



# QUALIFICATION FOR INTERNATIONAL PROTECTION (DIRECTIVE 2011/95/EU)

A Judicial Analysis

Produced by the

International Association of Refugee Law Judges  
European Chapter (IARLJ-Europe)

under contract to EASO

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## European Asylum Support Office

EASO is an agency of the European Union that plays a key role in the concrete development of the Common European Asylum System (CEAS). It was established with the aim of enhancing practical cooperation on asylum matters and helping Member States fulfil their European and international obligations to give protection to people in need.

Article 6 of the EASO founding Regulation\* (hereinafter the Regulation) specifies that the Agency shall establish and develop training available to members of courts and tribunals in the Member States. For this purpose, EASO shall take advantage of the expertise of academic institutions and other relevant organisations, and take into account the Union's existing cooperation in the field with full respect to the independence of national courts and tribunals.

## The International Association of Refugee Law Judges

The International Association of Refugee Law Judges (IARLJ) is a transnational, non-profit association that seeks to foster recognition that protection from persecution on account of race, religion, nationality, political opinion, or membership of a particular social group is an individual right established under international law, and that the determination of refugee status and its cessation should be subject to the rule of law. From its foundation in 1997, the association has been heavily involved in the training of judges around the world dealing with asylum cases. The European Chapter of the IARLJ (IARLJ-Europe) is the regional representative body for judges within Europe. One of IARLJ-Europe's specific objectives under its Constitution is 'to enhance knowledge and skills and to exchange views and experiences of judges on all matters concerning the application and functioning of the Common European Asylum System (CEAS)'.

## Contributors

This Analysis has been developed by a process having two components: an Editorial Team (ET) of judges with overall responsibility for the final product and a drafting team of experts.

In order to ensure the integrity of the principle of judicial independence and that the EASO Professional Development Series for Members of Courts and Tribunals is developed and delivered under judicial guidance, an ET composed of serving judges, with extensive experience and expertise in the field of asylum law, was selected under the auspices of a Joint Monitoring Group (JMG). The JMG is composed of representatives of the contracting parties, EASO and IARLJ-Europe. The ET reviewed drafts, gave detailed instructions to the drafting team, drafted amendments, and was the final decision-making body as to the scope, structure, content and design of the work. The work of the ET was undertaken through a combination of face-to-face meetings in Valletta in December 2015 and London in September 2016 as well as regular electronic/telephonic communication.

\* Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office [2010] OJ L 132/11.

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Comments on the draft were received from Judge **Lars Bay Larsen** of the Court of Justice of the European Union (CJEU) and Judge **Ledi Bianku** of the European Court of Human Rights (ECtHR) in their personal capacities.

**Carole Simone Dahan** (Senior Legal Adviser, Judicial Engagement) and **Cornelis (Kees) Wouters** (Senior Refugee Law Adviser) of the Division of International Protection of the United Nations High Commissioner for Refugees (UNHCR); and **Paul McDonough** (Asylum Liaison Expert, UNHCR Liaison Office to EASO) also expressed their views on the draft text.

Comments were also received from the following participants in the EASO network of court and tribunal members and in the EASO consultative forum: ACCEM, Spain; Administrative Court Sofia – City, Bulgaria; the Austrian Supreme Administrative Court; the Council for Alien Law Litigation, Belgium; the European Association for the Defence of Human Rights (AEDH); the First-tier Tribunal (Immigration and Asylum), UK; the German Federal Administrative Court; Hana Lupačová of the Czech Public Defender of Rights and the Law Faculty of Masaryk University, Czech Republic; the High Administrative Court of the Republic of Croatia; the Refugee Appeals Tribunal, Ireland; and the Tribunal of Turin, Italy.

All these comments were taken into consideration by the ET in finalising the text for publication. The members of the ET and EASO are grateful to all those who have made comments which have been very helpful in finalising this Judicial Analysis.

The methodology adopted for the production of this Analysis is set out in Appendix C, pp. 146-147.

This Judicial Analysis will be updated, as necessary, by EASO, in accordance with the methodology for the EASO Professional Development Series for Members of Courts and Tribunals.

