APAIPA

ACTORS OF PROTECTION AND THE APPLICATION OF THE INTERNAL PROTECTION ALTERNATIVE

NATIONAL REPORT

POLAND

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I. Acknowledgments.

This country report is based on research carried out by Mr Andrzej Kula.

II. Glossary of acronyms.

APC – the 1960 Administrative Procedure Code of Poland.

COI – country of origin information.

NSA – Supreme Administrative Court (*NaczelnySądAdministracyjny*), second instance judicial authority competent in asylum matters.

RDU – Refugee Board (*Rada do SprawUchodźców*), second administrative instance asylum authority.

SG – Border Guard (*Straż Graniczna*).

RSD – refugee status determination.

UDSC – Office for Foreigners (*Urząd do Spraw Cudoziemców*), first administrative instance asylum authority.

WSA – Warsaw District Administrative Court (*Wojewódzki Sąd Administracyjny w Warszawie*), first instance judicial authority competent in asylum matters.

III. Background: the national asylum system.

a. Applicable law.

The primary statutes governing RSD in Poland are the *Law of 13 June 2003 on Granting Protection to Foreigners on the Territory of the Republic of Poland* (Law on Protection) and the *Law of 14 June 1960 – the Administrative Procedure Code* with a limited subsidiary application of the *Law of 13 June 2003 on Foreigners*.[1] The Law on Protection transposed the Qualification Directive 2004 and the Asylum Procedures Directive 2005, in a legislative amendment that came into force in May 2008.None of the 2011 Qualification Directive provisions have yet been transposed. The Cabinet of Ministers presented a draft law amending the Law on Protection to the Parliament on 20 March 2014.

In transposing Article 7(2) of the 2004 Qualification Directive, the protection law omits the word “generally”, and uses “necessary measures” instead of “reasonable steps”. Article 18 of that law uses “settle without obstacles” to transpose “stay” from Article 8(1) of the Directive. Article 8(3) was not transposed. The proposed amendment to the protection law to transpose Article 8(1) of the Directive requires only a “reasonable probability” that an

[1] On 1 May 2014 the new *Law of 12 December 2013 on Foreigners* will enter into force.

applicant to whom the IPA is applied would be able to safely and legally reach the proposed protection region and settle there.

b. Institutional setup.

Three administrative agencies are competent in the administrative stage of RSD, with two instances of administrative courts involved in the judicial review.[2]

The Border Guard (*StrażGraniczna*, SG) is the "authority receiving the application for refugee status". Although the application is submitted to UDSC, this has to be done through SG, both for persons arriving at a port of entry and those already in the territory, including in detention.

The Head of the Office for Foreigners (*SzefUrzędu do SprawCudzoziemców,* UDSC), seated in Warsaw, is competent *inter alia* to consider protection applications. Over thirty eligibility officers of the UDSC Department for Refugee Status Proceedings, who assess claims, are divided into five divisions assigned, in principle, to particular countries of origin. A draft decision prepared by an officer needs to be formally issued by the Head of Department. The Department maintains a Division on Country of Origin Information to gather COI for RSD purposes.

The Refugee Board (*Rada do Spraw Uchodźców*, RDU), seated in Warsaw, is an administrative agency that considers appeals against UDSC decisions on international protection. RDU is composed of four standing three-member panels. Although formally its members are bound by law only, i.e. there is no administrative supervision or control over their decision-making process, RDU is an administrative, not a judicial entity.

The Warsaw District Administrative Court (*WojewódzkiSądAdministracyjny w Warszawie*, WSA) is competent in first instance judicial review of asylum decisions. It acts within the general framework of judicial review of public administration. Asylum cases constitute a relatively small share of its caseload. WSA rulings can be appealed to the Supreme Administrative Court (*NaczelnySądAdministracyjny*, NSA).

c. The procedure.

Poland operates a single procedure, in which the authorities assess the grounds for refugee status, subsidiary protection, the "tolerated stay permit" and removal.[3]If asylum based on refugee status is refused, the other types of protection are automatically considered. Applications can cover spouses and minor children, if physically present.

[2] For more information on the Polish institutional setup and asylum system, please see: ECRE/Helsinki Foundation for Human Rights, AIDA Country – Poland, http://www.asylumineurope.org/reports/country/poland

[3] After the *Law of 12 December 2013 on Foreigners* enters into force on 1 May 2014, the asylum procedure will no longer involve the assessment of grounds for the "tolerated stay permit", nor deciding on applicant's removal. The previous "tolerated stay permit" will be replaced by a "permit to remain for humanitarian reasons" and a "tolerated stay permit" of altered scope of application, both statuses granted, at first instance, by the Border Guard on an *ex officio* basis. Concerning applicant's removal, the decision refusing international protection will automatically effect an "obligation to return", potential non-compliance with that obligation to remain within the competence of Border Guard and not the asylum authorities.

SG competency includes collecting initial data using a standardised form. The form includes a section on "Identification of the major events forming the grounds to apply for refugee status", with open- and close-ended questions on events that led to an individual's flight and evidence thereto. Activities assigned to the SG are limited to gathering initial information. There is no separate admissibility procedure. There is no "border procedure" beyond simply receiving the application. Unless the claim is manifestly unfounded, UDSC is required to conduct a determination interview. In practice, the "application form" scheme generates significant credibility issues in subsequent proceedings, which often point to discrepancies between information provided in the form and during the interview.

Both the USDC and the RDU are required to notify the applicant of the completion of evidentiary proceedings and provide the opportunity to comment on the evidence. The Law on Protection prescribes additional safeguards in RSD, whenever the party is "an unaccompanied minor or a person, from whose physical or mental condition it can be presumed that s/he had been subjected to violence or who is disabled". Under certain circumstances (usually repeated applications), the application can be deemed inadmissible and RSD discontinued by either authority.

d. Appeals.

