

The Internal Flight Alternative in Norway: the law and practice with respect to Afghan families and unaccompanied asylum-seeking children

A mini-assessment commissioned by UNHCR

**By Jessica Schultz
Chr. Michelsen Institute**

Contents

1. Introduction	2
1.1 The treaty basis for IFA practice in refugee law	2
1.2 The legal criteria for IFA application under the Refugee Convention	4
1.2.1 What more? The legal basis for additional criteria for IFA practice	5
1.3 The origins and development of IFA practice in Norway	6
1.4 The legal parameters for IPA practice in Norway	7
1.4.1 The current IFA test: the availability of “effective protection”	10
2. Analysis of Norwegian IFA practice vis-à-vis Afghan families and UMs.....	13
2.1 Effective protection in Norwegian law and practice	17
2.1.1 Physical security	18
2.1.2 Social and economic security	20
2.1.3 Other human rights and humanitarian factors	24
2.2 Procedural issues	27
2.2.1 Burden of proof	27
2.2.2 Notice and right to be heard	27
3. Conclusions	30

1. Introduction

The internal flight alternative (IFA) is a limit on refugee status that potentially applies when a claimant's risk of persecution is confined to a specific area of a country. It permits a state to refuse refugee status to a person who faces persecution or similar serious harms in the area of previous residence, but can presumably live safely somewhere else in the country. For example, a young Afghan who resisted forced recruitment by the Taliban in Kunduz may be referred to Kabul for protection.

Although there is no mention of the IFA in the 1951 Refugee Convention, IFA practice is common in many state parties, including Norway. In Norway, the scope for IFA practice has recently expanded, following amendments to the Immigration Act which came into force in October 2016. This study reviews the law and practice of IFA application in Norway in light of international legal standards prescribed by the 1951 Convention, relevant UNHCR guidance and international human rights law. It focuses particularly on application of the IFA vis-à-vis two specific groups of refugee claimants with Afghan nationality: families with children and unaccompanied and separated minors (UAMs). Individuals from these groups are regularly denied status because they could presumably find protection somewhere in Afghanistan, for example Kabul, despite the deteriorating security there.

The main sources for my analysis include practice notes produced by Directorate of Immigration (UDI), and the Immigration Appeals Board (UNE), and a small sample of cases provided for purposes of this research by UDI and UNE. This sample includes 9 first-instance decisions concerning UAMs and 7 concerning families, as well as 4 second-instance decisions regarding families and 2 regarding minors (22 cases total).

1.1 The treaty basis for IFA practice in refugee law

Article 1A(2) of the Refugee Convention defines a 'refugee' as someone who

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.¹

¹ Article 1A(2) Refugee Convention. UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol 189, 137. The opening phrase of this definition, "(a)s a result of events occurring before 1 January 1951", was removed in the 1967 Protocol. UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, 237. Because the vast majority of state parties to the 1951 Convention are also party to the Protocol, the "modern" refugee definition, which encompasses future refugees from any region of the world, applies in these jurisdictions. As of May 2017, there were 145

This provision is satisfied when the claimant is 1) outside his or her country of origin; 2) can establish a legitimate fear of persecution for a Convention ground; and 3) is unable or unwilling, owing to the well-founded fear, to avail him or herself of that country's protection.

For the first three decades of practice under the Refugee Convention, refugees were found to satisfy these requirements if a well-founded fear of persecution was established *anywhere* in the country of origin. There is nothing in the ordinary terms of Article 1A(2) that compel IFA practice. Nonetheless, states in northern Europe (Germany and the Netherlands) began implying an IFA limit from the mid-1970s onwards, initially in claims involving minority groups from Turkey.² In its 1979 Handbook, UNHCR responded to incipient IFA practice with a clarification that the “fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality” to qualify for refugee status.³ It further stated that

in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, *if under all circumstances it would not have been reasonable to expect him to do so.*⁴

Based on this language, some states have concluded that if a person's risk of persecution could be *reasonably* overcome through the act of relocation, there is no “well-founded” fear in the country of origin. Although Norwegian IFA practice developed from the same rationale, current Norwegian law frames the IFA more generally, as an *exception* to refugee status.⁵ Section 28 of the Immigration Act outlines two distinct bases for refugee status. The first, in paragraph 1(a), codifies the traditional definition set out in Article 1A(2) of the Refugee Convention. The second, in paragraph 1(b), provides refugee status to persons who face a real risk of other serious harms (torture, inhuman or degrading treatment) in the country of origin. Both grounds for refugee status are subject to the same IFA test. Paragraph 5 of the Act provides, in relevant part, the following:

parties to the 1951 Convention and 146 parties to the 1967 Protocol. An updated list of ratifications is available at <https://treaties.un.org>.

² See, for example, the District Court of Almelo decision of 11 May 1977, Rechtspraak Vreemdelingenrecht (RV) 1977 N 21. Cited in Roel Fernhout, *Erkenning en toelating als vluchteling I Nederland* (Kluwer 1990).

³ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979) para 91.

⁴ *Ibid.* Emphasis added.

⁵ In the leading textbook on Immigration Law in Norway, the “internal flight alternative” is described as one of three exceptions to refugee status; the other two are exclusion (under Articles 1D and 1F) and cessation (Article 1C). Øyvind Dybvik Øyen, «Rett til flykningstatus og asyl» in Øyvind Dybvik Øyen (ed), *Lærebok i utlendingsrett* (Universitetsforlaget 2013).

The right to be recognized as a refugee under the first paragraph shall not apply if the foreign national may obtain effective protection in other parts of his or her country of origin than the area from which the applicant has fled.⁶

Thus, even though the claimant has fulfilled the core criteria (i.e. has a well-founded fear, or faces a real risk of serious harm), refugee status will not be recognized if a valid IFA exists. In the preparatory works to this Act, the Ministry of Labor and Inclusion (responsible for implementing immigration laws at the time) justified this implied exclusion clause with reference to the subsidiary (or “surrogate”) nature of refugee law.⁷ Accordingly, where protection is available within the country of origin, “backup” protection by another state is not normally required.

1.2 The legal criteria for IFA application under the Refugee Convention

As an implied limit on the scope of Convention protection, IFA application is subject to certain restraints.⁸ As a threshold requirement, the IFA must be safely, legally and practically accessible. The claimant cannot face dangers *en route* like “mine fields, factional fighting, shifting war fronts, banditry or other forms of harassment.”⁹ Furthermore, he or she must have the legal right to travel to the area, to enter and not least to reside there.¹⁰

It is also clear that conditions in an IFA cannot give rise to an independent claim for refugee status. Thus, the area must be free from an immediate or foreseeable risk of persecution, including risks that may have arisen subsequent to the applicant’s flight. These can include, for example, risks that may attach to one’s status as a “separated woman”, “survivor of sexual violence” or even an “internally displaced person.” As a “returned asylum seeker”, young Afghans may be associated with the West, “either ideologically or in terms of wealth.” The consequences—extortion, kidnapping, and even torture—may reach the persecutory threshold or in other ways render return fundamentally unsafe.

Article 33 of the Refugee Convention, which prohibits *refoulement* “in any way” to a threat to life or freedom, also prohibits removal where an *indirect* risk of persecution is present. In the practice of many European states, including Norway, this safety assessment is focused on the question of whether the situation would be so harsh as to constitute “inhuman or degrading

⁶ Norwegian Immigration Act (2010) §28(5). Available at <http://www.regjeringen.no/en/doc/laws/acts/immigration-act.html?id=585772> (accessed May 18, 2017).

⁷ Ot.prp. nr. 75 (2006-2007) para 5.4.4.

⁸ On the IFA as an implied limit on the right to refugee status, see Schultz, J and Einarsen, T, ‘The Right to Refugee Status and the Internal Protection Alternative: What Does the Law Say?’ in Burson B and Cantor DJ (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill Nijhoff 2016), 288-290.

⁹ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, available at: <http://www.refworld.org/docid/3f2791a44.html> (accessed 20 May 2017) para 10.

¹⁰ *Ibid*, para 12.

treatment” in violation of Article 3 of the European Convention on Human Rights (ECHR) and other instruments.¹¹

As UNHCR and others point out, the baseline IFA analysis requires a more robust assessment of minimum human rights guarantees. The proposed alternative must provide effective and *durable* protection against the risk of persecution established. This requirement is not only implicit in Article 33, but it also aligns with the treaty’s purpose to provide stable protection against a risk of persecution for certain discriminatory reasons. Durable protection is usually only available when the state or state-like authority has secure control over the territory. UNHCR’s newest Guidelines on International Protection, addressing situations of armed conflict and violence (2016), reiterate that “(o)nly when the situation of armed conflict and violence and its impact is geographically limited and confined to a specific part of the country would it be relevant to assess whether an internal flight or relocation alternative exists.”¹²

1.2.1 What more? The legal basis for additional criteria for IFA practice

Current state practice and UNHCR guidance reflect a broad agreement that the existence of a well-founded fear of persecution in one area triggers a heightened threshold for removal to another within the claimant’s country of origin. This is captured, for example, by the “reasonableness” prong of the IFA test advocated by UNHCR and applied in many jurisdictions. In its 2003 IFA Guidelines, UNHCR suggests framing the question as whether “the claimant, in the context of the country concerned, can lead a relatively normal life without facing undue hardship.”¹³ Basic human rights conditions in the proposed area are relevant, as are individual factors such as

(a)ge, sex, health, disability, family situation and relationships, social or other vulnerabilities, ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, educational, professional and work background and opportunities, and any past persecution and its psychological effects.¹⁴

Given the recent amendments in Norway, it is worth reiterating that a “reasonableness” or “proportionality” assessment is clearly supported by the IFA’s position as an implied limit on the scope of Convention protection.¹⁵ The basic criteria for refugee status – a well-founded

¹¹ UN International Covenant on Civil and Political Rights, Article 7; UN Convention Against Torture, Article 3.