# Table of contents

<b>Contributors</b> .....	3
<b>Table of contents</b> .....	5
<b>List of Abbreviations</b> .....	8
<b>Preface</b> .....	9
<b>Key questions</b> .....	10
<b>General introduction</b> .....	11
<b>Structure and scope</b> .....	14
<b>Interpretation of the QD (recast)</b> .....	16
<b>Part 1: Refugee protection</b> .....	22
1.1 Introduction .....	22
1.2 Who is a refugee? .....	22
1.3 Personal and territorial scope .....	23
1.3.1 Third-country national .....	23
1.3.2 Stateless person .....	25
1.3.3 Outside the country of nationality or of former habitual residence .....	26
1.4 Acts of persecution (Article 9(1) and (2)) .....	26
1.4.1 Definition of acts of persecution (Article 9(1)) .....	27
1.4.1.1 Reference to Article 1A of the Refugee Convention .....	27
1.4.1.2 Common denominator of Article 9(1)(a) and (b): sufficient seriousness of an act of persecution .....	27
1.4.1.3 Act sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights (Article 9(1)(a)) .....	29
1.4.1.4 Accumulation of measures (Article 9(1)(b)) .....	35
1.4.2 Enumeration of possible acts of persecution (Article 9(2)) .....	36
1.4.2.1 Acts of physical or mental violence (Article 9(2)(a)) .....	37
1.4.2.2 Legal, administrative, police and/or judicial measures (Article 9(2)(b)) .....	37
1.4.2.3 Disproportionate or discriminatory prosecution or punishment (Article 9(2)(c)) .....	38
1.4.2.4 Denial of judicial redress (Article 9(2)(d)) .....	39
1.4.2.5 Prosecution or punishment for refusal to perform military service in a conflict (Article 9(2)(e)) .....	39
1.4.2.6 Acts of gender-specific or child-specific nature (Article 9(2)(f)) .....	41
1.5 The reasons for persecution (Articles 9(3) and 10) .....	43
1.5.1 Connection between the reasons for persecution and the acts of persecution or the absence of protection (Article 9(3)) .....	44
1.5.1.1 Connection with the acts of persecution .....	44
1.5.1.2 Connection with the absence of protection .....	45
1.5.2 The different reasons for persecution (Article 10) .....	46
1.5.2.1 Race (Article 10(1)(a)) .....	47
1.5.2.2 Religion (Article 10(1)(b)) .....	47
1.5.2.3 Nationality (Article 10(1)(c)) .....	48
1.5.2.4 Membership of a particular social group (Article 10(1)(d)) .....	48
1.5.2.5 Political opinion (Article 10(1)(e)) .....	53
1.6 Actors of persecution or serious harm (Article 6) .....	55
1.6.1 The State (Article 6(a)) .....	56
1.6.2 Parties or organisations controlling the State or a substantial part of its territory (Article 6(b)) .....	58
1.6.3 Non-State actors (Article 6(c)) .....	59