The first instance administrative decision can be appealed to RDU. Submission of an appeal has an *ex lege* suspensive effect on the enforceability of the decision. RDU conducts a *de novo* procedure, assessing the facts of the case as of the date of its decision as well as verifying the first instance decision. RDU can uphold the UDSC decision; overturn it and remand the case for reconsideration; or overturn it entirely or in part and rule in its own right on the case within the extent overturned.

An RDU decision is a final administrative act subject to judicial appeal to the WSA. Relatively few RSD cases reach the court stage, likely due to the lack of an *ex lege* suspensive effect on the enforcement of the decision appealed against (although the WSA tends to separately grant this effect whenever the decision appealed was issued on the substance of the claim), and lack of reception assistance (including medical care) beyond the administrative phase. The court's competency extends only to verifying the RDU and UDSC decisions as of the date of their issuance. The court can overturn one (RDU) or both of them and remand the case, but may not alter the decision in its own right. This is in line with the accusatory character of administrative courts' rulings in Poland. A WSA ruling is subject to appeal to the NSA, which may overturn the ruling and order the WSA to re-examine the case, but may also overturn one (RDU) or both administrative asylum decisions and remand the administrative case for reconsideration. The WSA must hear all appeals that allege a "legal interest was violated". The NSA must consider appeals that claim "a violation of substantive law by its erroneous interpretation or incorrect application" or "of the rules of the procedure, if that violation could have borne a significant effect on the outcome of the case". RSD cases rarely reach the NSA.

When it overturns an RSD case, the WSA predominantly does so on procedural grounds, chiefly associated with the rules of evidence (if it concludes that a "significant" portion of relevant evidence has not been gathered). The court cannot conduct its own evidentiary

proceedings,[4] but can deem factual determinations incorrect (if they could have influenced the decision) and instruct the authority how to gather or assess the evidence. The WSA does not often provide guidance related to substantive asylum law. The research identified no such guidance within the themes of AP or IPA.

e. Representation and legal aid.

Any person enjoying full legal capacity (in principle, a person full of age) may represent the applicant at the administrative stage. At the WSA stage only a licensed attorney may represent the applicant, while at the NSA stage the applicant must be represented by a licensed attorney, who needs to *inter alia* draft the initial cassation claim to NSA. No state-provided free legal assistance is available at the administrative stage, although a limited amount is available through NGOs. The applicant can apply for legal representation at the court level. WSA normally grants such motions from asylum-seekers, an attorney being designated by the attorneys' chamber. The earliest such a motion can be filed is together with the appeal to court, meaning that applicants must use their own resources to draft appeals.

IV. Methodology: sample and interviews.

Sampling was constrained by the limited official databases on asylum cases in Poland (including no keyword-searchable database) and the country of origin structure of asylum applications.

Implementation consisted of three stages: a conceptual and preparatory stage (March – April 2013), collection and selection of research material (April – June 2013), and assessment of the research material and stakeholder interviews (June – September 2013).

<u>Preparatory stage</u>

The first stage included identifying governmental and non-governmental (NGO) stakeholders relevant to RSD in Poland; translation of the APAIPA Questionnaire and summary of sampling methodology into Polish for sharing with stakeholders; and communicating with stakeholders regarding technical and legal conditions of access.

Government stakeholders that agreed to support the project included the Office for Foreigners, the Refugee Board, and the Warsaw District Administrative Court. NGO stakeholders that agreed to support the project included the Helsinki Foundation for Human Rights (*Helsińska Fundacja Praw Człowieka*, Warsaw), the Association for Legal Intervention (*Stowarzyszenie Interwencji Prawnej*, Warsaw), the Halina Niec Legal Aid Center (*Centrum Pomocy Prawnejim. HalinyNieć*, Krakow), and the Rule of Law Institute Foundation (*FundacjaInstytutnarzecz Państwa Prawa*, Lublin).

[4] There is one exception, which is rarely applied: the court can admit "*complementary evidence in the form of a document, if this is necessary for clarification of significant doubts on facts of the case and will not cause an undue prolongation of the court proceedings*".

Gathering of research material

1. Conditions of access to the research material were agreed with each stakeholder. In most cases, the researcher visited the entity's archive, browsed the material in hard copies and anonymised the selected material before its extraction from the archive for assessment.

2. The WSA referred the researcher to the Administrative Rulings' Online Database, containing –the Court advised – the vast majority of rulings in asylum cases issued by WSA in 2012-13. WSA rulings in the database had been anonymised to an extent that often prevented the identification of characteristics such as the applicant's sex, age and country and region of origin.

3. Between 400 and 500 hard copy files and around 100 WSA database rulings were reviewed, out of which 230 pieces of potential research material (administrative decisions and court rulings) were extracted, 162 of which were used as the research sample for detailed assessment.

4. Inclusion of a given case in the sample depended primarily on whether the AP or IPA concepts were analysed or applied. Such instances were identified in 91 decisions and rulings, all of which were included. A further 71 files were included in the sample based on their factual similarity to cases where AP/IPA was applied or analysed. (By comparison, the UDSC issued 8641 decisions on refugee status in 2012 and 16,177 in 2013).