¹² UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, 2 December 2016, HCR/GIP/16/12, available at: <http://www.refworld.org/docid/583595ff4.html> (accessed 20 May 2017) para 41.

¹³ UNHCR IFA Guidelines, para 24.

¹⁴ *Ibid*, para 25.

¹⁵ See Schultz and Einarsen, *supra* note 8.

fear of persecution reflecting an absence of home state protection – may be satisfied even if that fear is localized in one area of a state’s territory.

I have argued elsewhere that the parameters for IFA practice should be explicitly framed within the rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties (VCLT). The “principle of systemic integration” set out in Article 31(1)(c) of the VCLT demands that the Refugee Convention be applied in harmony with other relevant instruments, particularly when filling interpretive gaps that the text does not clearly resolve. In line with UNHCR guidance, this compels a displacement-sensitive assessment of the following factors:

- Freedom of movement
- Access to cultural/religious/economic networks
- The general human rights situation
- Special needs (related to age, disability, gender, lack of nationality)
- Best interests of the child
- Prospects for family life
- Experience of past persecution¹⁶

Given the treaty’s object and purpose to provide stable protection against a risk of persecution somewhere, the overarching question is whether a secure and dignified life is possible in the proposed IPA.

Before analyzing current Norwegian practice against the normative approach outlined above, a review of how this practice has developed may be useful, and explains some of its unique aspects.

1.3 The origins and development of IFA practice in Norway

In Norway, the 1951 Convention refugee concept was first codified in §16 of the 1988 Immigration Act.¹⁷ UDI staff members from the 1990s confirm that early IFA practice was exceptional in nature, based on the narrow limit seemingly provided for in paragraph 91 of the UNHCR Handbook.¹⁸ Einarsen refers to two specific groups subject to the IFA analysis in his 1997 overview of the legal position of refugees in Norway: Kurdish village guards exposed to persecution in Kurdish areas of Turkey but not elsewhere in the country, and Tamils from Sri Lanka who could presumably be returned to Colombo.¹⁹

The first formal reference to the IFA appears in the Ministry of Justice’s Asylum Guidelines (1998), which came out following concerns raised by UNHCR and others regarding Norway’s low recognition rates.²⁰ These Guidelines clarified a range of interpretive issues related to

¹⁶ Ibid., at 297.

¹⁷ Prior to 1988, refugees in Norway were generally granted a humanitarian visa rather than legal Convention status.

¹⁸ Interview with Paula Tolonen, former Deputy Director of UDI, October 30, 2014.

¹⁹ Terje Einarsen, *Flyktingers rettsstilling i Norge* (Fagbokforlaget 1997) 50.

²⁰ Ministry of Justice, Guidelines for New Asylum Criteria (Retningslinjer for nye asylkriterier), published on January 13, 1998.

gender, sexual orientation, and not least the burden of proof. The Guidelines also, significantly, addressed persecution by non-state actors and the IFA:

In cases where the applicant will be threatened by non-state groups or individuals in certain areas of the home country, protection in Norway (either in the form of asylum or a residence permit) is normally not given if he or she will be secured protection in other (for example government-controlled) areas of the home country.²¹

The Guidelines further state that there may be cases where, after a holistic assessment of all aspects (health issues, impact on children, links to Norway), the claimant should not be compelled to relocate elsewhere in the home country despite the possibility of securing protection there. UNHCR's "reasonableness" criteria thus referred back to the specific issues mentioned by a separate provision of the Immigration Act concerning residence on humanitarian grounds.²² This link between the reasonableness criteria and factors shaping the concept of humanitarian protection in Norwegian law has entrenched not only a narrow "reasonableness" test in law, but also a perception that "reasonableness" is a discretionary criterion.

1.4 The legal parameters for IPA practice in Norway

The current Immigration Act (2008) codified, for the first time, the IFA limit. Section 28 of the Immigration Act provides as follows:

A foreign national who is in the realm or at the Norwegian border shall, upon application, be recognized as a refugee if the foreign national

- (a) has a well-founded fear of being persecuted for reasons of ethnicity, origin, skin colour, religion, nationality, membership of a particular social group or for reasons of political opinion, and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of his or her country of origin...or
- (b) without falling within the scope of (a) nevertheless faces a real risk of being subjected to a death penalty, torture or other inhuman and degrading treatment or punishment upon return to his or her country of origin.

Thus, §28 paragraph 1(a) incorporates the refugee definition from the 1951 Convention as modified by the 1967 Protocol, while paragraph 1(b) provides that persons who face treatment contrary to Article 3 of the European Convention on Human Rights (ECHR) (and Article 7 of the International Covenant on Civil and Political Rights, ICCPR) also qualify for refugee status. Both may be limited, as mentioned above, if a valid IFA is available.

²¹ Ibid, point 2.

²² According to §8(2), "On the grounds of strong humanitarian considerations, or when the foreign national has a particular connection with Norway, a work or residence permit may be granted even if the requirements are not satisfied." The Immigration Regulations of 1990 further specified that for cases involving minors the child's ties to Norway should be given special weight. See §21b, FOR-1990-12-21-1028.

Until it was amended on October 1, 2016, §28 para 5 framed the IFA exception as follows:

The right to be recognized as a refugee under the first paragraph shall not apply if the foreign national may obtain *effective protection* in other parts of his or her country of origin than the area from which the applicant has fled, and it is *not unreasonable* to direct the applicant to seek protection in those parts of his or her country of origin.²³

Despite the drafter's intentions to the contrary, the Immigration Regulations reconfirmed the link between the concept of "reasonableness" and the factors underpinning discretionary leave to remain for humanitarian reasons.²⁴ The now defunct §7-1 of the Immigration Regulations, which provided further parameters for practice, provided that

[e]ven if §28 of the Act is applicable when considering returning an applicant to the area from which he/she has fled, it shall only be deemed to be unreasonable to direct the foreign national to seek protection in safe and accessible parts of his/her country of origin if the situation upon return will be such that the person concerned meets the conditions for a residence permit under §38 of the Act. In the assessment of whether the conditions for a residence permit under §38 of the Act are met, the fact that the foreign national has no connection with a safe and accessible part of his/her country of origin is not in itself sufficient.

Section 38, setting out the criteria for "strong humanitarian considerations" ("sterke menneskelige hensyn") specifically mentions compelling health issues, social or humanitarian circumstances related to the return situation, and the absence of adequate care for cases involving minors. However, §38 also permits these factors to be balanced against certain state interests including the possible consequences for the number of applications based on similar grounds. Although §7-1 is no longer operational, its underlying assumption – that the "reasonableness" criteria are separate from the state's core treaty obligation – also informs the current IFA test.

²³ Emphasis added.

²⁴ The preparatory works clearly reference UNHCR guidance as the framework for the reasonableness assessment. Ot.prp.nr.75 (2006-2007) para 5.4.4.

Box 1. The 2015 *Internal Flight* judgment of the Norwegian Supreme Court (HR-2015-02524)

The linking of reasonableness criteria with discretionary humanitarian factors was challenged by claimants in the only case before the Norwegian Supreme Court to specifically address IFA practice. This case involved an Afghan family refused asylum on the basis of an IFA in Kabul. The parents were originally from Ghazni province, but had spent many years in Iran where their two daughters were born. The Board of Immigration Appeals (UNE) had concluded that their claim for asylum under the Refugee Convention was not credible, but that the family was nonetheless protected on grounds of the security situation from return to their area of origin (according to §28(b) of the Immigration Act).¹ The question was then: could the family safely and reasonably relocate to another part of Afghanistan?

The claimants' representatives argued that the IFA test should be interpreted in line with UNCHR's guidance, in accordance with the intention of lawmakers. By linking the reasonableness criteria with discretionary factors instead, they argued that the Immigration Regulations overstep their statutory basis in §28(8).¹ The Court, however, declined to rule directly on this issue. Instead, it simply confirmed that the Immigration Regulations, and the specific interpretation they codify, have a legal basis in the Immigration Act.¹ Even though this case did not address interpretation of the Refugee Convention itself (because the claim was based on §28(1)(b), not §28(1)(a) of the Act), the Court's conclusion, or absence of one, was later leveraged by the Ministry of Justice as evidence that the "reasonableness" criterion is not required under refugee law.

In addition to the specific language of §28 para 5, other parts of the Immigration Act inform the parameters for IFA practice. In §28 para 3, the Act refers to obligations under the Convention on the Rights of the Child (CRC):

[I]n cases concerning children, the best interests of the child shall be a fundamental consideration. Children may be granted a residence permit pursuant to the first paragraph even if the situation is not so serious that a residence permit would have been granted to an adult.

This, logically, applies to the asylum determination as a whole, and not only whether a "well-founded fear of persecution" or real risk of ill-treatment exists in the country of origin. More generally, human rights obligations are implicitly included through §3 of the Immigration Act, which reinforces the primacy of human rights law: "The Act shall be applied in accordance

with international provisions by which Norway is bound when these are intended to strengthen the position of the individual.”²⁵

1.4.1 The current IFA test: the availability of “effective protection”

Following a record high number of asylum claimants during the last half of 2015, the Norwegian government, like others in Europe, introduced a variety of measures to reduce and divert refugee flows.²⁶ On December 29, 2015, the Ministry of Justice and Security published a Hearing Note on potential amendments to both the Immigration Act and the Immigration Regulations.²⁷ This 150-page document included a wide range of proposals to make Norway less attractive as a destination for refugee claimants. Among those related to the legal criteria for protection were proposals to increase the standard and burden of proof, to reintroduce the former distinction between refugee status and complementary protection, and to remove the “reasonableness” requirement from the IPA test. With respect to this latter suggestion, the Ministry listed all the problems with existing practice: the term “reasonableness” has unclear scope and content; it opens for discretionary assessments that are difficult to structure; it leads to unequal treatment of similar cases, and results in the grant of refugee status to those with no claim under international law. With respect to the last point, the Ministry claimed that “it is undisputed that international law does not require states to operate with the reasonableness criteria.”²⁸ Despite significant critique from stakeholders in response to this Hearing Note, the Ministry of Justice repeated its position in the final proposal presented to the Parliament in April 2016.²⁹ On June 10, 2016 Parliament approved some of the proposed amendments to the Act, including changes to the IFA provision in §28 para 5.³⁰ These came into effect on October 1, 2016.