1.7 Actors of protection (Article 7) .....	60
1.7.1 Actors of protection willing and able to offer protection (Article 7(1) and (3)) .....	61
1.7.1.1 The State (Article 7(1)(a)) .....	62
1.7.1.2 Parties or organisations, including international organisations (Article 7(1)(b) and (3)) .....	64
1.7.2 Quality of protection (Article 7(2)) .....	66
1.7.2.1 Effectiveness .....	67
1.7.2.2 Durability .....	70
1.7.2.3 Accessibility .....	71
1.8 Internal protection (Article 8) .....	72
1.8.1 Quality of internal protection (Article 8(1)) .....	73
1.8.1.1 Safety in a part of the country of origin .....	74
1.8.1.2 Access to part of the country of origin .....	76
1.8.1.3 Reasonableness for the applicant to settle in a part of the country of origin .....	77
1.8.2 Requirements of examination (Article 8(2)) .....	78
1.8.2.1 Stage of examination .....	78
1.8.2.2 Forward-looking assessment .....	79
1.8.2.3 General circumstances in the part of the country of origin and personal circumstances of the applicant .....	79
1.9 Well-founded fear .....	80
1.9.1 Well-founded fear (Article 2(d)) .....	80
1.9.1.1 The bipartite test v the objective test .....	81
1.9.1.2 The standard of proof .....	82
1.9.2 Current risk and significance of past persecution (Article 4(4)) .....	83
1.9.3 Evidence of risk to persons similarly situated .....	84
1.9.4 Issue of discretion .....	85
1.9.5 Assessment of well-founded fear within the context of generalised violence .....	86
1.9.6 International protection needs arising sur place (Article 5) .....	86
1.9.6.1 Applications based on events occurring in the country of origin (Article 5(1)) .....	88
1.9.6.2 Applications based on post-flight activities of the applicant (Article 5(2)) .....	89
1.9.6.3 Subsequent applications (Article 5(3)) .....	91
1.10 Refugee status .....	93
1.10.1 Refugee status (Article 13) .....	93
1.10.1.1 Definition of refugee status .....	93
1.10.1.2 Declaratory nature of refugee status .....	94
1.10.1.3 Refugee status, residence permit and international protection .....	95
1.10.1.4 Relationship of refugee status with subsidiary protection status and asylum .....	96
1.10.2 Family members of refugees not qualifying for refugee status in their own right (Article 23) .....	96
1.10.2.1 Derivative status .....	96
1.10.2.2 Concept of family unity (Article 2(j)) .....	97
<b>Part 2: Subsidiary protection</b> .....	<b>99</b>
2.1 Introduction .....	99
2.2 Who is eligible for subsidiary protection? .....	100
2.3 Personal and territorial scope (Article 2(f)) .....	101
2.3.1 Third-country national or stateless person .....	101
2.3.2 Territorial scope .....	102
2.4 Serious harm (Article 15) .....	102
2.4.1 Object, purpose and structure .....	102
2.4.1.1 More favourable standards clause .....	103
2.4.1.2 Coherence of relationships between Article 15(a), (b) and (c) .....	104
2.4.1.3 Non-hierarchical character and overlaps between Article 15(a), (b) and (c) .....	104



2.4.2 Death penalty or execution (Article 15(a)) .....	105
2.4.2.1 Death penalty .....	105
2.4.2.2 Execution .....	105
2.4.3 Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin (Article 15 (b)) .....	106
2.4.3.1 Torture or inhuman or degrading treatment or punishment .....	106
2.4.3.2 Non-refoulement according to Article 3 ECHR and subsidiary protection under Article 15(b) in cases of unintentional ill-treatment .....	109
2.4.3.3 Inhuman or degrading treatment in the country of origin of an applicant .....	109
2.4.4 Serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict (Article 15(c)) .....	110
2.5 Actors of serious harm (Article 6) .....	110
2.5.1 The State (Article 6(a)) .....	111
2.5.2 Parties or organisations controlling the State or a substantial part of its territory (Article 6(b)) .....	111
2.5.3 Non-State actors (Article 6(c)) .....	111
2.6 Actors of protection (Article 7) .....	111
2.6.1 Actors of protection willing and able to offer protection (Article 7(1) and (3)) .....	111
2.6.1.1 The State (Article 7(1)(a)) .....	111
2.6.1.2 Parties or organisations, including international organisations (Article 7(1)(b) and (3)) .....	111
2.6.2 Quality of protection (Article 7(2)) .....	111
2.7 Internal protection (Article 8) .....	112
2.7.1 Quality of internal protection (Article 8(1)) .....	112
2.7.2 Requirement of examination (Article 8(2)) .....	113
2.8 Substantial grounds for believing in a real risk .....	114
2.8.1 Real risk (Article 2(f)) .....	114
2.8.2 Requirement of current risk (Article 2(f)) and significance of past serious harm (Article 4(4))	115
2.8.3 Evidence of risk to persons similarly situated .....	116
2.8.4 Issue of discretion .....	116
2.8.5 Assessment of serious harm within the context of generalised violence .....	117
2.8.6 Subsidiary protection needs arising sur place (Article 5) .....	117
2.8.6.1 Applications based on events occurring in the country of origin (Article 5(1)) .....	118
2.8.6.2 Applications based on post-flight activities of the applicant (Article 5(2)) .....	118
2.8.6.3 Subsequent applications (Article 5(3)) .....	118
2.9 Subsidiary protection status .....	119
2.9.1 Subsidiary protection status (Article 18) .....	119
2.9.1.1 Definition of subsidiary protection status .....	119
2.9.1.2 Subsidiary protection status and access to benefits (employment, social welfare, health care and integration facilities) .....	119
2.9.2 Family members of beneficiaries of subsidiary protection not qualifying for subsidiary protection in their own right (Articles 23 and 2 (j)) .....	120
<b>Appendix A: Decision trees</b> .....	<b>122</b>
<b>Appendix B: Primary sources</b> .....	<b>129</b>
<b>Appendix C: Methodology</b> .....	<b>146</b>
<b>Appendix D: Select bibliography</b> .....	<b>148</b>
<b>Appendix E: Compilation of jurisprudence</b> .....	<b>158</b>