5. Characteristics of the sample:

			Sample in general	**Sample's part involving AP/IPA**
A	Volume of material		162	91
B	Vol. per instance	UDSC	65	34
		RDU	55	27
		WSA	42	30
C	Applicant's sex		120 male (74%) – 42 female (26%)	75 male (82%) – 16 female (18%)
D	Country of origin		**Russian Federation – 61, Afghanistan – 22, Georgia – 15**, Nigeria – 11, Iraq – 9, Pakistan – 9, Palestinian (stateless) – 5, Iran – 4, Somalia – 3, Cameroon – 3, Egypt – 2, Uganda – 2, Armenia – 1, Bangladesh – 1, Guinea – 1, Kyrgyzstan – 1, Nepal – 1, Sudan – 1,	**Russian Federation – 31, Afghanistan – 11, Georgia – 11**, Nigeria – 9, Iraq – 7, Pakistan – 7, Palestinian (stateless) – 4, Somalia – 3, Cameroon – 2, Egypt – 2, Guinea – 1, Kyrgyzstan – 1, Nepal – 1, Uganda – 1

			Vietnam – 1, entirely anonymised – 9 (WSA)	
E	Result	RS	8	4
		SP	6	4
		NS	**130 (80%)**	**74 (81%)**
		RE[5]	18	9
F	Special needs		38 cases	26 cases

6. Sampling criteria:

    a) timeframe: since 31 December 2011;

    b) applicant's sex: this criterion was not entirely indicative: many asylum-seekers arrive in Poland as families (spouses with minor children) and submit one application with the husband/father as the "leading" applicant. Among the 91 cases that contained AP/IPA analysis only 16 cases, i.e. 18% of the total, concerned female "leading" applicants;

    c) country of origin: the largest single country of origin within the sample was Russia, the second largest group originating from Afghanistan and Iraq combined. The remaining research material approximated the general country of origin structure of cases in Poland (notably, with many from Georgia);

    d) legal characteristics: the research focused on decisions and rulings on the substance of claims. Whenever a UDSC (first instance) decision granting refugee status was included in the sample, the research was based on the official note to the Internal Security Agency extracted from the case file;

    e) cases involving asylum seekers with special needs comprised 23% of the sample, and 29% of the part involving AP/IPA analysis. Types of needs included LGBT applicants, single parents, pregnant women, victims of torture and one unaccompanied minor.

    f) The research identified only a few cases involving a non-state protection (co)actor.

Interviews

Interviews were conducted with representatives of the UDSC Department of Refugee Status Proceedings and Country of Origin Information Unit, the Refugee Board, Warsaw District Administrative Court and UNHCR. Apart from UNHCR and partially UDSC, all interviews

[5] Appeal allowed, remanded for reconsideration by first instance.

were conducted by written queries to allow contact persons to consult colleagues as needed before replying.

Questions focused primarily on structural issues, in particular whether:

a) Any recent capacity building activities were organised in the area of AP/IPA;
b) any binding or non-binding internal guidance (e.g. tools, guidelines, other resources) relating to AP/IPA was produced or external guidance followed;
c) AP/IPA issues were recorded by quality assurance or monitoring mechanisms and for what reasons;
d) any decision or interview templates accounting for AP/IPA issues were in use;
e) any blanket determination or application policies with regard to AP/IPA were in place;
f) any problems were encountered in gathering or producing AP/IPA related COI;
g) the UNHCR 2012 IFA report was shared with authorities and to what effect (e.g. official feedback, follow-up activities, changes in application patterns);
h) any IPA application was noted in accelerated procedures;
i) AP/IPA issues were addressed in determination interviews, and according to what pattern.

In general, replies were brief and tended to answer in the negative (i.e. no capacity building, no guidance, no templates, no application problems etc.).

V. National Overview.

a. Actors of protection.

i. The nature of protection.

The analysis of actors of protection is rare in Polish RSD. Decisions reviewed did not include a separate discussion of what entities can be considered actors of protection. No such instances of analysis appear in the leading NSA case law on asylum. The authorities usually moved straight to the analysis of the nature/ effectiveness of protection, in the vast majority of cases implicitly assuming the protection actor to be the state, in some other cases together with an entity charged with providing general security (most often multinational forces).

1. Prevention of persecution or serious harm.

The criterion of effectiveness for state actors of protection was almost always the operation of an effective legal system in detection, prosecution and punishment of wrongful acts, usually meaning a law enforcement agency to turn to and a set procedure to follow. Assessment usually did not cover the prospect of successful use of that system for the particular applicant, or did so in an apparent manner (“there is no reason to believe that in the applicant’s case the protection system would not be effective”), and never accounted for personal characteristics, particularly gender, age and family status. In some cases general indicators, usually decreasing crime rates, were invoked. When the actors of protection were

multinational forces (ISAF, AMISOM), the indicator was the level of security in the actor's area of operation, measured by the number of violent incidents, as well as its operational patterns. The situation was usually described as good, bad, improving or deteriorating, without citing quantitative information.[6]In no decision evaluated was "reasonable steps" or its transposing term "necessary measures" interpreted.

While the requirement for protection to be effective can be construed from the wording of Article 16(2) of the protection law, the temporal (i.e. durability) factor is not present. The research did not identify any explicit durability of protection assessment. In assessing the general security situation, "stability" was sometimes asserted.

2. Access to protection.

The requirement that the applicant has access to the proposed protection is prescribed by Article 16(2) of the protection law in the context of actors of protection, and not by Article 18 regulating the IPA. It was difficult to assess actor of protection analysis relating to the IPA as in the vast majority of IPA cases the IPA was alleged as a subsidiary/conditional argument, after the decision maker had cited the absence of a well-founded fear of persecution.

In non-IPA related assessment, analysis of the access requirement tended to be cursory or missing. If safeguards such as law enforcement agencies, criminal judiciary and procedure existed, access to them was assumed. One WSA ruling evaluated was issued after the NSA had remanded the case for reconsideration, stating, *inter alia*, that determining the "provision of protection" requires that the person concerned "has an actual opportunity to benefit from that protection".[7]Applicants' individual characteristics and personal circumstances potentially determining access to protection, as well as the effectiveness of protection, were not addressed.