The current amended paragraph states:

²⁵ In addition, the Human Rights Act of 1999 (‘Menneskerettsloven’ of May 21, 1999 No. 30) provides that the European Convention on Human Rights, the International Covenant on Political and Civil Rights and the International Covenant on Economic, Social and Cultural rights, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women are fully incorporated in Norwegian law and take precedence over any conflicting domestic legislation. The legal interpretation of a provision given by a human rights treaty’s oversight body should be given weight, provided that the interpretation is formulated as an authoritative reading and not merely a suggestion regarding optimal practice. See Norwegian Supreme Court, Rt 2009 s. 1261.

²⁶ In 2015, over 30,000 persons submitted a refugee claim in Norway, compared to just under 11,480 in 2014. Justis-og Beredskapsdepartementet, Høringsnotat – Endringer I Utlendingslovgivningen (Innstramninger II). Available at <https://www.regjeringen.no/no/dokumenter/horing--iendringer-i-utlendingslovgivningen-innstramninger-ii/id2469054>.

²⁷ Ministry of Justice and Security, Prop. 16L (2015-2016), Endringer I Utlendingsloven (Innstramninger).

²⁸ Innstramninger II para 6.5.3.

²⁹ Ministry of Justice and Security, Prop. 90 1 (2015-2016), Endringer I Utlendingsloven mn. (Innstramninger II) para 6.2.5.

³⁰ Stortinget, Lovvedtak 102 (2015-2016), 10 June 2016.

The right to be recognized as a refugee according to paragraph 1 does not pertain if the foreigner can receive effective protection in other parts of the country of origin than the area from which the claimant has fled.

Effective protection implies, as discussed below, that the claimant would not have a well-founded fear of persecution or face a real risk of torture, inhuman or degrading treatment in the identified area. In addition, he or she must be able to safely and legally travel there.

If a decision-maker concludes that “effective protection” is available within the claimant’s country of origin, he or she will then assess the humanitarian situation and any special connections to Norway in accordance with §38 of the Immigration Act. If “strong humanitarian considerations” exist, the claimant may receive a residence permit on humanitarian grounds. As noted earlier, immigration control interests potentially play a significant role in the overall assessment of whether a residence permit is justified. This balancing is formalized in a specific practice for older UAMs, to discourage future flows. Although UAMs with no (male) caregiver in a proposed IFA will normally fall under the remit of §38, their residence permit may expire at the age of majority (see Section 2.1.2.2, below).

1.4.1.1 Consequences and critique of the current parameters for IFA practice in Norway

Today, then, someone with a well-founded fear of persecution for whom “return” to internal displacement is unreasonable no longer has a right to refugee status. Instead, he or she is granted residence on a discretionary, humanitarian, basis. Recognized refugees have a right to family reunification even if they cannot support their relative(s). Furthermore, refugees enjoy greater protection with respect to travel papers, social welfare, and stability of their status. Another important consequence of this change is that administrative decisions under §38 are subject to less judicial scrutiny than those under §28. This means that the claimant has little recourse if, for example, assumptions made about the availability of a network in the area of return are unfounded.

To understand how the IFA test has evolved and how it is practiced today, it is important to note that the refugee concept set out in the 1951 Convention and its 1967 Protocol has historically been viewed as a target of political maneuvering in Norway. This understanding was expressed already in the 1991 Supreme Court *Abdi* decision³¹, which held that state parties to the Convention have some flexibility interpreting the refugee definition beyond its “core” area.³² According to the Court, protection against *refoulement* has a different content than the criteria for refugee status in Article 1A(2). In the gap between them, the authorities may intervene to serve immigration or other political objectives: “the practice of applying the refugee definition in immigration law is a not immaterial element of Norwegian refugee

³¹ Rt. 1991 s. 586 (1991)

³² Rt. 1991 s. 586 This (incorrect) decision has been forcefully criticized in academic commentaries, but for the purposes of this paper I refer to it only as an explanatory factor for the way the IFA test has developed. See Einarsen, T, *Retten til Vern som Flyktning* (Cicero: Bergen 2000) 78.

policy at large, among other things with respect to influencing the stream of refugees to Norway.”³³ Despite strong critique of the decision, the *Abdi* legacy clearly persists.³⁴ In the *Internal Flight* judgment, for example, Judge Utgård emphasized the state’s “broad liberty” to regulate who has the right to refugee status in Norway.³⁵ In his view, the parameters of *non-refoulement* regulated by Article 33 (1) only require that the “return *area* is accessible and safe.”³⁶ This sentiment was echoed by the Ministry of Justice and Security in its proposal to remove the reasonable conditions from the IFA test: “(t)he assessment here is linked to a core area for the Convention, which is protection against return *to an area* where the foreigner has a well-founded fear of persecution.”³⁷ The fact that the Ministry now has powers to instruct both UDI and UNE in matters of refugee law also reflects a sense that a state has a certain margin of appreciation when interpreting the Convention. This position is at odds with a good faith interpretation of both Article 1A(2) and Article 33(1), which have an autonomous, international meaning. It also conflicts with the plain language of the definition itself, which explicitly refers to a refugee’s *unwillingness, on account of* the well-founded fear, to return to the country (of origin) despite the availability of protection there. In other words, a lack of protection is not *a condition* for refugee status but rather an indication of the claimant’s well-founded fear.³⁸ This conclusion is compelled by established principles of treaty interpretation, which require that meaning is attached to each word of a treaty provision.³⁹

Norwegian lawmakers’ dismissal of UNHCR guidance in this regard also deserves some attention. The duty to cooperate with UNHCR is established in Article 35 of the Convention, and transposed in §98 of the Immigration Act.⁴⁰ Although this does not mean that UNHCR guidance is directly binding on states, it does mean that the agency’s considered view on interpretive issues should be accorded appropriate weight.⁴¹ Any practice that departs from

³³ Rt. 1991 s. 586, 590.

³⁴ The *Internal Flight* judgment, para 122, with further references to NOU 2004:20 pages 102-103 and Rt-1991-586. Also see the *Sur Place* judgment, HR-2017-569-A (Supreme Court of Norway).

³⁵ The *Internal Flight* judgment.

³⁶ *Ibid*, para 112. Emphasis added.

³⁷ Prop. 90L 2015-2016, *Endringer i Utlendingsloven mv (Innstramminger II)*, 6.2.3.

³⁸ Meanwhile, Norwegian authorities take the opposite view. The Ministry of Justice frames the lack of protection as an independent variable within the definition: at “(t)he heart of the refugee assessment is to secure protection against return for a foreigner with a well-founded fear of persecution on the basis of those grounds named in the Convention” *and* cannot receive protection by the state.” *Ibid*. This was approved by Parliament on June 13, 2016. See Lovvedtak 102 (2015–2016).

³⁹ This is consistent with the maxim *ut res magis valeat quam pereat*: “particular provisions (of a treaty) are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.” Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2008) 64.

⁴⁰ According to §98, “Norwegian authorities shall cooperate with the UN High Commissioner for Refugees in accordance with Article 35 of the Convention relating to the Status of Refugees, and in so doing shall facilitate the UN High Commissioner for Refugees’ discharge of its duty to supervise compliance with the provisions of the said Convention. Notwithstanding the rules concerning confidentiality, the UN High Commissioner for Refugees may be given access to case documents. To the extent necessary for the purpose of obtaining information, access may also be given to a refugee or human rights organization.”

⁴¹ In this regard, a distinction can also be made between the Guidelines on International

UNHCR guidance — in this case its consistent position that reasonableness is a legal condition for IFA practice — should consequently be carefully justified.⁴² The authoritativeness of UNHCR’s IFA Guidelines is reinforced by the fact that almost all states with IFA practice, including members of the Common European Asylum System, accept that reasonableness is a condition for IFA practice.⁴³

2. Norwegian IFA practice vis-à-vis Afghan families and UAMs

During the past decade, Afghanistan has been a significant source country of asylum claims in Norway.⁴⁴ During the large scale arrival of refugees during 2015, for example, 6,987 claimants were Afghan nationals (the second largest group after Syrians). Meanwhile, recent changes in law and practice have led to a sharp decline in both the numbers of Afghan claimants and in their rates of recognition as refugees. In 2016, Afghan nationals submitted only 373 claims; this included 208 men and 71 women (primary claimants) and 91 accompanying children. 128 of the primary claimants were unaccompanied minors (UAMs). The acceptance rate for Afghan claims, meanwhile, fell from 81 percent in 2015 to 28 percent in 2016. Among UAMs, UDI recognized 97 percent of claims in 2015, compared to 71 percent in 2016, and 33 percent so far in 2017.⁴⁵

What are the reasons underpinning these refugee claims? According to UDI, many Afghans cite a fear of the Taliban and other armed groups because of their or their families’ association with the government, international forces and/or international organizations. Others refer to private conflicts (especially related to land), forced marriage, extramarital relationships, sexual orientation, domestic violence, ethnic persecution, conversion to Christianity or criticism of Islam. Single women often assert that a risk of serious harm arises from the absence of a male network. Other Afghans fear economically-motivated kidnapping or blackmail. Most of the UAMs cite a fear of Taliban recruitment or reprisals as a consequence of their previous resistance.⁴⁶

Protection, of which the Internal Flight/Protection/Relocation Guidelines are part, and country-specific eligibility guidelines, which are not the products of the same kind of consensus building exercise. See Türk V, “Introductory Note to UNHCR Guidelines on International Protection” (2003) 15 Int J Refugee Law.

