

[111] *Ellis-Don Ltd v Ontario (Labour Relations Board)* [2001] 1 SCR 221.

[112] *CARL v Canada* (n101) [66]

[113] Ibid [67].

[114] Ibid [68].

longstanding practices or established internal authority without any explanation for so doing may be a badge of unreasonableness'.[115]

In de Montigny JA's opinion, three particular features of the Jurisprudential Guides supported a finding they are lawful. First, the factual issues referred to in the Guides are not just any type of factual issues:

> While these can be characterized as factual findings, they are of a special nature to the extent that they go beyond the evidence specific to any particular claimant. The accuracy of the review of a specific country condition with respect to IFAs, state protection or objective fear is not dependent upon a claimant's specific circumstances, and is not meant to be. After all, the objective of refugee determination is not so much to determine what has happened, but what will happen if a person is returned to his or her country of origin.[116]

Secondly, the Guides are issued in a transparent manner:

> The JGs are meant to apply to all claimants originating from the same country to which they are directed and whose situation broadly raise the same issues. They are also clearly identified and posted on the IRB website, and are readily available to all claimants and their counsel. They are therefore much less susceptible [than the closed-door proceedings in *Consolidated Bathurst* and *Ellis Don*] to give rise to an apprehension of coercion or to a perception of interference by superiors.[117]

Thirdly, the Guides do not actually dictate conclusions to IRB Members. Fundamentally, 'it is understood that the departure from a JG will be reasonable if justified, that is, when the decision-maker has provided proper reasons for doing so.'[118] Indeed, IRB Members 'should be expected to know the well-established legal principle that soft law tools such as guidelines are non-binding.'[119] Unlike Crampton CJ, de Montigny JA was not persuaded that the evidence established that IRB Members were under undue pressure from their superiors to follow the Jurisprudential Guides such that their adjudicative independence was

---

[115] Ibid [68] citing *Vavilov* (n39) [131].

[116] Ibid. [74].

[117] Ibid [77].

[118] Ibid [84].

[119] Ibid [86].

compromised.[120] His Honour however recognised 'that JGs on findings of fact are fraught with risks and difficulties'.[121] Country information is constantly changing, which requires the 'utmost vigilance' on the part of counsel and claimants.[122] This was not however enough to render the Jurisprudential Guides unlawful.[123] De Montigny JA's concluded '[a]djudicative decision-makers … must always use their discretionary powers wisely, and strive to avoid sacrificing fairness to consistency and expediency.'[124]

Finally, de Montigny JA made important observations about administrative tribunal decision-writing in addressing the argument that the Jurisprudential Guides were tainted by a reasonable apprehension of bias because the Member's superiors may have participated in the making of the decision. His Honour rejected any suggestion that adjudicative independence requires that any discussion of draft reasons is absolutely forbidden.[125] De Montigny JA made clear that there is nothing improper about consulting on a draft decision, indeed it may enhance the quality of the final decision and the overall consistency of a tribunal's decision-making.[126] An application by CARL for leave to appeal to the Supreme Court was dismissed on 5 August 2021.[127]

---

[120] Ibid [79]-[85] and [87].

[121] Ibid [89].

[122] Ibid [90].

[123] Ibid [91].

[124] Ibid [91].

[125] Ibid [98]. His Honour stated '[t]here is also no indication in the record tending to show that the Board member improperly consulted other members while she was deliberating, or that the circulation of draft reasons to other members for their comments was not voluntary. At the deliberation stage, members are not precluded from consulting other members with more experience to ensure consistency in decision-making. The Federal Court appropriately found that the review process was entirely consistent with the principles set out in *Consolidated-Bathurst* and *Ellis-Don*. While the Acting Deputy Chairperson reviewed drafts of the member's decision, under the IRPA, the Chairperson and Deputy Chairperson are also members of the RAD and paragraph 159(1)(h) does not prohibit them from suggesting changes to a draft at a deliberative stage.

[126] See IRB Reasons Review Policy: https://irb.gc.ca/en/legal-policy/policies/Pages/PolReaRevMot.aspx?=undefined&wbdisable=true

[127] Supreme Court of Canada applications for leave: https://decisions.scc-csc.ca/scc-csc/scc-l-csc-a/en/item/18974/index.do

3.5 Situating Jurisprudential Guides on the rules and discretion continuum

The Federal Court of Appeal's decision in *CARL v Canada* is a strong endorsement of the use by the IRB of soft law measures, specifically through the identification and use of Jurisprudential Guides. It clearly sets out the principles relevant to the manner in which soft law guidance, specifically Jurisprudential Guides, may be identified by the IRB and utilised by Members in subsequent cases consistently with administrative law norms. The support by the Court for the IRB's use of soft law guidance is consistent with Davis' proposed role for the courts 'to declare the appropriate extent to which administrative discretion should be structured by rules in order to satisfy the rule of law'.[128] Further, Davis saw a role for the courts 'to compel administrators to formulate rules which supply "the desired standards" if they fail to do so as a matter of their own initiative.'[129] In *CARL v Canada*, Montigny JA cited the Supreme Court's decision in *Vavilov* and its support for the use by administrative bodies of soft law techniques to address concerns about consistency. As His Honour noted, the Supreme Court went further, stating that 'a departure from longstanding practices or established internal authority without any explanation for so doing may be a badge of unreasonableness'.[130] Significantly, therefore the Supreme Court of Canada has indicated that a failure by an administrative tribunal to follow an adopted guideline may lead to legal error.[131]

Soft law guidance may consist of factual findings which have application beyond the specific circumstances of the matter that gave rise to it. However, it must not be treated by decision-makers as binding, nor can it dictate a particular outcome in a subsequent matter involving the same or similar claims.[132] Whereas its use promotes consistency and expediency in decision-making, care must be taken to ensure that it does not become out-

---

[128] Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016) 32 citing KC Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969), 50-51; 58.

[129] Ibid.

[130] At [68] citing *Vavilov* (n39) [131].

[131] For discussion of a requirement by administrators to comply with policies: see Shona Wilson Stark. 'Non-fettering, Legitimate Expectations and Consistency of Policy: Separate Compartments or Single Principle?' in Jason NE Varuhas and Shona Wilson Stark (eds) *The Frontiers of Public Law* (Hart Publishing, 2020), 464ff.

[132] Andrew Green, 'Delegation and Consultation: How the Administrative State Functions and the Importance of Rules' in Colleen Flood and Paul Daly (eds) *Administrative Law in Context* (4th ed, Emond Publishing, 2021) 103, 125.

of-date and continues to accurately reflect current country circumstances. The Court of Appeal found that the IRB's identification of the Jurisprudential Guides 'represented a defensible balancing of the twin imperatives of adjudicative consistency and independence.'[133]

The Federal Court of Appeal's decision in *CARL v Canada*, recognises that soft law is situated at the 'juncture between legal rule-making and discretionary decision-making.'[134] As Davis recognised, rules and discretion occupy positions on a 'spectrum' of decision-making authority 'rather than being two mutually exclusive options'.[135] This was acknowledged by Evans JA in his important judgment in *Thamotharem v Canada (Minister of Citizenship and Immigration),* in which His Honour observed that '[l]egal rules and discretion do not inhabit different universes, but are arrayed along a continuum.'[136] Although soft law measures such as Jurisprudential Guides are not legally binding on a decision-maker in the sense that it may be an error of law to misinterpret or misapply them, they may validly influence a decision-maker's conduct and be employed as a technique 'to achieve an acceptable level of consistency in administrative decisions.'[137]

The Federal Court of Appeal's decision conclusively settles the principles relevant to the legality of the development and use of soft law guidance by administrative tribunals. The judgment is of considerable significance for the issues examined in this thesis. It provides clear statements in relation to the permissible content of soft law guidance, the requirements for consultation in relation to its development, the instructions that can be given to decision-makers in relation to its use, and the circumstances in which it will conflict with established administrative law principles. The guidance provided by the Court on these

---

[133] Angus Grant and Lorne Sossin, 'Fairness in Context: Achieving Fairness Through Access to Administrative Justice' in Colleen Flood and Paul Daly (eds) *Administrative Law in Context* (4th ed, Emond Publishing, 2021) 425, 438-39.

[134] Sossin and van Wiltenberg (n27).

[135] Weeks (n128) 30, citing Davis at 15. Davis wrote '[l]aw and discretion are not separated by a sharp line but by a zone, much as night and day are separated by dawn.' Davis, 106.

[136] *Thamotharem v. Canada (Minister of Citizenship and Immigration)* [2008] 1 FCR 385 [59] per Evans JA.

[137] Ibid [60] per Evans JA.

legal issues is considered further in Chapter Seven, which proposes a procedure for the identification of Guidance Decisions under s 420B *Migration Act*.

4. Legitimacy of Tribunal Soft Law Guidance

Whereas the principles relevant to the legal validity of the development and use of soft law guidance by Canadian administrative tribunals are settled, questions have been raised by legal scholars about the broader legitimacy of tribunal soft law-making.[138] These include the capacity of tribunals to create and formalise soft law, whose preferences should be prioritised by the tribunal in its soft law-making function, and the relationships with its stakeholders, specifically in relation to the rights of affected parties to participate and contribute to the process of tribunal soft law-making.[139]

4.1 Consultation with stakeholders

The soft law guidance which results from Persuasive Decisions and Jurisprudential Guides is the product of the IRB's decision-making process and the contribution of the parties to that process. It does not include a process for consultation with stakeholders who may have an interest in the outcome, for example the communities whose members may be affected by them. Section 159(1)(h) *IRPA* requires only that the Chairperson consult with the Deputy Chairpersons prior to identifying a Jurisprudential Guide. There is no process for public consultation in either the selection of the decisions that form the basis of the Guide, nor for any input by interested parties beyond the individual applicant into the hearing process or the making of written submissions. The Minister and agency responsible for the immigration portfolio are neither parties to the litigation nor is there provision for them to contribute to the development of the guidance contained in a Jurisprudential Guide or Persuasive Decision. This is despite the fact the factual findings and standards they contain are likely to be closely considered, if not adopted, by IRB Members in subsequent cases involving applicants with the same or similar claims. Just as the identification of Jurisprudential Guides and Persuasive Decisions are largely a matter for the IRB

[138] Houle and Sossin (n32) 93.

[139] Ibid 97.

Chairperson,[140] so too is their revocation a matter for the discretion of the Chairperson.[141] There is no reference in the relevant Policy for Persuasive Decisions[142] or Jurisprudential Guides[143] to the existence of formal mechanism for the review of these soft law measures to ensure that they continue to accurately reflect country conditions in the relevant country, and that the reasoning in the decisions continues to have persuasive value relevant to present claims by applicants from the country in question.

4.2 Expertise of members

A further issue relevant to the legitimacy of tribunal guidance is the expertise and capacity of the tribunal to develop it. The IRB is the primary decision-maker for protection claims in Canada and it is recognised for its institutional expertise, which includes not only the knowledge, experience and decision-making skills of its members, but also the contribution of its well-resourced Research Directorate.[144] It is not equipped in the manner of an executive Department to undertake wide-ranging research and consultation in relation to the subject matter of the guidance. Jamie Liew has questioned the level of expertise of IRB Members, observing that many 'do not have past experience in immigration and refugee law, or even law for that matter.' [145] The legitimacy of tribunal guidance is examined further in the next Chapter in the context of the United Kingdom's Country Guidance System, and in Chapter Seven which proposes a procedure for the identification of guidance decisions under s 420B *Migration Act*.

---

[140] *Policy on the Use of Jurisprudential Guides* (n93) [4] and [5].

[141] Ibid [4] and [9]; The revocation of a persuasive decision is accomplished through the issuance of a *Notice of Revocation*, signed by the Deputy Chairperson. In the Notice, the RPD identifies the persuasive decision being revoked, along with an effective date of revocation, and provides a brief commentary as to the reason for the revocation: *Policy Note Persuasive Decisions* (December 2005) (n84) [2(b)].

[142] *Policy Note Persuasive Decisions* (December 2005) (n84).

[143] *Policy on the Use of Jurisprudential Guides* (n93).

[144] The IRB's Research Directorate produces National Documentation Packages and Responses to Information Requests for use by Members: Youliana Daskalova and Heidi Sprung, 'The Research Directorate and Country of Origin Information' (IRB Toronto, November 2016).

[145] Liew notes that 'while some members acquire expertise over time, it is unclear how we measure this. For many of us, it is perplexing that such a body could be characterized as expert when in some cases, decision makers are not. 'Jamie Chai Yun Liew, 'The Good, the Bad and the Ugly: A Preliminary Assessment of Whether the *Vavilov* Framework Adequately Addresses Concerns of Marginalized Communities in the Immigration Law Context' (2020) 98(2) *The Canadian Bar Review* 398, 408.

The next Chapter examines the protection status determination system in the United Kingdom. The particular focus is the promulgation by the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC) of Country Guidance. It shows that the development of the UTIAC of Country Guidance is authorised by legislation and has received the strong endorsement of the superior courts. The Chapter argues that the UTIAC's Country Guidance Practice is an example of soft law-making by tribunal adjudication to structure the discretions associated with protection status decision-making in the manner proposed by KC Davis. It provides a useful model for the development of a procedure for the identification by the AAT of Guidance Decisions under the *Migration Act*, which is the subject of Chapter Seven.

Chapter Six

Country Guidance for Protection Status Decisions by the United Kingdom Upper Tribunal (Immigration and Asylum Chamber)

The previous Chapter detailed the development and use by the Canadian Immigration and Refugee Board (IRB) of soft law measures to assist its Members to make protection decisions. It showed that s 159(1) *Immigration and Refugee Protection Act* 2002 authorises the IRB Chairperson to identify Jurisprudential Guides for the purpose of facilitating consistent and predictable decision-making. This Chapter describes the system of Country Guidance in the United Kingdom (UK) which was first introduced by the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC) in 2001 and given a statutory basis in 2004.[1] The UTIAC adopted this initiative in response to concerns expressed by the Court of Appeal about inconsistent outcomes in appeals involving applicants with similar protection claims.

The distinctive feature of the UTIAC Country Guidance system is that the *conclusions* in Country Guidance in relation to the risk to individuals and groups on return to the relevant country, and the application of legal concepts to recurring factual scenarios, are treated as authoritative in subsequent appeals involving the same or similar claims.[2] It is of central relevance to this thesis for reason that it is an excellent example of soft law-making by tribunal adjudication. Through its proactive identification of risk categories and risk profiles for claimants from refugee-producing countries, and its authoritative statements in relation to application of legal concepts to recurring factual scenarios, the UTIAC contributes to the implementation of the United Kingdom's international non-refoulement obligations. The wide discretions universally invested in protection decision-makers, discussed in Chapter Three, to identify, assess and evaluate evidence, particularly country information, and make risk assessments are *structured* by the Country Guidance developed by the UTIAC, thereby

---

[1] Section 107(3) *Nationality, Immigration and Asylum Act 2002 ('NIAA').*

[2] Practice Directions of the Immigration and Asylum Chambers of the First Tier Tribunal and the Upper Tribunal (19 December 2018) ('Practice Directions') [12.2]. In *HM (Art 15(c)) Iraq CG* [2012] UKUT 409 (IAC) at [19] the Tribunal explained that country guidance is 'one of the ways that a specialist Tribunal with judges with experience of the protection risks in various parts of the world and expert in the application of legal principles to a frequently shapeless and changing mass of country information, give effect to the over-riding objectives.'

promoting consistent and predictable decision-making. Through its promulgation of Country Guidance, the UTIAC engages in 'bottom-up' norm production[3] on an incremental basis in the manner proposed by KC Davis in *Discretionary Justice*, detailed in Chapter One.

Whereas the legal criteria for the recognition of protection status are specific to the United Kingdom, the individual assessment process does not relevantly differ from that applicable to the assessment of whether an applicant meets the eligibility criteria for a protection visa in Australia, outlined in Chapter Three. That is, the tasks of identifying, assessing and evaluating evidence to determine whether an applicant is at risk of harm on return, and deciding whether this meets the relevant risk threshold, are common to both jurisdictions. The UTIAC Country Guidance system is a good example of how these discretions can be structured by the formulation of tribunal guidance to promote consistent, predictable and efficient decision-making without compromising the need for an individual assessment of claims. Moreover, it provides a model for the identification in the next Chapter of a procedure for the development by the AAT of Guidance Decisions.

This Chapter details the process by which Country Guidance is produced, its content, particularly the identification of risk factors and risk categories, and its application to future claims. Country Guidance must be followed by Immigration Judges in subsequent appeals involving the same claims unless there has been a material change in the country evidence. It is also incorporated into Home Office Country Policy and Information Notes (CPIN) which are used by primary decision-makers in assessing protection claims. The Chapter examines the jurisprudence which has recognised the legal validity of Country Guidance, and the academic scholarship that has examined the effectiveness and legitimacy of the UTIAC's soft law-making by tribunal adjudication.

Before the Country Guidance system is described, it is necessary to briefly outline the protection status determination system in the United Kingdom. The next section details the primary decision-making by the Home Office, and the avenues for appeal of these decisions

---

[3] France Houle and Lorne Sossin, 'Tribunals and guidelines: Exploring the relationship between fairness and legitimacy in administrative decision-making' (2006) 49(3) *Canadian Public Administration* 282, 284; see also France Houle and Lorne Sossin, 'Tribunals and Policy-Making: From Legitimacy to Fairness' in Laverne A. Jacobs and Justice Anne L. Mactavish (eds), *Dialogue between Courts and Tribunals: Essays in Administrative Law and Justice 2001-2007*, (Les Éditions Thémis, 2008) 93, 97.

to the First-tier Tribunal (Immigration and Asylum Chamber), the UTIAC, and the superior courts.

1. Protection status determination in the United Kingdom

1.1 Primary decision and onward challenge

Protection status[4] decisions are made by the Home Office caseworkers on behalf of the Secretary of State for the Home Department (SSHD),[5] applying the relevant legal criteria.[6] Approximately one-third of protection claims[7] are accepted at the primary stage.[8] There is a

---

[4] A person has 'protection status' if the person has been granted leave to enter or remain in the UK as a refugee or as a person eligible for a grant of humanitarian protection: s 82(2)(c) *NIAA*.

[5] Protection claims are decided by caseworkers in the Home Office's UK Visas and Immigration (UKVI) directorate, on behalf of the Home Secretary. Each case is considered on its individual merits. The decision-maker must take into account the information provided by the applicant during their interview and any other supporting material they may have provided, and also apply relevant legislation and caselaw.

[6] Under the Immigration Rules HC 395 'an asylum applicant is a person who either (a) makes a request to be recognised as a refugee under the Refugee Convention on the basis that it would be contrary to the UK's obligations under the Refugee Convention for them to be removed from or required to leave the UK, or (b) otherwise makes a request for international protection. "Application for asylum" shall be construed accordingly.' The rules provide that an asylum applicant will be granted refugee status in the UK if the SSHD is satisfied that: (i) they are in the UK or have arrived at a port of entry in the UK; (ii) they are a refugee, as defined in Refugee Qualification Regulations 2006, reg 2; (iii) there are no reasonable grounds for regarding them as a danger to the security of the UK; (iv) having been convicted by a final judgment of a particularly serious crime, they do not constitute a danger to the community of the UK; and (v) refusing their application would result in them being required to go (whether immediately or after the time limited by any existing leave to enter or remain) in breach of the Refugee Convention, to a country in which their life or freedom would be threatened on account of their race, religion, nationality, political opinion or membership of a particular social group. An application which does not meet these criteria will be refused.

A person will be granted humanitarian protection in the UK if the SSHD is satisfied that: (i) they are in the UK or have arrived at a port of entry in the UK; (ii) they do not qualify as a refugee as defined in Refugee Qualification Regulations 2006, reg 2 (see above); (iii) substantial grounds have been shown for believing that the person concerned, if returned to the country of return, would face a real risk of suffering serious harm5 and is unable, or, owing to such risk, unwilling, to avail themselves of the protection of that country; and (iv) they are not excluded from a grant of humanitarian protection. Where these criteria are not met, humanitarian protection will be refused.

[7] A 'protection claim' means a claim made by a person that his or her removal from the UK (i) would breach the UK's obligations under the Refugee Convention, or (ii) would breach the UK's obligations in relation to persons eligible for a grant of humanitarian protection: s 82(2)(c) *NIAA*.

[8] In the year ending June 2020 32,423 asylum applications were submitted in the UK; 11,116 asylum applications were granted at initial decision stage; 1,387 grants of humanitarian protection and 889 grants of alternative types of immigration permission following an asylum application were made; 2,932 asylum applications were allowed at appeal stage: appeal stage: https://www.ein.org.uk/news/house-commons-library-publishes-overview-asylum-claims-uk#toc13 Thomas refers to the repeated criticisms of the quality of asylum decision-making, reporting that '[c]aseworkers have described the asylum process as a lottery in which many asylum interviews are rushed, biased and resolved by "cut and paste" decisions by overworked Home Office staff.' Robert Thomas, 'Administrative Justice and Tribunals in the United Kingdom: Developments;

right of appeal in relation to a refusal decision[9] to the First Tier Tribunal (Immigration and Asylum Chamber) (FTTIAC), an independent and specialist judicial tribunal[10] which is part of the unified tribunal structure in the Ministry of Justice.[11] FTTIAC proceedings are heard by Immigration Judges and proceedings are broadly adversarial, with the Home Office represented by a presenting officer.[12] The FTTIAC performs an appellate function and makes its own findings of facts to produce a determination that replaces the primary decision. It may consider any matter it considers relevant and take into account evidence that has arisen after the date of the initial decision.[13]

Procedures; and Reform' (2020) 26 *Australian Journal of Administrative Law* 255, 267 ('Tribunals in the United Kingdom') citing Kirstie Brewer, "Asylum Decision-maker: 'It's a Lottery'", *BBC News*, 8 May 2018; Kate Lyons and Kirstie Brewer, "'A Lottery': Asylum System is Unjust, Say Home Office Whistleblowers", *The Guardian*, 11 February 2018 https://www.theguardian.com/uk-news/2018/feb/11/lottery-asylum-system-unjust-home-office-whistleblowers.

[9] An applicant's protection claim is refused if the SSHD makes one or more of the following decisions: that their removal of P from the UK would not breach the UK's obligations under the Refugee Convention; (ii) that their removal of P from the UK would not breach the UK's obligations in relation to persons eligible for a grant of humanitarian protection: s 82(2)(b) *NIAA*.

[10] Appeals are pursuant to s 82(1)(a) *NIAA*. The grounds of appeal are listed in s 84(1). The Tribunal's task is to hear and determine the appeal and either allow it if the initial decision was not made in accordance with law or to dismiss it. The initial fact-finding merits appeal stage is undertaken by a single Immigration Judge and the second onward challenge stage is undertaken by a Senior Immigration Judge.

[11] The appeal is suspensive unless certified otherwise and must be lodged within 14 days of the asylum refusal being sent. In the year April 2020 to March 2021, the FTTIAC determined 26,211 appeals. In the previous year April 2019 to March 2020 it determined 42,293 appeals https://data.justice.gov.uk/courts/tribunals

[12] Robert Thomas describes the FTTIAC proceedings and decision-making process:

> The hearing room will resemble that of a court, with the judge sitting on a raised platform separately from the parties. The Home Office will defend its initial refusal decision. The bulk of the hearing will involve cross-examination of the appellant and then detailed submissions on the facts, country evidence, and law by the representatives. Hearings are usually adversarial and legalistic in that there is more reference to case law and documentary evidence. In asylum cases, the law is relatively simple, but the factual assessment is complex whereas in immigration cases, the facts are relatively simple, but the law is complex. The judge could have one or two asylum cases and perhaps some other immigration appeals …The judge will have the next day to write a detailed determination containing all of the evidence, findings of fact, and reasons for the decision. Immigration judges work on a "1+1" work pattern – one day of hearings and the next day writing up.

Thomas 'Tribunals in the United Kingdom' (n8) 257 and 262-64. See also Nick Gill et al 'Experiencing Asylum Appeal Hearings: 34 Ways to Improve Access to Justice at the First-tier Tribunal' (Public Law Project, 17 December 2020) and Nick Gill et al 'The tribunal atmosphere: On qualitative barriers to access to justice' (2021) 119 *Geoforum* 61.

[13] s 85(4) *NIAA*. Discussed in Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication*, (Hart Publishing, 2011) 63 ('Asylum Appeals'). Thomas states that it has been noted that the appellate structure is best regarded not as a review process but 'as an extension of the decision-making process' citing *Sandralingham and Ravichandran v Secretary of State for the Home Department* [1995] EWCA Civ 16; [1996] Imm AR 97, 112–113 (Brown LJ) (CA).

As Robert Thomas explains, in the United Kingdom 'there is little awareness or discussion about "merits review"' in the context of tribunals.[14] Tribunals 'hear and decide appeals *ab initio'*.[15] The Tribunal 'stands in the shoes of the initial decision-maker and considers matters afresh.'[16] The task of the FTTIAC is to 'collect and consider the relevant evidence, make findings of fact, and then make [its] own decisions on the substantive application of the law that determine[s] the appellant's eligibility for [protection] status.'[17] This function closely resembles the merits review function invested in the Administrative Appeals Tribunal (AAT), outlined in Chapter Two. Thomas explains the constitutional basis for the allocation of an appeal function to a judicial tribunal:

> From a UK constitutional perspective, allocating an appeal function to a judicial tribunal is not problematic. Appeal rights are always statutory and statute law is supreme. In practice, the administrative-judicial dichotomy is blurred and open to a variety of different meanings. But it is correct to say that tribunals determining appeals make in effect what are substantive administrative decisions on the merits by applying the relevant law. Such law is made by government to implement a policy goal and also often confers legal rights on individuals. But tribunal decisions are judicial in that they are made by independent judges through judicial procedures.[18]

A further appeal on a point of law may be made to the UTIAC with permission of the FTTIAC, or, if refused, of the UTIAC.[19] If the UTIAC identifies an error of law, it 'can either redetermine the appeal itself or, more usually, send the case back to be re-heard by a different First-tier Tribunal judge or panel.'[20]

---

[14] Thomas 'Tribunals in the United Kingdom' (n8) 260.

[15] Ibid.

[16] Ibid.

[17] Ibid 260-261. Thomas explains that the FTIACC 'has to consider circumstances arising after the date of the initial decision because of the forward-looking nature of assessing the risk of persecution on return to the home country.' Ibid, 262.

[18] Ibid 261.

[19] *TCEA* s 11(3)–(4) ('*TCEA*'). Discussed in Thomas 'Tribunals in the United Kingdom' (n8) 264. Application for permission to appeal must be made within 14 days of deemed receipt of the First Tier Tribunal decision. See Upper Tribunal Immigration and Asylum Chamber First-Tier Tribunal Immigration and Asylum Chamber Joint Presidential Guidance 2019 No 1: Permission to appeal to UTIAC (August 2019): https://www.judiciary.uk/wp-content/uploads/2019/08/PTA-guidance-August-2019-1.pdf .

[20] Thomas 'Tribunals in the United Kingdom' (n8) 264. Thomas explains that the vast bulk of the Upper Tribunal's workload involves correcting legal errors. The rate of onward challenges to the UTIAC against first-instance immigrations appeals 'has presented a major challenge over the years in terms of managing the

Appeals from the UTIAC to the Court of Appeal on a point of law may only be made with permission of the UTIAC or the Court of Appeal.[21] A final appeal to the Supreme Court may only be made on a point of law of public importance, certified by the Court of Appeal or Supreme Court.[22]

1.2 Upper Tribunal (Immigration and Asylum Chamber)

The Upper Tribunal Immigration and Asylum Chamber (UTIAC) is a superior court of record,[23] and forms part of the Tribunals Service, an executive agency of the Ministry of Justice. It hears and decide appeals against decisions made by the FTTIAC in immigration, asylum and nationality matters. Appeals are heard by one or more Senior or Designated Immigration Judges who sometime sit with non-legal members. Immigration Judges and non-legal members are appointed by the Lord Chancellor.[24]

The focus of this Chapter is the procedure adopted by UTIAC for the promulgation of Country Guidance, not its general appellate jurisdiction to hear appeals of FTTIAC decisions

---

[UTIAC's] caseload. Of these appeals, 'some 30%' are successful. If an error of law is identified, the Upper Tribunal can either remake the decision or, more usually, remit the case back to the First-tier Tribunal: Thomas 'Tribunals in the United Kingdom' (n8) 265. In the year April 2020 to March 2021, the UTIAC determined 2,359 appeals. In the previous year April 2019 to March 2020 it determined 4,320 appeals. https://data.justice.gov.uk/courts/tribunals.

[21] Where an error of law is found the UTIAC can remake a decision and receive new evidence in order to do so: sections 11 and 12 *TCEA*. For a comprehensive explanation of the procedures of the UTIAC see Mark Symes and Peter Jorro, *Immigration Appeals and Remedies Handbook* (2nd ed, Bloomsbury Publishing, 2021) Part 4 – Proceedings in the Upper Tribunal.

[22] The Court of Appeal and Supreme Court are superior courts with a general jurisdiction. Thomas explains that recently immigration and asylum appeals have accounted for 20–30% of the caseload of the Court of Appeal: Thomas 'Tribunals in the United Kingdom' (n8) 265.

[23] Section 3(5) *TCEA*. The Upper Tribunal is a superior court of record and has the same powers, rights, privileges and authority as the High Court in relation to the attendance and examination of witnesses, production and inspection of documents, and all other matters incidental to its own functions: there is no reason to interpret those powers restrictively. It presumptively acts within its powers unless the contrary is shown, it may set precedent, and it may punish for contempt, and it may regulate its own procedure, subject to *the* TCEA and other enactments. Symes and Jorro (n21) 656-657 citing Leggatt LJ in *Singh, R (On the Application Of) v The Secretary of State for the Home Department* [2019] EWCA Civ 1014 at [17]–[18].