The authorities often emphasised whether applicants had sought protection from their home state, even when they alleged a risk of persecution by a state actor (in which cases they were expected to approach the authorities responsible for protecting against abuses of power), and exhausted all venues for obtaining protection in the country. Citations to the following NSA rulings frequently appeared:

A. Ref. no. V SA 239/99 of 09.07.1999 and ref. no. V SA 1437/00 of 30.11.2002: "in order to be recognised as a refugee a person must previously exhaust all venues for seeking protection in his/her country of origin even if obtaining such protection seemed illusory or unlikely";

B. Ref. no. V SA 1648/99 of 23.02.2003: "problems on the part of neighbours, strangers, etc. cannot be deemed a ground for granting refugee status, on the part of the state authorities or persecution, against which the state could not protect the citizen";

C. Ref. no. V SA 1527/00 of 11.12.2001: "one cannot effectively seek international protection if he knowingly foregoes seeking protection in his country of origin".

[6] Since the research was based on the text of the decisions, it was not feasible to verify whether relevant figures were present in COI enclosed in the case files.
[7]WSA, Ruling no. V SA/Wa 986/12, 08.08.2012 (GUI01MRENO), case concerning revoking of refugee status of a Guinean national.

None of these rulings were recorded in the administrative courts' online database, and none of the decisions that invoked them indicated whether they were published and where. The citations appeared both where the applicant alleged persecution/ risk of harm on the part of non-state actors ("should have sought protection from the state"), and of the state ("should have sought protection from mechanisms that safeguard the individual against the abuse of authority"). None of the evaluated cases assessed whether the protection would have been effective, or whether turning for protection would in itself be safe for an applicant who alleged persecution/ serious harm by a state actor.

ii. Actors of protection.

1. General criteria.

The requirement that actors of protection be "willing and able to provide protection" is implied in Article 16(2) of the protection law under which protection is provided when relevant actors "take necessary measures to prevent persecution or serious harm". In practice, ability and willingness is closely tied to the assessment of effectiveness of protection. The practice evaluated almost always referred to the nature of protection and access thereto, i.e. when the authority, having otherwise dismissed the individual protection grounds, seemed to allege that "even if the applicant was/felt threatened by wrongful conduct", protection would be available in their place of former residence. Whenever IPA was alleged (always in the subsidiary-conditional manner), the authorities did not assess the level of and access to protection in the relocation area, seemingly arguing that relocation would be effective in the sense of the discontinuation of the threat rather than of obtaining protection. It was however sometimes difficult to reconstruct the line of argument adopted.

2. State actors of protection.

Article 16(1) of the protection law enumerates general types of actors of persecution, while Article 16(2) indicates that some of those types of actors are also potential actors of protection. The protection law does not prescribe any separate criteria for a state to be considered an actor of protection. Nonetheless, from the way protection was analysed in cases it followed that Polish authorities saw the main attribute of a state actor of protection in exerting formal and actual control over a legal system designed for detection, prosecution and punishment of acts that might constitute persecution or serious harm. Some UDSC decisions issued in 2013 concerning applicants from Georgia disregarded the significant change in government in that country in late 2012 in assessing it as a protection actor.

When protection was granted against persecution or serious harm from a non-state actor, it was usually indicated that the effectiveness of the legal system is so low as to allow an assumption that the applicant would not be protected upon return.[8]The emphasis in assessment of actors of protection was always on the characteristics of protection: even if it was determined that protection was absent or not effective enough, it was implicit from the decision that the given entity did not carry out its protection duties, and not that the entity did not at all qualify as a protection actor.

[8] See cases UDSC, 18.01.2013 (RUS06FSP(SP+TO));RDU, 23.08.2012 (RUS14FRESP);UDSC, 27.05.2013 (PAK01FRSTO);UDSC, 27.05.2013 (SOM01MSPTO);UDSC, 5.04.2013 (SOM02MSPNO);UDSC, 19.02.2013 (SOM03MSPNO), UDSC, 30.04.2013 (EGY01MRSTO);UDSC, 24.04.2013 (EGY02MRENO).

3. Non-state actors of protection.

Recognition of a non-state actor of protection was rare in the sample. In no decision was a non-state actor deemed a stand-alone actor of protection. Rather, asylum authorities always pointed to them next to or together with state actors. For example:

- multinational forces: in decisions concerning applicants from Afghanistan, especially from Kabul (or when the IPA in Kabul was alleged), ISAF troops were recognised as a protection actor together with Afghan troops and law enforcement;
- multinational forces: in decisions concerning applicants from Mogadishu, AMISOM troops (together with Somali government troops) were identified as the potential protection actor, which, however, was deemed ineffective against a risk of serious harm;
- other parties or organisations: in selected decisions concerning applicants from Russia and Georgia, it was alleged that the applicants could have turned for protection to "non-governmental organisations defending human rights". In these decisions the means by which the NGOs could provide protection were not explored;[9]
- international organisations: in one decision concerning a stateless Palestinian from Iraq, the authority asserted that the applicant "can benefit from the protection of UNRWA upon his return to Iraq" (it was suggested that protection would also be available from the Iraqi state).

The research recorded no decision indicating a clan or tribe as an actor of protection. In the majority of cases the analysis of whether the given actor can provide protection was brief. It was not possible to reconstruct any structure of analysis, e.g. a checklist that the authority would follow while carrying out the assessment. In no decision evaluated did the determining authority analyse the "controlling the State or a substantial part of the territory of the State" criterion.

b. The Internal Protection Alternative.

i. Assessment of the IPA.

Polish authorities alleged the IPA as a subsidiary, conditional argument, i.e. after otherwise dismissing the applicant's protection grounds.

1. Identifying the region.

Asylum authorities generally recognise their obligation to determine a specific relocation area. However, the level of detail differs depending on the country of origin. Regarding applicants from Afghanistan, the relocation area was always the city of Kabul. In Iraq, it was always the Kurdistan Region. For Russia, the authority usually did not identify a specific

[9] In the Russian cases this was only a general assertion. In a Georgian case concerning a Kurdish (Yezidi) applicant, the "European Centre for Minority Issues", an NGO without a protection mandate, was mentioned. In no case was the capacity or expected protection role of such an organisation indicated.

area, instead indicating “other parts of the country [than the North Caucasus]” or “large metropolitan areas”. Also with Nigeria, the authority generally pointed to any more stable and predominantly Christian region.