⁴² Hathaway and Foster, *The Law of Refugee Status* 2nd (Cambridge University Press 2014) 10; Walter Kälin, “Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond” in E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press 2003) 617.

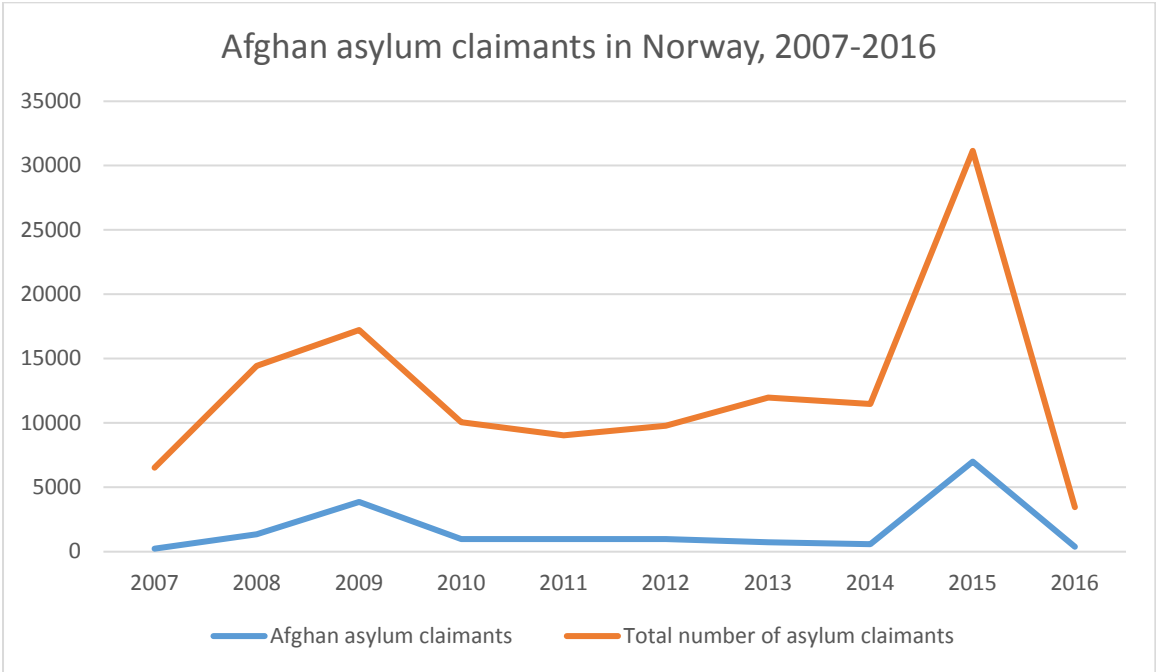
⁴³ Australia is the only other state which has explicitly removed the reasonableness assessment.

⁴⁴ During seven of the past 10 years, Afghanistan has been represented among the top three source countries of refugee claims in Norway. UDI Statistics, available at <https://www.udi.no/statistikk-og-analyse/statistikk/?year=0&filter=38&page=1>.

⁴⁵ Recent statistics available at www.udi.no/statistikk-og-analyse.

⁴⁶ UDI, Information Note on Asylum Seekers from Afghanistan (2015). Available at <https://www.udi.no/statistikk-og-analyse/statistikknotater/informasjonsnotat-om-asylsokere-fra-afghanistan-2015/> (accessed May 18, 2017).

Most of the Afghan claimants in Norway come from central and eastern areas of the country. Many, however, were born and raised in Iran or have lived for significant periods in either Afghanistan or Iran. UDI also reports that most have little education and many have experienced some form of physical or psychological trauma.⁴⁷



A majority of successful claimants were found to fulfil conditions for refugee status set out in the 1951 Refugee Convention and its 1967 Protocol. Meanwhile, just under half had a protection need recognized under §28(b), which codifies Norway’s obligations under human rights law not to return people to torture, inhuman or degrading treatment or punishment. In the Afghan context, this covers cases where people face a real risk of ill-treatment as a result of private conflicts, or because the security situation is sufficiently unstable. The following tables provide an overview of outcomes for first-instance asylum decisions concerning Afghan claimants in Norway.

Table 1. First instance asylum decisions for Afghan claimants in Norway (2012-2017)

	Total no. of claims ⁴⁸	Refugee Convention status	Other refugee status	Humanitarian status	UAM-limited (temporary)	Refusal	Approval rate
2012	1143	256	215	28	25	438	52%
2013	751	183	131	31	9	229	59%
2014	579	140	107	49	5	157	65%
2015	1358	236	316	44	10	129	81%
2016	5032	552	324	319	299	2791	28%

⁴⁷ Ibid.

⁴⁸ This includes applications that were not substantively determined, because the claim was transferred to another country in accordance with the Dublin Regulation, the claimant came from a «safe third country» or the claim was dismissed or withdrawn.

2017 (Jan- April)	1179	86	27	150	272	597	23%
-------------------------	------	----	----	-----	-----	-----	-----

As the table illustrates, the acceptance rate for Afghan claimants has dramatically declined during the past two years, following changes in law and policy aimed at making Norway less attractive as a destination country. A similar trend can be observed with regard to UAMs in particular:

Table 2. First instance asylum decisions for Afghan UAMs in Norway (2012-2017)

	Total no. of claims	RC status	Other refugee status	Humanitarian status	UAM-limited (temporary)	Refusal	Acceptance rate of claims determined on their merits ⁴⁹
2012	331	50	181	10	25	6	88%
2013	186	24	108	24	9	2	93%
2014	202	57	96	36	5	3	96%
2015	551	197	290	35	10	5	97%
2016	1485	424	307	259	295	111	71%
2017 (Jan- April)	531	44	25	101	268	81	33%

Of the 531 Afghan UAMs who received decisions from UDI during the first four months of 2017, about half were granted temporary leave to remain until the age of 18 (usually because they lack a guardian in a safe part of Afghanistan, see Section 2.1.2.2).⁵⁰

What accounts for the dramatic decrease in acceptance rates? One answer lies in the restrictive amendments made to the Immigration Act in 2016, which – among other things – lowered the threshold for refusing asylum on the basis of a valid IFA. Claims where an IFA would have previously been “unreasonable” – because, for example, the child lacked a caregiver in the proposed area - are now treated under §38 of the Immigration Act (residence on humanitarian grounds). For UAMs, this usually results in a residence permit limited in time until the claimant turns 18 (see 2.1.2.2). A more significant factor, according to UDI staff, is the practice change which came into effect in February 2016 with regard to the safety assessment. For most provinces, 32 of 34 at the time of writing, the security situation in itself is no longer an obstacle to return, unless the claimant can show that he or she is specially exposed.⁵¹ Insufficient risk in the area of origin is now the primary reason why Afghan claims are refused.

⁴⁹ Acceptance rates are based on the number of positive decisions based on a determination of a claim’s merits.

⁵⁰ See <https://www.udi.no/statistikk-og-analyse/statistikk/asylvedtak-etter-statsborgerskap-og-utfall-for-enslige-mindrearige-asylosokere-2017/> (accessed May 18, 2017).

⁵¹ In April 2017, UDI Director Frode Forfang announced the agency’s conclusion that Helmand and Nangarhar are the only provinces in Afghanistan to which return is unsafe for anyone. See

Table 3. Number of applications from Afghanistan refused on the basis of an IFA and percentage of all rejections justified on IFA grounds.⁵²

	IFA refusals	% all refusals
2010	925	83
2011	399	65
2012	292	67
2013	122	53
2014	64	41
2015	40	31
2016	163	6
2017 (Jan- April)	47	8

Although these statistics indicate a clear trend towards reduced use of the IFA, they do not disclose the full impact of the IFA analysis on the final decision. This is because the IFA is sometimes considered a subsidiary ground for refusal. In other words, the possibility of an IFA makes the decision-maker more confident in drawing a negative conclusion regarding the credibility of the claimant or his or her risk in the area of origin (“even if A’s story is true, he could in any case relocate to another part of the country”). Furthermore, UAMs with a time-limited residence permit (delayed removal, often to an IFA) are recorded as a separate category.

At the appeals level, the Immigration Appeals Board in 2016 processed 2 413 cases from Afghanistan on their merits (excluding Dublin cases). Sixty-four negative decisions were overturned, giving an approval rating of 2.6 percent.⁵³ Although UNE does not collect statistics on how many refusals are based on an IFA referral, the 2015 Practice Report confirms that “a large number of” claimants without individual protection needs were referred to an IFA in either Kabul, Herat or Mazar-i-Sharif.⁵⁴ These tend to come from areas that UNE had determined to be unstable from a security perspective.

The following sections take a closer look at the way in which the current IFA test is interpreted in Norwegian administrative practice, based on practice notes, instructions, and a

<http://www.vg.no/nyheter/innenriks/afghanistan/udi-bare-to-av-afghanistans-34-provinser-er-utrygge/a/23963813>.

⁵² See Jessica Schultz, «The Internal Protection Alternative in Refugee Law: Treaty basis and scope of application under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol», PhD Thesis, University of Bergen (Bergen 2017) 384. Statistics were prepared by UDI in January and May 2017. Emails on file with author.

⁵³ Email correspondence from UNE, March 27, 2017. On file with author.

⁵⁴ UNE, Practice Report Afghanistan 2015. Available at <http://www.une.no/no/Praksis2/Praksisrapporter/Asia/Asia-siste/Afghanistan/> (accessed May 18, 2017).

small sample of cases involving UAMs and families with Afghan nationality.