[24] The Tribunals Service was formed as an executive agency of the Ministry of Justice, with responsibility for the unified administration of the tribunals system. The *TCEA* extends the guarantee of judicial independence under the *Constitution Reform Act 2005* to the Senior Presidents of Tribunals and to most tribunals. The TCEA brought tribunals fully within the wider judicial system and the statutory duty on government to guarantee continued judicial independence was extended to the tribunals judiciary: *TCEA* s 1. Tribunal judges are appointed by the Judicial Appointments Commission through the same appointments process as the courts: *TCEA* Pt 2. See further Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd ed, Cambridge University Press, 2013), 54ff, 108ff.

or its judicial review jurisdiction.[25] The next sections outline the background to the introduction of the Country Guidance system, the current processes for its management and production, and its content and authoritative status. Also examined are the necessary safeguards identified by the superior courts for Country Guidance, and the circumstances in which it may be varied or set aside on appeal.

2. Background to the Introduction of Country Guidance

2.1 Encouragement from the Court of Appeal

The Court of Appeal recognised the importance of consistent outcomes for similarly-situated asylum-seekers at an early stage. In 1997, in *Manzeke v SSHD*,[26] Lord Woolf MR recognised that 'consistency in the treatment of asylum-seekers is important in so far as objective considerations, not directly affected by the circumstances of the individual asylum-seeker, are involved.'[27] His Lordship indicated that it would 'be beneficial to the general administration of asylum appeals' for decision-makers to have the benefit of the views of the senior tribunal judiciary concerning the general situation in a particular country.[28]

In his judgment in *Shirazi v SSHD*, Lord Justice Sedley expressed his 'concern that the same political and legal situation, attested by much the same in-country data from case to case, is

[25] Most immigration judicial reviews were transferred from the Administrative Court in 2013: Thomas 'Tribunals in the United Kingdom' (n8) 258, 265. For a comprehensive discussion of the Upper Tribunal's judicial review jurisdiction see Robert Thomas, 'Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis' [2015] *Public Law* 652; Robert Thomas and Joe Tomlinson, *Immigration Judicial Reviews: An Empirical Study* (Nuffield Foundation, August 2019); and Robert Thomas and Joe Tomlinson, 'How Immigration Judicial Review Works' UK Constitutional Law Association, 31 August 2019.

[26] *Manzeke v Secretary of State for the Home Department* [1997] EWCA Civ 1888; [1997] Imm AR 524.

[27] Ibid 529. Discussed in Thomas 'Asylum Appeals' (n13) 199 and Symes and Jorro (n21) [4.96].

[28] Ibid. Brooke LJ added '[i]t often occurs in asylum appeals that Special Adjudicators are asked to consider reports about conditions in the different countries to which asylum-seekers may return. Sometimes different Special Adjudicators reach different conclusions on the same, or much the same, evidence. This is an unfortunate fact which has led appeals and applications in such cases to be pursued right up to this court in recent months. In those circumstances the Tribunal may perform a valuable function if it decides in any given case to review all the reports available to it relating to a particular country over a particular period of time, so as to give helpful guidance to Special Adjudicators as to how they should approach that evidence in a future case.'

being evaluated differently by different tribunals.'[29] While noting that this differential approach is 'understandable', his Lordship emphasised that the inconsistent outcomes that resulted from variable evaluations of the same country information by different judges was 'not satisfactory' because it undermines legal certainty.[30] The solution he proposed was that the Tribunal adopt 'in any one period a judicial policy (with the flexibility that the word implies) … on the effect of the in-country data in recurrent classes of cases.'[31]

The encouragement by the Court of the Appeal in these cases for the adoption by the Tribunal of 'a judicial policy' on the effect of country information in recurring claims is consistent with Davis' proposed role for the courts 'to declare the appropriate extent to which administrative discretion should be structured by rules in order to satisfy the rule of law'.[32] The Court's support for the implementation by the Tribunal of measures to facilitate the findings of the senior tribunal judiciary having authoritative influence was an appeal for it to develop soft law measures which structure the discretion of Immigration Judges and thereby promote consistent and predictable outcomes.

2.2 Factual precedents – 'benign and practical'

In 2001, during the tenure of then President, Sir Andrew Collins, the Immigration Appeals Tribunal (IAT) began to experiment with providing guidance, initially on the situation concerning Czech Roma and ethnic Serbs in Croatia.[33] In *S*,[34] the IAT, chaired by Justice Collins, referred to the some 264 appeals relating to ethnic Serbs and the 'degree of apparent inconsistency'. It stated that it was 'desirable that there should be an

---

[29] *Shirazi v Secretary of State for the Home Department* [2003] EWCA Civ 1562 [29].

[30] Ibid.

[31] Ibid.

[32] Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016), 32 citing Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969), 50-51; 58.

[33] Discussed in Thomas 'Asylum Appeals' (n13) 199. See also discussion in Geoffrey Care, *Migrants and the Courts: A Century of Trial and Error?* (Ashgate, 2013) 76. At this time the practice of 'starring' decisions was also introduced. The initiative was first seen in Haddad (00/HX/00926, 13 March 2000). The Practice Directions make provision for this practice [12.1]. A number of UTIAC decisions are also reported and accessible via www.bailii.org See discussion in Mark Symes and Peter Jorro (n21) [4.91]

[34] *Secretary of State for the Home Department v S* 01/TH/00632 date notified 1 May 2001. See also *OP & Others v Secretary of State for the Home Department (Roma ethnicity) Czech Republic CG* [2001] UKIAT 00001.

authoritative decision as to what the current situation is to enable consistent results to be achieved'.[35] Having been able to 'consider all the relevant evidence', the IAT pronounced that its findings 'are to be regarded as definitive unless there is a material change in the situation in Croatia.'[36] The decision in *S* was appealed, and in *S & Others*[37] the Court of Appeal indicated its support for the Tribunal's emerging guidance system. Lord Justice Laws observed that 'the notion of a judicial decision which is binding as to *fact* is foreign to the common law'.[38] While the idea of a 'factual precedent' is 'exotic', in the context of the Tribunal's responsibilities, it is 'benign and practical'.[39] There is no public interest, or legitimate individual interest, in 'multiple examinations' of country conditions at any particular time, and it poses a risk, if not a likelihood, of inconsistent results.[40] It also creates the potential, if not certainty, of 'repeated and therefore wasted expenditure of judicial and financial resources upon the same issues and the same evidence.'[41] Laws LJ however emphasised that certain safeguards must be present if such guidance is to be authoritative in subsequent appeals. A principal requirement is 'the duty to give reasons with particular rigour'.[42] The Tribunal must ensure that its decision is 'effectively comprehensive' and addresses all the issues 'capable of having a real as opposed to fanciful bearing on the result'.[43] Furthermore, it must clearly explain its findings in relation to the evidence on these issues.[44] In this regard, attention should be paid to the advice of experts and specialists.[45]

---

[35] Ibid.

[36] Ibid.

[37] *S & Others v Secretary of State for the Home Department* [2002] EWCA Civ 539.

[38] Ibid at [26] emphasis in original.

[39] Ibid. Discussed in Thomas 'Asylum Appeals' (n13) 199. See further discussion in Trevor Buck, 'Precedent in Tribunals and the Development of Principles' (2006) 25 *Civil Justice Quarterly* 458, 477ff.

[40] Ibid at [28].

[41] Ibid.

[42] Ibid at [29].

[43] Ibid.

[44] Ibid.

[45] Ibid. See discussion in Thomas 'Asylum Appeals' (n13) 199; and Rebecca Stern, 'Country Guidance in Asylum Cases: Approaches in the UK and Sweden' *Refugee Law Initiative Working Paper 14* (October 2013).

Following this judicial endorsement, the Country Guidance system developed,[46] and was given a statutory basis in 2004.[47] Section 107(3) *Nationality, Immigration and Asylum Act 2002* provides that Practice Directions made by the Senior President of Tribunals under s23(1) *Tribunals, Courts and Enforcement Act 2007* may require the Tribunal or Upper Tribunal 'to treat a specified decision of the Tribunal or Upper Tribunal as authoritative in respect of a particular matter.'[48] Two decades on from its inception, the Country Guidance

---

[46] Former Immigration Judge, Geoffrey Care, explains that '[t]he unique formalisation of … Country Guidance' occurred during the Presidency of Justice Ouseley following discussions with Dr Hugo Storey and other Senior Immigration Judges 'over the general need to shorten the length of appeal hearings where much of the time was spent by immigration judges in going over the same ground time after time.' : Care (n33) 76. See also discussion in Colin Yeo, who writes that the Tribunal regarded *S & Others* and its later approval in *Shirazi v SSHD* [2003] EWCA Civ 1562 'to be a green light to go ahead with other similar precedent cases' and the current system emerged soon thereafter: Colin Yeo, 'Certainty, consistency and justice' in Colin Yeo (ed) *Country Guideline Cases: Benign and Practical?* (Immigration Advisory Service, 2005), 11.

[47] Section 107(3) *NIAA*. Section 107 *NIAA* made provision for practice directions to be given to require a tribunal (then the Immigration Appeal Tribunal and subsequently the Asylum and Immigration Tribunal) to treat a specified decision of the Tribunal as authoritative in respect of a particular matter: See Thomas 'Asylum Appeals' (n13) 200, footnote 14. See further Buck (n39).

[48] Pursuant to these provisions, the Practice Directions (n2) state:

> ***12. Starred and Country Guidance determinations***
>
> 12.1 Reported determinations of the Tribunal, the AIT and the IAT which are "starred" shall be treated by the Tribunal as authoritative in respect of the matter to which the "starring" relates, unless inconsistent with other authority that is binding on the Tribunal.
>
> 12.2 A reported determination of the Tribunal, the AIT or the IAT bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:
>
> (a) relates to the country guidance issue in question; and
>
> (b) depends upon the same or similar evidence.
>
> 12.3 A list of current CG cases will be maintained on the Tribunal's website. Any representative of a party to an appeal concerning a particular country will be expected to be conversant with the current "CG" determinations relating to that country.
>
> 12.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law.

There is power vested in the Upper Tribunal President to issue Guidance Notes: *TCEA*, Schedule 4, paragraph 7. This power was exercised by the President in Immigration and Asylum Chamber *Guidance Note* No 2 of 2011 'Reporting Decisions of the Upper Tribunal Immigration and Asylum Chamber' (July 2011, amended September 2013, March 2014, July 2015 and January 2018, May 2021) https://www.judiciary.uk/wp-content/uploads/2014/01/Guidance-Note-2011-No-2-Reporting-Decisions-May-2021.pdf See in particular [11] and [12] in relation to Country Guidance.

system is well-established,[49] and is recognised to 'play an extremely important role in the field of asylum.'[50]

2.3 Constraining discretion in making risk assessments

Prior to examining the authoritative status of Country Guidance and the processes for its management and production, it is necessary to explain how it operates to structure discretion in protection status decision-making in the manner of soft law. The UTIAC has adopted three broad techniques for issuing Country Guidance:[51]

- it is linked to the application of a particular concept of refugee, asylum or human rights law – mixed law and factual findings;[52]
- it identifies a risk category – that is a particular category of person who may be at risk on return – factual findings;[53]

---

[49] By 2010 there were 289 Country Guidance decisions concerning some 64 countries. The Tribunal maintains a list of 'Country Guideline Determinations' on its website: https://www.judiciary.uk/wp-content/uploads/2021/06/cg_list_last_updated_04_06_21.pdf. Thomas notes, '[g]iven its importance in achieving consistency in decision-making, it would take very clear statutory language to end the practice of giving country guidance' Thomas 'Asylum Appeals' (n13) 200 citing *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982; [2005] INLR 633, 661 (Brooke LJ) (CA).

[50] In *HF (Iraq) & Ors v SSHD* [2013] EWCA Civ 1276, Elias LJ observed that:

> Country guidance cases play an extremely important role in the field of asylum. Whether an individual will be safe on return to any particular state is ultimately a factual question which is likely to depend on the particular characteristics of the individual and the risks to which he or she will be subject on return. There is frequently detailed and extensive evidence about this, including country reports emanating from a variety of expert bodies both national and international, of which the reports of the United Nations High Commissioner for Refugees ('UNHCR') are usually given particular weight; reports from non-governmental organisations; information gleaned from the media; and expert evidence from individuals with specialist knowledge and understanding of the country in question. It would plainly be unnecessarily time-consuming and expensive if in each case the particular tribunal had to re-assess that evidence afresh, and there would be a real risk of inconsistent answers giving rise to claims of unfairness.

[51] These three techniques are identified and comprehensively explained by Thomas 'Asylum Appeals' (n13) 210-214.

[52] An example of the first type of Country Guidance is *MN and others (Ahmadis – country conditions – risk) Pakistan CG* [2012] UKUT 00389 (IAC). In this case it was recognised that in view of the nationwide effect in Pakistan of the anti-Ahmadi legislation, the option of internal relocation, previously considered to be available in Rabwah, is not in general reasonably open to a person who genuinely wishes to practise and manifest their faith openly in Pakistan contrary to the restrictions of the Pakistan Penal Code. This decision was overruled in part by *WA (Pakistan) v Secretary of State for the Home Department* [2019] EWCA Civ 302. The Court of Appeal found that the Guidance did not direct the decision-maker to consider why the Ahmadi in question would not practise their faith in Pakistan other than on a restricted basis [52]-[56].

[53] The second type of Country Guidance involves the identification a distinct risk category, that is, a class of people who, because they share certain characteristics, will (or will not) be at real risk on return. For example, in *EM and Others (Returnees) Zimbabwe CG* [2011] UKUT 98 (IAC), the Tribunal found that the evidence did

- it enumerates a number of risk factors – that is those factors which are likely to be relevant when determining the degree of risk on return in any individual case – factual findings.[54]

These techniques employed by the UTIAC to identify risk categories and risk profiles in countries of origin have the effect of structuring the discretion of Immigration Judges in subsequent appeals in relation to issues involving a mixture of law and fact, or solely factual issues. As explained below, Immigration Judges are obliged to apply Guidance decisions in subsequent appeals involving the same or similar claims unless there are good reasons not to do so. In effect, Country Guidance circumscribes the discretion of Judges who hear subsequent appeals involving similar claims to make risk assessments in relation to particular factual matrixes. The Judge's discretion to make factual findings and evaluate risk in relation to appeals involving claims which are the basis of a Guidance decision is structured by the rules or standards contained in the Guidance.

The methodology of Country Guidance is consistent with the recommendations proposed by KC Davis in relation to the structuring of administrative discretion. As outlined in Chapter One, Davis argued for the incremental development of rules[55] or guidelines, if necessary on a case by case basis, characteristic of 'judicial' rule-making through precedents and the doctrine of *stare decisis*.[56] He also envisaged a role for the courts 'to declare the

---

not show that, as a general principle, the return of a Zimbabwean national having no significant Movement for Democratic Change profile, would result in that person facing a real risk of persecution.

[54] The third type of Country Guidance involves the identification of risk factors relevant in particular country contexts that are to be considered by Immigration Judges when assessing risk in an individual appeal. For example, whereas the Tribunal has held that Sri Lankan Tamils are not *per se* at risk on return, in *GJ and others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 319 (IAC) (*GJ and others)*. it identified a number of risk factors which, if present in relation to a particular asylum-seeker, will increase the risk in their individual case. By itemising risk factors, the UTIAC selects those criteria which, on a proper evaluation of the country evidence, are likely to be regarded as relevant in determining the degree of risk in any particular case. See discussion in Thomas 'Asylum Appeals' (n13) 212. The UTIAC issued new country guidance in *KK and RS (Sur place activities: risk) Sri Lanka CG* [2021] UKUT 130 (IAC) addressing the risk of persecution for Sri Lankan nationals as a result of *sur place* political activities in the United Kingdom which are (or are perceived to be) in opposition to the government in Sri Lanka. It redrafts the country guidance in *GJ and others* and supplements that guidance to address recent developments in Sri Lanka and the current perception of the Sri Lankan government to those advocating in support of a Tamil separate state and involved in *sur place* activities including commemorative events.

[55] This was to be done in the form of 'rules', a word whose imprecision Davis found 'unsatisfactory' but which limitations of the language compelled him to use at Davis (n32) 56 (fn 4) discussed in Weeks (n32) 32.

[56] Davis (n32) 60 cited in Weeks (n32) 30.

appropriate extent to which administrative discretion should be structured by rules in order to satisfy the rule of law'.[57] Further, he saw a role for the courts 'to compel administrators to formulate rules which supply "the desired standards" if they fail to do so as a matter of their own initiative.'[58] As explained above, the Court of Appeal strongly encouraged the IAT to authoritatively declare what the current risk situation is for individuals and groups in particular countries so as to enable consistent outcomes for similarly-situated individuals. The IAT and later the UTIAC responded to this call and developed the tool of Country Guidance. In the next section, the circumstances in which Country Guidance is authoritative in subsequent appeals is examined to assess the degree to which it may be considered to be 'soft' law.

3. Nature and status of Country Guidance

3.1 Application in subsequent appeals and onward challenge

Once a decision is reported as a Country Guideline Determination (CGD)[59] it has elevated status and must be treated as authoritative and applied by Immigration Judges in subsequent appeals in so far as the appeal involves issues determined in the CGD and depends upon the same or similar evidence. In *HM (Iraq) v SSHD*,[60] Lord Justice Richards observed that CGDs '… have a status and significance comparable to that which declarations can have in public law cases …'.[61] In *RT (Zimbabwe) & Ors v SSHD* the Supreme Court stated that a CGD, unless overturned, is decisive of the factual findings made.[62]

---

[57] Weeks (n32) 32 citing KC Davis, (n32) 50-51; 58

[58] Ibid.

[59] See (n49).

[60] *HM (Iraq) v Secretary of State for the Home Department* [2011] EWCA Civ 1536.

[61] Ibid at [39].

[62] *RT (Zimbabwe) & Ors v SSHD* [2012] UKSC 38. This was confirmed by Stanley Burton LJ in *SG (Iraq) v SSHD* who stated '… a [CGD] of the [UTIAC] remains authoritative unless and until it is set aside on appeal or replaced by a subsequent [CGD].' [67]. The Tribunal is obliged to apply a CGD even if it has not been drawn to its attention by the parties: *Bozhurt v SSHD* [2006] EWCA Civ 289. See *SI (reported cases as evidence) Ethiopia* [2007] UKAIT 00012.

In *SA (Sri Lanka) v SSHD*[63] the Court of Appeal explained that a CGD is 'no more than a compilation and statement of evidence relevant to the position of asylum-seekers from the country in question'.[64] It therefore provides a 'convenient guide to the likely treatment' of those claiming international protection who fall into a category identified in the Guidance.[65] It is 'not intended to exclude other relevant evidence which the parties in particular cases are able to adduce.'[66] Accordingly, CGDs are 'no more than factual summaries updated from time-to-time to record material changes in the position on the ground. A change in country guidance is in no sense a change in the law.'[67] As a consequence of their authoritative nature, a failure by a Judge to follow a clear and apparently authoritative CGD, or to provide reasons as to why the CGD is inapplicable, may amount to an error of law.[68]

Writing extra-judicially, former President of the UTIAC, Sir Nicholas Blake, commented on whether the term 'factual precedent' aptly describes Country Guidance. He stated that this 'is perhaps too strong a term' for reason that it suggests that a decision must be followed in subsequent appeals.[69] He explained that Country Guidance 'ought to be followed in the absence of good reason such as different circumstances or evidence' which retains the decision-maker's 'individual responsibility for fair determination of the case.'[70] In *NM v SSHD (Lone Women – Ashraf) Somalia CG*,[71] the UTIAC explained that CGDs, unlike 'starred'

---

[63] *SA (Sri Lanka) v Secretary of State for the Home Department* [2014] EWCA Civ 683.

[64] At [12].

[65] Ibid. See further Green LJ in *SB (Sri Lanka) v The Secretary of State for the Home Department* [2019] EWCA Civ 160 [70], [75] who stated of Guidance, 'however valuable it cannot, and does not purport to, cover definitively every permutation of fact or circumstance which emerges … The Guidance is by its nature incapable of covering every conceivable scenario that might arise and which might place a person at jeopardy if returned. It is, though, a very important starting point, is to be taken into account, and carries significant weight.'

[66] Ibid.

[67] Ibid.

[68] In *SG (Iraq) v SSHD* [2012] EWCA Civ 940 Stanley Burton LJ stated that decision-makers and Judges 'are required to take [CGDs] into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so.' [47]. See Practice Directions [12.4]; Discussed in Nicholas Blake, 'Luxembourg, Strasbourg and the National Court: The Emergence of a Country Guidance System for Refugee and Human Rights Protection' (2013) 25 *International Journal of Refugee Law* 349, 351.

[69] Ibid 358.

[70] Ibid.

[71] *NM v SSHD (Lone Women – Ashraf) Somalia* CG [2005] UKIAT 00076.

decisions,[72] are not binding on points of law. The Country Guidance system 'does not have the rigidity of the legally binding precedent but has instead the flexibility to accommodate individual cases, changes, fresh evidence and other circumstances.'[73] It emphasised that because 'it is always possible for further evidence to show that the original [CGD] was wrong or to expose other issues which require examination, [CGDs] are not accurately understood or described as "factual precedents".'[74]

Country Guidance is authoritative beyond the appeal(s) which led to its promulgation. First, it will have application in subsequent appeals and affect individuals who were not party to the appeal in which the Guidance was determined and who therefore did not have an opportunity to participate in the arguments. Secondly, it is applicable even if it does not relate to a matter in which the appellant in the CGD had an interest because it was beyond the factual parameters of his or her appeal. Thirdly, Country Guidance is authoritative even if the appellant in the CGD had no interest in appealing it because his or her own appeal was successful. As the Court of Appeal recognised in *KS (Burma) v SSHD,* there is therefore a risk that a legally flawed decision may not be appealed, however 'that does not mean it is set in stone.'[75] It may be challenged by a subsequent appellant, and the court must satisfy itself

---

[72] Starred determinations on points of law are binding: Guidance Note No 2 of 2011 (n42) [10].

[73] *NM v SSHD* (n71) [140]. The *Guidance Note* (n42) states:

> 11. … If there is credible fresh evidence relevant to the issue that has not been considered in the Country Guidance case or, if a subsequent case includes further issues that have not been considered in the CG case, the judge will reach the appropriate conclusion on the evidence, taking into account the conclusion in the CG case so far as it remains relevant.
>
> 12. Country Guidance cases will remain on the UTIAC website unless and until replaced by fresh Country Guidance or reversed by a decision of a higher court. Where Country Guidance has become outdated by reason of developments in the country in question, it is anticipated that a judge of the First-tier Tribunal will have such credible fresh evidence as envisaged in paragraph 11 above. Where there is reasonable doubt as to whether Country Guidance is still applicable permission to appeal to the UTIAC may well be given in an appropriate case.

https://www.judiciary.uk/wp-content/uploads/2014/01/Guidance-Note-2011-No-2-Reporting-Decisions-May-2021.pdf

[74] *NM v SSHD* (n71) [141]. See discussion in Robert Thomas, Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom' (2008) *International Journal of Refugee Law* 489, 517-18.

[75] *KS (Burma) v Secretary of State for the Home Department* [2013] EWCA Civ 67 [19], [20].

that the particular part of the Country Guidance under challenge 'was the subject of evidence that was properly evaluated, after full argument.'[76]

The Country Guidance system incorporates mechanisms which allow changes in country conditions to be taken into account by Judges, and permits representatives to argue that Country Guidance has been superseded,[77] thereby ensuring that the individual circumstances of applicants are considered in each case. These mechanisms ensure that 'incorrect' guidance is not applied thereby making decisions more consistently inaccurate.

In *FA (Libya; art 15(c)) Libya CG*,[78] the UTIAC explained that Country Guidance need not be applied in circumstances where the evidence indicates that the country conditions had significantly changed since the Country Guidance was promulgated. It stated:

> But there is no intention that the guidance should be followed when the situation in the country concerned has changed substantially since the guidance was issued. Consistency is a virtue in a judicial system, but it does not displace the duty to determine cases correctly when the passage of time, and events since the evidence considered in the Guidance case, give real reason to say that the guidance either should not be followed or should be applied with caution. Whether that is the case must be a decision for a judge in an individual case and may require individual assessment.[79]

Appeals from Country Guidance are critically examined by the Court of Appeal, and decisions are set aside if the reasoning is obscure or deficient, the evidence recorded in support of a conclusion was defective or misapplied or ignored, there were errors in the legal questions posed by the Tribunal, or other procedural defects were present that render the Guidance flawed and in need of revisiting.[80]

---

[76] Ibid [20].

[77] Discussed in Thomas 'Asylum Appeals' (n13) 205.

[78] *FA (Libya; art 15(c)) Libya CG* [2016] UKUT 413.

[79] At [8].

[80] Blake (n68) 358 citing *PO (Nigeria) v Secretary of State for the Home Department* [2011] EWCA Civ 132. The Court of Appeal set aside that part of the guidance that did not seem to be justified by the evidence and the reasoning.

3.2 Structuring discretion to promote administrative law values

Blake has explained the mischief the Country Guidance system is designed to address, and provided a justification for the limits it imposes on Judges' discretion:

> if different judges reach radically different conclusions on the same objective [country] material, the grant or denial of protection becomes arbitrary, inconsistent and unfair.
>
> …
>
> If objective conditions are such that there is a real risk to life, bodily integrity or freedom to any claimant or any claimant with certain attributes in a particular country, then the result in principle should be the same whichever judge or whichever country determines the application. Real risk is real risk and not a matter of state discretion.[81]

Hugo Storey, a former Senior Immigration Judge, explains that Country Guidance promotes consistent and efficient determination of protection claims:

> [CGD] help ensure consistency in the treatment of the similarly situated; they are not meant to apply to persons dissimilarly situated. Thereby they prevent a situation where sometimes several hundred judges within the same country or several thousand within the one region can be deciding the very same issue often by reference to variable amounts of relevant COI and coming to diverse conclusions about it. [CGD] … are an aid to individual examination not a substitute for it. Thereby, to borrow Jaya Ramji-Nogales's terminology, they make the lottery less of a lottery.[82]

The Court of Appeal also has recognised that Country Guidance makes efficient use of limited resources and promotes consistency in protection status decision-making. In *SG (Iraq) v SSHD,* Stanley Burton LJ observed that in the absence of such guidance:

> [t]here would also be a risk of inconsistent decisions, a consideration that is particularly important in the present context since it follows from a decision that one person requires protection, if correct, that a person in the same situation who has been returned may have risked or suffered ill treatment or worse.[83]

He continued:

---

[81] Blake (n68) 354.

[82] Hugo Storey, 'Consistency in Refugee Decision-Making: A Judicial Perspective' (2013) 32(4) *Refugee Survey Quarterly* 112, 123.

[83] *SG (Iraq) v SSHD* (n68) [45].

> The system of Country Guidance … enables appropriate resources, in terms of the representations of the parties to the Country Guidance appeal, expert and factual evidence and the personnel and time of the Tribunal, to be applied to the determination of conditions in, and therefore the risks of return for persons such as the appellants in the Country Guidance appeal to, the country of question. The procedure is aimed at arriving at a reliable (in the sense of accurate) determination.[84]

These observations from the senior judiciary emphasise that the administrative law values of consistency, efficiency and predictability are regarded as warranting high priority in asylum appeals.[85] Accordingly, providing structure to the wide discretion invested in Judges to make factual findings and evaluate risk on return are regarded as necessary and justifiable. The rules and standards contained in Country Guidance structure the discretion of Judges in individual cases, however they retain the flexibility to accept new evidence of changed country conditions, and therefore potentially make different findings on the risk to the applicant. Country Guidance is not a 'one size fits all' template that is applied regardless of the individual merits of the claims. As KC Davis recognised, it is 'not merely to choose between rules and discretion but to find the optimum point on the rule-to-discretion scale.'[86] Through the development and application of Country Guidance, the senior tribunal judiciary has found the 'optimum point' on the rule-to-discretion scale in relation to the assessment and determination of protection claims.

The next section outlines the processes that are in place for the management of Country Guidance and the manner in which appeals are conducted. These provide a helpful guide to the procedures that should be implemented to facilitate the identification of Guidance Decisions by the AAT under s420B *Migration Act*, which is examined in the final Chapter.

---

[84] Ibid [46].

[85] Thomas 'Asylum Appeals' (n13) 198-199.

[86] Davis (n26) 215.

4. Management of Country Guidance and the Conduct of Appeals

4.1 Selection of appeals

Country Guidance is managed by the Senior Immigration Judges of the UTIAC who are organised into three geographical teams.[87] These teams oversee a number of different refugee-producing countries and monitor the country issues that arise in relation to each country.[88] Each team is headed by a Country Guidance Convenor and Deputy Convenor who are responsible for the case management issues relevant to Country Guidance. The system is overseen by the Country Guidance Coordinator who is also a Senior Immigration Judge.[89]

The UTIAC may determine that Country Guidance is necessary for a range of reasons. First, it has identified an issue of sufficiently general importance about which there is no Country Guidance. Secondly, there is evidence that previous Guidance may be affected by factual error. Thirdly there is evidence indicating that existing Guidance may no longer be applicable to owing to changes in country conditions. Fourthly, Guidance may have been found on appeal to be legally erroneous. And, finally, the applicable law may be changed by a court decision.[90]

In order to produce Country Guidance, the UTIAC must identify the country issue on which guidance is required, and also find an appeal to provide a vehicle for its production.[91] This

---

[87] Judith Gleeson, 'Sri Lanka Country Guidance in the United Kingdom, *GJ and others (post-civil-war: returnees) Sri Lanka* [2013] UKUT 319 (IAC)' Paper delivered at IARLJ seminar, Melbourne, 24 March 2014 at 6; Thomas 'Asylum Appeals' (n13) 202. Different judges co-ordinate Country Guidance in relation to different countries and the approach to Country Guidance varies. For some countries, several cases are designated as Country Guidance at the same time, each addressing different issues, including some relatively old cases. For other countries, the main Country Guidance is contained in a single determination, regularly replaced, which seeks to address most recurrent issues. The introduction to the list of pending Country Guidance cases contains an invitation to representatives to propose country guidance issues: see further Mark Henderson, Rowena Moffatt and Alison Pickup, *Best Practice Guide to Asylum and Human Rights Appeals* (2021) [29.15].