## List of Abbreviations

APD (recast)	Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
Dublin II Regulation	Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national
EASO	European Asylum Support Office
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EDAL	European Database of Asylum Law
EU	European Union
EWCA	Court of Appeal of England and Wales (UK)
IARLJ	International Association of Refugee Law Judges
ICCPR	International Covenant on Civil and Political Rights
QD	Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
QD (recast)	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)
NGO	Non-governmental organisation
Refugee Convention	Convention Relating to the Status of Refugees (1951), as amended by its Protocol (1967) [referred to in EU asylum legislation as ‘the Geneva Convention’]
Geneva Convention	See Refugee Convention
Returns Directive	Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UKIAT	United Kingdom Immigration and Asylum Tribunal
UKUT	United Kingdom Upper Tribunal
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
US	United States of America

## Preface

In close cooperation with courts and tribunals of the Member States as well as other key actors, the European Asylum Support Office (EASO) is creating a Professional Development Series aimed at providing courts and tribunals with a full overview of the Common European Asylum System (CEAS) on a step-by-step basis. Following consultations with the EASO network of court and tribunal members, including IARLJ-Europe, it became apparent that there was a pressing need to make available to courts and tribunals judicial professional development materials on certain core subjects dealt with in their day-to-day decision-making. It was recognised that the process for developing such core materials required the involvement of judicial and other experts in a manner fully respecting the principle of independence of the judiciary as well as also accelerating the development of the overall Professional Development Series.

This Judicial Analysis is the product of a project between EASO and IARLJ-Europe and it forms part of the EASO Professional Development Series for Members of Courts and Tribunals.

The Analysis is primarily intended for use by members of courts and tribunals of EU Member States concerned with hearing appeals or conducting reviews of decisions on applications for international protection. It aims to provide a Judicial Analysis on qualification for international protection under Directive 2011/95/EU (QD (recast)). It is intended to be of use both to those with little or no prior experience of adjudication in the field of international protection within the framework of the CEAS as well as to those who are experienced or specialist judges in the field. As such, it aims to be a useful point of reference for all members of courts and tribunals concerned with qualification for international protection. The structure, format and content have, therefore, been developed with this broad audience in mind. This Judicial Analysis provides:

- A general introduction setting out the objective and structure of the analysis, an overview of the rules of interpretation of the QD (recast), and a presentation of applications for international protection and the limited scope for more favourable standards.
- A detailed analysis of qualification for refugee status and its definitional elements as laid down in the QD (recast).
- A detailed analysis of qualification for subsidiary protection and its definitional elements as laid down in the QD (recast).

The Analysis is supported by a compilation of jurisprudence and appendices listing not only relevant EU primary and secondary legislation and relevant international treaties of universal and regional scope, but also essential case-law of the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) and selected jurisprudence of the courts and tribunals of EU Member States. Decision trees are also provided, setting out the questions courts and tribunals of Member States need to ask when examining applications for international protection. To ensure that the relevant legislation and case-law is easily and quickly accessible to readers making use of the digital version, hyperlinks have been utilised. Other Judicial Analyses, which have been or are being developed as part of the Professional Development Series, explore other specific areas of the CEAS, in addition to the Judicial Analysis providing a general introduction to the CEAS<sup>1</sup>.