2.1 Effective protection in Norwegian law and practice

As described above, the current test codified in §28 para 5 of the Immigration Act requires only that “effective protection” is available in the proposed IFA.

In UDI practice, evaluation takes place in the following steps:

- 1) Determination of a protection need under §28(1)(a) or (b) with regard to the home area;
- 2) Identification of a specific area for the IFA analysis;
- 3) Determination that the IFA would be physically and legally accessible for the claimant, which also implies that it would be safe to travel there. This analysis must be taken based on concrete country knowledge and information about the individual claimant. Norwegian authorities consider that most provincial capitals, including Kabul, Jalalabad Mazar-e-Sharif and Herat are safety accessible.⁵⁵
- 4) Determination that the IFA is safe, meaning that the claimant cannot risk persecution or be protected from return under international law (referring to the absolute protection from a real risk of torture, inhuman or degrading treatment or punishment in the receiving country).⁵⁶ In practice, some decisions also address the risk of being “sent onward”, or forcibly returned through an act home state, to the place of previous residence.⁵⁷

From this description, it is clear that the focus of an IFA analysis is not “effective protection” but rather the *absence* of risk (either persecution or similar serious harms). UDI’s Practice Note on UAMs even frames the issues this way: can the minor “*avoid persecution by taking up residence in other areas of the homeland?*”⁵⁸

In the Afghan caseload, the safety inquiry typically boils down to two considerations. First, in claims involving persecution by the Taliban or other non-state actors, the question is whether these actors can and will trace the claimant to the proposed IFA. Six of the nine UAM cases examined for this study involved Taliban recruitment/revenge cases considered under §28(a). In these claims decision-makers typically conclude, based on Landinfo reports, that the claimant’s profile is not such that would attract the persecutor’s interest country-wide.⁵⁹

⁵⁵ PN 2014-004 Country Practice Note-Afghanistan (last updated on 10 March 2017).

⁵⁶ UDI, «Internflukt - utlendingsloven § 28 femte ledd», IM 2016-006.

⁵⁷ Landinfos temanotat Afghanistan: Sikkerhetsoppdatering, published Jan 9, 2014.

⁵⁸ UDI, PN 2012-11, Section 2.2.1. My emphasis.

⁵⁹ Landinfo is an independent research body within the immigration administration established in January 2005. It produces (mainly public) country reports, thematic notes, and short responses to queries from individual caseworkers. All are commissioned by, and tailored to the needs of, Norwegian immigration authorities. For Landinfo reports on Afghanistan, see www.landinfo.no/id/401.0 (accessed May 20, 2017).

Apparently, then, the issue of affirmative state protection is avoided.⁶⁰ In claims of a personal nature, involving for example vendettas, the authorities are more likely to find that the risk extends to other areas.⁶¹

The second consideration is whether the security situation in the return area would constitute exposure to “inhuman or degrading treatment” in breach of Norway’s obligations under human rights law (in particular, Article 3 ECHR). To engage Article 3 ECHR, the decision maker must evaluate whether the warring parties use methods and tactics that impact or are directly targeting civilians; whether the use of such methods and/or tactics are widely used among parties; whether the acts of conflicts are geographically limited; and the number of civilians killed, injured or forcibly displaced as a consequence of the conflict.⁶²

This Article 3 standard excludes lower but still significant levels of violence that may render return insecure. It also fails to capture social and economic factors that inhibit long-term resettlement. Finally, as I discuss below, the concept of “effective protection” applied in Norwegian law does not include human rights and humanitarian interests relevant to a sustainable and dignified return (for example the possibility of family life or religious practice). In the following sections I discuss each of these factors – physical security, economic and social security, and other human rights/humanitarian interests – in turn.

2.1.1 Physical security

Until relatively recently, UDI considered a number of areas of Afghanistan “unsafe” and therefore unsuitable for return even though the security situation did not meet the Article 3 threshold. In February 2016, despite extensive research documenting a deteriorating security situation throughout Afghanistan,⁶³ the Directorate adopted a new, graded approach that opened for more returns to the previous area of residence.

According to this approach, distinctions are made between:

- Areas where the claimant’s individual situation is decisive for the protection need. This relates to areas with few acts of armed conflict, little loss of civilian life and few or no IDPs as a consequence of the security situation. Examples of

⁶⁰ According to UDI’s Practice note, the “serious inadequacies of the Afghan police and legal system make it impossible to guarantee with sufficient security that the authorities have the ability and will to protect residents against persecution.” PN 2014-004 at 6.

⁶¹ Ibid.

⁶² *Sufi and Elmi v United Kingdom* App nos 8319/07 and 11449/07, judgment, 28 June 2011 (Grand Chamber) para 241.

⁶³ During the first half of 2016, the UN Assistance Mission in Afghanistan (UNAMA) reported the highest numbers of civilian casualties since reporting commenced in 2009 (1,601 civilian deaths out of which 388 were children and 3,565 injured civilians, out of which 1,121 were children). UNAMA, *Afghanistan: Protection of Civilians in Armed Conflict*, Midyear Report 2016. Available at https://unama.unmissions.org/sites/default/files/protection_of_civilians_in_armed_conflict_midyear_report_2016_final.pdf.

individual reasons for 28(b) protection: blood feuds, land conflicts, extramarital relationships, and criminality.

- Areas where the situation in the home area is considered together with the claimant's individual situation. This relates to areas not under state control, where there are acts of armed conflict and civilian loss, and some internal displacement. The more serious the security situation is in the claimant's home area, the lower will be the demands with regard to individual risk.
- Areas where the security situation is so serious that any claimant is protected from return.

With regard to the second category, UDI recognizes that certain areas may not be safe for families and minors, because children run different risks and tolerate less than adults.⁶⁴ UDI also presumes that return *anywhere* is unsafe for single women without a male network.⁶⁵

UNE takes a less explicitly graded approach. The basic rule is that safety is synonymous with an absence of Article 3 harm. To be “unsafe”, in either the home area or proposed IFA, there must be “systematic attacks against the civil population or military activity at a level that life and health of anyone in the area is threatened.” Where these conditions are not met, a protection need is only recognized if the claimant is “exposed to security problems to a significantly greater degree than the population ... in general.”⁶⁶ For UAMs, the small sample provided for this study suggests that the same standard applies. In one decision, for example, UNE overruled UDI's conclusion that a UAM's home in Laghman province was too insecure.

When it comes to commonly proposed IFAs (Kabul, Jalalabad, Mazar-i-Sharif and Herat), decision-makers typically rely on ECtHR caselaw together with information from LandInfo to conclude that urban centers under government control are essentially secure. For example, a number of decisions examined for this study referred to the ECtHR judgment *H. and B. v the United Kingdom*, which confirmed that the general situation in Afghanistan (at the time of judgment in 2013) did not engage Article 3.⁶⁷ Recent province-level studies produced by Landinfo give more detailed information.⁶⁸ At the same time, the office's capacity to produce current information relevant to individual claims is still limited.⁶⁹

The durability of the security situation is not explicitly addressed in either ECtHR jurisprudence or in Landinfo reports. The UN Mission in Afghanistan's civilian casualty reports paint a picture of continued insecurity and risk throughout the country. During the first quarter of 2017, most civilian deaths due to suicide and complex attacks occurred in fact in Kabul.⁷⁰ In May 2017, meanwhile, a suicide bomb ripped through the embassy quarter of the

⁶⁴ UDI, Praksisnotat Asylpraksis – Afghanistan, PN 2014-004, 5.3.4.

⁶⁵ Ibid, 5.3.2.

⁶⁶ UNE decision concerning the return of a Tajik family to Herat.

⁶⁷ *H. and B. v the United Kingdom*, App no 70073/10 and 44539/11 (judgment, 9 July 2013).

⁶⁸ These are available at <http://www.landinfo.no/id/455> (accessed May 20, 2017).

⁶⁹ Interview, UDI caseworker, January 2017.

⁷⁰ United Nations Mission in Afghanistan, UNAMA First Quarter 2017 Civilian Casualty Data, available at <https://unama.unmissions.org/unama-first-quarter-2017-civilian-casualty-data> (accessed

capital, killing at least 80 people and injuring 350.⁷¹ Removals to Kabul, then, are hardly a low-risk endeavor, much less a stable solution to an individual or family's risk of serious harm somewhere else.

2.1.2 Social and economic security

Historically, the question of “social and economic security” in a proposed IFA has been linked to this issue of whether the claimant has a network (based on family or ethnic ties) in the return area. Although it is no longer a direct consideration for purposes of asylum, it is still a significant aspect in claims to humanitarian protection and therefore of practical significance especially for families and UAMs.

As an element of “effective protection”, humanitarian issues rarely play a decisive role in the IFA analysis. The only exception, for purpose of an asylum claim, is if conditions in the proposed IFA breach Article 3 ECHR as interpreted by the ECtHR. This is a high threshold indeed. The ECtHR's approach to humanitarian harms under Article 3 distinguishes between situations in which there is a positive breach of a legal obligation by the country of origin and those that stem from a lack of resources for which the state is not (directly) responsible. In *Sufi and Elmi*, the Court found that the dire humanitarian conditions in IDP settlements in southern part of Somalia engaged the removing state's obligations under Article 3. Critical to the Court's finding, however, was that the warring parties in Somalia had, by their actions and inactions, *exacerbated* the situation for civilians. In *S.H.H. v the United Kingdom*, the ECtHR concluded that return of a disabled man to Kabul would not engage Article 3 despite a lack of family support or other resources. Here, the Court emphasized that Afghanistan could not be held accountable under the Convention for failures to provide adequate welfare assistance to persons with disabilities.⁷² This approach is too narrow for the IFA context, as a lack of local services even in the absence of direct state responsibility could render an IFA uninhabitable and therefore unsafe.