[88] Thomas 'Asylum Appeals' (n13) 202.

[89] Gleeson (n87) 6. See also Thomas 'Asylum Appeals' (n13) 202.

[90] Ronan Toal, *Country Guidance Course Materials*, Immigration Law Practitioners Association, 22 January 2020, 20.

[91] Thomas 'Asylum Appeals' (n13) 202. The Tribunal ordinarily notifies the parties when it is considering using a particular appeal to give Country Guidance on particular issues. If that occurs, the parties are expected to assist the Tribunal by providing more extensive country evidence than usual. The LAA recognises the importance of the Country Guidance system and is normally prepared to fund such evidential preparation at a

usually consists of one or more appeals heard together where the case has been identified at a case management hearing as suitable of giving of guidance.[92] The choice of an appeal for the production Country Guidance is a matter for the UTIAC, not the parties.[93] Senior Immigration Judge Judith Gleeson has explained that Country Guidance cases are selected where credibility has been accepted, the individual factual matrix is settled, and the appellants' representatives are willing and able to undertake the additional work required in a Country Guidance appeal.[94]

4.2 Conduct of the hearing

Given the importance accorded to Country Guidance, the UTIAC's regular appeal procedures are modified.[95] A Country Guidance panel normally consists of three Senior Immigration Judges who are specialists in Country Guidance. At the appeal hearing, the Home Office and the parties are both represented, and the focus of the proceedings is on determining the issue(s) relevant to the production of the Country Guidance.[96] Interveners, for example non-government organisations, are permitted where they can assist the UTIAC in its task.[97]

---

substantially higher level than for an ordinary appeal: Henderson, Moffatt and Pickup (n87) [29.26]. The Tribunal may invite the parties to agree upon the issues to be decided by the CG or it may decide for itself the issues and may invite submissions as to the issues to be addressed. The eventual identification of the CG issues is normally reduced to writing in the form of directions. The Tribunal will set a timetable for the filing and serving of evidence and the progression of the appeal to hearing and post-hearing submissions: Toal (n90) 20-21.

[92] Blake (n68) 354. The reason for including more than one appeal in the Country Guidance process is that if the Secretary of State decides to grant asylum to one of the applicants, then the guidance will not be derailed: Gleeson (n87) 6.

[93] Thomas 'Asylum Appeals' (n13) 203. The current practice is that parties are given notice that a case may be used for the giving of CG. This may be when permission to appeal is granted or, more often, when a decision is made as to whether the FTTIAC decision contains an error of law or by directions given by the Tribunal. Sometimes, where the UTIAC has identified a need for a CG decision, it will arrange a hearing for a number of cases at which suitable cases for proceeding as CG may be selected: Toal (n90) 19.

[94] Gleeson (n87) 6.

[95] For example, normal time limits do not apply: Thomas 'Asylum Appeals' (n13) 201. *Tribunal Procedure (Upper Tribunal) Rules* SI 2008/2698, rule 21.

[96] Thomas 'Asylum Appeals' (n13) 203.

[97] Gleeson (n87) 6. See *AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia* CG [2011] UKUT 00445 (IAC) – UNHCR intervention; and *GJ and others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 319 (IAC) – Tamils Against Genocide intervention permitted.

The UTIAC takes evidence from expert witnesses, including country experts, examines expert reports, and considers advice provided by NGOs, and submissions made by the parties.[98] Given the complexity of the issues and the volume of evidence, experienced and highly competent legal representation is essential in Country Guidance appeals.[99] In order for the Guidance to be comprehensive, it is essential that the UTIAC has before it all material information, irrespective of whether it has been presented to it by the parties.[100] The approach taken by the UTIAC in a Country Guidance appeal is more investigative than a regular appeal.[101] Although the adversarial structure of the hearing is unaffected, it assumes 'something of an inquisitorial quality'.[102] The UTIAC seeks to receive the knowledge and opinions of the best experts available, and to examine all relevant material in order to give guidance on the current risks to individuals and groups in the country.[103]

Country Guidance appeals are time intensive for judges and parties, involving many witnesses and large document collections.[104] Senior Immigration Judge Gleeson, the leading

---

[98] Blake (n68) 354. High standards of procedural fairness are required in the treatment of expert and other sources of evidence: Maurice Kay LJ in *PO (Nigeria)* (n80) [12]–[29] cited in Symes and Jorro (n21) [4.99].

[99] Thomas notes that the UTIAC's practice is only to select appeals for country guidance purposes if the appellant is in receipt of publicly funded representation: Thomas 'Asylum Appeals' (n13) 203. The UTIAC has emphasised that steps should be taken to ensure asylum-seekers can be represented at public expense in such proceedings, because 'their importance in saving costs in future cases, quite apart from their general importance, makes the grant of representation in the public interest highly desirable irrespective of the view formally taken of the appellant's/claimant's chances of establishing his or her need for international protection': *HM (Art 15(c)) Iraq CG* [2012] UKUT 409 (IAC) at [15]. The Court of Appeal has made it clear that a case should proceed with the asylum-seeker unrepresented only where all alternative possibilities have been exhausted, including considering whether an *amicus curiae* could be appointed or whether the UNHCR might feel able to participate, because of the overall importance of securing proper argument on its behalf: Richards LJ in *HM (Iraq) v Secretary of State for the Home Department* [2011] EWCA Civ 1536 at [39]–[47]. Discussed in Symes and Jorro (n21) [4.99].

Eligible asylum-seekers are entitled to government-funded legal assistance in respect of their asylum claims: *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) (LASPOA) Schedule 1, Part 1, para 30. Factors such as the asylum-seeker's financial circumstances and prospects of success will be assessed to determine their eligibility: ss 11, 21 LASPOA. Legal aid is available for judicial review proceedings, except in immigration cases where the same, or substantially the same, issue was the subject of an adverse judicial review or appeal outcome in the last 12 months: Schedule 1, Part 1, cl 19 LASPOA.

[100] Thomas 'Asylum Appeals' (n13) 208.

[101] Gleeson (n87) 2.

[102] Thomas 'Asylum Appeals' (n13) 208 citing *S & Others* (n31) 431 Laws LJ. See also Robert Thomas, 'From 'Adversarial v Inquisitorial' to 'Active, Enabling and Investigative': Developments in UK Administrative Tribunals' in Sasha Baglay and Laverne Jacobs, *The Nature of Inquisitorial Processes in Administrative Regimes* (Taylor and Francis, 2016) 64ff.

[103] Gleeson (n87) 2.

[104] Ibid 6.

judge in the 2013 Sri Lanka CG: *GJ and others (post-civil war: returnees),*[105] reported that there were eight days of substantive appeal hearings, ten experienced counsel represented each of the appellants and the Secretary of State, evidence was received from 17 witnesses (some oral and some written) and 5000 pages of documents were received.[106]

4.3 Producing Country Guidance

The task of writing the Country Guidance decision involves evaluating or attributing weight to the relevant country information in order to assess risk on return for individuals or categories of asylum-seeker. The evidence is summarised and evaluated in the body of the decision and the detailed evidence is included in the appendices.[107] The decision identifies the sources of country information that are accepted, and those which are not.[108] All documents considered by the UTIAC are listed in an appendix, so that representatives in future appeals may know what was the 'factual database' for the particular CGD.[109] This assists those who refer to the Guidance in subsequent appeals to know whether 'new' information was considered in producing the Determination.[110] CGDs are frequently very lengthy due to the volume of country information received, and the detailed assessment of the evidence and consideration of relevant issues by the UTIAC.[111]

Once written, the decision is submitted to the Reporting Committee and the Country Guidance Convenor for their consideration and a decision is made as to whether it should receive the special cachet of the 'CG' designation.[112] The Reporting Committee's practice is

---

[105] *GJ and others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 319 (IAC) (*GJ and others)*.

[106] Gleeson (n87) 8.

[107] Ibid 6.

[108] Thomas 'Asylum Appeals' (n13) 206.

[109] Ibid.

[110] Gleeson (n87) 6.

[111] Thomas 'Asylum Appeals' (n13) 206. For example, *GJ and others* is 216 pages (457 paragraphs) including 13 Appendices.

[112] Ibid 205; Blake (n68) 354. The *Guidance Note* (n42) states:

> 11. Special arrangements are made for the reporting of country guidance cases. Before a case is promulgated and designated as a Country Guidance case it is considered by the relevant country convener and the Reporting Committee and advice may be tendered to the determining judges.

only to designate an appeal as 'CG' if it provides a comprehensive overview of the country situation. A decision will not be reported as 'CG' if, although dealing with a reasonable amount of country information, it appears not to have considered all relevant country information.[113] The criteria for being designated as 'CG' is that it does not only 'adequately determine the particular appeal, but also provide a balanced, impartial, and authoritative assessment of available country information drawing out guidance relevant in subsequent appeals.'[114] When finalised and approved, the CGD is published. The subject matter of the Guidance is set out in italics at the beginning of the decision, as well as in the body of the document.[115] Each CGD has a headnote, setting out the points for which it is to be regarded as authoritative, as well as key words to facilitate the searching and retrieval of relevant CGDs.[116]

4.4 Revision of Country Guidance

Country Guidance remains valid and applicable unless and until it is replaced by subsequent guidance.[117] The UTIAC endeavours to keep the country conditions the subject of Country Guidance under review, and also monitors the types of issues arising in initial appeals with a

---

In *MOJ & Ors (Return to Mogadishu) Somalia CG* [2014] UKUT 00442 (IAC), one of the appellants challenged the practice set out in [11] of the Guidance Note as giving rise to procedural unfairness. This challenge was rejected by the UTIAC on the grounds that there was in its view nothing improper about judicial colleagues being consulted about a decision, provided always that the members of the panel which heard the appeal ensured that the ultimate decision was theirs alone. It emphasised that none of the parties had any role to play in this process, and that the Tribunal would not receive or consider any additional evidence (at least not without affording the parties an opportunity to make submissions on it): Henderson, Moffatt and Pickup (n87) [29.14C]; Toal (n90) 26. In *SM (Somalia) v SSHD* [2015] EWCA Civ 763, Laws and Underhill LLJ refused permission to appeal in relation to this issue. Laws LJ stated, 'it seems to me that is unobjectionable, provided of course, and this needs emphasis, that the principles of judicial independence and fairness to the parties are strictly observed' [58]. He observed however that 'it would have been better if the Upper Tribunal had said more about the nature of the advice which the paragraph contemplates [59]. Underhill LJ agreed that it would have been useful to have the nature of the advice 'authoritatively explained' [66] but did not accept that the procedure would give rise to any procedural unfairness.

[113] Thomas 'Asylum Appeals' (n13) 205.

[114] Ibid.

[115] Gleeson (n87) 6.

[116] Ibid. The Court of Appeal has stated that any headnote should fully and accurately reflect the guidance therein: Carnwath LJ in *PO (Nigeria)* (n80) [50]–[54], [55]-[56], Maurice Kay LJ at [35]–[37]; The headnote should identify those factual findings which have value as guidance: Simon LJ in *ST (Afghanistan) v Secretary of State for the Home Department* [2018] EWCA Civ 2382 at [18] cited in Symes and Jorro (n21) [4.99].

[117] Thomas 'Asylum Appeals' (n13) 216.

view to convening another Country Guidance appeal if and when necessary.[118] As Thomas observes, '[t]he broader picture is that country guidance is an incremental, ongoing process by which the Tribunal seeks to decide on whether any reassessment of risk categories or factors is needed in the light of changing country conditions.'[119]

Judges are obviously aware of the age of individual CGDs and are made aware by the parties when there have been changes in country conditions that may impact on the conclusions contained in the decision. In this way CGDs 'provide the parameters for decision-making by establishing a benchmark against which subsequent country developments are to be assessed.'[120]

4.5 Country Guidance as soft law

As explained above, Judges are expected to follow Country Guidance in subsequent appeals involving similar claims. It will generally amount to an error of law to depart from it without good reason 'explicitly stated'.[121] Furthermore, it is authoritative with respect to subsequent appeals involving appellants who were not party to the Country Guidance. However, whereas it may contain conclusions in relation to the application of the law to factual scenarios, it does not change the law nor is it is not binding on points of law.[122] Whereas Country Guidance ought to be followed in subsequent appeals, the Judge must have regard to the individual circumstances of the appellant, and not apply the Guidance if there is evidence to indicate that its conclusions are not applicable. Country Guidance is a form of soft law because, whereas it is not binding in the manner of judicial decisions[123] or

---

[118] Ibid 205; According to Blake with respect to countries giving rise to a large number of cases, changing conditions are likely to emerge in appeals that could give rise to new CG as and when it arises. In countries giving rise to few cases the absence of a recent opportunity to review the CG is less of a problem. The substantial passage of time since the CG was revised may in itself be a reason for granting permission to appeal in a case where it is suggested circumstances have changed: Blake (n68) 362.

[119] Ibid.

[120] Ibid 216.

[121] *R (Iran) & Others v Secretary of State for the Home Department* [2005] EWCA Civ 982 [27].

[122] As Thomas states, Country Guidance 'is intended as authoritative, though flexible, guidance, but not legally binding precedent.' Thomas 'Asylum Appeals' (n13) 216.

[123] Starred determinations on points of law are binding: Guidance Note No 2 of 2011 (n42) [10]. In the absence of a starred case the common law doctrine of judicial precedent shall not apply, and decisions of the AIT and one constitution of the Chamber do not as a matter of law bind later constitutions.

statutory provisions, it is highly authoritative.[124] It is what Cane describes as 'non-canonical law' in the sense it is 'provisional and open to be changed (*not merely* interpreted) at the point of application if there are good reasons for doing so.'[125] Country Guidance is best described as a type of highly influential soft law.[126]

Country Guidance also has effect as soft law for other actors within the protection status determination process as it is authoritative and modifies behaviour. The Home Office's Country Policy and Information Team (CPIT) undertakes COI research and provides executive policy for UK Visas and Immigration (UKVI) officials who make protection status decisions.[127] CPIT produces Country Policy and Information Notes (CPINs)[128] which include COI and 'Assessment'.[129] CPINs routinely refer to and incorporate the conclusions in

---

[124] In *Adam (Rule 45: authoritative decisions)* [2017] UKUT 00370 (IAC) [7] the UTIAC explained that Country Guidance is authoritative 'in the sense that it is not open to a Tribunal affected by the decision simply to decide a case on its own motion, in a sense contrary to that indicated by the decision in question in the same way as if there were a binding decision.'

[125] Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press, 2016) 205 emphasis in original.

[126] Thomas states that because Judges in subsequent appeals are obliged to treat as Country Guidance is authoritative and apply it becomes part of the law governing eligibility for asylum: Thomas 'Asylum Appeals' (n13) 197.

[127] CPINs are produced by the Country Policy Information Team ('CPIT'). Re-structuring at the Home Office saw the merger of the Country of Origin Information Service (COIS), who were responsible for producing country information reports, and the Country Specific Litigation Team (CSLT) who were responsible for Operational Guidance Notes (OGNs), to create the Country Policy and Information Team (CPIT): Annual report of the Independent Chief Inspector of Borders and Immigration (ICIBI) 2013-14, 18.

CPIT provides information on the top 20 countries that generate the most asylum claims in the UK. However, it may also produce COI on other countries where there is a 'specific operational need'.

[128] Previously known as Country Information and Guidance. The name change to CPIN in 2016 followed criticism by the UTIAC in *MST and Others (national service – risk categories), MST and Others (national service – risk categories (CG)* [2016] UKUT 00443 (IAC) that the use of the previous terminology (Country Information and Guidance) risked creating confusion between 'Country Guidance,' which is the function of the UTIAC, and 'operational' or 'policy' guidance which is properly the function of the executive. The UTIAC emphasised that the 'Home Office has no legal competence to decide whether or not a [CGD] is to be followed or not'. It accepted however that the Home Office may advise its officials a particular CGD should no longer be followed, or that they need not follow a CGD in full or in part if more up-to-date COI exists. [8]-[9]. The Tribunal stated, '[g]iven that the term "country guidance" is an established term to describe judicial guidance, we deprecate any adoption of terminology that confuses this important fact.' At [8].

[129] CPINs thematic and deal with issues which commonly arise (eg 'blood feuds' or 'female victims of trafficking'), while remaining country specific. The most recent CPINs are located together, grouped by country, at https://www.gov.uk/government/collections/country-policy-and-information-notes.

CPINs previously contained a section entitled 'Policy Guidance' which was renamed 'Assessment' following criticism from the Independent Chief Inspector of Borders and Immigration (ICIBI) in his January 2018 report. The ICIBI found that the structure and format of CPINs were not compatible with the UK's obligations under the Refugee Convention 'because they are intended, or lead, to predetermined outcomes without

Country Guidance in relation to risk profiles and risk categories in the subject country of origin.[130] As Thomas observes, 't]hrough this process, Country Guidance tends to filter down into initial Home Office decision-making.'[131] CPINs are themselves soft law as they are highly influential in the protection status decision-making of UKVI officials.

5. Legitimacy of the Development of Soft Law Guidance by Tribunal Adjudication

5.1 Artificial certainty

A criticism of Country Guidance is that it prioritises certainty and consistency over individual justice.[132] A critic of the early Country Guidance system, Colin Yeo, warned of the danger of 'sacrificing individual justice on the false altar of legal certainty.'[133] Rodger Haines QC, a former Deputy Chair of the New Zealand Refugee Status Appeals Authority, also has been critical of the Country Guidance system.[134] In his opinion, it is not 'realistically achievable' to

---

consideration of a case's individual facts.' In its response, the Home Office rejected this criticism and explained that 'CPINs state whether a person making a claim is, in general, likely or unlikely to qualify for protection.' It is made clear in the Preface to the CPIN that 'they provide general guidance and that each case must be considered on its individual merits; none of them tell a decision maker what decision they must make.' Home Office *Response to the Independent Chief Inspector of Borders and Immigration's report: An Inspection of the Home Office's Production and Use of Country of Origin Information April–August 2017* [1.10] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/677540/Use_of_COI_Home_Office_Response.pdf citing *The Chief Inspector's report on the Home Office's Production and use of Country of Origin Information* [3.18] 9-10) https://www.gov.uk/government/publications/an-inspection-of-country-of-origin-information. The purpose of the 'Assessment' section of a CPIN is to 'analyse' the COI contained in the report, and assess whether a person is reasonably likely to face a real risk of persecution or serious harm, and whether they are able to obtain state protection, or can reasonably relocate within the country. It contains a reminder to decision-makers that they 'must, however, still consider all claims on an individual basis, taking into account each case's specific facts.': See Preface to CPIN. This reflects the Home Office's statement in its response to the Chief Inspector's report that it would amend the format of the reports to make this clearer, despite its rejection of the criticism that it should not produce policy alongside its country information.

[130] See discussion in Femke Vogelaar, *Country of Origin Information: The Essential Foundation for Fair and Credible Guidance for Decision-making on International Protection Needs* (PhD thesis, Faculty of Law, Vrije Universiteit Amsterdam, 2020) 109 who notes that CGDs are frequently referenced by the European Court of Human Rights: for example *Sufi and Elmi v United Kingdom* App Nos 8319/07 and 11449/07 (ECtHR, 11 June 2011).

[131] Thomas 'Asylum Appeals' (n13) 200.

[132] Ibid 224 citing Colin Yeo, 'Certainty, Consistency, and Justice' in Colin Yeo (ed) *Country Guideline Cases: Benign and Practical?* (Immigration Advisory Service, 2005) and Jonathon Ensor, 'Country Guideline Cases: Can they be Challenged?' (2005) 11 *Immigration Law Digest* 1.

[133] Yeo (n130) 20.

[134] Rodger Haines, 'Country Information and Evidence Assessment in New Zealand' in Satvinder Juss (ed) *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate, Fanham and Burlington, 2013) 179.

'capture (accurately) the rich texture of possibilities in a particular country and context'.[135] Experience shows that the 'truth on the ground' to be 'incapable of being "shoe-horned" into neat categories or sets of conclusions'.[136] According to Haines, Country Guidance 'entails stereotyped or formulaic decision-making' and 'attempting consistency through country guidance cases comes at too high a price'.[137] The essence of Haines' criticism is that Country Guidance 'is too blunt a tool with which to perform a sensitive and complex adjudicative task.'[138]

Former Senior Immigration Judge, Hugo Storey, argues that Haines' critique 'rests on a misconception'.[139]

> It fails to recognise the defeasibility of such guidance. [Country Guidance Decisions] do not intend or attempt to treat their conclusions as binding axioms which must be applied irrespective of the particular circumstances of any asylum case. [Country Guidance Decisions] do not seek to displace the fundamental principle that there must be an individual examination of every asylum claim.[140]

Storey points out that conclusions in Country Guidance about the existence of risk categories are not 'a *substitute* for individual assessment'.[141] However, in cases where only limited findings of fact can be made in relation to a claimant, for example that he or she has a particular nationality, area of origin, race or religion, 'the maxim that "like cases should be treated alike" has particular purchase.'[142]

These divergent opinions in relation to the utility and fairness of Country Guidance are in part a result of different views as to the extent to which the discretionary tasks of fact-finding and risk assessment can and should be structured by soft law guidance. For Storey,

---

[135] Ibid.

[136] Ibid.

[137] Storey (n82) 122 citing Haines (n132).

[138] Thomas 'Asylum Appeals' (n13) 224.

[139] Storey (n82) 122.

[140] Ibid.

[141] Hugo Storey, 'Book review: Satvinder S Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (2014) 26(1) *International Journal of Refugee Law* 166, 169 emphasis in original.

[142] Ibid.

Country Guidance embodies soft law norms in relation to risk categories or risk profiles, which structure but do not eliminate decision-making discretion. They are not 'hard law' rules or 'binding axioms' that must be applied regardless of the applicant's individual circumstances.[143] The soft law guidance contained in Country Guidance promotes the administrative law values of efficiency, certainty, consistency and predictability. By contrast, Yeo and Haines are concerned that the soft law contained in Country Guidance unduly constrains decision-making discretion at the expense of an individualised consideration of claims. This is fails to recognise that the conclusions in Country Guidance about the existence of risk categories are merely a guide and do not replace the need for an individual assessment of claims.

Underlying this debate is the issue of the legitimacy of soft law-making by tribunal adjudication, specifically whether it is the appropriate forum for policy development, and whether tribunal judges have sufficient expertise to undertake this function.

5.2 Policy-making by tribunal adjudication

According to Thomas, it is not doubted that the UTIAC develops asylum policy when it issues Country Guidance.[144] This is evident in its intended purpose which is to authoritatively identify the categories of claimant who are or are not at risk on return to a country which must be accepted by Judges when deciding subsequent appeals. By concretising the risk factors and risk categories in a country at a point in time and requiring that these be adopted by Judges when determining future appeals, Country Guidance contributes to the asylum policy that governs which claimants from that country will, and will not, be granted protection status in the United Kingdom. When Country Guidance is incorporated into Home Office CPINs and applied by UKVI officials, it also directs how claims are to be decided at first instance, subject to changes in country conditions and/or the updating or revocation of the Country Guidance.[145]

---

[143] Storey (n82) 122.

[144] Thomas 'Asylum Appeals' (n13) 201-202. Thomas claims that '[n]o-one doubts that when the Tribunal issues [CG] that it is developing asylum policy.'

[145] See discussion above section 4.5 and Thomas 'Asylum Appeals' (n13) 200.

The development by the UTIAC of asylum policy by way of its promulgation of country guidance, begs the question of whether it has sufficient expertise to perform this task.[146] The UTIAC Senior Judges claim that they build up their own expertise in country conditions and a selected group undertake the Country Guidance work.[147] The expertise of the UTIAC has been recognised by the Court of Appeal which has acknowledged its 'background of experience, not least experience in assessing evidence about country conditions' unavailable to the higher courts.[148] This specialist knowledge possessed by the Senior Immigration Judges who are responsible for producing Country Guidance gives considerable legitimacy to the process.

The final Chapter draws on the soft law-making practices of the UTIAC and IRB for the determination of protection claims, examined in this Chapter and Chapter Five, and adapts them to the Australian constitutional and administrative law framework. It proposes a procedure for the identification by the AAT of Guidance Decisions for protection visa decision-making under s420B *Migration Act,* which will withstand judicial scrutiny and permit Guidance Decisions to be regarded as legitimate tools to assist Australian decision-makers make these hard decisions.

---

[146] Ibid 226.

[147] Ibid citing *Secretary of State for the Home Department v SK (Return—Ethnic Serb) Croatia CG (Starred determination)* [2002] UKIAT 05613 at [5]; John Barnes, 'Expert Evidence—The Judicial Perspective in Asylum and Human Rights Appeals' (2004) 16 *International Journal of Refugee Law* 349.

[148] Ibid citing *R (Madan and Kapoor) v Secretary of State for the Home Department* [2007] EWCA Civ 770; [2008] 1 All ER 973, 978 (CA). See also *Subesh v Secretary of State for the Home Department* [2004] EWCA Civ 56; [2004] Imm AR 112, 140 (Laws LJ) noting that the Tribunal 'is a specialist appellate tribunal. An important part of its work has been to identify current trends and problems and, where appropriate, to give general guidance on in-country conditions on the basis of its expert consideration of the latest material'. See also *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] 1 AC 678, 691 (Baroness Hale) (HL).

Chapter Seven

Administrative Appeals Tribunal Guidance Decisions:

Procedure, Legality and Legitimacy

The previous two Chapters outlined the processes that have been adopted by the Immigration and Refugee Board (IRB) in Canada and the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC) in the United Kingdom to develop soft law guidance to structure the wide discretions associated with the determination of protection claims. This Chapter proposes a procedure for the identification by the AAT of Guidance Decisions under s 420B *Migration Act 1958 (Cth)*[1] which draws on the Canadian and British models. As outlined in Chapter Four, this provision was inserted into the Act in April 2015,[2] but to date the power to identify a Guidance Decision has not been used. The provision authorises the identification of Guidance Decisions by the AAT President and Migration and Review Division Head (MRD Head) and details how they are to be applied to subsequent claims. However, it does not prescribe the criteria or procedure for the identification of Guidance Decisions or processes for their revision or review. Nor does it stipulate on which issues they may provide guidance, nor specify their permissible scope and content or legal status.

This thesis has argued that the AAT should engage in the formulation of soft law, specifically in the field of protection visa decision-making, to structure the discretions associated with fact finding, the evaluation of evidence and the assessment of risk on return. It has shown that it can do this by developing guidance in relation to the groups and individuals with a risk profile in identified countries of origin who prima facie satisfy the eligibility criteria for a

---

[1] **Guidance decisions**

1) The President of the Tribunal, or the head of the Migration and Refugee Division of the Tribunal, may, in writing, direct that a decision (the ***guidance decision***) of the Tribunal, or of the former Refugee Review Tribunal, specified in the direction is to be complied with by the Tribunal in reaching a decision on a review of a Part 7-reviewable decision of a kind specified in the direction.

2) In reaching a decision on a review of a decision of that kind, the Tribunal must comply with the guidance decision unless the Tribunal is satisfied that the facts or circumstances of the decision under review are clearly distinguishable from the facts or circumstances of the guidance decision.

3) However, non-compliance by the Tribunal with a guidance decision does not mean that the Tribunal's decision on a review is an invalid decision.

[2] Introduced by the *Migration Amendment (Protection and Other Measures) Act 2015 (Cth)* No. 35 of 2015 assented to 13 April 2015.

protection visa, or by specifying how legal provisions or concepts should apply to recurrent factual scenarios. This guidance would assist protection visa decision-makers to make these hard decisions and promote consistent and predictable outcomes. Chapter One demonstrated that the development by tribunals of soft law guidance conforms with the recommendation by KC Davis in *Discretionary Justice* that the executive should incrementally develop rules or guidelines, characteristic of 'judicial' rule-making through precedents and the doctrine of *stare decisis,* to structure administrative discretion and thereby reduce inconsistent decision-making. Chapter Two showed that through its decision-making in individual review applications the AAT develops soft law for reason that, while its decisions are not binding precedents, they nevertheless have authoritative status. Further, it emphasised that the AAT has the capacity to incrementally develop norms or standards to structure the discretions associated with administrative decision-making. In *Drake (No 2)*[3] Brennan J supported the development by the AAT of its own 'policy' which all Members could follow to ensure the integrity of administrative decision-making by 'diminishing the importance of individual predilection' and 'the inconsistencies which might otherwise appear in a series of decisions'.[4]

Section 420B *Migration Act*, examined in Chapter Four, empowers the AAT President and MRD Head to direct that a protection visa decision be a Guidance Decision. This provision was introduced to address inconsistent decision-making by AAT Members. It *expressly* authorises the AAT to identify or produce decisions which structure the discretions associated with protection visa decision-making in the manner envisaged by KC Davis. If there is any doubt that Brennan J's judgment in *Drake (No 2)* provides the authority for the development by the AAT of soft law guidance, section 420B explicitly authorises it to do so in its protection visa jurisdiction under the *Migration Act*. Chapter Four outlined the divergent outcomes that have been identified in the Australian context between primary protection visa decisions and AAT reviews, which indicate that variable risk assessments based on common country information are frequently being made for applicants whose claims are the same or similar. The range of 'top down' measures that have been imposed

---

[3] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 ('*Drake (No 2)').*

[4] Ibid 640.

by way of Ministerial Direction, which primary decision-makers and the AAT are obliged to follow, were intended to encourage consistency in the making of protection visa decisions, but have not achieved their intended aim. The Guidance Decision provision has the potential to be used by the AAT to develop 'bottom-up' norms to address inconsistent protection visa decision-making, but the powers it confers to do so have yet to be exercised.