The aim is to set out clearly and in a user-friendly format the current state of the law. This publication analyses the law as it stood at 30 September 2016. However, the reader will be aware that this is a rapidly evolving area of law and practice. At the time of writing, between May 2015 and September 2016, the asylum systems of a number of EU Member States came under exceptional pressure due to the arrivals of unprecedented numbers of persons seeking international protection. It is worth emphasising in this context that, together with other Judicial Analyses in the Professional Development Series, this Judicial Analysis will be updated periodically as necessary. However, it will be for readers to check whether there have been any changes in the law. The Analysis contains a number of references to sources that will help the reader to do that.

<sup>1</sup> See: EASO, *The Implementation of Article 15(c) QD in EU Member States*, July 2015; EASO, *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) – A Judicial Analysis*, January 2016; EASO, *Ending International Protection – A Judicial Analysis*, forthcoming; EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, August 2016; EASO, *Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis*, forthcoming; and EASO, *Access to Procedures governing International Protection and the Non-Refoulement Principle – A Judicial Analysis*, forthcoming.

## Key questions

The present Judicial Analysis aims to provide an analysis of qualification for international protection under the recast Qualification Directive 2011/95/EU (QD (recast)) for courts and tribunals of Member States. It strives to answer the following main questions:

1. **Who is respectively a refugee or a beneficiary of subsidiary protection** (Section 1.2 and Section 2.2) and what is the **personal and territorial scope** of the QD (recast) when it comes to qualification for refugee protection (Section 1.3) and subsidiary protection (Section 2.3)?
2. What does **persecution** mean under Article 9(1) and (2) QD (recast) (Section 1.4)? What are the **serious harms** that comprise qualification for subsidiary protection under Article 15 QD (recast) (Section 2.4)?
3. How should an **act of persecution** be connected to one or more reason(s) for persecution or to the absence of protection against such acts under the terms of Article 9(3) QD (recast) (Section 1.5.1)?
4. What are the **reasons for persecution** defined in Article 10 QD (recast) (Section 1.5.2)?
5. Which **actors of persecution or serious harm** are recognised in Article 6 QD (recast) (Section 1.6 and Section 2.5)?
6. What is meant by **effective protection** against actors of persecution or serious harm and by which actors can such protection be provided by virtue of Article 7 QD (recast) (Section 1.7 and Section 2.6)?
7. What does **internal protection** mean and entail for Member States applying Article 8 QD (recast) (Section 1.8 and Section 2.7)?
8. What is meant by **‘well-founded fear’** of persecution for the purposes of qualifying for refugee protection under the terms of Articles 2(d), 4(4) and 5(1)-(2) QD (recast) (Section 1.9)? What does the phrase **‘substantial grounds have been shown for believing that the person would face a real risk’** of suffering serious harm mean for the purposes of qualifying for subsidiary protection under the terms of Articles 2(f), 4(4) and 5(1)-(2) QD (recast) (Section 2.8)?
9. What does the granting of **refugee status** or **subsidiary protection status** entail (see respectively Section 1.10.1 for refugee status, and Section 2.9.1 for subsidiary protection status)?
10. What is the situation of **family members** of refugees or subsidiary protection beneficiaries not qualifying for international protection in their own right under Article 23 QD (recast) (see respectively Section 1.10.2 for refugee status, and Section 2.9.2 for subsidiary protection status)?

# General introduction

## Objective

This Judicial Analysis concerns qualification for international protection in terms of the [Qualification Directive 2011/95/EU](#) (QD (recast))<sup>1</sup>. The QD (recast) is an essential part of the European Union (EU) asylum *acquis* and derives its legal basis from primary law in Articles 78(2)(a) and (b) of the [Treaty on the Functioning of the European Union](#) (TFEU)<sup>2</sup>, which provides for the adoption of measures for a Common European Asylum System (CEAS) comprising a uniform status of asylum and a uniform status of subsidiary protection. The significance of the fact that the QD (recast) is in the form of a Directive is analysed further in *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*<sup>3</sup>, but in view of the fact that interpretation of each Directive requires regard to its specific objects and purposes, certain preliminary observations about it are in order.