Another problem with reliance on ECtHR decisions is that the Court does not always apply the safeguards established in its own jurisprudence. For example, despite the requirement in *Salah Sheekh* that the claimant can settle, and not simply stay, in the proposed IFA, the durability of protection is rarely considered.⁷³ This was certainly the case for *S.H.H.*, who would predictably return to the support of his family despite the fact that he faced a real risk

June 1, 2017). This Mission also recorded a 24 per cent increase in women civilian casualties (273) during this period and a 3 per cent increase in child casualties (735).

⁷¹ See BBC, “Kabul bomb: Diplomatic zone attack kills dozens,” 31 May 2017.

⁷² *S.H.H. v the United Kingdom*, App No 60367/10 (judgment 29 January 2013) para 90. Confirmed by a 4-3 judgment by the Grand Chamber on 02 May, 2017.

⁷³ [A]s a precondition for relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, to gain admittance and be able to settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill-treatment. *Salah Sheekh v the Netherlands*, App no 1984/04 (judgment, 11 January 2007) para 141.

of ill-treatment there. By deferring to ECtHR jurisprudence, Norwegian practice reinforces the incorrect perception that only a likelihood of living in an informal settlement for internally displaced persons, or other similar scenarios, can displace a presumption of safety for IFA purposes.

2.1.2.1 The role of networks for Afghan families in Norwegian IFA practice

The question of whether “effective links” to the area of return are required for IFA application has been a topic of considerable debate in Norwegian asylum policy and practice during the past decade.⁷⁴ Before the “reasonableness” test was removed from the Immigration Act in 2016, §7-1 of the Regulations emphasized that the lack of a network in a safe and accessible part of the claimant’s country of origin was not determinative for the IFA assessment:

Even if section 28 of the Act is applicable when considering returning an applicant to the area from which he or she has fled, it shall only be deemed to be unreasonable to direct the foreign national to seek protection in safe and accessible parts of his/her country of origin if the situation upon return will be such that the person concerned meets the conditions for a residence permit under section 38 of the Act. In the assessment of whether the conditions for a residence permit under section 38 of the Act are met, the fact that the foreign national has *no connection with a safe and accessible part of his/her country of origin is not in itself sufficient*.

In the Afghan context, however, networks play a major role in all aspects of society: family, work, politics, ethnicity and religion.⁷⁵ Despite the changes in clan structures and the meaning of traditional networks through years of war and unrest, ethnic and tribal networks have helped many internally displaced persons to establish themselves in Kabul and elsewhere.⁷⁶

In its Eligibility Guidelines for claimants from Afghanistan, UNHCR has consistently emphasized the importance of networks as protection providers. In 2010, it stated that an IFA would only be reasonable

where protection is available from the individual’s own extended family, community or tribe in the area of prospective relocation. Single males and nuclear family units

⁷⁴ See, for example, two early UNE Grand Board decisions concerning return to Afghanistan: N7332221886 (2007) and N4327852063 (2007). These confirmed that effective links are generally required for IFA application. In 2009, however, the Ministry of Labor and Inclusion announced that the *lack* of any connection in the return area should not in itself be grounds for gaining residence in Norway. See Ministry of Labor and Inclusion, “Tightening of Asylum Policy”, press release issued on September 3, 2009. Available at <https://www.regjeringen.no/nb/aktuelt/innstramming-av-asylpolitikken/id525564/> (accessed May 18, 2017). This position was reasserted in Circular A-50/2009.

⁷⁵ Landinfo, *Afghanistan: Kommentarer til endringer i UNHCR’s anbefalinger om internflukt og relokalisering*, 11 March 2015, 5.

⁷⁶ Landinfo interview with OCHA representatives in Kabul. Ibid. Other Landinfo informants, on the other hand, pointed out that many individuals and families have managed to settle even without the support of a network.

may, in certain circumstances, subsist without family and community support in urban and semi-urban areas with established infrastructure and under effective Government Control.⁷⁷

In August 2013, meanwhile, UNHCR changed its recommendation and the concept of a “nuclear family” shifted to “married couples of working age”.⁷⁸ This was meant to reduce the scope for IFA practice given the extremely precarious living conditions of IDPs in Kabul. UNHCR’s concern was that returnees may be compelled to live in an informal settlement without adequate shelter, water or sanitation.⁷⁹ UDI requested permission from the Ministry of Justice to align its practice with this new information. Accordingly, families with children would only exceptionally be referred to an IFA – provided that they had a network that was able and willing to support them.

In January 2015, the Ministry of Justice agreed to UDI’s proposal, instructing the Directorate that refusal of Afghan families on grounds of an IFA should only be deemed “reasonable” if the family has an adequate network and/or adequate resources to establish themselves in the internal flight area and meet their basic needs.⁸⁰

Following an independent assessment of conditions in Kabul in 2015, Landinfo concluded that there was no evidence that relatively resourceful families returning from Europe would end up in informal settlements.⁸¹ This finding, in particular, is often cited in recent IFA cases. The sample decisions generally relied upon the fact that the family has “adequate resources”, *not* an existing network, to support a finding that return would be reasonable or – post October 2016 – defensible from a humanitarian perspective. For example, one UDI decision referred to the claimant’s tapestry-making skills and wife’s education in its finding that return to Kabul would be reasonable despite a lack of connections there. In another case, involving a Hazara family referred to Kabul, UNE pointed out that the family is not “particularly vulnerable.” In this decision, the family’s reliance on migration as a coping strategy (through Iran and Russia before coming to Norway) was interpreted as an indication that return to yet another situation of displacement would not be unduly difficult. Despite the fact that humanitarian circumstances retain an important role in the protection assessment for families (as opposed to UAMs, below), we still have too little knowledge to justify the presumptions made about Kabul and other cities. Returnees from Europe may avoid the informal settlements, but where in fact do they live and for how long? What risks face teens returning alone to Afghanistan? What impact does relocation have on women’s rights, in particular

⁷⁷ UNCHR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* 2010, 3.

⁷⁸ UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* 2013, 8.

⁷⁹ Landinfo, *Afghanistan: Kommentarer til endringer i UNHCR’s anbefalinger om internflukt og relokalisering*, 11 March 2015, 2.

⁸⁰ See Circular of 30 January 2015 from the Department of Justice to UDI: Instruction on a practice change under 28(5) owing to the deteriorating situation for IDPs in Afghanistan.

⁸¹ According to Landinfo, “the groups that live in such camps are, as a point of departure, groups that lack the resources, competence and network presumably needed to complete an illegal journey to a Western country.” Landinfo 2015, 4.

freedom of movement? In Norwegian practice, age and gender considerations are not routinely canvassed when assessing the adequacy of a proposed IFA.

2.1.2.2 The role of networks for Afghan UAMs in Norwegian IFA practice

For UAMs, the availability of a caregiver (family network) in the area of return is usually a decisive factor in determining whether an IFA would be reasonable or –following the change in law in October 2016 - defensible from a humanitarian perspective. In the Afghan context, this must be a male family member. In one decision, for example, UDI refused a residence permit because the minor claimant’s paternal uncle in Jalalabad had briefly cared for him earlier, and would presumably do so again.⁸²

There are two qualifications to this position in practice. First, minors approaching 18 are sometimes returned to an IFA without any additional networks. Factors considered include their capacity to work and educational background. In the decisions reviewed for this study, only minors at the cusp of majority (age 17 or older) were referred to an IFA *despite* the absence of family ties there.

Second, if the lack of a caregiver is the only reason for residence in Norway, and the claimant is over 16, the decision maker may grant a temporary residence status that expires at the age of majority. According to §8-8 of the Immigration Regulations,

[u]naccompanied asylum-seeking minors who have reached the age of 16 at the time the decision is made and who do not have any grounds for stay other than that the Norwegian authorities deem that the applicant would be without proper care if he/she were returned may be granted a residence permit under section 38, first paragraph, of the Act until they reach the age of 18.

This time-limited permit may not be renewed or provide the basis for family reunification.⁸³

Section 8-8 opens for a *discretionary* assessment of whether a residence permit should be limited. The main purpose of the provision is to prevent arrivals of other children with no protection need in Norway. When considering the limitation, the claimant’s age may be relevant, together with any health issues and (lack of) attachment to the home country.⁸⁴ The decision to limit a residence permit must also be defensible with regard to the child’s best interest.⁸⁵

In a recent letter to the Ministry of Justice, UDI tried to soften the impact of new IFA practice with regard to UAMs. It recommended that the absence of a network and/or resources to

⁸³ §8-8 Immigration Regulations.

⁸⁴ According to UDI practice, a decision that a regular (not-restricted) residence permit is more often given to claimants that just turned sixteen than to a claimant that is almost 18.

⁸⁵ Rundskriv om ikrafttredelse av ny utlendingslov og utlendingsforskrift fra 1 januar 2010, A-63/2009 Vedlegg 8.

establish oneself in an IFA should have «great weight» in the assessment of whether an ordinary residence permit should be given under §38, if the claimant is under 17 at the time a decision is reached. However, the Ministry refused this suggestion, confirming instead that claimants between 16 and 18 without a caregiver should normally receive a time-limited permit in Norway.⁸⁶ Any exceptions to this rule, resulting in an ordinary residence permit, cannot be based on humanitarian conditions alone, since return is not imminent. Instead, they must relate to individual factors that are *not* tied to the return situation, for example health issues or an extended period of previous exile. Because the policy is intended to stem the tide of UAMs from Afghanistan, it seems that interests common to these children as a group are not given specific attention. For example, in the sample reviewed, no best interest assessment addressed the impact of temporary status on the claimant’s physical and psychological well-being.⁸⁷

2.1.3 Other human rights and humanitarian factors

As an implied limit on the application of refugee law, IFA practice is subject to certain constraints (see Section 1.2.1, above). Here it is important to remember that in addition to protection from persecution, the Convention aims to alleviate disadvantages faced by forcibly displaced persons within the host community. IFA practice should not compromise the claimant’s ability, in the words of UNHCR, to reestablish a “normal life” in the country concerned. Relevant interests include the right to family life, freedom of movement, the right to exercise political and religious beliefs, and educational and work opportunities.