Chapters Five and Six demonstrated that the soft law guidance produced by the IRB and UTIAC, while different in the manner of its formulation and authoritative effect, has in common that it is designed to structure the discretions invested in decision-makers when evaluating evidence and making risk assessments for individuals claiming protection status. These Chapters showed that the UTIAC and IRB, within their respective constitutional and statutory frameworks, have adopted measures to produce soft law guidance to structure the discretions associated with the determination of protection claims in two ways. First, by the tribunal identifying *existing* decisions and giving them authoritative status and strongly encouraging or requiring their application by decision-makers in subsequent cases involving the same or similar protection claims. Examples of this first type of soft law guidance are the Persuasive Decisions and Jurisprudential Guides developed by the IRB discussed in Chapter Five. Secondly, by the tribunal conducting a hearing of one or more protection claims for the specific purpose of *producing* guidance which will be binding on decision-makers in subsequent cases involving the same or similar protection claims. The Lead Case strategy trialled by the IRB discussed in Chapter Five, and the Country Guidance promulgated by the UTIAC examined in Chapter Six, are examples of this second type of tribunal soft law-making. The soft law guidance produced by *both* processes can detail the tribunal's application of legislative provisions or legal concepts to particular factual scenarios, or identify groups or individuals who are prima facie accepted as satisfying (or not satisfying) the eligibility criteria for protection in specified countries of origin. The jurisprudence and academic scholarship examined in Chapters Five and Six highlighted the legal limitations on the development by tribunals of soft law guidance, and the broader legitimacy issues relevant to its use to determine protection claims.

This Chapter draws on the guidance practices adopted by the UTIAC and IRB and adapts them to the Australian constitutional and administrative law framework to devise a detailed procedure for the identification by the AAT of Guidance Decisions. In addition to outlining a

procedure for the identification of Guidance Decisions, the Chapter makes suggestions about their scope and content, and how they may be used to promote consistent protection visa decision-making. The Chapter considers the legal status of Guidance Decisions, and the potential for their substantive content and application in subsequent cases to be the subject of legal challenge. Finally, it discusses the broader legitimacy issues surrounding the development by the AAT of soft law guidance, specifically whether AAT members have the expertise required to formulate guidance, and whether the proposed procedure provides adequate opportunity for those affected by Guidance Decisions to participate in their production.

1. Substantive Content and Legal Status of Guidance Decisions

Before a procedure for the identification of Guidance Decisions can be outlined, it is necessary to clarify exactly what s 420B authorises in relation to the substantive scope and content of Guidance Decisions and their intended legal status. This impacts on the appropriate procedure for the identification of Guidance Decisions, the extent to which they will be subject to judicial scrutiny, and their broader legitimacy as soft law instruments.

1.1 Substantive content

Section 420B does not specify the issues on which authoritative guidance may be provided in a Guidance Decision. The relevant paragraph in the Explanatory Memorandum to the Bill states:

> The purpose of this provision is therefore to promote consistency in decision-making between different members of the [AAT] *in relation to common issues and/or the same or similar facts or circumstances.*[5]

As the Senate Standing Committee for the Scrutiny of Bills ('Senate Scrutiny Committee') noted in its July 2014 report,[6] the provision 'does little to indicate what aspects of a "guidance decision" are considered binding (unless distinguishable).'[7] In his evidence to the

[5] Migration Amendment (Protection and Other Measures) Bill 2014, Explanatory Memorandum [334], emphasis added ('Explanatory Memorandum').

[6] Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 8 of 2014, 9 July 2014 ('Alert Digest').

[7] Ibid 21.

Senate Legal and Constitutional Affairs Legislation Committee, ('Senate Legislation Committee') Khanh Hoang representing the ANU College of Law, also pointed out that the provisions do not specify 'exactly what parts of a decision would be binding on tribunal members', and queried whether it would be 'the application of the law' or 'the way in which the country information is interpreted.'[8]

Section 420B does not specify the issues which may be the subject of a Guidance Decision, nor does it provide restrictions on the type of matters on which guidance may be given. In response to a question raised with the Minister by the Senate Scrutiny Committee in relation to 'what aspects of a Guidance Decision will be binding and how a decision-maker will be able to identify them', the Minister stated that this is a matter for the person who issues the direction. This, he said, allows him or her 'the flexibility to tell the decision-maker what needs to be complied with to assist the tribunal members.'[9] The Explanatory Memorandum to the Bill was amended to reflect this understanding.[10] Accordingly, it was Parliament's intention that the aspects of a Guidance Decision that must be followed by the AAT in subsequent reviews are for the President or MRD Head to determine.

As outlined in Chapters Five and Six, the Jurisprudential Guides and Country Guidance produced by the IRB and the UTIAC respectively contain authoritative guidance in relation to factual and legal issues and mixed questions of fact and law. There is no indication in s 420B that Guidance Decisions must be limited to issues of fact, although the Explanatory Memorandum and evidence presented to the Senate Legislation Committee suggest that it

---

[8] Hansard, Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014, Public Hearing, 5 September 2014 ('Hansard') 27.

[9] Senate Standing Committee for the Scrutiny of Bills Tenth Report of 2014, 27 August 2014, 456 ('Tenth Report').

[10] The Explanatory Memorandum (n5) [335] provides:

> Guidance decisions are not intended to go to the conduct of the review but are intended to provide guidance on how to decide factual or evidentiary issues that might arise in review cases. The application of a guidance decision in a direction of the Principal Member of the MRT depends on whether the facts or circumstances in the guidance decision can be distinguished from the current matter before the relevant tribunal. Once those matters of substance are determined, it becomes clear whether or not the tribunal must follow the direction and apply a decision (the guidance decision) of the tribunal as a matter of practice. That is, the question of whether a guidance decision must, as a matter of practice, be applied is resolved. The application of guidance decisions will align and reduce inconsistencies in decision-making and increase efficiency of the review process. However, there will be no derogation of the responsibility of the tribunal to investigate the individual circumstances of an applicant.

was generally understood that Guidance Decisions would have the effect of 'factual' precedents.[11] The application of legal criteria to accepted factual matrices to reach conclusions in relation to the risk certain groups or individuals face on return to a particular country does not involve the AAT making conclusive findings on legal issues which it is constitutionally prohibited from doing.[12] Consistently with the UTIAC Country Guidance procedure, the AAT President or MRD Head could identify as a Guidance Decision a protection visa decision that finds that a group or individuals in the country prima facie satisfy the eligibility criteria for a protection visa. For example, 'A convert to Christianity seeking to openly practice that faith in Iran would face a real chance of persecution.'[13] If the claimant satisfies the decision-maker that it is reasonably likely that he or she is a Christian, then he or she will meet the refugee criteria.[14] A Guidance Decision could also provide guidance on the application of the internal relocation test to a specific group or category of individuals. For example, 'It is not unreasonable or unduly harsh for a single adult male in good health to relocate to Kabul even if he or she does not have any specific

---

[11] The Principal Member of the Migration Review Tribunal and Refugee Review Tribunal (MRT-RRT) in her evidence to the Senate Legislation Committee on 5 September 2014 stated that a Guidance Decision would have the status of a 'factual precedent': Hansard (n8) 54. The Explanatory Memorandum states 'guidance decisions are not intended to go to the conduct of the review, but are intended to provide guidance on how to decide factual or evidentiary issues that might arise in review cases.' Explanatory Memorandum (n5) [335].

[12] As an administrative tribunal, the AAT cannot conclusively decide legal questions as this is an exclusively judicial function which can only be invested in a Federal court which exercises judicial power. Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2009) 163.

[13] Example adapted from *PS (Christianity - risk) Iran* CG [2020] UKUT 46 (IAC) (20 February 2020). The Guidance would need to be consistent with the requirements of the *Migration Act*. In determining whether a person could take reasonable steps to modify their behaviour so as to avoid a real chance of persecution, a decision-maker cannot require that person to modify their behaviour in one of the ways set out in s 5J(3)(a)–(c).

PS (Christianity - risk) Iran CG relevantly states [3]:

> Decision-makers should begin by determining whether the claimant has demonstrated that it is reasonably likely that he or she is a Christian. If that burden is discharged the following considerations apply:
>
> i) A convert to Christianity seeking to openly practice that faith in Iran would face a real risk of persecution.
>
> ii) If the claimant would in fact conceal his faith, decision-makers should consider why. If any part of the claimant's motivation is a fear of such persecution, the appeal should be allowed
>
> iii) If the claimant would choose to conceal his faith purely for other reasons (family pressure, social constraints, personal preference etc) then protection should be refused. The evidence demonstrates that private and solitary worship, within the confines of the home, is possible and would not in general entail a real risk of persecution.

[14] Section 36(2)(a) *Migration Act*.

connections or support network in Kabul.'[15] A further example of guidance in relation the application of a legal test to a factual scenario is one that provides '[t]he state-sanctioned restrictions faced by Ahmadis in Pakistan amount to a denial of freedom of religion that constitutes persecution; and there is an absence of both state protection and a viable internal flight alternative for Ahmadi claimants from Pakistan.'[16]

A protection visa decision which contains findings such as those in these examples, if identified by a direction as a Guidance Decision and treated as authoritative in subsequent cases as mandated by s 420B, would have the effect of constraining the discretion of the AAT to make factual findings, evaluate evidence and assess risk for similarly-situated individuals in future review applications. Guidance Decisions could thereby contribute to the implementation of Australia's non-refoulement obligations on an incremental case-by-case manner, by providing authoritative statements of law, fact and mixed fact and law. The application of the soft law guidance contained in Guidance Decisions would promote consistency and predictability in protection visa decision-making by 'diminish[ing] the importance of individual predilection'.[17]

1.2 Legal status

Section 420B provides that a Guidance Decision must be 'complied with' by the Tribunal in subsequent matters involving decisions of the same kind unless the facts or circumstances are 'clearly distinguishable'. The manner in which Guidance Decisions have 'binding force' was considered by the Senate Scrutiny Committee in its July 2014 report.[18] It accepted that

---

[15] Example adapted from *AS (Safety of Kabul)* (CG) [2020] UKUT 130. Section 5H(1), as qualified by s 5J(1)(c) *Migration Act* requires that the real chance of persecution relates to all areas of the receiving country. Unlike the relocation principle as developed under the Convention, the reasonableness of requiring a person to move to an area that is free from a real chance of persecution does not form part of the test.

[16] Example adapted from IRB RAD Decision TB7-01837, Jurisprudential Guide dated 18 July 2017. Section 5J(2) of the Migration Act provides that a person will not have a well-founded fear of persecution if 'effective protection measures are available to the person in a receiving country'. Section 5LA provides circumstances in which 'effective protection measures' are available to a person, requiring consideration of the protection available to an applicant within their country of nationality or former habitual residence. A key distinction between the concept of 'state protection' under the Convention and 'protection' under s 5J(2) of the Act is the role of non-State actors. Under the Convention as interpreted in Australia, protection provided by non-State actors may be relevant to the assessment of whether there is a real chance of harm.

[17] *Drake (No 2)* (n2) 640.

[18] Alert Digest (n6).

the power of the President or MRD Head to issue a Guidance Decision cannot for constitutional reasons be characterised as an exercise of judicial power.[19] It therefore considered whether a Guidance Decision constitutes an exercise of legislative power 'as it appears to determine how the law should be applied in a general category of cases.'[20] It noted that, if this is correct, then a Guidance Decision falls within the definition of a legislative instrument in section 5 *Legislative Instruments Act 2003 (Cth)*.[21] The Committee sought the advice of the Minister on the legal status of Guidance Decisions. In his response, the Minister stated that Guidance Decisions are an exercise of legislative power, but they are not subject to disallowance under the *Legislative Instruments Act,* for reason that practice directions made by a tribunal are not legislative instruments.[22]

If it is correct that Guidance Decisions are not legislative instruments or another type of 'hard' law, they may properly be categorised as soft law. As explained in Chapter One, soft law is a norm or rule 'which has no legally binding force, but which is intended to influence conduct.'[23] Guidance Decisions are intended to be followed by the Tribunal in subsequent reviews involving similar facts or circumstances unless these are 'clearly distinguishable'

---

[19] Ibid 20. In his response the Minister concurred with this view: Tenth Report (n9) 455. This was incorporated into the Explanatory Memorandum (n5) by way of an Addendum adding [335].

[20] Ibid.

[21] Section 5 of the *Legislative Instruments Act 2003 (Cth)* ('*Legislative Instruments Act*') provides that an instrument will be taken to be of a legislative character if:

a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and

b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

[22] The Explanatory Memorandum (n5) was amended by way of an Addendum adding [335]. The relevant paragraph provides:

> A direction of a Principal Member in relation to a guidance decision is not an instrument for the purposes of the *Legislative Instruments Act 2003* (LIA) and is not subject to disallowance under the LIA. Section 7 of the LIA provides for instruments declared not to be legislative instruments. Subsection7(1)(a) of the LIA provides that an instrument is not a legislative instrument for the purposes of the LIA if it is included in the table in section 7. Item 24 of that table relevantly provides that instruments that are prescribed by the regulations for the purposes of this table are not legislative instruments. Regulation 7 of the *Legislative Instruments Regulations 2004* (LIR) provides that for item 24 of the table in subsection 7(1) of the LIA, and subject to sections 6 and 7 of the LIA, instruments mentioned in Schedule 1 of the LIR are prescribed. Item 6 of Part 1 of Schedule 1 provides that practice directions made by a court or tribunal are not legislative instruments. As such, the direction of a Principal Member in relation to a guidance decision is not an instrument for the purposes of the LIA and is not subject to disallowance.

[23] Robin Creyke, 'Soft Law' and Administrative Law: A New Challenge' (2010) 61 *AIAL Forum* 15, 15. Discussed in Chapter One [3.3].

from those of the Guidance Decision. The Explanatory Memorandum emphasises that the existence of a relevant Guidance Decision does not derogate from 'the responsibility of the tribunal to investigate the individual circumstances of an applicant.'[24] This is an important aspect of the legality of soft law guidance, which is also relevant to Guidance Decisions, and is discussed in section 3 of this Chapter. The next section proposes a procedure for the identification of Guidance Decisions which draws on the British and Canadian models and adapts them to the Australian constitutional and administrative law framework.

2. Procedure for the Identification of Guidance Decisions

Section 420B empowers the AAT President or the MRD Head to direct in writing that a Guidance Decision 'be complied with' by the Tribunal in reaching a decision on reviews involving similar facts or circumstances. The provision does not prescribe how Guidance Decisions are to be identified, nor the criteria for their designation. As noted above, the IRB and UTIAC guidance practices demonstrate that soft law guidance for protection status decision-making may be identified in two ways. First, as is the process adopted for the identification by the IRB of Jurisprudential Guides and Persuasive Decisions, a decision may be retrospectively designated as guidance, that is *after* a claim has been determined and the reasons for decisions published. A direction is then made by the IRB Chairperson that the decision be treated as authoritative on issues of fact, law, or both fact and law in subsequent applications involving the same or similar claims. Secondly, as is the UTIAC's practice, an appeal can be identified in advance as being a suitable vehicle for the *making* of soft law guidance, which will identify risk groups in a particular country that will determine the particular appeal and provide authoritative guidance for the determination of future appeals involving similar facts or circumstances. As s 420B does not prescribe a method for the identification of Guidance Decisions, there is no reason why *both* the retrospective and prospective processes cannot be adopted in the Australian context. As the next section explains, whereas the two procedures for the identification of these decisions are different, the substantive issues on which the Guidance Decision may provide guidance, and the legal issues that arise, are largely the same.

[24] Explanatory Memorandum (n5) at [335].

2.1 Identification of an existing decision as a Guidance Decision

Whereas the identification of a Guidance Decision by the President or MRD Head is entirely within their discretion, it is advisable that the criteria for doing so be detailed in a Practice Direction issued by the President or a Policy Statement published by the AAT. The IRB Policy on Jurisprudential Guides provides the circumstances in which the Chairperson may decide to identify a decision as a Jurisprudential Guide. These include to address an emerging issue or resolve inconsistency in decision-making.[25] Given the volume of protection visa decisions heard and determined annually by the MRD,[26] the President and MRD Head would benefit from advice from a Guidance Decision Advisory Group (GD Advisory Group) on the matters on which Members would be assisted by the identification of a Guidance Decision. The membership of the GD Advisory Group should include Deputy Presidents and Senior Members of the AAT who regularly hear and determine protection visa reviews, and are therefore familiar with the recurring claims and issues in countries of origin, have specialist expertise in protection visa decision-making, and are aware of any inconsistencies in decision-making that are occurring that could be addressed by the issuing of a Guidance Decision.

The Explanatory Memorandum states that Guidance Decisions are intended to 'provide guidance on how to decide factual or evidentiary issues that might arise in review cases'.[27] The criteria for the selection of an existing decision as a Guidance Decision should include those recognised by the UK courts as essential to comprehensive Country Guidance. It should be well-written; provide a detailed and clear analysis; consider all the relevant factual and legal issues; and contain persuasive reasoning.[28] Where the decision evaluates and draws conclusions about risk to groups or individuals based on country information (COI) it should detail the COI relied on and comprehensively state the reasons for the conclusions reached.

---

[25] IRB *Policy on Jurisprudential Guides* https://irb.gc.ca/en/legal-policy/policies/Pages/PolJurisGuide.aspx

[26] The Migration and Refugee Division (MRD) finalised a total of 5,558 protection visa reviews in the 2020-21 year: Administrative Appeals Tribunal *Annual Report* 2020-21.

[27] Explanatory Memorandum (n5) [335].

[28] IRB *Policy on the Use of Jurisprudential Guides* (n25).

The composition of the Tribunal who hears and determines the review, and the scope, content and presentation of the decision are common to whether an *existing* decision is identified as a Guidance Decision or it is *produced* by a Tribunal convened to hear and determine a review for this specific purpose. This latter method of identifying Guidance Decisions is considered in the following sections.

2.2 Selecting a review for the production of a Guidance Decision

In addition to retrospectively identifying an existing decision as a Guidance Decision, a pending protection visa review application may be selected to provide the vehicle for the production of a Guidance Decision. As is the UTIAC's practice, a Guidance Decision review should be one that will permit a full and comprehensive examination by the AAT of relevant issues and COI in relation to common claims made by applicants from the country of origin. The selection of the appropriate review for a Guidance Decision should be a task for the AAT President or MRD Head who will direct the decision to be a Guidance Decision, following consultation with the GD Advisory Group. A necessary aspect of the AAT's Guidance Decision procedure should be that the applicant is willing for their review to be a vehicle for the production of a Guidance Decision, and they are given sufficient notice of the hearing of the matter.[29] The AAT President should publish a Practice Direction for Guidance Decision reviews specifying how reviews will be selected and the manner in which review proceedings will be conducted.

2.3 Composition of the AAT for a Guidance Decision review

Once a review is selected as the vehicle for the production of a Guidance Decision, it will be constituted to a panel for hearing and determination. For the conduct of a Guidance Decision review, it is advisable that the power to constitute the AAT as a multi-Member panel be exercised.[30] As Guidance Decisions reviews require a comprehensive review of the

---

[29] Section 425 *Migration Act* requires the AAT to invite the applicant in protection visa reviews to appear before it to give evidence and present arguments.

[30] Prior to the 2015 amendments to the *Migration Act*, introduced by the *Tribunals Amalgamation Act 2015 (Cth)* the RRT could only be constituted as a single member panel. The AAT can now be constituted as a multi-member panel for the purposes of a protection visa review. Section 19A *Administrative Appeals Tribunal Act 1975 (Cth*) ('*AAT Act*'). Single member panels continue to be used for both migration and protection matters with multi-member panels 'reserved for particularly complex or novel matters': see Explanatory

evidence, particularly COI, in order to make an assessment of relevant risk factors, they will be considerably more demanding and time-consuming than regular protection visa reviews. A multi-Member panel would facilitate the efficient and timely production of Guidance Decisions and be 'proportionate to the importance and complexity of the matter'.[31]

It would be most appropriate for the President or a judicial Deputy President to be a member of the panel which conducts the review undertaken for the purposes of producing a Guidance Decision. As discussed in Chapter Six, in the UK Senior Immigration Judges with extensive knowledge and experience of asylum appeals who are specialists in Country Guidance and the country of origin that is the subject of the Guidance are assigned to hear the relevant appeals. As explained in Chapter Two, the President and the judicial Deputy Presidents sit as Members of the AAT as well as sitting as Justices of the Federal Court of Australia and have high-level legal expertise and judicial experience. The presence of a Federal judicial officer on a multi-Member panel for a Guidance Decision review would bolster confidence in the quality of these decisions.[32] They would be assisted by the inclusion on the panel of one or more Senior Member of the AAT who have extensive experience in conducting protection visa reviews, and who have developed specialist knowledge of the common claims and conditions in the particular country of origin. The constitution of the Tribunal by judicial and specialist Members for a Guidance Decision review would promote the statutory objective of the AAT to provide a review mechanism that 'promotes public trust and confidence in the decision-making of the Tribunal.'[33]

Memorandum, Tribunals Amalgamation Bill 2015 [268]. See also s19B *AAT Act* which provides that the Tribunal may not have more than three members and not more than one judicial member. It is recognised that multi-member panels 'assist in the quality of decision-making, which promotes the Tribunal's objective of promoting public trust and confidence in the decision-making of the Tribunal.' Multi-member panels enable 'complex matters to be considered and discussed by more than one Member also assists in the fair resolution of complex matters and provides guidance for Members subsequently considering similar matters': Law Council of Australia, 'Practice and Procedure – Migration and Refugee Division Administrative Appeals Tribunal' 8 December 2016 [6].

[31] Section 2A *AAT Act*.

[32] UNSW Andrew & Renata Kaldor Centre for International Refugee Law, Legislative brief, Tribunals Amalgamation Bill 2014, 2.

[33] Section 2A *AAT Act*.

2.4 Parties to the review

Unlike asylum appeals in the UK, where both the appellant and the Home Office are parties to the proceedings, as explained in Chapter Three, the Minister for Home Affairs and her Department are not represented in protection visa reviews, nor do they usually present any further material other than the production of the Department's file.[34] There being no contradictor, the proceedings in protection visa reviews are non-adversarial in nature. The AAT takes evidence and receives submissions only from the applicant.[35] Whereas the applicant is best placed to provide the AAT with all relevant personal information and evidence necessary for it to determine the factual basis of their protection visa claim, the Department is often in a better position to provide information on general country conditions. Given the authoritative status of Guidance Decisions and the contribution they will make to the implementation of Australia's non-refoulement obligations, the Minister may wish to make submissions on the issues and may also wish to appear at the review hearing. The AAT has powers to require that a person appear before it to give evidence and to produce documents.[36] It therefore could require the Department to appear at the hearing, or require it to undertake an investigation into a particular subject relevant to the review.[37] This could include requiring the Department to provide a report detailing the current political and security environment for particular individuals or groups in the relevant country. This information could supplement COI provided to the AAT by the applicant, and any evidence that it may receive from country experts.[38]

---

[34] See discussion in *Administration and Operation of the Migration Act 1958*, Senate Legal and Constitutional References Committee Report, March 2006 [3.60]ff.

[35] The absence of a contradictor makes a significant difference to the dynamics of the hearing compared to those reviews where the primary decision-maker appears and argues that the decision should be affirmed. It also changes the emphasis of the AAT's role: Bernard McCabe, Bernard McCabe, 'Perspectives on Economy and Efficiency in Tribunal Decision-Making' (2016) 85 *AIAL Forum* 40, footnote 16.

[36] Section 427(3) *Migration Act*.

[37] Section 427(1) *Migration Act*. See AAT President's Direction 'Conducting Migration and Refugee Reviews' 1 August 2018, [13.1]- [13.2]. https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Presidents-Direction-Conducting-Migration-and-Refugee-Reviews.pdf

[38] See discussion in Chapter Three [1.2] in relation to the inquisitorial powers of the AAT to obtain evidence.

2.5 Legal representation

The access of applicants to quality legal representation should be an important factor considered when a review is selected as a vehicle for the production of a Guidance Decision. Even if legal representatives do not appear at the hearing, they can play an essential role in identifying relevant claims and evidence, and making written submissions, which must be considered by the AAT in the course of the review. However, as explained in Chapter Three, in the Migration Review Division an applicant is 'not entitled' to representation,[39] or to examine or cross-examine witnesses if they are invited to present evidence to the Tribunal.[40] Applicants may be assisted by another person or representative, who may be a lawyer or a registered migration agent, however this person is not entitled to make formal submissions on their behalf.[41] The Federal Court has held that a provision declaring that a person is 'not entitled' to be represented, related only to matters of entitlement and did not exclude the rules of natural justice if representation was required in the circumstances of the case. Accordingly, it did not displace the discretion of the decision-maker to allow representation in an appropriate case.[42] Following this authority, the AAT should exercise its discretion to permit applicants to be legally represented in Guidance Decision reviews. As discussed in Chapter Six, it is recognised that the complexity of the issues and the volume of evidence examined in Country Guidance appeals makes essential the involvement of experienced and highly competent legal representation.[43] The President's Practice

---

[39] Section 427(6)(a) *Migration Act*. In other Divisions of the AAT, legal representation, including by counsel, is permitted. See discussion in Chapter Three [1.2].

[40] Section 427(6)(b) *Migration Act*. In Australia, there has been an emphasis generally on limiting the need for legal representation in the tribunal context, in part because of their inquisitorial powers: Reference to Matthew Groves, 'Administrative Justice Without Lawyers? Unrepresented Parties in Australian Tribunals' in S Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (University of Wales Press, Cardiff, 2017) 346 at 357; see also Melinda Richards SC, 'Accessibility, Merits Review and Self-represented Litigants' in Debra Mortimer (ed), *Administrative Justice and its Availability* (Federation Press, 2015), 116 at 119; Council of Australian Tribunals (COAT) *Practice Manual for Tribunals* (5th edition, 2020) [5.5.3].

[41] Ibid.

[42] In *WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 271, 294 French and Lee JJ reviewed many of the cases arising from the provision that an applicant appearing before the RRT is 'not entitled ... to be represented ... by another person' except to the limited extent provided by the provision. Their Honours concluded that the provision was 'a statement about entitlements. It does not exclude the rules of procedural fairness insofar as they require representation in the circumstances of a particular case': cited in Groves article at 360.

[43] See discussion in Chapter Six [4.2].

Direction should state that the discretion to permit legal representation will be exercised favourably in Guidance Decision reviews.

2.6 Participation by other parties

Provisions in the *Administrative Appeals Act 1976 (Cth)* permit third parties to apply for standing in review proceedings and present evidence and make submissions.[44] However, applications made for review of protection visa decisions,[45] under the *Migration Act* are limited to the person who is the subject of the decision.[46] Section 420B sits within Part 7 of the Act which applies to protection visa reviews,[47] indicating that the general standing provisions also would not apply to a review conducted for the purposes of producing a Guidance Decision.[48] Accordingly, there is no provision in the Act for parties other than the review applicant to participate in proceedings intended to produce a Guidance Decision. However, as noted above, the AAT has powers to require that a person appear before it to give evidence and to produce documents.[49] The provision of evidence by interested parties, including non-government organisations, and persons affected by a Guidance Decision would facilitate the full and comprehensive examination of all relevant issues and information by the AAT during the conduct of the review. As discussed in Chapter Six, in the UK this is a necessary and essential feature of a fair and effective Guidance system, and non-government organisations are permitted to intervene where they can assist the UTIAC in its task.[50] The AAT should therefore invite interested and affected parties to provide evidence in a Guidance Decision review if this would assist it to fully consider all relevant material. Their involvement in the review proceedings would also bolster the legitimacy of the Guidance Decision process, a matter that is discussed in section 5 of this Chapter.

---

[44] Section 27(2) *AAT Act* gives standing to interest groups to challenge decisions that are reviewable by the AAT. See also sections 31 and 44(2) *AAT Act* in relation to the AAT's power to determine whether the interests of a person are affected by a decision. See discussion in Dennis Pearce, *Administrative Appeals Tribunal* (5th edition, LexisNexis, Butterworths, 2020) 70ff.

[45] Termed in the *Migration Act* 'Part 7 reviewable decisions' defined in section 411 *Migration Act*.

[46] Section 412 *Migration Act*.

[47] Part 7, Division 4 *Migration Act* contains the provisions applicable to the conduct of a protection visa review.

[48] Section 420B is contained in Part 7, Division 3 *Migration Act*.

[49] Section 427(1) *Migration Act.*

[50] Chapter Six [4.2].

3. Conduct of Guidance Decision Reviews

It is essential that the AAT conducts a comprehensive and impartial review of relevant and reliable evidence, particularly COI, so that the Guidance Decision produced is an accurate statement of the risks on return for individuals or groups to the country. This is particularly important given that, as discussed below, the review of protection visa decisions, including Guidance Decisions, is limited to jurisdictional error.