The EU has been working towards the creation of a CEAS<sup>4</sup> since 1999, which must be in accordance with the [Convention Relating to the Status of Refugees \(1951\)](#), as amended by its [Protocol \(1967\)](#) (Refugee Convention)<sup>5</sup> and other relevant treaties (Article 78(1) TFEU). As a first-phase legal instrument of the CEAS, the [Qualification Directive 2004/83/EC](#) (QD), which entered into force on 20 October 2004, established minimum standards for the qualification and status of third-country nationals or stateless persons in need of international protection<sup>6</sup>. However, such minimum standards afforded Member States a degree of flexibility for the implementation of additional measures<sup>7</sup>.

It was therefore already agreed upon in 1999 that, in the second phase of the creation of the CEAS<sup>8</sup>, EU legislation should lead to a ‘common asylum procedure’ and a ‘uniform status’ for persons who are granted international protection<sup>9</sup>.

As a result, the QD (recast) as a second-phase legal instrument of the CEAS, which entered into force on 21 December 2013, reinforces the harmonisation of asylum law within the Union<sup>10</sup>. This aim is manifested by the legislator’s choice to avoid the expression ‘minimum standards’, as is apparent from the wording of Article 1 QD (recast):

The purpose of this Directive is to lay down **standards** for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a **uniform status** for refugees or for persons eligible for subsidiary protection, and for the content of the protection-granted<sup>11</sup>.

Recital (8) QD (recast) explains that considerable disparities remained between Member States concerning the granting of protection and content of such protection after the adoption of the QD. Therefore, the objective of the QD (recast) is a higher level of approximation of the rules on the recognition and content of international protection on the basis of higher standards (recital (10) QD (recast)). According to recital (13), achieving this objective should help to limit the secondary movement of applicants for international protection between Member States, where such movement is purely caused by differences in legal frameworks.

<sup>1</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJL 337/9.

<sup>2</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

<sup>3</sup> EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, August 2016, pp. 66 and 67.

<sup>4</sup> European Council, *Presidency Conclusions*, Tampere European Council 15 and 16 October 1999, SN 200/99, Brussels, para. 13 (*Tampere Conclusions*). The legal basis of the CEAS is discussed more extensively in EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, op. cit., fn. 3, Part 1, pp. 13–23. The principles of interpretation of the legislative provisions of the CEAS are also dealt with in Part 3 of the Introduction.

<sup>5</sup> Convention Relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entry into force: 22 April 1954); and Protocol Relating to the Status of Refugees, 606 UNTS 267 (entry into force: 4 October 1967).

<sup>6</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12.

<sup>7</sup> UNHCR, *UNHCR Comments on the European Commission’s Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009)*, July 2010, p. 2.

<sup>8</sup> See EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, op. cit., fn. 3, Section 1.4, pp. 15 and 16.

<sup>9</sup> European Council, *Tampere Conclusions*, op. cit., fn. 4, para. 15.

<sup>10</sup> CJEU, judgment of 7 June 2016, Grand Chamber, case C-63/15, *Mehrdad Ghezlebash v Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:409, para. 60.

<sup>11</sup> Emphasis added.

Although the QD (recast) has the purpose of laying down standards for a uniform status, it continues to permit Member States to introduce or retain more favourable standards. However, as before, this is subject to the reservation that those standards are compatible with the QD (recast) (see Section below on Article 3 QD (recast), pp. 19).

All EU Member States are bound by the QD (recast), except for Denmark, the United Kingdom (UK) and Ireland as illustrated in Table 1 below. Denmark does not take part in the adoption of measures based on Article 78 TFEU and is therefore not bound by the QD nor the QD (recast)<sup>12</sup>. The UK and Ireland are also not taking part in the adoption of the QD (recast)<sup>13</sup>, but since they opted into the QD, these Member States remain bound by the QD<sup>14</sup>.