From a humanitarian perspective, meanwhile, experience of severe persecution in the past may make a dignified and durable stay anywhere in the country of origin impossible. This is recognized in Article 1A(2), which accommodates a claimant’s unwillingness, owing to the well-founded fear, to avail him or herself of existing state protection. A restrictive use of the IFA is called for in these cases, particularly for children, who may associate their entire country of origin with a traumatic experience.

The scope of “effective protection” in Norwegian law, of course, excludes most of these interests. The Immigration Act does, as mentioned, formally adopt a “child sensitive approach” in §28 para 3:

(i)n cases concerning children, the best interests of the child shall be a fundamental consideration. Children may be granted a residence permit pursuant to the first paragraph even if the situation is not so serious that a residence permit would have been granted to an adult.

⁸⁶ GI-02/2017 – Instruks om praktisering av utlendingsloven § 38, jf. utlendingsforskriften § 8-8 – enslige, mindreårige asylsøkere mellom 16 og 18 år som kan henvises til internflukt, 29 mars 2017.

⁸⁷ UDI itself has expressed deep concern over the mental and physical consequences of uncertain legal status on UAMs. See Skjetne, Oda Leraan, «UDI: Veldig bekymret for enslige mindreårige i norske mottak», VG, 9 February 2017.

A similarly lowered threshold for children is expressed in §38 para 3 with respect to the grant of residence for humanitarian reasons: children can receive a residence permit even though the situation upon return does not rise to the level of severity required to grant a residence permit to an adult.

This child-sensitive approach does not clearly compel a consideration of human rights interests relevant to a child's *future* development, which are relevant for the IFA inquiry. In its 2009 Guidelines on Child Asylum Claims, UNHCR emphasized that the relocation must be assessed against the backdrop of the child's best interests, as well as his or her right to survival and development.⁸⁸

2.1.3.1 The best interests principle in international law

The principle that the best interests of the child shall be a primary consideration in all actions concerning children is established by Article 3 of the Convention on the Rights of the Child. The principle implies that any decision made by an administrative or judicial body describes how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision.⁸⁹ Interests revolve around the child's safety, permanency of her situation and well-being. As described below, the "best interests" principle has procedural implications as well, regarding the right of a child to be heard in proceedings affecting her.

In Norway, the question of what factors should be considered in the best interest determination was recently addressed by the Supreme Court, in the *Internal Flight* judgment mentioned above. UNHCR and the applicants argued that the concept of a "best interest" naturally implies a comparison between two alternatives. For children, therefore, the situation in the country of asylum may be relevant."⁹⁰ The Norwegian government, on the other hand, argued that requiring an assessment of conditions in Norway would result in a rule that gives a right to asylum on humanitarian grounds.⁹¹ It proposed instead that the best interest principle be implemented through a child-sensitive analysis of safety and reasonableness in the proposed IFA.

In the *Internal Flight* judgment, the Court endorsed the state's argument, holding that the child's connections to Norway are not relevant to the "best interests" analysis in the IFA context. Instead, a child's interests must be evaluated within the scope of the ordinary criteria.⁹² Fewer hardships must be established before an IFA for a child is considered unreasonable than there would be for a young man. The Court did, however, agree that the

⁸⁸ UNHCR, 'Guidelines on International Protection: Child Asylum Claims under Articles 1A(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees' (2009), para 56. When children are unaccompanied or separated, relocation must be in the child's best interest and satisfy the minimum safeguards identified in the 2010 *Aide-mémoire: Special Measures Applying to the Return of Unaccompanied and Separated Children to Afghanistan*.

⁸⁹ Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1).

⁹⁰ *Ibid*, para 31.

⁹¹ Regjeringsadvokaten, Disposisjon for Hovedinnlegg, Høyesteretts sak nr. 2015/203. On file with author.

⁹² *Ibid*, para 85-86.

situation in Norway must be considered under §38 of the Act. In other words, even if asylum is refused on IFA grounds, the child may still receive a permit on humanitarian grounds if his or her best interests so dictate. This suggests that for the asylum decision, “best interests” is translated into a “child sensitive” evaluation of risk, while for humanitarian residence the situation of Norway is relevant for determining whether return would be defensible from a child rights perspective. While the child’s best interest must be a “fundamental consideration” in any decision (including an immigration decision) him or her, it is not always the determinative factor. For example, even if its outcome tilts in favor of a residence permit in Norway, the state’s immigration control interest may nonetheless outweigh the interest of the child.

Section 8-5 of the Immigration Regulations provides guidance on the operation of a best interest assessment. Factors to consider include the child’s need for stability and continuity, language issues, health issues, attachment to family, friends, social networks in Norway and the home country, and the humanitarian situation upon return. Nonetheless, UDI and UNE have slightly different perspectives on how these factors apply. As a point of departure, UDI considers that a child’s best interest is to live with its parents and family in his or her country of origin.⁹³ The social protection these relations provide help ensure the child’s right to family life, in addition to his or her identity in terms of language, culture, religion and ethnicity. At the same time, when “fundamental human rights” are at risk in the home country, a child’s best interest may be to remain in Norway.⁹⁴ Then the question arises whether they trump immigration control interests.

At the appeals level, the question of the child’s attachment to Norway more often arises, since as a practical matter more time has passed for the family or UAM in Norway. Generally, residence of 4.5 years or longer, including at least one year on school, is needed to constitute a “strong humanitarian condition” for the best interest assessment.⁹⁵ In the Afghan cases, predictably poor living conditions for children do not in themselves qualify as a “strong humanitarian consideration”, so this balancing exercise typically only takes place with children who have lived for a long period in Norway. When there is doubt about what constitutes the best interest of a child, the weight of this consideration is reduced in the overall assessment.

In the sample cases, UNE has emphasized the family’s own resources, and the fact that the children will not be among the most vulnerable in Afghanistan. The analysis is focused on whether access to health and education is available on par with other locals in the return area. This comparative assessment has no place in the best interest analysis, although the possibility of attracting large numbers of similarly situated claimants may be an immigration control interest to be considered *after* the child’s best interest has been established.

⁹³ UDI, Behandling av asylsaker fra enslige mindreårige søkere - særlig om aldersvurdering (PN 2012-011), updated 17 January 2017.

⁹⁴ Ibid.

⁹⁵ Ministry of Justice and Security, 2014-06-G, Ikraftttredelse av endringer i utlendingsforskriften – varig ordning for lengeværende barn og begrunnelse i vedtak som berører barn.

2.2 Procedural issues

2.2.1 Burden of proof

With respect to IFA practice, UNHCR insists that “(t)he usual rule must continue to apply, that is, the burden of proving an allegation rests on the one who asserts it.” On this basis, it advises that

The decision-maker bears the burden of proof of establishing that an analysis of relocation is relevant to the particular case. If considered relevant, it is up to the party asserting this to identify the proposed area of relocation and provide evidence establishing that it is a reasonable alternative for the individual concerned.⁹⁶

The fact that the state authorities have the burden of proof to establish a valid IFA follows “logically from the fact that before turning to a consideration of the possibility of an IFA; a decision maker is already satisfied that the applicant has established that he or she faces a well-founded fear of being persecuted for a Convention reason, thus giving rise to a presumptive entitlement to refugee status.”⁹⁷ In the *Internal Flight* case, meanwhile, the Norwegian Supreme Court agreed that the state must ensure that a proposed IFA is accessible and safe. With respect to reasonableness, however, it found that the claimant has the duty to establish that relocation would be unreasonable.⁹⁸ It follows that under the current formulation, the state must demonstrate the availability of “effective protection” in a proposed IFA.

In practice, however, it is difficult for a claimant to rebut the state’s assertion that a proposed IFA is safe. Often a claimant will not have first-hand knowledge of conditions in the area, or of the reach of organized insurgent groups. With regard to the existence of a network, the sample cases suggest that authorities are unconvinced by assertions that a paternal relative would be unable or unwilling to absorb a UAM or even an entire family into his extended household.

2.2.2 Notice and right to be heard

In its 2003 IFA Guidelines, UNCHR observes that “(b)asic rules of procedural fairness require that the asylum-seeker be given clear and adequate notice that (IFA application= is under consideration. They also require that the person be given an opportunity to provide

⁹⁶ UNHCR IFA Guidelines, para 34.

⁹⁷James C. Hathaway and Michelle Foster, “Internal protection/relocation/flight alternative as an aspect of refugee status determination” in E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press 2003) 414.

⁹⁸ HR-2015-02524-P (2015) para 130. This is because, according to the Court’s reasoning, the claimant is in the best position to put forth evidence relevant to his or her personal circumstances.

arguments why (1) the consideration of an alternative location is not relevant in the case, and (b) if deemed relevant, that the proposed area would be unreasonable.” Often in the process of determining refugee status, however, claimants have an inadequate opportunity to counter arguments regarding a proposed IFA. In Norway, claimants may not be aware of the evidence on which the IFA assessment is made until after the decision is made. In some cases, decision-makers either fail to identify a specific IFA or base their decision on one that was not mentioned.⁹⁹

The Board of Appeals, meanwhile, infrequently allows the claimant to submit personal testimony before a second-instance decision is made. If the first real notice a claimant has of the IFA is when he or she receives a negative decision from UDI, the limited opportunities for a personal appearance before UNE mean that the human rights and humanitarian impacts of relocation for the claimant may be underestimated. In most cases, only one board member decides the case without the presence of the claimant.