3.1 Inquisitorial process

As in regular protection visa reviews, the AAT will not be bound by the rules of evidence in making a Guidance Decision, and 'must act according to substantial justice and the merits of the case.'[51] The inquisitorial character of protection visa reviews by the AAT, outlined in Chapter Three, makes them especially well-suited to the investigative role of the decision-maker that is a key feature of the production of guidance. As explained in Chapter Six, in the United Kingdom it is recognised that in order for the Country Guidance to be comprehensive, it is essential that the UTIAC has before it all material information, irrespective of whether it has been presented to it by the parties. It is primarily for this reason that the UTIAC assumes 'something of an inquisitorial quality' when it conducts Country Guidance appeals.[52]

3.2 Evidentiary materials and expert evidence

As outlined in Chapter Three, in protection visa reviews the AAT has before it any COI provided by the applicant, and any material it obtains from undertaking its own country research. It is on the basis of this evidence that it must assess the applicant's individualised risk on return.[53] In a review conducted for the purpose of producing a Guidance Decision, it is critical that the COI relied on by the AAT is the best available, which requires it to be relevant, accurate and current. Chapter Three also explained that the AAT does not receive written reports or oral testimony from country experts, although its broad powers permit it

[51] Section 420 *Migration Act*.

[52] Chapter Six [4.2].

[53] See discussion in Chapter Three [3.4]. Ministerial Direction No. 56 requires the AAT to have regard to DFAT Country Information Reports - see discussion in Chapter Four [2.2].

to do so. The *Migration Act* provides that the applicant may request that the Tribunal hear oral evidence from named witnesses at the review hearing, however the Tribunal is under no obligation to hear evidence from the person.[54] The Tribunal has broad statutory power to obtain 'any information that it considers relevant' during the conduct of the review, and it may invite, or summons, a person to give information to it.[55] In order to ensure that the AAT has access to the best available evidence in a Guidance Decision review, it should be willing to hear from witnesses, including country experts nominated by the applicant. It should also invite country experts to give oral testimony or provide a written report in relation to the current political and security situation in the relevant country if this will assist it to make reliable findings that will form the basis of the conclusions contained in the Guidance Decision.

3.3 Production of the Guidance Decision

The production of the Guidance Decision should not differ significantly from the writing of a regular protection visa review decision. However as noted above, it should be comprehensive in its reasons and clearly identify those parts of the Guidance Decision which are to be authoritative. The standard applied to UTIAC Country Guidance, namely that the decision provides a balanced, impartial, and authoritative assessment of available COI drawing out guidance relevant to a subsequent appeal, provides a useful guide to the necessary content of a Guidance Decision. It would be advisable for the decision 'template' adopted by the UTIAC for Country Guideline Determinations to be followed when the Guidance Decision is written. These state clearly at the beginning of the decision the guidance it promulgates, followed by the relevant claims, the evidence before the Tribunal, the legal framework, and an evaluation of the evidence that resulted in the conclusions contained in the guidance. Once written, the decision can be published and made the subject of a direction by the President or MRD Head if he or she considers it appropriate that it be a Guidance Decision. The GD Advisory Group may also provide advice on whether the decision should be made the subject of a Guidance Decision direction.

---

[54] Section 426 *Migration Act*.

[55] Sections 424 and 427(3) *Migration Act*.

3.4 Application and revision of Guidance Decisions

Following a direction by the President or MRD Head that a decision is to be a Guidance Decision, it must be complied with in subsequent reviews involving similar facts or circumstances unless these are clearly distinguishable. As the AAT must always conduct an individualised merits review, the applicant in a subsequent review may present updated COI or other evidence to persuade the Tribunal that his or her circumstances should be distinguished from that on which the Guidance Decision is based.

As the British experience demonstrates, for soft law guidance to have an influence on protection visa decision-making at both the primary and appellate level, it is necessary for it to be incorporated into the executive policy followed by primary decision-makers. In Australia, this can be achieved by the incorporation of Guidance Decisions into the Department's Refugee Law Guidelines and Complementary Protection Guidelines (Protection Guidelines) which primary decision-makers must follow when making protection visa decisions. As discussed in Chapter Two, this executive policy is developed to enunciate the considerations to be taken into account by decision-makers in exercising administrative discretions.[56] As explained in Chapter Four, Ministerial Direction No 84 requires that the Protection Guidelines must be taken into account both by primary decision-makers and the AAT when it conducts reviews.[57] The incorporation of AAT Guidance Decisions into the Protection Guidelines will mean that both primary decision-makers and the AAT will apply the same standards, increasing the likelihood of comparable conclusions on risk assessments for applicants from the country to which the Guidance Decision relates. The soft law guidance in Guidance Decisions can thereby be applied at all stages of the protection visa decision-making process, and thereby promote consistent, fair and predictable outcomes.[58] This would address the concerns raised by Brennan J in *Drake (No*

---

[56] Chapter One [3.2].

[57] Chapter Four [2.2]. Ministerial Direction No 84 – 'Consideration of Protection visa applications' made under s 499 on 24 June 2019 and has effect from 25 June 2019.

[58] In addition to the intended aim of increasing the consistency of protection visa decision-making, the identification of Guidance Decisions would assist the MRD to more efficiently manage its growing caseload. The MRD has experienced a gradual but substantial increase in protection visa review applications with 32,064 cases on hand at 30 June 2021. In the year 2020-21 the active protection visa caseload increased by 18% when compared to 30 June 2020 and constituted 57% of all cases on hand in the MRD. Protection visa applications

2), discussed in Chapter Two, that primary decision-makers and the AAT would be applying different standards.[59]

Guidance Decisions will remain applicable to subsequent protection visa reviews where appropriate unless and until they are replaced by a later Guidance Decision on the same matter or are revoked by the President or MRD Head. As country conditions, particularly in volatile regions, frequently change, the GD Advisory Group should be made responsible for monitoring the issues arising in reviews so that, if necessary, an existing Guidance Decision can be revoked, or another review conducted to update a Guidance Decision that has become out of date.

4. Judicial review of Guidance Decisions

As explained in Chapter Six, the British courts have emphasised that judicial supervision of Country Guidance is essential for a fair and robust system, and guidance tainted by legal error must be identified and set aside.[60] Country Guidance is subject to full examination by the Court of Appeal, and it may be set aside if the reasoning is obscure or deficient, the evidence recorded in support of a conclusion was defective or misapplied or ignored, there were errors in the legal questions posed by the UTIAC, or other procedural defects were present that render the guidance flawed and in need of revisiting. It is also recognised as crucial that the courts be astute to identifying and overturning decisions that misapply Country Guidance.[61]

Section 420B provides that a Guidance Decision must be complied with in a subsequent review unless the facts and circumstances of the review are distinguishable from the Guidance Decision.[62] However, a failure to comply with a Guidance Decision will not

---

comprised 66% of all lodgements in 2020–21 and remains the largest single caseload within the MRD: Administrative Appeals Tribunal *Annual Report 2020-2021* 58-59.

[59] *Drake (No 2)* (n3) 645. Brennan J observed it would be 'a regrettable anomaly if the decisions which were not reviewed revealed different standards and values from those made on review.'

[60] Chapter Six [3.1].

[61] Discussed in Hugo Storey, 'Consistency in Refugee Decision-Making: A Judicial Perspective' (2013) 32(4) *Refugee Survey Quarterly* 112, 124.

[62] Section 420B(2) *Migration Act.*

invalidate the decision.[63] The following section considers the potential grounds of review for challenging a decision that is identified as a Guidance Decision, and for those which may be relevant to a subsequent decision which applies a Guidance Decision.

4.1 Judicial review of the making and content of Guidance Decisions

As outlined in Chapter Three, there is no right of appeal from a decision of the Migration and Refugee Division to a Federal Court.[64] The only avenue available for challenging a protection visa decision is by way of an application for judicial review.[65] A Guidance Decision that provides guidance on the interpretation of the relevant legislative provisions will therefore be able to be reviewed and any errors identified. If the Court finds jurisdictional error, the decision will be set aside, and the matter remitted to the AAT for its reconsideration.

Guidance Decisions that provide guidance solely on factual matters will be unlikely to be the subject of a successful judicial review unless the AAT applies an incorrect legal test or asks itself the wrong question, or otherwise makes a jurisdictional error, including failing to provide procedural fairness. As outlined in Chapter Three, it is generally not possible to challenge findings of fact made by the AAT.[66] However, where factual findings which go to jurisdiction are erroneous, irrational or illogical, the Court may find that the jurisdictional basis for the making of the decision is not satisfied and set the decision aside.[67] In order to

---

[63] Section 420B(3) *Migration Act*.

[64] Chapter Three [1.2]. Compare s44 *AATA* which provides that a party to a merits review proceeding may appeal to the Federal Court from any decision of the AAT, on a question of law. Section 43C excludes migration decisions. Discussed in Pearce, *Administrative Appeals Tribunal* (5th edition, 2020) [19.2], 439.

[65] Under section 476 *Migration Act* to the Federal Circuit Court and the High Court under section 75(v) *Australian Constitution*. Judicial review is limited to the identification of jurisdictional error. While there is no right of appeal from the MRD AAT to the Federal Courts, the right to judicial review is constitutionally entrenched and is regularly invoked.

[66] Chapter Three [3.1].

[67] Cases involving flawed factual findings by the AAT on review, have been premised on the failure of the tribunal to exercise its jurisdiction in proceeding to make a decision on the basis of incorrect facts, or neglecting material evidence that would have guided the tribunal in making correct factual findings: Pearson (n49) 106-107 citing *SZTSC v Minister for Immigration and Border Protection SZTSC v Minister for Immigration and Border Protection* [2017] FCA 1032 and *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99; [2013] FCA 317.

avoid making such an error, Guidance Decisions reasons must be comprehensive, and factual findings made must be logical and based on probative evidence.

The Canadian jurisprudence surrounding the Lead Case strategy, discussed in Chapter Five,[68] demonstrates that care must be taken when developing soft law guidance that the rule against the reasonable apprehension of bias is not infringed. In *Geza*, the Federal Court of Appeal held that the specific steps taken by the IRB to organise the lead case gave rise to a reasonable apprehension of bias and a loss of decisional independence.[69] The Court found that the process would lead a reasonable observer to believe that the decision-makers had been influenced by an 'extraneous or improper consideration,' resulting in an 'improper' surrender of decision-making autonomy.[70] One of the factors the Court identified as indicating apprehended bias was the lack of wide consultation in relation to the selection of the claims for the lead case which 'would … trouble the reasonable observer.'[71]

In the Australian context, the Guidance Decision provision does not mandate that the President or MRD Head engage in a consultation process before identifying a decision as a Guidance Decision. This Chapter proposes that advice be obtained from the GD Advisory Group as to the recurring claims and issues in countries of origin, and any inconsistencies in decision-making that are occurring that could be addressed by the issuing of a Guidance Decision. However, the selection of a review for the production of a Guidance Decision must be made with an 'open mind' so as to limit the potential for the resulting decision being the subject of challenge on the ground of reasonable apprehension of bias.[72]

The next section considers the circumstances in which the application of a Guidance Decision may give rise to grounds for judicial review. This may arise either when a

---

[68] See discussion in Chapter Five [3.1].

[69] *Geza v. Canada (Minister of Citizenship and Immigration)* [2006] FCA 124.

[70] At [57].

[71] At [63].

[72] *Ebner v Official Trustee* (2000) 205 CLR 337. See discussion in Mark Aronson, Matthew Groves and Greg Weeks *Judicial Review of Administrative Action and Government Liability* (6th ed, 2017 Thomson Reuters) [9.20].

Department decision-maker follows a Guidance Decision in making a primary decision or when the AAT follows a Guidance Decision when conducting a review of a primary decision.

4.2 Judicial review of decisions that apply Guidance Decisions

As discussed in Chapter Five, the Canadian Supreme Court has emphasised that tribunal soft law guidelines must not fetter administrative discretion. [73] Decision-makers must not treat soft law as a binding rule or use it 'to justify the exclusion of choices provided by the law.'[74] Simply stated, 'soft law may not harden into a rule.'[75] In the Australian context, the rules against fettering discretion have comparable application to soft law guidance. Mark Aronson, Matthew Groves and Greg Weeks state:

> The principle against fettering administrative power allows the adoption and promulgation of policies or 'guidance statements', albeit on the proviso that these will never be entirely rigid.[76]

This is also recognised in the Australian jurisprudence which, as discussed in Chapter Two, accepts the desirability of administrative policies that diminish 'blinkered and individualised decision-making' that is 'a recipe for maladministration'[77] yet insists that each application be determined on its merits.[78] The decision-maker must give 'proper, genuine and realistic consideration to the merits of the case' and must 'be ready in a proper case to depart from any applicable policy'.[79] If a decision-maker were 'not to hear any application of a particular character by whomsoever made', this would amount to an unlawful fetter on a discretionary power.[80] In the context of administrative tribunals it has been recognised that 'a tribunal which is called upon to exercise a discretion does not perform its duty if it acts in

---

[73] *Canada (Minister of Citizenship and Immigration) v Vavilov* 2019 SCC 65 at [130].

[74] See discussion in Chapter Five [2.3].

[75] Paul Daly, *Understanding Administrative Law in the Common Law World* (Oxford University Press, 2021) 59.

[76] Aronson, Groves and Weeks (n71) [5.240].

[77] *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 327 ALR 8 per Gageler J at [69]. Discussed in Chapter Two [4.2].

[78] Ibid [68].

[79] *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291, 292 per Gummow J cited in Daly (n74) 60 footnote 182.

[80] Ibid citing *R v Port of London Authority, ex parte Kynoch* [1919] 1 KB 176, 184 per Bankes LJ.

blind obedience to a rule or policy that it had previously adopted.'[81] The tribunal would not be 'fairly judging all the issues which are relevant to each individual case as it comes up for decision', and the accuracy of decisions would suffer.[82]

Aileen McHarg explains that the 'no-fettering principle' operates 'as a means of judicial control over the *degree of structuring* of discretion that is appropriate in particular contexts.'[83] As she explains, in some circumstances, 'a high degree of flexibility and a genuine consideration of the merits of particular cases is required; at other times, rules are allowed, even where they permit few or no exceptions.'[84] She notes that, '[i]n assessing the degree of structuring that is permissible, courts appear to be influenced both by the substantive nature of the decision to be made and by its administrative context.'[85] In decision-making contexts 'involving a high volume of similar cases' there is an acceptance that 'it is simply unrealistic to expect administrators to act other than through rules.'[86] This reasoning is apparent in the judgment of Montigny JA in *CARL v Canada*, discussed in Chapter Five. His Honour recognised that 'the use of guidelines and other soft law techniques to achieve an acceptable level of consistency is particularly important for large tribunals exercising discretion such as the IRB.'[87]

In the context of Guidance Decisions under the *Migration Act*, these principles should apply in relation to their application by decision-makers in subsequent cases involving the facts and circumstances in the Guidance Decision unless these are clearly distinguishable.

---

[81] *Re Clarkson, ex parte Australian Telegram and Phonogram Officers' Association* (1982) 39 ALR 1, 9 per Gibbs CJ.

[82] Daly (n75) 61 citing *Stringer v Minister of Housing and Local Government* [1971] 1 WLR 1281, 1289 per Cooke J.

[83] Aileen McHarg, 'Administrative Discretion, Administrative Rule-making, and Judicial Review' (2017) 70 *Current Legal Problems* 267, 273, emphasis in original. The 'apparent non-fettering/consistency paradox' has attracted increasing academic scrutiny in recent years: see Shona Wilson Stark. 'Non-fettering, Legitimate Expectations and Consistency of Policy: Separate Compartments or Single Principle?' in Jason NE Varuhas and Shona Wilson Stark (eds) *The Frontiers of Public Law* (Hart Publishing, 2020), 443 citing McHarg and Adam Perry 'The Flexibility Rule in Administrative Law' (2017) 76 *Cambridge Law Journal* 375.

[84] Ibid.

[85] Ibid.

[86] Ibid 274 citing William Wade and Christopher F Forsyth, *Administrative Law* (11th edn, Oxford University Press, 2014) 276 and *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610.

[87] *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugee and Citizenship* [2020] FCA 196 [67].

Guidance Decisions must be followed and applied by the primary decision-makers and the AAT, but not so that the individual merits are not considered. So applied, Guidance Decisions allow the flexibility required to ensure that administrative discretion is not unlawfully fettered. The decision-maker should invite the applicant to comment on why a Guidance Decision should not be applied and be willing to listen to arguments as to the reasons why he or she claims their circumstances are exceptional and should not be subject to the application of the Guidance Decision.[88] If the decision-maker 'blindly' applies the Guidance Decision to the applicant's circumstances, the decision that results may be the subject of judicial review based on the no-fettering ground.

The Canadian Federal Court of Appeal's judgment in *CARL v Canada,* discussed in Chapter Five, cautioned that soft law guidance must not be treated by decision-makers as binding, nor dictate a particular outcome in a subsequent matter involving the same or similar claims.[89] In the Australian context, there is authority to support the adoption of policies by tribunals to assist their decision-making without creating a risk of prejudgment, provided they are prepared to listen to arguments contrary to the policy.[90] Aronson, Groves and Weeks observe that 'the acceptance of such arrangements suggests that the courts will allow tribunals a level of institutional leeway with prejudgment.'[91] Based on this jurisprudence, the conclusions contained in Guidance Decisions in relation to the risk of groups or individuals on return to their country can be applied by the AAT in subsequent reviews, provided that they are not applied without consideration of the individual merits.

5. Legitimacy of Guidance Decisions

As discussed in Chapters Five and Six, the legitimacy of the development and use by tribunals of soft law tools to structure the discretions associated with protection visa

---

[88] See discussion and cases cited in Aronson, Groves and Weeks (n72) at [5.250] and Daly (n75) 57 citing *R (Gujra) v Crown Prosecution Service* [2012] UKSC 52; [2013] 1 AC 484 [76] per Lord Kerr: 'A person or agency who is exercising discretion as to how to use a statutory power . . . may formulate a policy or make a limiting rule as to the future exercise of his discretion . . . provided that he listens to any applicant who has something new to say.' See also *Applicant S214 of 2002 v Attorney-General* [2004] FCA 1635 [16].

[89] See discussion in Chapter Five [3.2].

[90] See discussion and cases cited in Aronson, Groves and Weeks (n72) [9.280].

[91] Ibid.

decisions is an important consideration. These include the capacity and resources available to the tribunal, and the expertise of their members, to create and formalise soft law. Also relevant are the rights of affected parties other than the applicant to participate in and contribute to the process of tribunal soft law-making.[92] These are issues that must also be considered in the context of the development of a procedure for the production of AAT Guidance Decisions.

5.1 Expertise and access to information

It is widely accepted that the AAT lacks the capacity and resources to engage in the 'high level' policy-making that is undertaken by the executive government.[93] Not only is it unable to carry out wide consultation with affected groups and the community, it is not equipped to take into account the political variables that are part of the policy formulation process. [94] This distinguishes the development of Guidance Decisions from the formulation of executive policy which incorporates consultation processes and permits input from a range of external stakeholders. The benefit of developing Guidance Decisions in the context of a Tribunal review of a protection visa decision is that applicants have the opportunity to directly contribute to the policy-making process by making submissions to the panel which will formulate the guidance.

However, as Brennan J made clear in *Drake (No 2)* it is not the AAT's role to formulate 'broad policy'.[95] As His Honour recognised, the AAT's reasons in an individual review

[92] France Houle and Lorne Sossin, 'Tribunals and Policy-Making: From Legitimacy to Fairness' in Laverne A. Jacobs and Anne L. Mactavish (eds), *Dialogue between Courts and Tribunals: Essays in Administrative Law and Justice 2001-2007*, (Les Éditions Thémis, 2008) 93, 97.

[93] For example, Linda Pearson states that '[p]olitical sensitivities inherent in the review of decisions taken at the highest level of government, which may also have significant consequences both for the individual and the community, lie at the heart of the reluctance manifested in *Drake.'* Pearson, Linda, 'Policy, Principles and Guidance: Tribunal Rule-Making' (2012) 23(1) *Public Law Review* 16, 20.

[94] Roger Douglas, *Administrative Law*, (5th ed, Federation Press, 2006) 365.

[95] Ibid. Brennan J stated that 'this is essentially a political function, to be performed by the Minister who is responsible to the Parliament for the policy he (sic) adopts. The very independence of the Tribunal demands that it be apolitical ... The Tribunal is not linked into the chain of responsibility from Minister to Government to Parliament, its membership is not appropriate for the formulation of broad policy and it is unsupported by a bureaucracy fitted to advise upon broad policy. It should therefore be reluctant to lay down broad policy, although decisions in particular cases will impinge on or refine broad policy emanating from a Minister'.

'inevitably spins out threads of policy'[96] specifically the identification of the considerations relevant to the exercise of administrative discretion under a legislative scheme. When the soft law guidance that results is treated as authoritative by decision-makers in subsequent cases it has consequences for individuals who were not party to the review that produced the guidance. The polycentric nature of soft law guidance therefore requires modifications to the regular process for hearing and determining a review application. As Sharpe recognised, unless the tribunal is able to consider a broad range of information, the soft law guidance it develops may be *ad hoc* by addressing an 'immediate problem at the expense of a consistent and overall picture.'[97]

This Chapter has proposed that reviews that produce AAT Guidance Decisions should be heard and determined by a mix of judicial members and specialists in protection visa decision-making. It also has recommended that the conduct of the review be investigative and inquisitorial, and that the AAT use its broad statutory powers to ensure that it is able to consider all relevant material and hear the diversity of views on the issues that are the subject of the Guidance Decision. The specialist expertise of the AAT panel, and the investigative, active, and enabling'[98] process for the production of Guidance Decisions, will go some way to addressing concerns about their wider impact beyond the individual review applicant.

5.2 Consultation and participation in the process

As the process for the identification of Guidance Decisions proposed in this Chapter is a product of the AAT's merits review function[99] there will necessarily be limited opportunities

---

[96] *Drake (No 2)* (n2) 644.

[97] Sharpe, Jennifer, *The Administrative Appeals Tribunal and Policy Review* (Law Book Company, 1986) 129; Pearson (n93) 20-21. Referring to the potential for the AAT to contribute to the development of policy, Sharpe cautioned, '[u]nless the AAT has a high level of expertise, experience and informational input, its contribution to the development of policy may be *ad hoc* and disruptive.'

[98] Robert Thomas, 'From 'Adversarial v Inquisitorial' to 'Active, Enabling and Investigative': Developments in UK Administrative Tribunals' in Sasha Baglay and Laverne Jacobs, *The Nature of Inquisitorial Processes in Administrative Regimes* (Taylor and Francis, 2016) 51.

[99] The policy-making process inherent in Guidance Decisions is what Diver termed 'incrementalist'. Diver distinguished between two forms of policy-making, namely 'incrementalism' and 'comprehensive rationality'. He wrote that 'these represent two competing models of the policy-making process. Each has its own internal logic: comprehensive rationality is structural, static, prophylactic; incrementalism is organic, dynamic, remedial.' Colin Diver, 'Policymaking Paradigms in Administrative Law' (1981) 95 *Harvard Law Review* 393,

for the participation of affected parties other than the applicant. As Guidance Decisions will contribute to the implementation of Australia's international non-refoulement obligations, ideally there should be consultation with and participation by interested groups and individuals, including the Minister and her Department. This could be achieved in several ways. First, the President and MRD Head together with the members of the GD Advisory Group could hold regular meetings with relevant stakeholders, including Departmental officials and representatives from non-government organisations, refugee advocacy groups, and ethnic and religious communities. Any concerns about inconsistent decision-making could be raised, and discussions held about whether it would be beneficial for a Guidance Decision to be identified or produced. These meetings could also discuss whether any existing Guidance Decision continues to accurately identify 'at risk' groups and individuals, and whether the production of new guidance is required. Another more formal option would be for external members to be appointed to the GD Advisory Group which advises the President and MRD Head on the matters on which the production of a Guidance Decision may assist in addressing inconsistent decision-making.

A second method for including consultation within the Guidance Decision process would be for the President's Practice Direction for Guidance Decisions to clearly specify the circumstances in which the AAT will obtain evidence from witnesses, including non-government organisations and ethnic and religious groups, when conducting a Guidance Decision review. It may also make provision for interested and affected parties to make an application to the AAT to present evidence and/or make submissions on the issues under consideration in the Guidance Decision review.[100] Opportunities for participation by

---

395. Incrementalist policy-making regards policy as 'the gradual accretion of adjudicative deposits' (404). Comprehensive rationality involves four steps (396). 'First, the decision-maker must specify the goal he (sic) seeks to attain. Second, he (sic) must identify all possible methods of reaching his objective. Third, he must evaluate how effective each method will be in achieving the goal. Finally, he (sic) must select the alternative that will make the greatest progress toward the desired outcome.' Diver concluded that '[o]nly a superhuman decision-maker could faithfully adhere to the ideal of comprehensive rationality'. As Aronson, Groves and Weeks observe, this policy-making process 'cannot be achieved using an adjudicative process or method.' Aronson, Groves and Weeks (n72) [3.320]. Aileen McHarg notes that Davis' work was influential in the United States, citing the writings of Diver and William West: McHarg (n83) 268.

[100] Whereas the standing provisions of the *Administrative Appeals Act* do not apply to protection visa reviews and there is no provision for *amicus curiae* in the relevant provisions of the *Migration Act*, the President's Practice Direction may nevertheless establish an informal process for the MRD to consider applications by interested and affected parties to give evidence.

interested and affected parties would not only facilitate the full and comprehensive examination of all relevant issues, but also enhance the legitimacy of Guidance Decisions.

The incorporation of opportunities for consultation with and participation by interested parties in the production of Guidance Decision is consistent with KC Davis' proposals for the structuring of discretion outlined in Chapter One. Davis wrote that as rules are general, rule-making encourages 'comprehensive solutions' to problems that 'go beyond the facts of individual cases' and permits 'broader participation by stakeholders' and provides 'opportunities for public participation.'[101] He described administrative rule-making as 'a miniature democratic process.'[102] The inclusion of processes to permit interested and affected parties to be involved in the development of Guidance Decisions goes some way to achieving this ideal.

This Chapter has proposed a procedure for the identification by the AAT of Guidance Decisions under s 420B *Migration Act* which will withstand judicial scrutiny and address concerns about its broader legitimacy. It has demonstrated that the development by the AAT of soft law guidance in the form of Guidance Decisions is consistent with Davis' proposal that the executive develop 'bottom up norms' to structure discretion to promote consistent and predictable administrative decision-making.

[101] Carol Harlow and Richard Rawlings, *Law and Administration*, (3rd edition, Cambridge University Press, 2009) 201.

[102] Ibid.

Conclusion

> The practical effect of soft law has always been of greater significance than its legal character. If soft law is nothing more than an emperor without clothes, its power stems from the fact that the majority of people simply do not realise.[1]

This thesis has argued that the AAT engage in the formulation of soft law guidance, specifically by developing Guidance Decisions as it is authorised to do in its protection visa jurisdiction by s 420B *Migration Act*. These decisions provide guidance to decision-makers in relation to the exercise of the discretions associated with the finding of facts, evaluation of evidence and assessment of risk in determining whether an applicant satisfies the eligibility criteria for protection under the Act. Guidance Decisions are not akin to binding legal precedents which must be applied in subsequent cases. They permit and indeed require that individual circumstances be examined in every case and accommodate new evidence and changes to country conditions. By providing guidance on the application of the law to recurring factual scenarios and identifying groups and individuals in specified countries who prima facie satisfy the eligibility criteria, Guidance Decisions will assist decision-makers to make hard decisions and promote consistent and predictable outcomes.

The development of tribunal soft law guidance conforms with the recommendations by KC Davis in *Discretionary Justice* that the executive incrementally develop rules or guidelines, characteristic of 'judicial' rule-making through precedents and the doctrine of *stare decisis,* to structure administrative discretion. In 1979 in *Drake (No 2)*, the first President of the AAT, Sir Gerard Brennan supported the development by the AAT of its own 'policy' so as to 'diminish the importance of individual predilection' and 'enhance the sense of satisfaction with the fairness and continuity of the administrative process.'[2] Despite this authoritative encouragement, the AAT has been reluctant to develop soft law guidance to structure administrative discretion, and has not realised its intended normative function within the Australian administrative justice system. Section 420B of the *Migration Act* expressly authorises the AAT to engage in soft law-making to structure the discretions associated with protection visa decision-making in the manner envisaged by Davis. This thesis has proposed

---

[1] Greg Weeks, *Soft Law and Public Authorities*, 269.

[2] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 *('Drake (No 2)'* 640.

a process for the identification by the AAT of Guidance Decisions that will allow them to withstand legal challenge and address questions about their broader legitimacy.

Observers of administrative decision-making processes are well aware of the normative impact of soft law on decisional outcomes. Like the Emperor without clothes, soft law is authoritative despite not being cloaked in formal legal attire. Executive policy guidelines are significant non-legislative norms that considerably influence the decisions made by primary decision-makers. Similarly, the AAT's decisions, although not binding precedents, provide authoritative guidance as to the correct interpretation and application of law and policy. As an important objective of merits review is the normative effect of decisions, the AAT should assume the soft law-making authority conferred on it by s 420B of the *Migration Act,* and contribute its specialist expertise to the proactive development of guidance for the assessment by decision-makers of the eligibility of individuals for the grant of a protection visa.