2. Safety in the region.

The risk of persecution or serious harm was not analysed, usually replaced with a general assertion that the applicant “would be safe / not threatened” upon relocation (the term persecution / serious harm was never used in this context). The analysis provided was not sufficient to establish the pattern related to applications from women and children. No case was recorded where an IPA was alleged for a victim of trafficking.

Domestic provisions foresee no presumption such as in Recital (27) of the 2011 Qualification Directive, that effective protection is unavailable when the state causes or tolerates acts of persecution. When the IPA was assessed with regard to Russia (applicants from the North Caucasus, predominantly Chechnya), the dynamics were not analysed between contingent actors of persecution, including rebel groups, Chechen authorities and federal Russian authorities (both those on the territory of Chechnya and outside of it). When the IPA was assessed with regard to other countries of origin, it was never established that the state was the actor of persecution or tolerated the persecution.

3. Securing human and social rights.

The material evaluated usually emphasised the general circumstances in the relocation area and rarely considered the applicant’s personal circumstances. Most decisions asserted that the level of security is satisfactory in the proposed region, so the applicant can reasonably be expected to stay there. “Stay” is applied to mean taking up permanent residence. The reasonableness analysis in IPA assessment is usually not conducted.

a. General circumstances.

By far the most common and often the only factor assessed was the security situation, in terms of either protection against the actor of persecution, or whether the influence or capacity of that actor extended to the area. When other factors were considered, they most often related to characteristics of the population in the area, predominantly ethnicity (Iraqi Kurdistan; Chechen diasporas in urban Russia) and religion (Christian states of Nigeria).

The IPA analysis in the material evaluated generally did not explicitly address rights observance and living standards. However it was often stated that Chechen communities in Russian metropolitan areas are “working, running businesses and leading a fairly normal life” (living standard), while they “cultivate their religion and traditions, their children go to school” (observance of rights). The “diasporas” excerpt was identical in every decision reviewed. The situation of Chechen communities around Russia was covered by a report commissioned by UDSC from OSW (*Ośrodek Studiów Wschodnich*, “Center for Eastern Studies”), a government-owned think tank.

b. Personal circumstances.

No legal provisions, case law or internal guidance explicitly requires the decision-maker to account for an applicant’s particular needs. The only framework is the “can be reasonably

presumed to settle without obstacles" premise in Article 18(1) of the protection law. There is no separate provision ordering a best interest of a child assessment in the IPA context. Polish law does not include a provision equivalent to QD 2011 Recital (27) concerning the availability of care and custodial arrangements.

In practice, even where there was reason to believe the applicant had special needs, the reasonableness of relocation vis-à-vis specific characteristics was usually not analysed. "Personal circumstances" analysis was recorded in a few decisions granting protection, where the IPA was considered but rejected. Such analyses focused on one circumstance due to which the IPA was deemed unavailable. For example, the UDSC asserted that a woman from Chechnya did not have the IPA in Russia because "she would not be able to sustain herself as a single mother".

When the IPA was alleged against women, societal, cultural and religious factors, as well as economic sustainability (safe employment) were either not analysed or not analysed individually. Exploitation, including prostitution, was not considered, in general or individually. Decisions where the IPA was alleged against families with children never included the "best interest" or the "availability of support" assessment in the IPA context. No case was recorded where the authority raised the IPA against an applicant recognised as suffering from trauma, or against an LGBT applicant.

No decisions issued in 2012-13 concerning unaccompanied children were found. According to stakeholders, unaccompanied children who apply for asylum in Poland are predominantly boys from Afghanistan who subsequently abscond from their RSD, which is discontinued. In one RDU decision the authority cited evidence that the applicant was a child (applicant's testimony, corroborated by the Embassy of Afghanistan), but nevertheless considered the case as if he were an adult.[10]

4. Access to protection.

Even when a specific IPA area was identified, the issues of safe and legal travel and admittance were often not assessed. When the assessment appeared, it was usually limited to establishing that the applicant enjoyed formal freedom of movement in the country of origin.

The issue of imbalance between people with special needs and protection actors vis-à-vis access to protection is not analysed in practice: there are no statutory provisions requiring such analysis and corresponding guidance in the case law of the NSA, nor any written internal/administrative guidance. The research noted cases where the issue may have been relevant, in particular Kurdish applicants from Georgia; single mothers (or a broader group of single women) from Chechnya; and homosexual applicants from African countries.

ii. Application of the IPA.

1. Procedure.

[10] RDU, Decision no. 313-1/S/122, 2.11.2012 (AFG06MNSUM).

a. Location of the IPA in the asylum procedure.

Use of the IPA usually involved a determination that the applicant's fear was not well-founded, followed by the IPA as a subsidiary argument. That argument was sometimes made on a conditional basis and often related to the applicant's perception of the circumstances in the region of former residence (not those circumstances as such), reflected by a formulation "should the applicant feel threatened in the region, than s/he has an opportunity to relocate". This general threat would not be evaluated as a fear of persecution or a risk of serious harm, but in practice the argument was more frequently embedded in the decisions' sections considering refugee status than subsidiary protection.

The IPA was never considered as a threshold argument to deny protection. Neither did the research note any instance of its being the sole or even main argument to deny a protection claim, after it had been concluded that the applicant would otherwise qualify. The case sample and interviews confirmed the IPA is not invoked in the accelerated procedure, which applies only to manifestly unfounded applications.

b. Procedural safeguards.