When it comes to children, Article 12 CRC provides the legal basis for a child’s right to be heard in decisions that concern him or her. That provision states that a child’s views should be given weight in accordance with his or her age and maturity.¹⁰⁰ Further, they may be expressed either directly or through a representative or relevant organ.¹⁰¹ In General Comment No. 12, the Committee on the Rights of the Child called the right to be heard “one of the fundamental values of the Convention,” which is essential for establishing a child’s best interests.¹⁰² According to the Committee, states parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity.¹⁰³ Thus, a child must be afforded a real opportunity, and be supported when necessary, to express him or herself regarding the potential impact of IFA application.¹⁰⁴

In its Guidelines on Child Asylum Claims, UNHCR observes that the “specific circumstances facing child asylum-seekers as individuals with independent claims to refugee status are not

⁹⁹ In one decision concerning a Hazara UAM, the applicant’s rebuttal of an IFA in Jalalabad resulted in the decision-maker relying on an IFA in Mazar-e-Sharif instead.

¹⁰⁰ UN Convention on the Rights of the Child, Article 12(1).

¹⁰¹ Ibid, Article 12(2).

¹⁰² Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard* (2009) paras 2 and 74.

¹⁰³ Ibid, para 20.

¹⁰⁴ Norwegian Administrative Law §17(1) provides that minors must “have the opportunity to express their view, to the degree that they are capable of providing their own perspectives on the case concerned. Their views will be weighted according to their age and maturity.” In the Immigration Act, the right to participation for children is regulated in the Immigration Regulations §17-3: “Children who are 7, and younger children who are capable of creating their own views, shall be informed and be given the opportunity to be heard before decisions in cases that concern them under the Immigration Act are made.” In the *Internal Flight* judgment, however, a majority of the Norwegian Supreme Court upheld the decision of the Immigration Appeals Board not to permit a personal appearance requested by the claimant’s young daughter.

generally well understood.”¹⁰⁵ Especially when accompanied by other family members, a child or adolescent’s rights and interests may be subordinated to those of the primary claimant. UNHCR urges states to establish procedures so that children can communicate in a safe and trust-generating environment, with information regarding options and consequences provided in a language they understand.¹⁰⁶ This advice is equally relevant in the IFA context, where focus tends to be on the collective vulnerability of “families with children.”

In Norwegian law, the operational consequences of the right to be heard are captured by the §17-3 and §17-4 of the Immigration Guidelines. These assert that children over age 7 and those under age 7 who can express their own views will be informed of the right and be given an opportunity to be heard through a conversation with UDI. The purpose of these discussions is to illuminate the child’s situation and to determine whether the child can have an independent claim for asylum.¹⁰⁷ They do not, in the samples provided, address protection needs that may arise in a proposed IFA.

Often, the first time the claimant is prepared to rebut a proposed IFA is at the appeals level. At this point, the limited opportunities for a personal appearance before UNE mean that the human rights and humanitarian impacts of relocation for the claimant may be underestimated. In most cases, only one board member decides the case without the presence of the claimant. Of the six UNE decisions sampled, only one was decided by a three-person board, with a personal appearance by the claimant. As the Norwegian Bar Association has observed, “(t)he party involved is, as a rule, the most qualified to clarify the conditions underpinning the case and point out potential mistakes or inconsistencies. If the administration neglects to investigate the party’s ability to explain the case then the case will often be incompletely explained.”¹⁰⁸ The limited use by UNE of the board meeting mechanism sits in tension with the administration’s general duty to investigate under Norwegian procedural law, since claimants themselves are best situated to clarify, or point out potential mistakes in a case. It also arguably violates state obligations under Article 12 CRC (see above). In the *Internal Flight* judgment, nonetheless, a majority of the Norwegian Supreme Court found that UNE was within its rights to deny the minor daughter an opportunity to speak at the appeal. Justice Ringnes and five colleagues dissented on this point, concluding that personal appearance, when desired, was justified to ensure that the child’s interests are identified and weighed.¹⁰⁹

¹⁰⁵ UNHCR, "Guidelines on International Protection: Child Asylum Claims under Articles 1A(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees" para 2.

¹⁰⁶ *Ibid.*

¹⁰⁷ Immigration Regulations §17-3, 17-4 para 2.

¹⁰⁸ The Norwegian Lawyers Association’s asylum group notes that even when the claimant is able to appear personally, they have limited opportunity to explain their story because they are treated as the “object of investigation rather than a party in the board meeting.” Humlen and Myhre, *Advokatforeningens aksjons- og prosedyregruppe i utlendingsrett 2007-2014: Rapport fra virksomheten og forslag om regelendringer* 115.

¹⁰⁹ *Internal Flight* judgment, para 293.

3. Conclusions

Like other jurisdictions, IPA practice in Norway reinforces the negative discourse of *non-refoulement* in affirmative claims for asylum. Following the recent amendments to the Immigration Act, the question facing a decision-maker today is not whether IPA application would be a legitimate limit on refugee status, but whether the claimant can be returned safely to some area of his or her home country.

Both the current and previous tests for IPA practice reflect a misunderstanding of the treaty basis for IPA application under the Refugee Convention. By establishing a well-founded fear of persecution for a recognized reason, the claimant establishes a legal position that can only be modified under certain limited circumstances. Although the precise formulation of this limit may be discussed, there is no doubt that it exists *in some form* and that all state parties to the Convention are bound to apply it. To link the criteria with domestically-determined provisions for humanitarian relief – which was Norwegian practice until October 2016 – contravenes the autonomous concept of the refugee enshrined in Article 1A(2). To *negate* the reasonableness or proportionality test, meanwhile, as Norwegian legislators have recently done, places the availability of national protection on an equal conceptual footing with the well-founded fear. While the possibility of “safe return” is the key consideration under human rights law, the Refugee Convention clearly requires state parties to accommodate those situations in which an applicant is legitimately “unwilling” to avail him or herself of state protection, including elsewhere in the country of origin (Article 1A(2)). A reasonableness or proportionality test captures the bounds of legitimate unwillingness.

In current Norwegian practice, the focus of the safety analysis is on an absence of risk, not the presence of protection.¹¹⁰ Current risks are inadequately captured in the sources that decision-makers depend on. To the extent a positive duty of protection is implied, it centers on the absence of conditions that engage Article 3 ECHR. This standard of serious harm is hardly an adequate proxy for sustainable protection when a risk of persecution somewhere in the same country already exists.¹¹¹ First, it reinforces an overly narrow scope of relevant threats (i.e. active conflict or extreme humanitarian suffering). Second, it gives no clear guidance with regard to the *durability* of protection for IFA purposes. Finally, reliance on ECtHR jurisprudence reinforces poor reasoning in cases where the Court has failed to apply its own standards for protection under Article 3. This is true for example in cases addressing general issues of risk in major refugee source countries like Afghanistan.

¹¹⁰ For example, decisions involving civilian Afghans associated with international forces or organizations frequently cite a Landinfo thematic note suggesting that relocation is an effective tool for avoiding security problems or threats from the Taliban. See Landinfo Temanotat, *Afghanistan: Sivile afghanere tilknyttet internasjonal virksomhet* (Sept 2015).

¹¹¹ This is also recognized in the EU Qualification Directive, which states in Article 7 that “protection” (also in the IFA context) must be effective and of a “non-temporary nature.” It further explains that protection is generally provided when there is an effective legal system in place and the applicant can access it. Although not legally binding on Norway, drafters of the current Immigration Act indicated that Norwegian law should be interpreted in conformity with instruments of the Common European Asylum System. Ot. Prp.nr.75 (2006-2007) 73.

Administrative and judicial practice also illustrate some of the obstacles to the correct application of legal norms and principles. In practice, the threshold safety analysis is compromised by a failure to assess long-term stability of proposed IFAs, and individual factors affecting the claimant's ability to live a normal life there. Further, inadequate notice and opportunities to be heard undermine the *identification* of relevant factors for the IPA assessment. These pitfalls particularly affect claimants who fear non-state persecution, or rely on non-state actors for protection, like members of their own extended family.

We have little knowledge of what happens to families and children from Afghanistan who are refused residence in Norway on the basis of an IFA.¹¹² The Refugee Support Network (RSN) in the UK, however, has documented the experience of young Afghan men returned to Kabul. Their research found the following:

- 1) A significant number of young returnees quickly left Afghanistan
- 2) Those who remained faced challenges derived from
 - a. the impact of weakened or disappeared family and social networks;
 - b. fear of stigma and discrimination impeding the formation of new social networks, leading in turn to increased isolation;
 - c. challenges in accessing institutional support and reliance on ad hoc assistance from people in the UK;
 - d. generalized insecurity and victimization due to issues related to the original asylum claim or their identity as a returnee;
 - e. the difficulty of finding sustainable work;
 - f. mental health difficulties and protracted deterioration in emotional well-being, especially following the interruption of specialized care and medication; and
 - g. limited access to essentials support and health care.¹¹³

In addition to the legal issues raised in this report, then, empirical evidence exposes a mismatch between the criteria considered for residence in Norway and the factors decisive for a sustainable and humane return policy.

¹¹² There are, however, anecdotes reported in the media. See, for example, Tollesrud, Emma, "Gutta vi glemte", Dagsavisen, 7 May 2017. Less recent research investigated the return experience more generally (not focused on IFA cases). See Strand, Arne; Akbari, Argawan; Wimpelmann Chaudhary, Torunn; Harpviken, Kristian Berg; Sarwari, Akbar; and Suhrke, Astri (2008), *Return with Dignity, Return to What? Review of the Voluntary Return Programme to Afghanistan* (Bergen: Chr Michelsen Institute, 2008).

¹¹³ Refugee Support Network, "After Return: documenting the experiences of young people forcibly removed to Afghanistan," April 2016. The findings were summarized in *Forced Migration Review* 54, "Post-deportation risks and monitoring," February 2017.