Whereas this thesis has focused on the production of soft law by the AAT in the form of Guidance Decisions in its protection visa jurisdiction under the *Migration Act*, its findings and recommendations have broader application to the other Divisions of the AAT. Although these Divisions are not expressly authorised by legislation to identify guidance decisions, Brennan J's judgment in *Drake (No 2)* provides the necessary authority for them to adopt practices which recognise the precedential value of their decisions and/or to develop soft law guidance that will enhance the consistency of its decisions, and those of the Ministers, departments and agencies whose decisions are subject to its review.

It has been said that the challenge for tribunals in the 21st century is 'carving out a philosophy for their existence.'[3] As Gabriel Fleming observed more than two decades ago:

[3] Robin Creyke, 'Tribunals – "Carving Out the Philosophy of Their Existence": The Challenge for the 21st Century' (2012) 71 *AIAL Forum* 19, 30 citing John McMillan, 'Merit Review and the AAT: A Concept Develops' in John McMillan (ed) *The AAT – Twenty Years Forward: Passing a Milestone in Commonwealth Administrative Review* (Australian Institute of Administrative Law, 1998) 33.

> The administrative review system will have added little normative benefit to government administration, and at great cost, if it is found ultimately to be a system, devoid of precedential force, that provides only an individual case-by-case check on excess of administrative power.[4]

This thesis contributes to the task of carving out a philosophy for the AAT's existence by demonstrating how its merits review function can be used as a vehicle to develop soft law guidance to structure the exercise of administrative discretion and thereby enhance the consistency, predictability and efficiency of decision-making. It has done so through an examination of the AAT's protection visa jurisdiction which accounts for a large proportion of its caseload and involves the making of hard decisions. If the AAT adopts the procedure proposed in this thesis to facilitate the identification of Guidance Decisions under s 420B *Migration Act*, it will take a significant step towards securing its position as the centrepiece of the Australian administrative justice system.

[4] Gabriel Fleming, 'Administrative Review and the 'Normative Goal' - Is Anybody Out There?' (2000) 28 *Federal Law Review* 61 at 86.

Bibliography

Books

Aiken, Sharon J et al *Immigration and Refugee Law* (Emond Publishing, 3rd ed, 2020)

Allars, Margaret *Introduction to Australian Administrative Law* (Butterworths, 1990)

Aronson, Mark, Matthew Groves and Greg Weeks *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017).

Arthurs, Harry W, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press, 1985)

Baldwin, Robert *Rules and Government* (Clarendon Press, 1995)

Bedford, Narelle and Robin Creyke, *Inquisitorial Process in Australian Tribunals* (Australian Institute of Judicial Administration, 2006)

Cane, Peter and Leighton McDonald, *Principles of Australian Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008)

Cane, Peter, *Administrative Tribunals and Adjudication* (Hart Publishing, 2010)

Cane, Peter, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press, 2016)

Cane, Peter, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018)

Care, Geoffrey, *Migrants and the Courts: A Century of Trial and Error?* (Ashgate, 2013)

Corlett, David, *Returning Failed Asylum Seekers From Australia, A Discussion Paper* (Printmode, 2007)

Council of Australian Tribunals (COAT) *Practice Manual for Tribunals* (5th edition, 2020)

Craig, Paul P, *Administrative Law* (Sweet & Maxwell, 8th ed, 2016)

Creyke, Robin (ed), *Tribunals in the Common Law World* (Federation Press, 2008)

Creyke, Robin, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases & Commentary* (LexisNexis Butterworths, 5th ed, 2019)

Crock, Mary and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2011)

Daly, Paul, *Understanding Administrative Law in the Common Law World* (Oxford University Press, 2021)

Davis, Kenneth Culp and John P Wilson, *Administrative Law Treatise* (2nd ed, KC Davis Publishing Co, 1979)

Davis, Kenneth Culp, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969)

Desloges, Chantal and Cathryn Sawicki, *Canadian Immigration and Refugee Law: A Practitioner's Handbook* (Emond Publishing, 3rd ed, 2020)

Dicey, Albert Venn, *Introduction to the Study of the Law of the Constitution* (MacMillan, reprint ed, 1975)

Dickinson, John, *Administrative Justice and the Supremacy of Law* (Harvard University Press, 1927)

Douglas, Roger, *Administrative Law* (Federation Press, 5th ed, 2006)

Dworkin, Ronald, *Taking Rights Seriously* (Duckworth, 2005)

Elliott, Mark and Robert Thomas, *Public Law* (Oxford University Press, 4th ed, July 2020)

Ellis, Ron, *Unjust By Design: Canada's Administrative Justice System* (UBC Press, 2013)

Evans Cameron, Hilary, *Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake* (Cambridge University Press, 2018)

Evans, Tony and Peter Hupe (eds) *Discretion and the Quest for Controlled Freedom* (Springer, 2019)

Farmer, JA, *Tribunals and Government* (Weidenfeld and Nicolson, 1974)

Finn, Chris (ed), *Sunrise or Sunset? Administrative Law in the New Millennium* (Australian Institute of Administrative Law, 2000)

Forbes, JRS, *Justice in Tribunals* (Federation Press, 5th ed, 2019)

Freckelton, Alan, *Administrative Decision-Making in Australian Migration Law* (ANU Press, 2015)

Galligan, Denis J, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, 1986)

Galligan, Denis J, *Due Process and Fair Procedures*: *A Study of Administrative Procedures* (Clarendon Press, 1997)

Ganz, Gabriele, *Quasi-legislation* (Sweet and Maxwell, 1987)

Germov, Ros and Francesca Motta, *Refugee Law in Australia* (Oxford University Press, 2003)

Gill, Nick and Anthony Good, *Asylum Determination in Europe* (Palgrave Socio-Legal Studies, 2019)

Gill, Nick et al, *Experiencing Asylum Appeal Hearings: 34 Ways to Improve Access to Justice at the First-tier Tribunal* (Public Law Project, December 2020)

Goodwin-Gill, Guy and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 4th ed, 2021)

Groves, Matthew (ed) *Modern Administrative Law in Australia* (Cambridge University Press, 2014)

Hamlin, Rebecca *Let Me Be A Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada and Australia* (Oxford University Press, 2014)

Handler, Joel F, *The Conditions of Discretion: Autonomy, Community, Bureaucracy* (Russell Sage Foundation, 1986)

Harlow, Carol and Richard Rawlings, *Law and Administration* (Cambridge University Press, 3rd ed, 2009)

Hart, HLA *The Concept of Law* (Oxford University Press, 1969)

Hathaway, James and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014)

Hawkins, Keith (ed), *The Uses of Discretion* (Clarendon Press, 1992)

Hayek, FA, *The Road to Serfdom* (University of Chicago Press, 1944)

Hertogh, Marc et al (eds), *The Oxford Handbook of Administrative Justice* (Oxford University Press, 2021)

Immigration and Refugee Board *Quality Assurance Framework for Decision-Making* (2021)

Jones, Martin and Sasha Baglay, *Refugee Law* (Irwin Law, 2007)

Kelley, Ninette and Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (University of Toronto Press, 1998)

Kneebone, Susan (ed) *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge University Press, 2009)

Kneebone, Susan (ed), *Administrative Law and the Rule of Law: Still Part of the Same Package?* (Australian Institute of Administrative Law, 1999)

Law Commission of Canada (ed) *Law and Risk* (UBC Press, 2005)

Legomsky, Stephen H, *Immigration and the Judiciary: Law and Politics in Britain and America* (Clarendon Press, 1987)

Legomsky, Stephen H, *Specialized Justice: Courts, Administrative Tribunals and a Cross-National Theory of Specialization* (Clarendon Press, 1990)

Mackey, Allan and John Barnes, *Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive - Judicial criteria and standards* (International Association of Refugee Law Judges, 2013)

Mashaw, Jerry L., *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press, 1983)

McAdam, Jane (ed), *Forced Migration, Human Rights and Security* (Hart Publishing, 2008)

Nagarajan, Vijaya, *Discourses on Discretion and the Regulatory Agency* (ANU Press, 2013)

O'Connor, Pamela *Tribunal Independence* (Australasian Institute of Judicial Administration, 2013).

Pearce, Dennis and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis, 5th ed, 2017)

Pearce, Dennis, *Administrative Appeals Tribunal* (LexisNexis, Butterworths, 5th ed, 2020)

Psihogios-Billington, Maria, *A Case for Justice: Position Paper on the Legal Process of Seeking Asylum in Australia* (Asylum Seeker Resource Centre, 2009)

Ramji-Nogales, Jaya, Andrew I. Schoenholtz and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press, 2009)

Shah, Prakesh (ed), *The Challenge of Asylum to Legal Systems* (Cavendish Publishing Ltd, 2005)

Sharpe, Jennifer, *The Administrative Appeals Tribunal and Policy Review* (Law Book Company, 1986)

Shetreet, Simon and Sophie Turenne, *Judges on Trial, The Independence and Accountability of the English Judiciary* (Cambridge University Press, 2nd ed, 2013)

Sossin, Lorne and Emily Lawrence, *Administrative Law in Practice: Principles and Advocacy* (Emond Publishing, 2018)

Staffans, Ida, *Immigration and Asylum Law and Policy in Europe: Evidence in European Asylum Procedures* (Brill Nijhoff, 2012)

Stebbings, Chantal *Legal Foundations of Tribunals in Nineteenth Century England* (Cambridge University Press, 2009)

Symes, Mark and Peter Jorro, *Immigration Appeals and Remedies Handbook* (Bloomsbury Publishing, 2nd ed, 2021)

Thomas, Cheryl and Hazel Genn *Understanding Tribunal Decision-making: A Foundational Empirical Study* (Nuffield Foundation, 2013)

Thomas, Robert and Joe Tomlinson, *Current issues in administrative justice: Examining administrative review, better initial decisions, and tribunal reform* (December 2016)

Thomas, Robert and Joe Tomlinson, *How Immigration Judicial Review Works* (UK Constitutional Law Association, 2019)

Thomas, Robert and Joe Tomlinson, *Immigration Judicial Reviews: An Empirical Study* (Nuffield Foundation, 2019)

Thomas, Robert, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart Publishing, 2011)

Trachtman, Joel P., *The Future of International Law: Global Government* (Cambridge University Press, 2013)

Tsangarides, Natasha *The Refugee Roulette: The Role of Country Information in Refugee Status Determination* (Immigration Advisory Service, 2010)

United Nations Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR, 2019)

Wade, HWR and Christopher Forsyth, *Administrative Law* (Oxford University Press, 11th ed, 2014)

Weeks, Greg, Janina Boughey and Ellen Rock, *Government Liability: Principles and Remedies* (Lexis Nexis, Butterworths, 2019)

Weeks, Greg, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016)

Yeo, Colin (ed) *Country Guideline Cases: Benign and Practical?* (Immigration Advisory Service, (Immigration Advisory Service, 2005)

Book chapters

Anker, Deborah, 'Regional Refugee Regimes: North America' in Cathryn Costello, Michelle Foster and Jane McAdam (eds) *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021)

Ansari, Sas and Lorne Sossin, 'Legitimate Expectations in Canada: Soft Law and Tax Administration' in Matthew Groves and Greg Weeks (eds), Legitimate Expectations in the Common Law World (Hart Publishing, 2017) 293

Bacon, Rachel, 'Are the Babies Being Thrown Out with the Bathwater? Retaining the Benefits of Specialist Tribunals within the ART' in Chris Finn (ed), *Sunrise or Sunset? Administrative Law in the New Millennium* (Australian Institute of Administrative Law, 2000)

Baldwin, Robert, 'Governing with Rules: the Developing Agenda' in Genevra Richardson and Hazel Genn (eds), *Administrative Law and Government Action* (Oxford University Press, 1994)

Bix, Brian 'Waismann, Wittgenstein, Hart, and Beyond: The Developing Idea of 'Open Texture' of Language and Law' in Dejan Makovec and Stewart Shapiro (eds), *Friedrich Waismann: History of Analytic Philosophy* (Palgrave Macmillan, 2019)

Blair, Peter, 'Comment: An Inside View of the Role of the Refugee Review Tribunal' in Susan Kneebone (ed), *Administrative Law and the Rule of Law: Still Part of the Same Package?* (Australian Institute of Administrative Law, 1999)

Blake, CG 'Judicial Review, Second Tier Tribunals and Legality' in Martin Partington (ed), *The Leggatt Review of Tribunals: Academic Seminar Papers* (University of Bristol, Faculty of Law, Working Paper Series No 3, 2001)

Bryden, Philip, 'How to Achieve Tribunal Independence: A Canadian Perspective' in Robin Creyke (ed), *Tribunals in the Common Law World* (The Federation Press, 2008)

Burson, Bruce, 'Refugee Status Determination' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021)

Cane, Peter, 'Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals' in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Edward Elgar Publishing, 2010)

Carnwath, Lord Justice, 'Tribunal Justice: Judicial Review by Another Route' in Christopher Forsyth (ed), *Executive Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, 2010) 143

Carnwath, Lord Justice et al, 'An Overview of the Tribunal Scenes in Australia, Canada, New Zealand and the United Kingdom' in Robin Creyke (ed), *Tribunals in the Common Law World* (The Federation Press, 2008)

Cartier, Geneviève, 'Administrative Discretion: Between Exercising Power and Conducting Dialogue' in Colleen Flood and Lorne Sossin (eds), *Administrative Law in Context* (Emond Montgomery Publications, 2nd ed, 2013) 385

Creyke, Robin, 'Administrative Tribunals' in Matthew Groves and HP Lee (eds), *Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007)

Creyke, Robin, 'Where Do Tribunals Fit into the Australian System of Administration and Adjudication?' in Grant Huscroft and Michael Taggart (eds), *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (University of Toronto Press, 2008)

Creyke, Robin, 'Administrative Justice in Australia' in Michael Adler (ed), *Administrative Justice in Context* (Hart Publishing, 2010)

Creyke, Robin, 'Pragmatism v Policy: Attitude of Australian Courts and Tribunals to Inquisitorial Process' in Sasha Baglay and Laverne Jacobs (eds), *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Routledge, 2013)

Creyke, Robin, 'Tribunals and Merits Review' in Matthew Groves (ed), *Modern Administrative Law in Australia* (Cambridge University Press, 2014)

Creyke, Robin and John McMillan, 'Soft Law Versus Hard Law' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008)

Cronin, Kathryn, 'A Culture of Control: An Overview of Immigration Policy Making' in James Jupp and Marie Kabala (eds) *The Politics of Australian Immigration* (AGPS, 1993)

Fleming, Gabriel, 'Tribunal Independence in Australia' in Robin Creyke (ed), *Tribunals in the Common Law World* (The Federation Press, 2008)

Gageler, Stephen, 'Three is Plenty' in Greg Weeks and Matthew Groves (eds), *Administrative Redress In and Out of the Courts: Essays in Honour of Robyn Creyke and John McMillan* (Federation Press, 2019)

Garlick, Madeline, 'Introduction to the Credo Project' in Carolus Grütters, Elspeth Guild and Sebastiaan de Groot (eds), *Assessment of Credibility by Judges in Asylum Cases in the EU* (Wolf Legal Publishers, 2013)

Glass, Arthur, 'Subjectivity and Refugee Fact Finding' in Jane McAdam (ed), *Forced Migration, Human Rights and Security* (Hart Publishing, 2008)

Good, Anthony, '‘Witness Statements and Credibility Assessments in the British Asylum Courts' in Livia Holden (ed), *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives* (Routledge, 2011)

Good, Anthony, 'The Benefit of the Doubt in British Asylum Claims and International Cricket' in Daniela Berti, Anthony Good and Gilles Tarabout (eds), *Of Doubt and Proof: Ritual and Legal Practices of Judgment* (Ashgate Publishing, 2015)

Grant, Angus and Lorne Sossin, ‘Fairness in Context: Achieving Fairness Through Access to Administrative Justice’ in Colleen Flood and Paul Daly (eds), *Administrative Law in Context* (Emond Publishing, 2021)

Green, Andrew, 'Delegation and Consultation: How the Administrative State Functions and the Importance of Rules' in Colleen Flood and Paul Daly (eds), *Administrative Law in Context* (Emond Publishing, 4th ed, 2021)

Groves, Matthew, 'Administrative Justice Without Lawyers? Unrepresented Parties in Australian Tribunals' in Sarah Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (University of Wales Press, 2017)

Groves, Matthew, 'The Return of the (Almost) Absolute Statutory Discretion' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020)

Groves, Matthew and Greg Weeks, 'The Creation of Australian Administrative Law: The Constitution and its Judicial Gatekeepers' in Swati Jhaveri and Michael Ramsden (eds), *Judicial Review of Administrative Action Across the Common Law World Origins and Adaptation* (Cambridge University Press, 2021)

Harlow, Carol and Richard Rawlings, 'Proceduralism and Automation: Challenges to the Values of Administrative Law' in Elizabeth Fisher, Jeff King and Alison L Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press, 2020)

Harvey, Colin, 'Judging Asylum' in Prakesh Shah (ed), *The Challenge of Asylum to Legal Systems* (Cavendish Publishing Ltd, 2005)

Hawkins, Keith, 'The Use of Legal Discretion; Perspectives from Law and Social Science' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1992)

Heckman, Gerald P, 'Inquisitorial Approaches to Refugee Protection Decision-making: The Australian Experience and Possible Lessons for Canada' in Laverne Jacobs and Sasha Baglay (eds), *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Routledge, 2016)

Houle, France and Lorne Sossin, 'Tribunals and Policy-Making: From Legitimacy to Fairness' in Laverne Jacobs and Anne Mactavish (eds), *Dialogue between Courts and Tribunals: Essays in Administrative Law and Justice* 2001-2007 (Montreal: les éditions thémis, 2008)

Juss, Satvinder and Jeni Mitchell ‘Gatekeepers of asylum: UK country guidance, indiscriminate violence and internal relocation’ in Satvinder Juss (ed) *Research Handbook on International Refugee Law* (Edward Elgar, 2019)

Kirk, Linda, 'Island Nation: The Impact of International Human Rights Law on Australian Refugee Law' in David Cantor and Bruce Burson (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill Nijoff, 2016)

Kneebone, Susan, 'Is the Australian Refugee Review Tribunal "Institutionally" Biased?' in Francois Crepeau (ed), *Forced Migration and Global Processes: A View from Forced Migration Studies* (Lexington Books, 2006)

Kneebone, Susan, 'The Australian Story: Asylum Seekers Outside the Law' in Susan Kneebone (ed), *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge University Press, 2009)

Lacey, Nicola, 'The Jurisprudence of Discretion' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1992) 366

Lawrance, Benjamin N and Gayla Ruffer, 'Introduction: Witness to the Persecution? Expertise, Testimony, and Consistency in Asylum Adjudication' in Benjamin Lawrance and Gayla Ruffer (eds), *Adjudicating Refugee and Asylum Status: The Role of Witness, Expertise, and Testimony* (Cambridge University Press, 2015)

Legomsky, Stephen H 'Refugees, Asylum Seekers and the Rule of Law in the USA' in Susan Kneebone (ed), *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge University Press, 2009)

Legomsky, Stephen H, 'Learning to Live with Unequal Justice: Asylum and the Limits to Consistency' in Jaya Ramji-Nogales, Andrew I Schoenholtz and Philip G Schrag, (ed), *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press, 2009)

Liodden, Tone Maia, 'Making the Right Decision: Justice in the Asylum Bureaucracy in Norway' in Nick Gill and Anthony Good (eds), *Asylum Determination in Europe* (Palgrave Socio-Legal Studies, 2019)

Macklin, Audrey, 'Truth and Consequences: Credibility Determination in the Refugee Context' in *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (International Association of Refugee Law Judges, 1999)

Macklin, Audrey, 'Asylum and the Rule of Law in Canada: Hearing the Other (Side)' in Susan Kneebone (ed), *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge University Press, 2009)

Macklin, Audrey, 'Refugee Roulette in the Canadian Casino' in Jaya Ramji-Nogales, Andrew I. Schoenholtz and Philip G. Schrag (eds), *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press, 2009)

Macklin, Audrey, 'A Safe Country to Emulate? Canada and the European Refugee' in Hélène Lambert, Jane McAdam and Maryellen Fullerton (eds), *The Global Reach of European Law* (Cambridge University Press, 2013)

MacNaughton, Heather, 'Future Directions for Administrative Tribunals: Canadian Administrative Justice - Where Do We Go From Here?' in Robin Creyke (ed), *Tribunals in the Common Law World* (Federation Press, 2008)

Mascini, Peter, 'Discretion from a Legal Perspective' in Tony Evans and Peter Hupe (eds), *Discretion and the Quest for Controlled Freedom* (Springer, 2019) 121

McMillan, John, 'Administrative Tribunals in Australia - Future Directions' in Robin Creyke (ed), *Tribunals in the Common Law World* (Federation Press, 2008)

McNee, Bettie, 'Independence and Appointment to Commonwealth Tribunals' in Chris Finn (ed), *Sunrise or Sunset? Administrative Law in the New Millennium* (Australian Institute of Administrative Law, 2000)

Morris, Stuart, 'Tribunals and Policy' in Robin Creyke (ed), *Tribunals in the Common Law World* (Federation Press, 2008)

Nicholson, RD, 'Better Decisions: Commonwealth Administrative Review at the Crossroads' in John McMillan (ed), The AAT — Twenty Years Forward (Australian Institute of Administrative Law, 1998)

Noll, Gregor, 'Introduction: Re-Mapping Evidentiary Assessment in Asylum Procedures' in Gregor Noll (ed), *Proof, Evidentiary assessment and Credibility in Asylum Procedures* (Martinus Nijhoff Publishers, 2005)

Noll, Gregor, 'Credibility, Reliability and Evidential Assessment' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021)

O'Connor, the Hon. Justice Deidre F., 'Merits Review in the New Millennium' in Chris Finn (ed), *Sunrise or Sunset? Administrative Law in the New Millennium* (Australian Institute of Administrative Law, 2000)

Partington, Martin, 'Rules and discretion in British social security law' in Franz Gamillsheg (ed), *In Memoriam Sir Otto Kahn Freund* (Stevens, 1980)

Preston, Brian, 'The Role of Courts in Relation to Adaptation to Climate Change' in Tim Bonyhady, Andrew Macintosh and Jan Mcdonald (eds), *Adaptation to Climate Change: Law and Policy* (Federation Press, 2010)

Rawlings, Richard, 'Soft Law Never Dies' in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015)

Richards, Melinda, 'Accessibility, Merits Review and Self-represented Litigants' in Debra Mortimer (ed), *Administrative Justice and its Availability* (Federation Press, 2015)

Robertson, Alan, 'Is Judicial Review Qualitative?' in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance: Process and Substance* (Hart Publishing, Bloomsbury Collections, 2016)

Robertson, Alan, 'The Federal Court and Administrative Law: How Does the Court Deal with Findings of Fact on Judicial Review?' in Pauline Ridge and James Stellios (eds) *The Federal Court's Contribution to Australian Law: Past, Present and Future* (Federation Press, 2018)

Rundle, Kristen, 'Administrative discretion and governing relationships: Situating procedural fairness', Procedural Justice and Relational Theory: Empirical, Philosophical, and Legal Perspectives' in Denise Meyerson, Catriona Mackenzie and Therese MacDermott (eds), *Procedural Justice and Relational Theory: Empirical, Philosophical, and Legal Perspectives* (Routledge, 2020)

Schneider, Carl E, 'Discretion and Rules A Lawyer's View' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1992)

Selway, Bradley, 'Commentary: The Question of Independence' in Chris Finn (ed), *Sunrise or Sunset? Administrative Law in the New Millennium* (Australian Institute of Administrative Law, 2000)

Simeon, James C., 'How Other Countries Do It – Canada The Evolution and Development of the Refugee Status Determination System in Canada and the Balanced Refugee Reform Act' in Geoffrey Care (ed), *Migrants and the Courts: A Century of Trial and Error?* (Routledge, 2013)

Sossin, Lorne, 'The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada' in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact* (Cambridge University Press, 2004)

Stelkens, Ulrich and Agnė Andrijauskaitė 'Sources and Content of the Pan-European General Principles of Good Administration' in Ulrich Stelkens and Agnė Andrijauskaitė (eds) *Good Administration and the Council of Europe: Law, Principles, and Effectiveness* (Oxford University Press, 2020)

Thomas, Robert, 'Asylum Appeals: The Challenge of Asylum to the British Legal System' in Prakesh Shah (ed), *The Challenge of Asylum to Legal Systems* (Cavendish Publishing Ltd, 2005)

Thomas, Robert, 'Refugee Roulette: A UK Perspective' in Jaya Ramji-Nogales, Andrew I. Schoenholtz and Philip G. Schrag (eds), *Refugee Roulette: Disparaties in Asylum Adjudication and Proposals for Reform* (New York University Press, 2009)

Thomas, Robert 'Current Developments in UK Tribunals: Challenges for Administrative Justice' in Sarah Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (University of Wales Press, 2017)

Thomas, Robert, 'From 'Adversarial v Inquisitorial' to 'Active, Enabling and Investigative': Developments in UK Administrative Tribunals' in Laverne Jacobs and Sasha Baglay (eds), *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Ashgate, 2013)

Weeks, Greg, 'Attacks on Integrity Offices: A Separation of Powers Riddle' in Greg Weeks and Matthew Groves (eds), *Administrative Redress In and Out of the Courts: Essays in Honour of Robyn Creyke and John McMillan* (Federation Press, 2019) 25

Wilson Stark, Shona, 'Non-fettering, Legitimate Expectations and Consistency of Policy: Separate Compartments or Single Principle?' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart Publishing, 2020)

Yeo, Colin, 'Certainty, consistency and justice' in Colin Yeo (ed), *Country Guideline Cases: Benign and Practical?* (Immigration Advisory Service, 2005)

Zahle, H, 'Competing Patterns for Evidentiary Assessments' in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff, 2005)

Journal Articles

Allars, Margaret, 'The Nature of Merits Review: A Bold Vision Realised in the Administrative Appeals Tribunal' (2013) 41 *Federal Law Review* 197

Allison, J.W.F., 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' (1994) 53(2) *Cambridge Law Journal* 367

Anker, Deborah E., 'Determining Asylum Claims in the United States - Summary Report of an Empirical Study of the Adjudication of Claims before the Immigration Court' (1990) 2 *International Journal of Refugee Law* 252

Anker, Deborah E 'Determining Asylum Claims in the United States: An Empirical Case Study' (1992) 19 *New York University Journal of Law and Social Change* 433

Appleby, Gabrielle, Horizontal Accountability: the Rights-Protective Promise and Fragility of Executive Integrity Institutions' (2017) 23 *Australian Journal of Human Rights* 168

Allison, JWF, 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' (1994) 53(2) *Cambridge Law Journal* 367

Aronson, Mark, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1

Arthurs, Harry W, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17 *Osgoode Hall Law Journal* 1

Asimnow, Jeffrey and Michael Lubbers, 'The Merits of 'Merits Review': A Comparative Look at the Australian Administrative Appeals Tribunal' (2011) 67 *AIAL Forum* 58

Avery, Christopher, 'Refugee Status Decision Making: The System of Ten Countries' (1983) 19 *Stanford Journal of International Law* 235

Baldwin, Robert and Keith Hawkins, 'Discretionary Justice: Davis Reconsidered' [1984] *Public Law* 570

Baldwin, Robert and J Houghton, 'Circular Arguments: The Status and Legitimacy of Administrative Rules' [1986] *Public Law* 239

Barnes, John, 'Expert Evidence—The Judicial Perspective in Asylum and Human Rights Appeals' (2004) 16 *International Journal of Refugee Law* 349

Barsky, Robert F, 'The Interpreter and the Canadian Convention Refugee Hearing: Crossing the Potentially Life-threatening Boundaries Between 'coccode-e-eh,' 'cluck-cluck,' and 'cot-cot-cot'' ' (1993) 6(2) *Traduction, Terminologie, Rédaction* 131

Bates, Emily, Jennifer Bond and David Wiseman, 'Troubling Signs: Mapping Access to Justice in Canada as Refugee System Reform' (2015-16) 47 *Ottawa Law Review* 1

Bayne, Peter, 'The Proposed Administrative Review Tribunal: Is there a Silver Lining in the Dark Cloud?' (2000) 7 *Australian Journal of Administrative Law* 86

Bennett, David, 'Balancing Judicial Review and Merits Review' (2000) 53 *Administrative Review* 3

Bennett, Mark, 'The Rule of Law Means Literally What it Says: The Rule of Law' (2007) 32 *Australian Journal of Legal Philosophy* 90

Bianku, Ledi, 'Roundtable Discussion with the IARLJ, CJEU and European Court of Human Rights on Leading Asylum Cases' (2013) 25(2) *International Journal of Refugee Law* 382

Billings, P, 'A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims' (2000) 52 *Administrative Law Review* 253

Bingham, Lord, 'The Rule of Law' (2007) 66(1) *Cambridge Law Journal* 67

Blake, Nicholas, 'Luxembourg, Strasbourg and the National Court: The Emergence of a Country Guidance System for Refugee and Human Rights Protection' (2013) 25(2) *International Journal of Refugee Law* 349.