1. Notice given to applicant.

The first notice applicants usually receive that the IPA is under consideration is when they receive the determination decision. A standard IPA question is often asked at the determination interview ("[Given your fear of persecution/ risk of suffering serious harm in the region of your former habitual residence] would you be able to resettle to another part of your country of origin?"), but this is done in a formal, single-question manner.

2. Opportunity to challenge the IPA.

The applicant does not have an effective opportunity to contest or comment on the IPA before the appellate stage. Pursuant to Article 10 (1) of the 1960 Administrative Procedure Code (APC) "the administrative authority shall at every stage of the proceedings ensure that all parties can actively participate in the proceedings, and before issuing the decision ensure that they had the opportunity to comment on the evidence and materials gathered, as well as the demands presented". Polish RSD authorities implement that requirement either by presenting the case file to the applicant at the end of the RSD interview, asking them to comment (UDSC), or by forwarding a letter indicating that all evidence has been enclosed in the case file and that the applicant may comment within a prescribed period (UDSC, RDU). Neither of these exercises informs the applicant that the IPA will be alleged.

2. Policy.

a. Type of protection claim.

The IPA has appeared in the determination decisions' sections dedicated to both refugee status and subsidiary protection. No patterns have been identified: some decisions (rulings) would apply IPA only with regard to RS, others only to SP, some to neither, a few to both. No

differences in rules for applying the IPA to RS and SP were noticed. In one decision the IPA was applied with regard to a risk of Article 15(c) serious harm.

No cases were noted where the IPA would be applied after the authority accepted that the applicant had a well-founded fear of persecution on the part of a state actor. The IPA was applied in some cases of applicants from Chechnya, who alleged fear of persecution or serious harm on the part of law enforcement agencies operating there.

b. Frequency of application.

Bearing in mind that any binding internal guidance on determination procedures could only be issued at UDSC level (RDU members and WSA/ NSA judges are bound by law only), no such guidance at either level of binding or non-binding character has been located. In the evaluated practice, no patterns of regular IPA assessment in the decisions of similar categories (whatever the criterion for their selection – outcome of the decision, applicant's country of origin etc.) have been recorded, IPA having been considered irregularly and inconsistently across the research sample.

c. IPA as a blanket policy?

RDU and WSA have not adopted a blanket policy approach towards any category of applicants. However, some RDU panels tended to allege the IPA more often in cases concerning applicants originating from Chechnya than in others.

A UDSC stakeholder confirmed that with regard to asylum-seekers from Chechnya the authority shared UNHCR's position on the IPA as presented in the *Interim Guidance for Assessing the International Protection Needs of Asylum-Seekers from the Chechen Republic of the Russian Federation of 16 March 2009* ("The question as to whether or not an internal flight or relocation alternative is available should be assessed on a case by case basis in light of the requisite relevance and reasonableness analysis and taking into account the individual circumstances of the case. The research and analysis so far however supports the position that an internal flight or relocation alternative should not be considered to be available, either within the Chechen Republic or in other regions of the Russian Federation"). The UDSC also stated that in cases originating from Chechnya "the internal flight alternative is usually considered in a common sense understanding, i.e. as a general opportunity of safe residence in another part of the Russian Federation".

UDSC stated that in cases from Afghanistan, the authority followed the UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan of 17 December 2010* as well as its own COI compilation, both of which reject the availability of the IPA in Afghanistan. This statement was not consistent with UDSC decisions, which seemed to have accepted the IPA in Kabul. UDSC further stated that in light of the available COI, eligibility officers were instructed (verbally) not to consider the IPA for applicants originating from Belarus, Egypt, Somalia and Syria. This was consistent with the research findings (although no first instance decisions concerning Belarus were evaluated).

d. *Scope of application of IPA.*

The research found that IPA has most often been applied with regard to persons from Russia and Afghanistan. IPA was also applied to asylum-seekers from Nigeria and Iraq. The IPA was applied in decisions regarding asylum-seekers from Chechnya throughout the research sample. UDSC decisions issued in 2013 were in general shorter and usually lacked any actors of protection or IPA related arguments. This may be due to the significant increase (up to 100%, according to UDSC and UNHCR) in applicants from Chechnya in 2013 over 2012, without additional resources being made available to the asylum authorities.[11] In recent years, Russian citizens of Chechen nationality have constituted the largest ethnic group among asylum claimants in Poland.

No category of applicants, whatever the selection criterion (country of origin, special needs, a personal feature etc.), to whom the application of the IPA would be altogether excluded was identified in the evaluated practice.

c. *Assessment of facts and circumstances.*

With regard to both the IPA and the elements of protection the authorities formally adhere to the “the one who declares” principle (it is up to the party making an assertion to prove it), but this is frequently reversed in practice. The research did not record any instances of authority explicitly requiring the applicant to prove they did not have the IPA or that a given protection actor would not provide protection.

The manner in which the IPA was raised in the decisions studied indicated that as a general rule the authorities recognised that the burden of substantiating the IPA lies with them. In no evaluated decision did the authority demand that the applicant provide evidence to the (non)existence of an IPA related circumstance. Nonetheless, in practice the burden often seemed to shift to the applicant, especially when the IPA argument lacked the reasonableness analysis or relied on the applicant’s past experience of residence in another part of the country of origin.

While none of the RSD authorities expressly indicated that the applicant should prove that the IPA is not reasonable, the manner in which the analysis was conducted would usually compel the applicant to provide such evidence so as not to have the IPA invoked as one of the reasons for rejecting the claim. If evidence showed the applicant had permanently or temporarily resided in a part of the country of origin other than the region associated with the alleged fear of persecution or risk of serious harm, this was sometimes raised to substantiate the IPA. This tended to be a matter-of-fact argument of the pattern, “if the applicant managed to settle outside his region of origin in the past, then in all probability s/he would be able to do so again”, implicitly incorporating elements of relevance (“was able to gain access to another part of the country”) and reasonableness (“was able to lead a relatively normal life there”). Such information was usually based on the applicant’s testimony, either in the application form lodged with the Border Guard or (most often) during the determination interview.