**Table 1: Adoption of the QD and its recast by Denmark, Ireland and the UK**

	QD	QD (recast)
Denmark	✘	✘
Ireland	✔	✘
UK	✔	✘

It must be remembered that the CEAS is an evolving system. With regard to possible future developments, it should be noted that on 6 April 2016, the European Commission set out its priorities for further comprehensive structural reform of the CEAS<sup>15</sup>. Whilst considering that significant progress has been made in the development of the CEAS, the Commission noted structural weaknesses and shortcomings in the design and implementation of the CEAS. Amongst other things, the Commission highlighted that there are still notable differences between Member States in the types of procedures applied, the reception conditions provided to applicants, recognition rates and the status granted to beneficiaries of international protection. In its view, these divergences contribute to secondary movements and ‘asylum shopping’, create pull factors, and ultimately lead to an uneven distribution among the Member States of the responsibility to offer protection to those in need<sup>16</sup>. On 4 May and 13 July 2016, the Commission proceeded to publish proposals for the reform of six legislative instruments, including the QD (recast)<sup>17</sup>.

One of the Commission’s proposals of 13 July 2016 seeks to replace the QD (recast) with a Regulation<sup>18</sup> as unlike directives, regulations are directly applicable and, therefore, this change itself is likely to contribute to greater convergence in the application of the provisions<sup>19</sup>. The Proposal itself explains why the Commission considers this necessary. It notes that whilst the QD (recast) has contributed to some level of approximation of national rules, recognition rates still vary between Member States and there is a lack of convergence as regards decisions on the type of protection status granted by each Member State. There is also considerable variation among Member States’ policies with regard to the duration of residence permits granted to beneficiaries of international protection, as well as their access to rights. Moreover, it considers that the current provisions on cessation of status are not systematically used in practice. Finally, it states that some of the rules in the QD (recast), providing common criteria for qualification for international protection, are optional (for example, Article 4(1) concerning the duty of the applicant to substantiate the application; Article 5(3) concerning international protection needs arising *sur place*; and Article 8 concerning internal protection) and allow Member States a wide degree of discretion. As a result, the Commission considers that greater convergence is required in order to seek to ensure equal treatment of applicants across the EU and thereby deter the movement of applicants to Member States which are perceived to provide higher standards of international protection. In addition, many of the proposed changes react

<sup>12</sup> Protocol No 22 on the position of Denmark, annexed to the TFEU in [2012] OJ C 326/299.

<sup>13</sup> Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TFEU in [2012] OJ C 326/295.

<sup>14</sup> Recitals (38) and (39) QD. See also S. Peers, ‘The Revised Directive on Refugee and Subsidiary Protection Status’, *Statewatch*, 2011, pp. 2-3.

<sup>15</sup> European Commission, *Communication from the European Commission to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, 6 April 2016, COM(2016) 197 final.

<sup>16</sup> European Commission, *Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*, 13 July 2016, COM(2016) 466 final (Proposal for a Qualification Regulation).

<sup>17</sup> See [http://europa.eu/rapid/press-release\\_IP-16-2433\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2433_en.htm).

<sup>18</sup> European Commission, *Proposal for a Qualification Regulation*, op. cit., fn. 16.

<sup>19</sup> See EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, op. cit., fn. 3, pp. 66 and 67.

to decisions of the CJEU<sup>20</sup>. The proposed Article 10(3) clarifies that a determining authority cannot reasonably expect an applicant to behave discreetly or abstain from certain practices, where such behaviour or practices are inherent to his/her identity, to avoid the risk of persecution in his/her country of origin.

The proposal to replace the QD (recast) with a Regulation and the proposed amendments contained therein will now be the subject of scrutiny and negotiation within the Council and European Parliament. The participation of the UK, Ireland and Denmark in the arrangements set out in the Commission's proposal repealing the QD (recast) will be determined in the course of negotiations in accordance with the Protocols mentioned above<sup>21</sup>; and with regards specifically to the UK, in light of negotiations for its withdrawal from the EU. At the time of writing, the precise terms of the new Regulation cannot be known. The reader should, therefore, simply be aware that at some point in the future, there is the possibility that the QD (recast), which is the subject of this Judicial Analysis, may be repealed and replaced by a Regulation with some amended provisions.