Blayden, Lynsey, 'Book Review - 'Let Me Be A Refugee': Administrative Justice and the politics of Asylum in the United States, Canada and Australia (2015) 23 *Australian Journal of Administrative Law* 56

Blunn, AS, 'Administrative Decision-Making: An Insider Tells' (2003) 37 *AIAL Forum* 35

Bonisteel, Jacqueline, 'Ministerial Influence at the Canadian Immigration and Refugee Board: The Case for Institutional Bias' (2010) 27(1) *Refuge* 103

Bostock, Chantal, 'The Effect of Ministerial Directions on Tribunal Independence' (2011) 66 *AIAL Forum* 33

Bradley, A.W., 'Administrative Justice: A Developing Human Right' (1995) 1(3) *European Public Law* 347

Brennan, F.G, 'Comment: The Anatomy of an Administrative Decision' (1980) *Sydney Law Review* 1

Britten-Jones, Peter, 'The Administrative Appeals Tribunal: Why are we here?' (2021) 102 *AIAL Forum* 67

Buck, Trevor, 'Precedent in Tribunals and the Development of Principles' (2006) 25 *Civil Justice Quarterly* 458

Byrne, Rosemary, 'Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals'' (2007) 19 *International Journal of Refugee Law* 609

Cane, Peter, 'Merits Review and Judicial Review - The AAT as Trojan Horse' (2000) 28(2) *Federal Law Review* 213

Cane, Peter, 'Judicial Review in the Age of Tribunals' [2009] *Public Law* 479

Cane, Peter, 'Outsourcing Administrative Adjudication' (2010) 126 *Law Quarterly Review* 343

Care, Geoffrey, 'Life After Refusal to Enter: Reflections of an Immigration Judge' (2008) 25(2) *Refuge* 195

Carnwath, Lord Justice, 'Tribunals under the Constitutional Reform Act' (2006) 13 *Journal of Social Security Law* 58

Carnwath, Robert, 'Tribunal Justice - A New Start' [2009] *Public Law* 48

Cartier, Geneviève, 'Administrative Discretion and the Spirit of Legality: From Theory to Practice' (2009) 24(3) *Canadian Journal of Law and Society* 214

Chiam, Christopher, 'Characterising Migration Directions as Legislative Instruments: Implications for Judicial Review' (2018) 24 *Australian Journal of Administrative Law* 234

Christou, Alison, 'The 'Good' Tribunal Member - An Aretaic Approach to Administrative Tribunal Practice' (2009) 28(2) *The University of Queensland Law Journal* 339

Christou, Alison, 'Issues of Mandate and Practice for Non-Adversarial Adjudication' (2011) 20 *Journal of Judicial Administration* 178

Clark, David, 'Informal Policy and Administrative Law' (1997) 12 *AIAL Forum* 30

Coffey, Guy, 'The Credibility of Credibility Evidence at the Refugee Review Tribunal' (2003) 15 *International Journal of Refugee Law* 377

Colaiacovo, Innessa, 'Not Just the Facts: Adjudicator Bias and Decisions of the Immigration and Refugee Board of Canada (2006-2011)' (2013) 1(4) *Journal on Migration and Human Security* 122

Colborne, Craig, 'The Refugee Review Tribunal: A Personal View' (1999) 75 *Reform* 27

Crepeau, Francois and Delphine Nakache, 'Critical Spaces in the Canadian Refugee Determination System 1989-2002' (2008) *International Journal of Refugee Law* 50

Creyke, Robin and John McMillan, 'Executive Perceptions of Administrative Law – An Empirical Study' (2002) 9 *Australian Journal of Administrative Law* 163

Creyke, Robin, 'The Special Place of Tribunals in the System of Justice: How Can Tribunals Make a Difference?' (2004) 15 *Public Law Review* 220

Creyke, Robin, ''Soft Law' and Administrative Law: A New Challenge' (2010) 61 *AIAL Forum* 15

Creyke, Robin and Matthew Groves, 'Administrative Law Evolution: An Academic Perspective' (2010) 59 *Administrative Review* 20

Creyke, Robin, 'Tribunals – "Carving Out the Philosophy of Their Existence": The Challenge for the 21st Century' (2012) 71 *AIAL Forum* 19

Creyke, Robin, 'Integrity in Tribunals' (2013) 32 *University of Queensland Law Journal* 45

Creyke, Robin, 'Tribunal Amalgamation 2015: An Opportunity Lost? ' (2016) 84 *AIAL Forum* 54

Creyke, Robin, 'Judicial Review and Merits Review: Are the Boundaries Being Eroded'?' (2017) 45(4) *Federal Law Review* 627

Creyke, Robin, 'Book Review: Soft Law and Public Authorities: Remedies and Reform' (2017) 24 *Australian Journal of Administrative Law* 63

Creyke, Robin, 'Australian Tribunals: Impact of Amalgamation' (2020) 26 *Australian Journal of Administrative Law* 206

Crock, Mary, 'Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law' (2004) 26 *Sydney Law Review* 51

Crock, Mary and Hannah Martin, 'Refugee Rights and the Merits of Appeals' (2013) 31(1) *University of Queensland Law Journal* 137

Curtis, Lindsay, 'Crossing the Frontiers Between Law and Administration' (1989) 58 *Canberra Bulletin of Public Administration* 55

Daly, Stephen, 'The Rule of (Soft) Law' (2021) 32(1) *King's Law Journal* 3

Dauvergne, Catherine and Jenni Millbank, 'Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers' (2003) 31 *Federal Law Review* 299

Dawson, Paul, 'Tenure and Tribunal Membership' (1997) 4 *Australian Journal of Administrative Law* 140

Derrington, Roger, 'Migrating towards a Principled Approach to Reviewing Jurisdictional Facts' (2020) 27 *Australian Journal of Administrative Law* 70

Diver, Colin, 'Policymaking Paradigms in Administrative Law' (1981) 95 *Harvard Law Review* 393

Dörig, Harald, 'The Handling of Leading Asylum Cases by National Courts' Roundtable Discussion with the IARLJ, CJEU and European Court of Human Rights on Leading Asylum Cases (2013) 25(2) *International Journal of Refugee Law* 373.

Dowd, Rebecca et al, 'Filling Gaps and Verifying Facts: Assumptions and Credibility Assessment in the Australian Refugee Review Tribunal' (2018) 30(1) *International Journal of Refugee Law* 71

Driver, Rolf and Aimee Bradbury, 'Refugee Status Determination in Australia and New Zealand' (2012) 8 *New Zealand Law Journal* 283

Edgar, Andrew, 'Tribunals and Administrative Policies: Does the High or Low Policy Distinction Help?' (2009) 16 *Australian Journal of Administrative Law* 143

Edgar, Andrew, 'Book Review: Peter Cane, Administrative Tribunals and Adjudication' [2010] Public Law 639

Elliott, Mark and Robert Thomas, 'Tribunal Justice and Proportionate Dispute Resolution' (2012) 71(2) *Cambridge Law Journal* 297

Ellis, Ronald, 'The Corporate Responsibility of Tribunal Members' (2009) 22 *Canadian Journal of Administrative Law and Practice* 1.

Evans Cameron, Hilary, 'Refugee Status Determinations and the Limits of Memory' (2019) 22(4) *International Journal of Refugee Law* 469

Evans Cameron, Hilary, 'The Battle for the Wrong Mistake: Risk Salience in Canadian Refugee Status Decision-making' (2019) 42(1) *Dalhousie Law Journal* 1

Eyer, Katie R, 'Administrative Adjudication and the Rule of Law' (2008) 60(3) *Administrative Law Review* 648

Fathalipour, Nora, 'Book Review: Geoffrey Care, Migrants and the Courts: A Century of Trial and Error' (2014) 46(2) *Journal of Legal Pluralism and Unofficial Law* 276

Finlay, Bryan and Richard Ogden, 'Consistency in Tribunal Decision-Making' (2012) 25(3) *Canadian Journal of Administrative Law and Practice* 277

Fleming, Gabriel, 'A Tough Call: Making Immigration Decisions' (1999) 75 *Reform* 24

Fleming, Gabriel, 'Review of Migration Decision-Making: Rival Goals and Values' (1999) 10 *Public Law Review* 131

Fleming, Gabriel, 'The Proof of the Pudding is in the Eating: Questions about the Independence of Administrative Tribunals' (1999) 7 *Australian Journal of Administrative Law* 33

Fleming, Gabriel, 'Administrative Review and the 'Normative Goal' - Is Anybody Out There?' (2000) 28 *Federal Law Review* 61

Foster, Michelle, 'Book Review 'Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform'' (2012) 24(1) *International Journal of Refugee Law* 168

Freckelton, Alan, Administrative Decision-Making in Australian Migration Law (ANU Press, 2015)

Fuller, Lon L., 'The Forms and Limits of Adjudication' (1978-1979) 92 *Harvard Law Review* 353

Gageler, Stephen, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92

Gallagher, Stephen, 'Canada's Dysfunctional Refugee Determination System: Canadian Asylum Policy from a Comparative Perspective' (2003) 78 *Public Policy Sources* 3

Galpin, David, 'Planning Principles: Policy-Making by the Land and Environment Court' (2005) 11(2) *Local Government Law Journal* 94

Gibb, Robert and Anthony Good, 'Do the Facts Speak for Themselves? Country of Origin Information in French and British Refugee Status Determination Procedures' (2013) 25(2) *International Journal of Refugee Law* 291

Gifford, Daniel J, 'Need Like Cases Be Decided Alike? Mashaw's Bureaucratic Justice' (1983) 8(4) *American Bar Foundation Research Journal* 985

Gifford, Daniel J, 'Decisions, Decisional Referents and Administrative Justice' (1972) 37 *Law and Contemporary Problems* 3

Gill, Nick et al, 'The Tribunal Atmosphere: On qualitative barriers to access to justice' (2021) 119 *Geoforum* 61

Gleeson, Murray, 'Outcome, Process and the Rule of Law' (2006) 65(3) *Australian Journal of Public Administration* 5

Goodin, Robert, 'Welfare Rights and Discretion' (1986) 6 *Oxford Journal of Legal Studies* 232

Gorlick, Brian, 'Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status' (2003) 15 *International Journal of Refugee Law* 357

Grant, Angus and Sean Rehaag, 'Unappealing: An Assessment of the Limits on Appeal Rights in Canada's New Refugee Determination System' (2016) 49(1) *University of British Columbia Law Review* 203

Greenberg, Daniel, 'Dangerous Trends in Modern Legislation' (2015) *Public Law* 96

Groves, Matthew, 'The Duty to Inquire in Tribunal Proceedings' (2011) 33 *Sydney Law Review* 177

Groves, Matthew, 'Administrative Justice in Australian Administrative Law' (2011) 66 *AIAL Forum* 18

Groves, Matthew, 'Book Review: Robert Thomas, Administrative Justice and Asylum Appeals' (2011) 19 *Australian Journal of Administrative Law* 52

Groves, Matthew, 'The Duty to Inquire in Tribunal Proceedings' (2011) 33 *Sydney Law Review* 177

Groves, Matthew and Greg Weeks, 'The Ongoing Quest to Define a Duty of Consistency' (2020) 27 *Australian Journal of Administrative Law* 3

Haines, Roger, 'Country Information and Evidence Assessment in New Zealand' in Satvinder S Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate Publishing Limited, 2013)

Hamlin, Rebecca, 'International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada and Australia' (2012) 37(4) *Law & Social Inquiry* 933

Harlow, Carol, 'Law and public administration: convergence and symbiosis' (2005) 79(2) *International Review of Administrative Sciences* 279

Heckman, Gerald P, 'Securing Procedural Safeguards for Asylum Seekers in Canadian Law: An Expanding Role for International Human Rights Law' (2003) 15(2) *International Journal of Refugee Law* 212

Heckman, Gerald P, 'Canada's Refugee Status Determination System and the International Norm of Independence' (2008) 25(2) *Refuge* 79

Heckman, Gerald P and Lorne Sossin, 'How Do Canadian Administrative Law Protections Measure Up to International Human Rights Standards? The Case of Independence' (2005) 50 *McGill Law Journal* 193

Herlihy, Jane and Stuart Turner, 'The Psychology of Seeking Protection' (2009) 21(2) *International Journal of Refugee Law* 171

Herlihy, Jane and Stuart Turner, 'Untested Assumptions: Psychological Research and Credibility Assessment in Legal Decision-Making' (2015) 6 *European Journal of Psychotraumatology* 27380

Houle, France, 'The Credibility and Authoritativeness of Documentary Information in Determining Refugee Status: The Canadian Experience' (1994) 6(1) *International Journal of Refugee Law* 6

Houle, France, 'Thamotharem and Guideline 7 of the IRB: Rethinking the Scope of the Fettering of Discretion Doctrine' (2008) 25(2) *Refuge* 103

Houle, France and Lorne Sossin, 'Tribunals and Guidelines: Exploring the Relationship between Fairness and Legitimacy in Administrative Decision-Making' (2006) 49(3) *Canadian Public Administration* 282

Hunter, Jill et al, 'Asylum Adjudication, Mental Health and Credibility Evaluation' (2013) 41 *Federal Law Review* 471

Jeater, Diana, 'Shifting the Expert Goal Posts: The Influence of Country Guidance Cases in the Developments and Use of Expert Evidence in Zimbabwe Asylum Cases in the UK' (2012) 26(2) *Journal of Immigration, Asylum and Nationality Law* 190

Johnson, Emily, 'Should 'Inconsistency' of Administrative Decisions Give Rise to Judicial Review' (2013) 72 *AIAL Forum* 50

Jones, Martin and France Houle, 'Building a Better Refugee Status Determination System' (2008) 25(2) *Refuge* 3

Joshi, Makesh D, 'The use of country guidance case law in refugee recognition outside the UK' (2020) 65 *Forced Migration Review* 32

Jowell, Jeffrey, 'The Legal Control of Administrative Discretion' (1973) *Public Law* 178

Jowell, Jeffrey, 'Is Equality a Constitutional Principle?' (1994) *Current Legal Problems* 1

Kagan, Michael, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2003) 17 *George Immigration Law Journal* 367

Kairys, David, 'Searching for the Rule of Law' (2003) 36(2) *Suffolk University Law Review* 307

Kalin, Walter, 'Troubled Communication: Cross Cultural Misunderstandings in the Asylum Hearing' (1986) 20(2) *International Migration Review* 230

Kent, Greenwalt., 'Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges' (1975) *75 Columbia Law Review* 359

Kerns, Susan, 'Country Conditions Documentation in US Asylum Cases: Leveling the Evidentiary Playing Field' (2000) *Indiana Journal of Global Legal Studies* 197

Kerr, Hon. Justice Duncan, 'The Intersection of Merits and Judical Review: Looking Forward' (2013) 32(1) *University of Queensland Law Journal* 9

Kirby, Michael, 'Administrative Review: Beyond the Frontier Marked "Policy – Lawyers Keep Out"' (1981) 12 *Federal Law Review* 121

Kirk, Linda, 'Improving Consistency in Protection Status Decisions in Australia: Looking to the United Kingdom for "Guidance"?' (2017) 31(2) *Journal of Immigration Asylum and Nationality Law* 151

Kneebone, Susan, 'The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role?' (1998) 5 *Australian Journal of Administrative Law* 78

Kneebone, Susan, 'Believable Tales: Credibility and Proving a 'Well-founded Fear of Persecution'' (2003) 25(3) *Migration Action* 4

Laurie, Emma, 'Assessing the Upper Tribunal's Potential to Deliver Administrative Justice' [2012] *Public Law* 288

Legomsky, Stephen H 'Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process' (1985-1986) 71 *Iowa Law Review* 1297

Legomsky, Stephen H 'Political Asylum and the Theory of Judicial Review' (1989) 73 *Minnesota Law Review* 1205

Legomsky, Stephen H., 'Refugees, Administrative Tribunals, and Real Independence: Dangers Ahead for Australia' (1998) 76(1) *Washington University Law Quarterly* 243

Legomsky, Stephen H., 'An Asylum Seeker's Bill of Rights in a Non-Utopian World' (1999-2000) 14 *George Immigration Law Journal* 619

Legomsky, Stephen H., 'Deportation and the War on Independence' (2006) 91 *Cornell Law Review* 369

Legomsky, Stephen H., 'Learning to Live with Unequal Justice: Asylum and the Limits to Consistency' (2007-2008) 60 *Stanford Law Review* 413

Legomsky, Stephen H., 'Restructuring Immigration Adjudication' (2010) 59 *Duke Law Journal* 1635

Liew, Jamie Chai Yun, 'The Good, the Bad and the Ugly: A Preliminary Assessment of Whether the Vavilov Framework Adequately Addresses Concerns of Marginalized Communities in the Immigration Law Context' (2020) 98(2) *The Canadian Bar Review* 398

Lindsay, Robert, 'Yes Minister? The 2012 Migration Amendments: Whence Have We Come and Whither Are We Going?' (2013) 75 *Australian Institute of Administrative Law Forum* 63

Liodden, Tone Maia, 'Who is a Refugee? Uncertainty and Discretion in Asylum Decisions' (2020) 32(4) *International Journal of Refugee Law* 645

Liodden, Tone Maia, 'The Map and the Territory: The Use of Country Information in Asylum Assessments' (2021) *International Migration Review* 1

Lucy, Juliet, 'Merits Review and the 21st Century Tribunal' (2017) 24 *Australian Journal of Administrative Law* 121

Luker, Trish, 'Decision Making Conditioned by Radical Uncertainty: Credibility Assessment at the Australian Refugee Review Tribunal' (2013) 25(3) *International Journal of Refugee Law* 502

Macklin, Audrey, 'Coming between Law and the State: Church Sanctuary for Non-Citizens' (2005) 49 *Nexus* 49

MacLauchlan, H. Wade, 'Some Problems with Judicial Review of Administrative Inconsistency' (1984) 8 *Dalhousie Law Journal* 435

Martin, David A., 'Reforming Asylum Adjudication: On Navigating the Coast of Bohemia' (1990) 138(5) *University of Pennsylvania Law Review* 1247

Mashaw, Jerry L., 'Conflict and Compromise Among Models of Administrative Justice' (1981) 2 *Duke Law Journal* 181

McCabe, Bernard, 'Perspectives on Economy and Efficiency In Tribunal Decision-Making' (2016) 85 *AIAL Forum* 40

McDonald-Norman, Douglas, 'Young's "Fact finding made easy" in Refugee Law: A Former Practitioner's Perspective' (2018) 92 *Australian Law Journal* 349

McHarg, Aileen, 'Administrative Discretion, Administrative Rule-making, and Judicial Review' (2017) 70 *Current Legal Problems* 267

McKenzie, Fiona, 'The Immigration Review Tribunal and Government Policy: To follow or not to follow?' (1997) 4 *Australian Journal of Administrative Law* 117

McMillan, John, 'Re-thinking the Separation of Powers' (2010) 38 *Federal Law Review* 423

Megarry, Robert E, 'Administrative Quasi-Legislation' (1944) 60 *Law Quarterly Review* 125

Millbank, Jenni, '"The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Decisions' (2009) 21 *International Journal of Refugee Law* 1

Millbank, Jenni, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 *International Journal of Human Rights* 391

Mnookin, Robert, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) *Law and Contemporary Problems* 226

Ng, Yee-Fui, 'Tribunal Independence in an Age of Migration Control' (2012) 19 *Australian Journal of Administrative Law* 203

Norman, Steve, 'Assessing the Credibility of Refugee Applicants: A Judicial Perspective' (2007) 19 *International Journal of Refugee Law* 273

O'Brien, Denis, 'Review of the Merits of Migration and Refugee Decisions - Reflections on the Operation of the Migration Review Tribunal and Refugee Review Tribunal in an Interconnected World' (2013) 32(1) *University of Queensland Law Journal* 123

O'Connor, the Hon. Justice Deidre F, 'Effective Administrative Review: An Analysis of Two-Tier Review' (1993) 1 *Australian Journal of Administrative Law* 4

O'Callaghan, Kerrie and Michelle Howard, 'Promoting Administrative Justice: The Correct and Preferable Decision and the Role of Government Policy in the Determination' (2013) 32 *University of Queensland Law Journal* 169

Pearson, Esther, 'Finding Fairness in Fact Finding: Material Mistake of Fact Review in Asylum Cases' (2019) 26 *Australian Journal of Administrative Law* 100

Pearson, Linda, 'Policy, Principles and Guidance: Tribunal Rule-Making' (2012) 23(1) *Public Law Review* 16

Perry, Adam, 'The Flexibility Rule in Administrative Law' (2017) 76 *Cambridge Law Journal* 375

Pettitt, Jo, Laurel Townhead and Stephanie Huber, 'The Use of COI in the Refugee Status Determination Process in the UK: Looking Back, Reaching Forward' (2008) 25(2) *Refuge* 182

Pratt, Anna and Lorne Sossin, 'A Brief Introduction of the Puzzle of Discretion' (2009) 24(3) *Canadian Journal of Law and Society* 301

Radin, Margaret J., 'Reconsidering the Rule of Law' (1989) 69(4) *Boston University Law Review* 781

Ramji-Nogales, Jaya, Andrew I. Schoenholtz and Philip G. Schrag, 'Refugee Roulette: Disparities in Asylum Adjudication' (2007) 60(2) *Stanford Law Review* 295

Rehaag, Sean, 'Troubling Patterns in Canadian Refugee Adjudication' (2008) 39(2) *Ottawa Law Review* 335

Rehaag, Sean, 'Do Women Refugee Judges Really Make a Difference? An Empirical Analysis of Gender and Outcomes in Canadian Refugee Determinations' (2011) 23 *Canadian Journal of Women and the Law* 627

Rehaag, Sean, 'The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment' (2011) 49 *Osgoode Hall Law Journal* 71

Rehaag, Sean, 'Judicial Review of Refugee Determinations: The Luck of the Draw?' (2012) 38 *Queen's Law Journal* 1

Rehaag, Sean, Julianna Beaudoin and Jennifer Danch, 'No Refuge: Hungarian Romani Refugee Claimants in Canada' (2015) 52(3) *Osgoode Hall Law Journal* 705

Rehaag, Sean, ''I Simply do not Believe ...': A Case Study of Credibility Determinations in Canadian Refugee Adjudication' (2017) 38 *Windsor Review of Legal and Social Issues* 38

Rehaag, Sean and Hilary Evans Cameron, 'Experimenting with Credibility in Refugee Adjudication: Gaydar' (2020) 9(1) *Canadian Journal of Human Rights* 1

Reneman, Marcelle, 'Access to an Effective Remedy in European Asylum Procedures' (2008) 1(1) *Amsterdam Law Forum* 65

Robertson, Alan, 'What is "Substantive" Judicial Review? Does it Intrude on Merits Review in Administrative Decision-Making?' (2016) 85 *AIAL Forum* 24

Rottman, Andy J, Christopher J Fariss and Steven C Poe, 'The Path to Asylum in the US and the Determinants for Who Gets In and Why' (2009) 43 *International Migration Review* 3

Rousseau, Cécile et al, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-Making Process of the Canadian Immigration and Refugee Board' (2002) 15(1) *Journal of Refugee Studies* 43

Sauve, Jean-Marc, 'Introduction to the Concluding Session' Roundtable Discussion with the IARLJ, CJEU and European Court of Human Rights on Leading Asylum Cases' (2013) 2013) 25(2) *International Journal of Refugee Law* 399

Shaw, Geoffrey C, 'HLA Hart's lost essay: Discretion and the Legal Process School' (2013) *Harvard Law Review* 666

Simeon, James C., 'A Comparative Analysis of the Response of the UNHCR and Industrialiszed States to Rapidly Fluctuating Refugee Status and Asylum Applications: Lessons and Best Practices for RSD Systems Design and Administration' (2010) 22(1) *International Journal of Refugee Law* 72

Smith-Khan, Laura, 'Telling stories: Credibility and the Representation of Social Actors in Australian Asylum Appeals' (2017) 28(5) *Discourse and Society* 512

Smyth, Mark, 'Inquisitorial Adjudication: The Duty to Inquire in Merits Review Tribunals' (2010) 34 *Melbourne University Law Review* 230

Sossin, Lorne, 'Discretion Unbound: Reconciling the Charter and Soft Law' (2002) 45 *Canadian Public Administration* 465

Sossin, Lorne and France Houle, 'Tribunals and Guidelines: Exploring the Relationships between Fairness and Legitimacy in Administrative Decision-Making' (2006) 46 *Canadian Public Administration* 283

Sossin, Lorne and Charles W Smith, 'Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government' (2003) 40 *Alberta Law Review* 867

Steyn, Karen, 'Consistency - A Principle of Public Law?' (1997) *Judicial Review* 22

Storey, Hugo, 'Briefing Note for Participants' Roundtable Discussion with the IARLJ, CJEU and European Court of Human Rights on Leading Asylum Cases' (2013) 25(2) *International Journal of Refugee Law* 328

Storey, Hugo, 'Consistency in Refugee Decision-Making: A Judicial Perspective' (2013) 32(4) *Refugee Survey Quarterly* 112

Storey, Hugo, 'Book review: Satvinder S Juss (ed), The Ashgate Research Companion to Migration Law, Theory and Policy' (2014) 26(1) *International Journal of Refugee Law* 166

Sweeney, James, 'Credibility, Proof and Refugee Law' (2009) 21 *International Journal of Refugee Law* 700

Swink, Arwen, 'Queer refuge: A review of the role of country condition analysis in asylum adjudications for members of sexual minorities' (2005) 29 *Hastings International and Comparative Law Review* 251

Taylor, Margaret H., 'Refugee Roulette in an Administrative Law Context: The Deja Vu of Decisional Disparaties in Agency Adjudication' (2007-2008) 60 *Stanford Law Review* 475

Thomas, Justice David, 'Contemporary Challeges in Merits Review: The AAT in a Changing Australia' (2019) 96 *AIAL Forum* 1

Thomas, Robert, 'Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals' (2005) 25(3) *Legal Studies* 462

Thomas, Robert, 'Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined' (2006) 8 *European Journal of Migration and Law* 79

Thomas, Robert, 'Risk, Legitimacy and Asylum Adjudication' (2007) 58(1) *Northern Ireland Legal Quarterly* 49

Thomas, Robert, 'Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom' (2008) *International Journal of Refugee Law* 489

Thomas, Robert, 'Report on a Roundtable Seminar "Asylum Adjudication and Country Guidance: Function, Operation and Future"' (2010) 22(2) *International Journal of Refugee Law* 336

Thomas, Robert, 'Book Review: Peter Cane, Administrative Tribunals and Adjudication' (2011) 70(1) *Cambridge Law Journal* 274

Thomas, Robert, 'Agency Rule-Making, Rule-Type and Immigration Administration' [2013] *Public Law* 135

Thomas, Robert, 'Administrative Justice, Better Decisions and Organisational Learning' [2015] *Public Law* 111

Thomas, Robert, 'Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis' [2015] *Public Law* 652

Thomas, Robert and Joe Tomlinson, Mapping Current Issues in Administrative Justice: Austerity and the 'More Bureaucratic Rationality' Approach" (2017) 39 *Journal of Social Welfare and Family Law* 380.

Thomas, Robert and Joe Tomlinson, 'A different tale of judicial power: administrative review as a problematic response to the judicialisation of tribunals' [2019] Public Law 537

Thomas, Robert, 'Administrative Justice and Tribunals in the United Kingdom: Developments; Procedures; and Reform' (2020) 26 *Australian Journal of Administrative Law* 255

Toal, Ronan, 'The Reporting Committee of the Upper Tribunal, Immigration and Asylum Chamber and the Citation of Authorities' (2012) 26(3) *Journal of Immigration Asylum and Nationality Law* 278

Tomkinson, Sule, 'Who are you afraid of and why? Inside the black box of refugee tribunals' (2018) 61(2) *Canadian Public Administration* 184

Tsangarides, Natasha, 'The Politics of Knowledge: An Examination of the Use of Country Information in the Asylum Determination Process' (2009) 23(3) *Journal of Immigration Asylum and Nationality Law* 252

Turk, Volker, 'Introductory Remarks' Roundtable Discussion with the IARLJ, CJEU and European Court of Human Rights on Leading Asylum Cases (2013) 25(2) *International Journal of Refugee Law* 394

Van der Slujis, Jessika, 'The Infrastructure of Normative Legitimacy in Domestic Soft Law - Sketching the Field' (2017) 62 *Scandinavian Studies in Law* 245

Vinokur, David, 'Institutional Independence and Bias in the Context of the Immigration and Refugee Board of Canada' (2015) 28 *Canadian Journal of Administrative Law and Practice* 169

Vogelaar, Femke, 'A Legal Analysis of a Crucial Element in Country Guidance Determinations: Country of Origin Information' (2019) 31(4) *International Journal of Refugee Law* 49

Weeks, Greg, 'The Use and Enforcement of Soft Law by Australian Public Authorities' (2014) 42 *Federal Law Review* 181

Weeks, Greg, 'Soft Law and Public Liability: Beyond the Separation of Powers' (2018) 32(2) *Adelaide Law Review* 303

Weeks, Greg and Linda Pearson, 'Planning and Soft Law' (2018) 24 *Australian Journal of Administrative Law* 252

West, William, 'Administrative rule-making: An old and emerging literature' (2005) 65 *Public Administration Review* 655

Wilkins, Roger and Bronwyn McGee, 'Judicial Review: A Jurisdictional Limits Model' (2013) 72 *Australian Institute of Administrative Law Forum* 20

Wilson Stark, Shona, 'Non-fettering, Legitimate Expectations and Consistency of Policy: Separate Compartments or Single Principle?' in Jason NE Varuhas and Shona Wilson Stark (eds), The Frontiers of Public Law (Hart Publishing, 2020)

Wydrzynski, Christopher J, 'Refugees and the Immigration Act' (1979) 25(1) *McGill Law Journal* 154

Zalar, Bostjan, 'Comments on the Court of Justice of the EU's Developing Case Law on Asylum' Roundtable Discussion with the IARLJ, CJEU and European Court of Human Rights on Leading Asylum Cases (2013) 25(2) *International Journal of Refugee Law* 377

Zambelli, Pia, 'Paradigm Shift: Towards a New Model for Refugee Status Determination in Canada' (2018) 51(1) *University of British Columbia Law Review* 229

Research and Working Papers

Bayne, Peter, 'Tribunals in the System of Government' (Papers on Parliament No.10, October 1990)

Chen, Daniel, Matt Dunn, Levent Sagun, and Hale Sirin, 'Early Predictability of Asylum Court Decisions' Toulouse School Economics, Working Paper, n. 17-781, March 2017

Cini, Michelle, 'From Soft Law to Hard Law? Discretion and Rules-making in the Commission's State Aid Regime' Working Paper 35, European University Institute, 2000

Daly, Paul, 'Waiting for Godot: Canadian Administrative Law in 2019' Working Paper No. 2020-20, University of Ottawa, Faculty of Law, 2 December 2019

Daly, Paul, 'The Vavilov Framework and the Future of Canadian Administrative Law' Working Paper No 2020–09, University of Ottawa, Faculty of Law, 2020

Gorlick, Brian, 'Improving decision-making in Asylum Determination' UN High Commissioner for Refugees (UNHCR) August 2005, Working Paper No.119, August 2005.