[11]The research sample and statistics from UDSC and EUROSTAT did not seem to indicate any significant change in recognition rates from 2012 to 2013.

The authorities generally recognised the relevance of Article 4 of the Qualification Directive in consideration of asylum claims, Article 4(5) having been repeatedly cited with regard to credibility assessment. The principles set out in Article 4(3) with regard to conducting the assessment on an individual basis were usually disregarded in alleging the IPA.

d. Decision quality.

i. Country of Origin Information.

The COI used in Polish determination, per the corresponding "evidence lists" included in first instance administrative decisions, was generally up to date. In an average RSD, the largest share of COI is gathered at the first administrative instance. On a smaller scale, evidence is gathered by RDU, which can also remand the case to the first instance for failure to establish relevant facts.

1. Use of COI.

No provision explicitly prescribes the standards that country of origin information (COI) in asylum cases should adhere to, including for IPA assessment. Nonetheless, the requirement for the state to ensure that precise and up-to-date information is obtained from relevant sources applies to RSD through general rules of evidence. Pursuant to the APC, "anything that can contribute to establishing the facts of the case and that is not in violation of the law" can be accepted as evidence in RSD.

Three overarching provisions on evidence of the APC apply to RSD:

a) Under Article 7, "the public authority (...) takes all measures necessary to establish in detail the facts of the case";

b) Article 77(1): "The public authority shall in an exhaustive manner gather and assess all evidence of the case";

c) Article 81: "The given fact can be deemed proven only if the applicant had the opportunity to comment on the evidence produced"

In general, Polish administrative procedure adheres to the "objective truth principle", requiring the authority to assume an inquisitive position towards the facts of the case and seek to produce the evidence necessary to decide on the application.

2. Specific to the region.

When they specified a region of protection in the context of the IPA (often Iraqi Kurdistan and the city of Kabul), the authorities used both the information contained in the region-dedicated parts of broader COI reports, as well as COI materials dedicated to the region. The research noted references to two IPA-specific UDSC COI compilations (*UDSC COI analysis on the internal flight/ relocation alternative in Pakistan of 16.11.2012* and *UDSC COI analysis on the internal flight alternative in the Russian Federation of 29.03.2011*) as well as two UDSC COI analyses *on the freedom of movement within the Russian Federation* of 18.02.2011 and 28.05.2012.

3. Challenging or introducing alternative COI.

Each reviewed UDSC decision contained list of evidence based on which the case was decided, attached to the case file in hard copy. The list either directly cites the COI used (reports, press releases, etc.) or points to the compilation produced by the COI Division of UDSC: each such compilation contains a list of primary sources, but those are not reflected in the decision itself, therefore a determination of primary COI sources used may require browsing the case file.

The means of monitoring the evidence produced by the authority at the applicant's disposal is the right to access the case file at any stage of the proceedings, as well as the authority's obligation to advise the applicant of the completion of the evidentiary proceedings and the opportunity to comment, prescribed in Article 10 APC. The applicant has the right to comment on the evidence at any stage before the decision is issued and the authority should take those comments into account. Any effective evidence related activity normally requires legal assistance, especially for asylum-seekers in detention, who among other disadvantages lack access to their case file.

ii. Templates, guidance and training.

In 2012-13, according to stakeholders, no specific guidelines on the interpretation and application of actors of protection and the IPA were introduced at UDSC, RDU or the WSA, nor were capacity building activities dedicated to these concepts organised. In 2009-10 UDSC eligibility officers attended the European Asylum Curriculum "Inclusion" module, which covered AP and the IPA. The UDSC has decided based on the results of the 2013 QAM that all staff of its Department for Refugee Procedures will attend the Inclusion module. The RDU's members meet regularly at plenary sessions and discuss issues including the IPA, especially as it pertains to the North Caucasus; they sometimes come to a common understanding of certain points, but this cannot be regarded as "guidelines". WSA judges participated in a conference in October 2012 on the "use of COI in RSD", co-organised by the WSA, UNHCR and the International Association of Refugee Law Judges. No session was dedicated specifically to AP or the IPA.

In the framework of two ERF projects, "Asylum Systems Quality Assurance and Evaluation Mechanism" (2008-10) and "Further Developing Asylum Quality in the EU" (2010-11), UNHCR cooperated with UDSC to develop an in-house quality assurance mechanism (QAM) for its determination practice. The QAM by-law prescribes a methodology, including sampling and assessment criteria and a procedure to communicate and implement recommendations. In 2012-13 the QAM repeatedly produced two recommendations concerning actors of protection:

- "Assessment of potential persecution in the case should account for: the character of the rights infringed, actors committing the infringement, character of infringement, the issue of state protection, the reasons for persecution, as well as the degree of probability that persecution will take place";
- "In alleging that the applicant could turn for protection to the competent authorities of the country of origin it should be assessed whether in the given circumstances such a step would be safe for the applicant and potentially effective";

And two one-time recommendations pertaining to the IPA:

- “When the authority took the general view [in the decision] that the applicant does not meet the criteria for granting protection, the investigation of the internal relocation alternative should be abandoned”;
- “The written reasoning of a decision granting refugee status or subsidiary protection should assess whether circumstances mentioned in Article 18(1) of the Law (the opportunity to settle without obstacles in another part of the country of origin) are present”.[12]

However it is not clear what effect these recommendations have had on practice.