McMillan, John, 'Review of Government Policy by Administrative Tribunals' Law and Policy Papers No 9, ANU Centre for International and Public Law, 1998

Stern, Rebecca, 'Country Guidance in Asylum Cases: Approaches in the UK and Sweden' Working Paper No. 9, Refugee Law Initiative, School of Advanced Study, University of London, October 2013

Strauss, David, 'Must Like Cases Be Treated Alike?' University of Chicago Public Law & Legal Theory Working Paper No. 24, 2002.

Theses

Bacon, Rachel, *Amalgamating Tribunals: A Recipe for Optimal Reform* (PhD thesis, University of Sydney, 2004).

Bayrak, Sule, *Contextualizing Discretion: Micro-dynamics of Canada's Refugee Determination System* (PhD Thesis, University of Montreal, 2016)

Cartier, Geneviève, *Reconceiving Discretion: From Discretion as Power to Discretion as Dialogue* (SJD thesis, University of Toronto, 2004)

Fleming, Gabriel, *Rival Goals and Values in Administrative Review: A Study of Migration Decision-Making* (PhD thesis, University of Sydney, 2001)

Sage Jacobsen, Susannah, *Administrative Justice at the Australian Refugee Review Tribunal* (SJD thesis, Monash University, 2009)

Liodden, Tone Maia, *The Burdens of Discretion: Managing Uncertainty in the Asylum Bureaucracy* (PhD thesis, University of Oslo, 2016)

Vogelaar, Femke, *Country of Origin Information: The Essential Foundation for Fair and Credible Guidance for Decision-making on International Protection Needs* (PhD thesis, Vrije Universiteit Amsterdam, 2020)

Weeks, Greg, *Australian Public Authorities which Breach their Soft Law: Remedies and Suggested Reforms* (PhD thesis, University of New South Wales, 2013)

Conference Papers

Arsenault, Jean-Pierre, 'Independence and Accountability: Just How Compatible Are They?' Canadian Council of Administrative Tribunals, 16th Annual Conference, 2000

Brennan, Sir Gerard, 'The AAT — Twenty Years Forward' Administrative Appeals Tribunal Twentieth Anniversary Conference, Canberra, 1 July 1996).

Bryden, Philip, 'A Canadian Perspective on Tribunal Independence' Council of Canadian Administrative Tribunals Annual Conference, May 2007

Chitra, Murray, 'Ethics, Values and Vision: The Tribunal Community as the Guardian of its Own Integrity' Council of Canadian Administrative Tribunals 16th Annual Conference, 2000

Colbran, Stephen, 'Tribunals and Performance Criteria' Queensland State Chapter of the Council of Australasian Tribunals, 14 February 2013

Cotterell, Barry, 'Tribunals are part of the executive arm of government but as merit review tribunals they provide decision making and dispute resolution processes between the citizen and the government. What steps are required to ensure that they are truly independent of the executive arm of government?' 7th Annual AIJA Tribunals Conference, June 2004

Creyke, Robin, 'Tribunals as the Generic Face of Justice: A Challenge for the 21st Century' Council of Australasian Tribunals, 8 June 2012

Cromwell, Thomas A, 'Evolving to Meet Changing Needs: Re-examining the Purposes of Administrative Tribunals' Council of Canadian Administrative Tribunals 16th Annual Conference

Daskalova, Youliana and Heidi Sprung, 'The Research Directorate and Country of Origin Information' Immigration and Refugee Board, November 2016

French, Robert, 'The Role of Courts in Migration Law' Migration Review Tribunal and Refugee Review Tribunal Annual Members' Conference, 25 March 2011

Gaze, Beth, 'Challenges Facing Administrative Tribunals - The Complexity of Legislative Schemes and the Shrinking Space for Preferable Decision-Making - Comment on Justice Kerr's Paper' Council of Australasian Tribunals (COAT) Victoria Twilight Seminar, 18 November 2013)

Gleeson, Judith, 'Sri Lanka Country Guidance in the United Kingdom: *GJ and others (post civil-war: returnees) Sri Lanka CG*' International Association of Refugee Law Judges, Australasian Chapter, Seminar 24 March 2014

Goodman, Brian, 'Promoting Predictability and Consistency: The IRB Experience' Council of Canadian Administrative Tribunals, 27th Annual Conference, 6 June 2011

Karas, Steve, 'Should Tribunals be Required to Meet Performance Criteria and, if so, How Would they be Designed and Enforced?' Queensland State Chapter of the Council of Australasian Tribunals, 14 February 2003

Karas, Steve, 'Supporting Independence While Ensuring Consistency: Experience of the Australian Immigration Portfolio Tribunals' Council of Canadian Tribunals 4th International Conference, 2 October 2002

Kerr, Hon. Justice Duncan, 'Challenges Facing Administrative Tribunals - The Complexity of Legislative Schemes and the Shrinking Space for Preferable Decision-Making' Council of Australasian Tribunals (COAT) Victoria Twilight Seminar, 18 November 2013

Lucy, Juliet, 'Core Principles of Merits Review' Legalwise Seminar, 4 September 2013

Mason, Anthony, 'The Kerr Report of 1971: Its Continuing Significance'' Inaugural Whitmore Lecture at the Council of Australasian Tribunals NSW Chapter – Annual General Meeting, 19 September 2007

McDonald, S.A., 'How to Identify Jurisdictional Error in Asylum Cases' Justice Net CPD Seminar for Pro Bono Lawyers, 10 May 2013

McMillan, John, 'An Analysis of Reasons for Decision of the Refugee Review Tribunal' Refugee Review Tribunal Members' Annual Conference, 20 October 2000

Ng, Yee-Fui, 'Politics, Policy and Position: Does Structural Dependence Affect the Decision-Making of the Immigration Tribunals' Australian Institute of Administrative Law National Forum, 23 July 2010

O'Brien, Denis, 'The Challenges of Bringing the Tribunals within Mainstream Administrative Law' Law Council of Australia, CPD Immigration Law Conference

Ransome, Kay, 'Current Challenges for the Refugee Review Tribunal' International Association of Refugee Law Judges, Australasian Chapter Regional Conference

Showler, Peter, 'Oral statement at the Spring meeting' Spring meeting of the Canadian Council for Refugees, 2000

Unpublished papers

Bayly, John 'Common Grounds of Jurisdictional Error in Applications for Judicial Review of Decisions Made Under Part 7 of the *Migration Act 1958 (Cth)*' (16 December 2019).

Buck, Trevor Giles, 'Tribunal Reform in the UK: Precedent and Reporting in the New Unified Structure' June 2007

Downes, Gary 'Case Management in the Administrative Appeals Tribunal' (February 2007)

Green, Nicholas and Natalie Blok, 'Facts and Evidence in Administrative Law: Does it Matter?' March 2017

Sossin, Lorne and Chantelle van Wiltenburg, 'The Puzzle of Soft Law' November 2020

Reports

Administrative Appeals Tribunal, *Annual Report 2020-2021*

Administrative Review Council, *Administrative Accountability in Areas where Business Activities are Subject to Complex Regulation* Report No. 49, January 2008 (Australian Government Publishing Service)

Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* Report No. 39, November 1995 (Australian Government Publishing Service)

Administrative Review Council, *Federal Judicial Review in Australia* Report No. 50, September 2012 (Australian Government Publishing Service)

Callinan, Hon. Ian *Review: Section 4 of the Tribunals Amalgamation Act 2015 (Cth)*

Chief Inspector of Borders and Immigration *Annual Report* 2013-14

Chief Inspector of Borders and Immigration, *An Inspection of the Home Office's Production and Use of Country of Origin Information* (2017)

Commonwealth Administrative Review Committee Report No Parliamentary Paper No 144 (Kerr Committee Report)

Department of Immigration and Border Protection, *Asylum Trends Australia* 2012-13

Final Report of the Committee on Administrative Discretions, Parliamentary Paper No 316 (Commonwealth Parliament, 1973) (Bland Committee Final Report)

Franks Committee, *Report of the Franks Committee on Administrative Tribunals and Enquiries*, Cmnd 218 (1957).

Grey-letter law, Commonwealth Interdepartmental Committee on Quasi-regulation, Productivity Commission, 1997

Independent Chief Inspector of the UK Border Agency, *The Use of Country of Origin Information in Deciding Asylum Applications: A Thematic Inspection* (July, 2011)

Interim Report of the Committee on Administrative Discretions, Commonwealth Parliament, 1973 Parliamentary Paper No 53) (Bland Committee Interim Report)

Lavarch, Michael, *Report on the Increased Workload of the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT),* December 2011

Leggatt Review of Tribunals, *Tribunals for Users – One System, One Service* (Department for Constitutional Affairs, 2001

Prerogative Writ Procedures: Report of Committee of Review, Parliamentary Paper 56 of 1973 (Canberra, Commonwealth Parliament, 1973) (Ellicott Committee Report).

Report of the Committee on Administrative Tribunals and Enquiries, United Kingdom, No Command Paper No 218, 1957)

Report of the Standing Committee on Citizenship and Immigration, House of Commons (Canada) *Responding to Public Complaints: A Review of the Appointment, Training and Complaint Processes of The Immigration and Refugee Board* (September 2018).

Yeates, Neil, *Report of the Independent Review of the Immigration and Refugee Board: A Systems Management Approach to Asylum* (Immigration and Refugee Board Secretariat, April 2018)

Parliamentary Committee Reports

Committee for the Review of the System for Review of Migration Decisions, *Non-Adversarial Review of Migration Decisions: The Way Forward* (Australian Government Publishing Service 1992)

Senate Legal and Constitutional Committee *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000

Senate Legal and Constitutional References Committee *Administration and Operation of the Migration Act 1958,* March 2006

Senate Standing Committee for the Scrutiny of Bills, *Alert Digest* No. 8 of 2014, 9 July 2014.

Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014*, 27 August 2014.

Newspaper articles

Brewer, Kirstie, ‘Asylum Decision-maker: ‘It’s a Lottery’’ *BBC News*, 8 May 2018

Crock, Mary, Michelle Foster and Jane McAdam, 'Overheated Carr Takes Aim at Scapegoats in Boats', *The Age* (Melbourne, 2 July 2013)

Gordon, Michael and David Wroe, 'Fears Unit's Closure Designed to Reduce Successful Claims', *Sydney Morning Herald* (Sydney, 19 July 2013)

Lyons, Kate and Kirstie Brewer, “‘A Lottery’: Asylum System is Unjust, Say Home Office Whistleblowers”, *The Guardian*, 11 February 2018.

Maley, William, Opinion, 'Asylum Process Stands Up', *Canberra Times*, 19 July 2013

Pelly, Michael, 'Most Succeed in Appeal of Refugee Decisions', *The Australian*, 12 July 2013

Pelly, Michael, 'Refugee Cart Put Before the Horse', *The Australian*, 19 July 2013

Prasad, R, 'The Asylum Lottery', The Guardian, 25 January 2002

Sheridan, Greg, 'Hugh Numbers of Asylum-Seekers are Fabricating their Claims', The *Weekend Australian*, 15-16 June 2013

Wroe, David and Bianca Hall, 'Refugee Review Tribunal "Gets It Right"', *Sydney Morning Herald* (Sydney, 3 July 2013)

Blog posts

Daly, Paul, 'Consistency in Administrative Adjudication: Canadian Association of Refugee Lawyers v. Canada (Citizenship and Immigration), and Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals)', *Administrative Law Matters*, 30 September 2019.

Dastyari, Azadeh, 'Circumventing the System: No, Not the Asylum Seekers, the Government', Castan Centre for Human Rights Law, Blog Post, 29 April 2013

Dastyari, Azadeh, 'The Return to Rudd: A Turn for the Worse on Asylum Seeker Policy' (2013) Castan Centre for Human Rights Law, Blog Post, 1 July 2013

Ghezelbash, Daniel, 'How refugees succeed in visa reviews: new research reveals the factors that matter', The Conversation, Blog Post, 9 March 2020

McDonald-Norman, Douglas, 'Country Guidance Decisions in the UK and Australia', AUSPUBLAW, Blog Post, 7 July 2016

Petrova, Sasha, 'Asylum Experts Question DIAC's Neutrality' *New Matilda*, 30 May 2013

Petrova, Sasha, 'Is Immigration Playing Yes Minister?' *New Matilda*, 31 May 2013

Online publications

Administrative Appeals Tribunal, *Guide to Refugee Law in Australia* (2021) https://www.aat.gov.au/guide-to-refugee-law-in-australia

Administrative Appeals Tribunal, Migration and Refugee Division *Guidelines on the Assessment of Credibility* (July 2015) https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-on-Assessment-of-Credibility.pdf

Department of Home Affairs Onshore Humanitarian Program 2019–20 Delivery and outcomes for Non–Irregular Maritime arrival as at 30 June 2020 https://www.homeaffairs.gov.au/research-and-stats/files/ohp-june-20.pdf

Immigration and Refugee Board *Interpretation of the convention refugee definition in the case law* (2019) https://irb.gc.ca/en/legal-policy/legal-concepts/Pages/RefDef.aspx

Immigration and Refugee Board, *Weighing Evidence* (December 2020) https://irb.gc.ca/en/legal-policy/legal-concepts/Pages/EvidPreu.aspx

Henderson, Mark, Rowena Moffatt and Alison Pickup, *Best Practice Guide to Asylum and Human Rights Appeals* (2021) https://www.ein.org.uk/bpg/contents

Kaldor Centre for International Refugee Law, *Legislative brief, Tribunals Amalgamation Bill 2014,* January 2014 https://www.kaldorcentre.unsw.edu.au/publication/legislative-brief-tribunals-amalgamation-bill-2014

Macklin, Audrey and Joshua Blum, 'Country Fiche, Canada' (January 2021) https://www.asileproject.eu/

Rehaag, Sean, 'Brief Submitted to the Standing Committee on Citizenship and Immigration ', 12 April 2018) https://www.ourcommons.ca/content/Committee/421/CIMM/Brief/BR9776382/br-external/RehaagSean-e.pdf

Rehaag, Sean, '2018 Refugee Claim Data and IRB Member Recognition Rates', 19 June 2019 https://ccrweb.ca/en/2018-refugee-claim-data

Rehaag, Sean, '2020 Refugee Claim Data and IRB Member Recognition Rates', 5 August 2021 https://refugeelab.ca/refugee-claim-data-2020/

Other

Toal, Ronan, 'Country Guidance Course Materials' (Immigration Law Practitioners Association, January 2020)

Cases

Australia

AJW15 v Minister for Immigration and Border Protection [2016] FCA 197

Alstom Transport Australia Pty Ltd and Comptroller-General of Customs [2021] AATA 3816

Applicant S214 of 2002 v Attorney-General [2004] FCA 1635

ARG15 v Minister for Immigration and Border Protection [2016] FCAFC 174

Babaniaris v Lutony Fashions Proprietary Limited (1987) 163 CLR 1

BJO18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 189

BQL15 v MIBP [2018] FCAFC 104

BXK15 v Minister for Immigration and Border Protection (2018) 261 FCR 515

Chan v MIEA (1989) 169 CLR 379

Confidential and Commissioner of Taxation [2013] AATA 112

DAO16 v Minister for Immigration and Border Protection (2018) 258 FCR 175

Drake v Minister for Immigration and Ethnic Affairs (1979) 2 ALD 60; 24 ALR 577

Frugtniet v Australian Securities and Investments Commission (2019) 266 CLR 250

FTZK v Minister for Immigration and Border Protection (2014) 310 ALR 1

Khan v Minister for Immigration and Ethnic Affairs (1987) 14 ALD 291

Latitude Fisheries Pty Ltd v Minister for Primary Industries and Energy (1992) 110 ALR 209

Minister for Home Affairs v Brown [2020] FCAFC 21

Minister for Immigration and Border Protection v MZYTS [2013] FCAFC 114

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332

Minister for Immigration and Citizenship v SZIAI (2009) 240 CLR 611

Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611

Minister for Immigration and Citizenship v SZQRB (2013) 210 FCR 505

Minister for Immigration and Citizenship v SZRKT (2013) 212 FCR 99; [2013] FCA 317

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Minister for Immigration and Multicultural Affairs v Hughes (1999) 86 FCR 567

Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham (2000) 168 ALR 407

MZAKQ v Minister for Immigration and Border Protection [2016] FCCA 1186

MZZSH v Minister for Immigration and Border Protection [2014] FCA 1292

NARY v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 1255

Nevistic v Minister for Immigration and Ethnic Affairs (1981) 34 ALR 639

Nowicka v Superannuation Complaints Tribunal [2008] FCA 939

Plaintiff M64/2015 v Minister for Immigration and Border Protection (2015) 258 CLR 173

Port Stephens Council v Sansom (2007) 156 LGERA 125

R v Kirby; ex parte Boilermakers' Society of Australia (1956) 94 CLR 254

R v Moore, ex p Australian Telephone and Phonogram Officers' Association (1980) 148 CLR 600

Re Aston and Secretary, Department of Primary Industry (1985) 8 ALD 366

Re Australian Metal Holdings Pty Ltd and Australian Securities Commission and Others (1995) 37 ALD 131

Re Becker and Minister for Immigration and Ethnic Affairs (1977) 1 ALD 158

Re Clarkson, ex parte Australian Telegram and Phonogram Officers' Association (1982) 39 ALR 1

Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD 634

Re Ganchov and Comcare (1990) 19 ALD 541

Re Greenham and Minister for Capital Territory (1979) 2 ALD 137

Re Littlejohn and Secretary, Department of Social Security (1989) 17 ALD 482

Re Lumsden and Secretary, Department of Social Security (1986) 10 ALN 225

Re MT and Secretary, Department of Social Security (1986) 9 ALD 146

Re Presmint Pty Ltd and Australian Fisheries Management Authority (1995) 39 ALD 625

Re Sahin and Minister for Immigration and Citizenship (2012) 120 ALD 345

Re Scott and Commissioner for Superannuation (1986) 9 ALD 491

Re Zheng and Minister for Immigration and Citizenship (2011) 121 ALD 372

Segal v Waverley Council (2005) 64 NSWLR 177

SGBB v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 199 ALR 364

Shi v Migration Agents Registration Authority (2008) 235 CLR 286

Sun v Minister for Immigration and Border Protection [2016] FCAFC 62

SZJTQ v Minister for Immigration and Citizenship (2008) 172 FCR 563

SZLPN v Minister for Immigration and Citizenship [2010] FCA 202

SZLVZ v Minister for Immigration and Citizenship (2008) FCA 1816

SZMCD v Minister for Immigration and Citizenship (2009) 174 FCR 514

SZMIP v Minister for Immigration and Citizenship [2009] FCA 217

SZNRZ v Minister for Immigration and Citizenship [2010] FCA 107

SZQMB v Minister for Immigration and Citizenship [2012] FMCA 24

SZRGE v Minister for Immigration and Citizenship [2013] FMCA 18

SZSBR v Minister for Immigration and Border Protection [2013] FCA 1208

SZSFS v Minister for Immigration and Border Protection [2015] FCA 534

SZTCU v Minister for Immigration and Border Protection [2014] FCCA 1600

SZTCV v Minister for Immigration and Border Protection [2015] FCA 1309

SZTCV v Minister for Immigration and Border Protection [2015] FCCA 1677

SZTMD v Minister for Immigration and Border Protection [2015] FCA 150

SZTSC v Minister for Immigration and Border Protection [2017] FCA 1032

Tascone and Australian Community Pharmacy Authority and Katsavos and Katsavos and Kouzas (Parties Joined) [2011] AATA 724

Teekay Shipping (Aust) Pty Ltd v Australian Maritime Safety Authority [2012] AATA 519

Toro Martinez v Minister for Immigration and Citizenship (2009) 177 FCR 337 (2009) 177 FCR 337

Vero Insurance Ltd v Gombac Group Pty Ltd [2007] VSC 117

VHAJ v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 131 FCR 80

WABZ v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 134 FCR 271

WADA v Minister for Immigration & Multicultural Affairs [2002] FCAFC 202

Wang v Migration Agents Registration Authority [2012] AATA 463

Williams and Members of the Companies Auditors and Liquidators Disciplinary Board [2019] AATA 504

United Kingdom

AA (Somalia) v Secretary of State for the Home Department [2007] EWCA Civ 1040

Adam (Rule 45: authoritative decisions) [2017] UKUT 00370 (IAC)

AH (Sudan) v Secretary of State for the Home Department [2008] 1 AC 678

AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC)

AS (Safety of Kabul) (CG) [2020] UKUT 130

Bozhurt v SSHD [2006] EWCA Civ 289

British Oxygen Co Ltd v Minister of Technology [1971] AC 610

Chirairo, R (on the application of) v Secretary of State for the Home Department [2016] EWCA Civ 77

E v Secretary of State for the Home Department [2004] QB 1044

EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC)

FA (Libya; art 15(c)) Libya CG [2016] UKUT 413

GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319 (IAC) [2013] UKUT 319 (IAC)

Haddad No (00/HX/00926, 13 March 2000)

HF (Iraq) & Ors v SSHD [2013] EWCA Civ 1276

HM (Art 15(c)) Iraq CG [2012] UKUT 409 (IAC)

HM (Iraq) v Secretary of State for the Home Department [2011] EWCA Civ 1536

Kacaj v Secretary of State for the Home Department [2002] EWCA Civ 314

Karanakaran v Secretary of State for the Home Department [2000] All ER 449

KK and RS (Sur place activities: risk) Sri Lanka CG [2021] UKUT 130 (IAC)

KS (benefit of the doubt) [2014] UKUT 00552 (IAC)

KS (Burma) v Secretary of State for the Home Department [2013] EWCA Civ 67

Manzeke v Secretary of State for the Home Department [1997] EWCA Civ 1888

Matadeen v Pointu [1998] 1 AC 98

MH (Iraq) v Secretary of State for the Home Department [2007] EWCA Civ 852

MN and others (Ahmadis – country conditions – risk) Pakistan CG [2012] UKUT 00389 (IAC)

MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC)

MST and Others (national service – risk categories) (CG) [2016] UKUT 00443 (IAC)

NM v Secretary of State for the Home Department (Lone Women – Ashraf) Somalia CG [2005] UKIAT 00076

OP & Others v Secretary of State for the Home Department (Roma ethnicity) Czech Republic CG [2001] UKIAT 00001

Otshudi v Secretary of State for the Home Department [2004] EWCA Civ 893

PO (Nigeria) v Secretary of State for the Home Department [2011] EWCA Civ 132

PS (Christianity - risk) Iran CG [2020] UKUT 46 (IAC)

R (Gujra) v Crown Prosecution Service [2012] 1 AC 484

R (Iran) & Ors v Secretary of State for the Home Department [2005] EWCA Civ 982

R (Madan and Kapoor) v Secretary of State for the Home Department [2008] 1 All ER 973

R (on the application of Gallaher Group Ltd and others) v The Competition and Markets Authority [2019] AC 96

R v Port of London Authority, ex parte Kynoch [1919] 1 KB 176

RT (Zimbabwe) & Ors v Secretary of State for the Home Department [2012] UKSC 38

S & Others v Secretary of State for the Home Department [2002] EWCA Civ 539

SA (Sri Lanka) v Secretary of State for the Home Department [2014] EWCA Civ 683

Sandralingham and Ravichandran v Secretary of State for the Home Department [1995] EWCA Civ 16

SB (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 160

Secretary of State for the Home Department v S No 01/TH/00632, 1 May 2001)

Secretary of State for the Home Department v SK (Return—Ethnic Serb) Croatia CG (Starred determination) [2002] UKIAT 05613

SG (Iraq) v Secretary of State for the Home Department [2012] EWCA Civ 940 [2012] EWCA Civ 940

Shirazi v Secretary of State for the Home Department [2003] EWCA Civ 1562

SI (reported cases as evidence) Ethiopia [2007] UKAIT 00012.

Singh, R (On the Application Of) v The Secretary of State for the Home Department [2019] EWCA Civ 1014

SM (Somalia) v Secretary of State for the Home Department [2015] EWCA Civ 763

ST (Afghanistan) v Secretary of State for the Home Department [2018] EWCA Civ 2382

Stringer v Minister of Housing and Local Government [1971] 1 WLR 1281

Subesh v Secretary of State for the Home Department [2004] EWCA Civ 56

WA (Pakistan) v Secretary of State for the Home Department [2019] EWCA Civ 302

Canada

Beauregard v Canada [1986] 2 SCR 56

Canada (Citizenship and Immigration) v Huruglica 2016 FCA 93

Canada (Minister of Citizenship and Immigration) v Vavilov [2019] SCC 65

Canadian Association of Refugee Lawyers v Canada (Immigration, Refugee and Citizenship) [2020] FCA 196

Canadian Association of Refugee Lawyers v Minister of Citizenship and Immigration [2019] FC 1126

Carrillo v Canada (Minister of Citizenship and Immigration) [2008] 4 FCR 636

Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles) [1993] 2 SCR 756.

Ellis-Don Ltd v Ontario (Labour Relations Board) [2001] 1 SCR 221

Geza v. Canada (Minister of Citizenship and Immigration) [2005] 3 FCR 3

Geza v. Canada (Minister of Citizenship and Immigration) [2006] FCA 124

IWA v Consolidated-Bathurst Packaging Ltd [1990] 1 SCR 282 [1990] 1 SCR 282

Kanthasamy v Canada (Citizenship and Immigration) [2015] 3 SCR 909

Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch) [2001] 2 SCR 781

Singh v Minister for Employment and Immigration [1985] 1 SCR 177

Thamotharem v Canada (Minister of Citizenship and Immigration) [2008] 1 FCR 385

New Zealand

Re DS (Iran) [2016] NZIPT 800788

Europe

NA v the United Kingdom (2008) Appl No 25904/07, European Court of Human Rights.

Sufi and Elmi v United Kingdom (2011) Appl Nos 8319/07 and 11449/07, European Court of Human Rights.

Legislation

Administrative Appeals Act 1975 (Cth)

Administrative Appeals Tribunal Act 1975 (Cth)

Administrative Decisions (Judicial Review) Act 1975 (Cth)

Legislative Instruments Act 2003 (Cth)

Legislative Instruments Regulations 2004 (Cth)

Migration Act 1958 (Cth)

Migration Amendment (Protection and other Measures) Act 2015 (Cth)

Migration Regulations 1994 (Cth)

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014 (Cth)

Ombudsman Act 1976 (Cth)

Privacy Act 1988 (Cth)

Tribunals Amalgamation Act 2015 (Cth)

United Kingdom

Legal Aid, Sentencing and Punishment of Offenders Act 2012

Nationality, Immigration and Asylum Act 2002

Refugee Qualification Regulations 2006

Tribunals, Courts and Enforcement Act 2007

Tribunal Procedure (Upper Tribunal) Rules SI 2008/2698

Canada

Balanced Refugee Reform Act SC 2010, c8

Immigration and Refugee Protection Act 2002 SC 2001, c. 27

Immigration and Refugee Protection Regulations, SOR/2002-227

Protecting Canada's Immigration System Act SC 2012, c17

Refugee Protection Division Rules SOR/2012-256

Ministerial Directions

Ministerial Direction No 15 – 'Refugee Review Tribunal Role and Responsibility of Members' (1 June 1999)

Ministerial Direction No 56 – 'Consideration of Protection visa applications' (21 June 2013)

Ministerial Direction No 84 – 'Consideration of Protection visa applications' (24 June 2019)

Practice Directions

Administrative Appeals Tribunal, 'President's Direction 'Conducting Migration and Refugee Reviews' (August 2018)

'Practice Directions of the Immigration and Asylum Chambers of the First Tier Tribunal and the Upper Tribunal', (2018)

'Upper Tribunal Immigration and Asylum Chamber First-Tier Tribunal Immigration and Asylum Chamber Joint Presidential Guidance 2019 No 1: Permission to appeal to UTIAC', (2019)

Practice Directions of the Immigration and Asylum Chambers of the First Tier Tribunal and the Upper Tribunal (2018)

Policy Documents

Immigration and Refugee Board, *Policy on the Use of Jurisprudential Guides* 2003-01, as amended 3 December 2019

Immigration and Refugee Board, *Policy Note on Persuasive Decisions* May 2009

Department of Home Affairs, 'Policy: Refugee and Humanitarian – Refugee Law Guidelines', re-issued 1 July 2017

Department of Home Affairs, Policy: Refugee and Humanitarian – Complementary Protection Guidelines', re-issued 29 February 2020

Treaties

Convention relating to the Status of Refugees, opened for signature 28 July 1951 (entered into force 22 April 1954)

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

Protocol relating to the Status of Refugees, opened for signature 31 January 1967 (entered into force 4 October 1967)

Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991)