Within the first QAM project, UNHCR NO in Warsaw translated and shared with UDSC the UNHCR guidance document “*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*” (2003). The research did not record any UDSC decisions invoking that guidance, and the rules of assessment it set out were generally not followed. In 2011, UNHCR RRCE Budapest and NO Warsaw carried out a “Study on the Practice of the Internal Flight Alternative in Central European Countries”. The national report on Poland included recommendations for practice. According to the UDSC,the Polish language version was shared with eligibility officers in April 2012. The research sample indicated that significant gaps the report highlighted persisted in 2013, although the IPA may have been considered less frequently than in prior years. UNHCR NO is implementing the “Response to Vulnerability in Asylum” project, coordinated by UNHCR RRCE. It was not possible to establish whether this project will produce capacity building activities or guidelines relating to actors of protection or the IPA.

Neither UDSC nor RDU (which may interview the applicant if it finds some of the evidence inconclusive) introduced templates for determination interviews. The limited number of UDSC interview records browsed by the researcher indicated that two questions were frequently asked: “Would you be able to settle in another part of your country?” or similar, and “Would you be able to obtain protection in the country of origin” or similar. In all cases, the reply was negative and the interviewer did not explore the issue further, regardless of whether the applicant merely answered “no” or elaborated on the reasons. Such practice may reflect the criteria (“Real alternative of internal flight examined” and “Real opportunity to obtain protection in the country of origin”, to be assessed as “yes/ no/ not applicable + remarks”) included in the Assessment Form for RSD Interviews, a part of the UDSC QAM.

UNHCR guidance invoked by Polish authorities across all RSD instances frequently and almost exclusively is the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1992). The material evaluated never invoked the *Handbook* in the context of actors of protection, effectiveness of protection or the IPA. No other UNHCR general RSD guidance was invoked. Some decisions invoked the UNHCR *Interim Guidance for Assessing the International Protection Needs of Asylum-Seekers from the Chechen Republic of the Russian Federation* (2009), but never in the context of the IPA, despite a dedicated excerpt in the document. The research recorded one instance of invoking foreign guidance in the context of the IPA: UDSC invoked the general conclusion on the IPA reached by the UK

[12] This recommendation was formulated against a decision concerning a female applicant from Cameroon.

Upper Tribunal in the case *HM and Others (Article 15(c)) Iraq CG [2010] UKUT 331 (IAC)*, not on a point in law, but rather as a direct argument that the IPA was available in Iraq should 15(c) circumstances be established. Otherwise, Polish authorities did not invoke any foreign or international guidance on the IPA. Nor was any foreign or international guidance (apart from the *Handbook*) invoked with regard to any other area.

VI. National recommendations.

These recommendations are considered particularly relevant to the Polish context, and are complementary to the general recommendations provided in the APAIPA comparative report.

General Recommendation:

- If the IPA or AP is raised as a possibility or as a supporting argument, it must be fully assessed as a separate and independent ground to deny protection and not simply asserted.

Actors of Protection:

- The availability of protection must be demonstrated in practice, not merely in principle. The effect of that practice must be shown in relation to the particular person concerned (or similarly situated persons), not merely in general terms. It should be demonstrated that the particular applicant can effectively be protected by a specific actor of protection and will have access to protection and that the protection is not temporary.

- The effectiveness of protection implies the durability of protection. The decision maker needs to ensure that protection is non-temporary, and thus establish that the factors which formed the basis of the refugee's fear of persecution may be regarded as having been permanently eradicated in that here are no well-founded fears of being exposed to acts of persecution or a risk of serious harm.

- Applicants are not required in law, and should not be required in practice, to exhaust all possibilities to find protection in the country of origin prior to their flight. In particular, full account should be taken of situations where requesting protection in the country is dangerous or likely to be unavailing. The applicant should also not be expected to request such protection where the determining authority has not clearly demonstrated the availability and access to protection in the country and region of origin.

- Non-State actors should never be considered as actors of protection, as by their nature they are unable to ensure durability of protection.

Internal Protection Alternative:

- If the decision maker decides to use the IPA, s/he must do so with careful regard to international law, and must rigorously follow the guidance provided in the recast

Qualification Directive, in particular Recital 27, Articles 4, 7 and 8, as well as applicable norms of Polish asylum law. Each time the determining authority proposes that the applicant relocates within his or her country of origin, this constitutes the application of the IPA.

- The IPA can effectively be alleged only with regard to a clearly delimited area of relocation. Whenever the relocation area does not coincide with an administrative entity of the country of origin, the authority conducting the assessment needs to delimit it in a manner enabling verification of whether the applicant has a safe and legal access to the whole of the delimited area and whether protection is available to the applicant in the whole of the delimited area.

- When assessing whether in a part of the country of origin the applicant has no well-founded fear of being persecuted or is not at real risk of suffering serious harm, and can reasonably be expected to settle there, the decision maker needs to take into account the individual circumstances of the applicant.

- With due regard to Recital 27 of the 2011 Qualification Directive the determining authorities, while considering the IPA, should adopt a presumption that effective protection is not available where State agents are the actors of, or tolerate, persecution or serious harm.

- The IPA should not be applied unless it is demonstrated that the applicant will be able to safely and legally traverse each stage of the journey required to travel from the Member State to the identified protection region, including gaining admittance.

- If the IPA may be applicable to the applicant, he/she must be provided with information explaining the concept and its significance, either in written form or through their legal representative or both. If the IPA is to be considered, the applicant must be promptly made aware of this possibility and given the opportunity to present evidence and arguments against it.

- The authority conducting the assessment bears the burden of establishing each element of the IPA. The burden of proof as to the availability of the IPA should not be shifted by the decision maker to the applicant by way of disregarding any component of the IPA analysis.

Vulnerable groups:

- The Decision maker in applying the IPA must each time verify whether the applicant has any special needs due to circumstances such as age, gender, health, disability or other aspects of their personal background. If such needs are present, it should be separately analysed whether and how they affect the prospect of applying the IPA.

- As indicated in the Recast Qualification directive (Recital 27), when the applicant is an unaccompanied child, the availability of appropriate care and custodial arrangements, which are in the best interest of the unaccompanied child, should form part of the assessment as to whether that protection is effectively available.

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