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<sup>20</sup> For example, proposed Article 10(3) clarifies that a determining authority cannot reasonably expect an applicant to behave discreetly or abstain from certain practices, where such behaviour or practices are inherent to his/her identity, to avoid the risk of persecution in his/her country of origin; see CJEU, judgment of 7 November 2013, joined cases C199/12 to C201/12, *Minister voor Immigratie en Asiel v X and Y, and Z v Minister voor Immigratie en Asiel*, EU:C:2013:720.

<sup>21</sup> See above footnotes 12 and 13.

## Structure and scope

The definition of ‘international protection’ as laid down in Article 2(a) QD (recast) encompasses both refugee status and subsidiary protection status. The QD (recast) comprises **two components**: the provisions regarding **qualification for international protection** from Chapters II to VI and the provisions regarding **the content of international protection** in Chapter VII (recital (12) QD (recast)) (see Table 2 below).

This Judicial Analysis exclusively considers qualification for international protection. It analyses separately the conditions for qualifying for refugee status and subsidiary protection status. It therefore consists of two parts:

- Part 1: Refugee protection (pp. 22-98), covering the criteria for refugee status; and
- Part 2: Subsidiary protection (pp. 99-120), analysing the criteria for subsidiary protection status, as far as those differ from the criteria for refugee status.

This Judicial Analysis does not deal with the topics of evidence and credibility assessment, including issues concerning the duty of the applicant to substantiate the application for international protection, as they will be elaborated upon in a different Judicial Analysis in this series<sup>22</sup>. Furthermore, this Judicial Analysis only covers elements of the QD (recast) that are relevant to inclusion. It does not cover clauses related to ending international protection. These are dealt with in separate Judicial Analyses as part of the EASO Professional Development Series<sup>23</sup>. Nor does it cover the content of international protection in Chapter VII QD (recast), which in the main sets out the rights and benefits enjoyed by beneficiaries of international protection. The aforementioned subjects will only be discussed in this Judicial Analysis if reference to them is necessary for the analysis of the provisions relating to inclusion. Table 2 below summarises the structure of the QD (recast) and highlights **in bold** elements that will be addressed in this Judicial Analysis.

It is important to note that although the structure adopted for the purposes of this Analysis serves as an illustration of just one possible order in which the elements of the definitions of ‘refugee’ and ‘person eligible for subsidiary protection’ may be addressed, it broadly reflects that adopted by the Court of Justice of the European Union (CJEU). In relation to the need to deal with eligibility for refugee protection before considering eligibility for subsidiary protection, the CJEU has already made clear that this is a necessity, but it has yet to rule on ordering of analysis in more detail<sup>24</sup>. For this reason approaching the assessment of qualification in the way adopted in this Judicial Analysis is commended but (save where the CJEU has ruled on the matter) the actual approach taken may in many respects depend on the individual facts of each case. The structure proposed is slightly different in the decision trees in Appendix A (pp. 122-128) where the actors of persecution and the lack of protection against persecution are considered before the connection between the act of persecution or the absence of protection and one or more reasons for persecution.

<sup>22</sup> See EASO, *Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis*, forthcoming.

<sup>23</sup> See EASO, *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) – A Judicial Analysis*, 2016; and EASO, *Ending International Protection – A Judicial Analysis*, forthcoming.

<sup>24</sup> See CJEU, judgment of 8 May 2014, case C-604/12, *HN v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, EU:C:2014:302, paras. 29-35. The CJEU elaborated, that ‘an application for subsidiary protection should not, in principle, be considered before the competent authority has reached the conclusion that the person seeking international protection does not qualify for refugee status.’



**Table 2: Structure of the QD (recast) and scope of this Judicial Analysis**

This Judicial Analysis addresses those articles highlighted in bold.

Chapter I: General provisions	<b>Article 1: Purpose</b> <b>Article 2: Definitions</b> <b>Article 3: More favourable standards</b>
Chapter II: Assessment of applications for international protection	Article 4: Assessment of facts and circumstances <b>Article 4(4): Previous persecution or serious harm</b> <b>Article 5: International protection needs arising <i>sur place</i></b> <b>Article 6: Actors of persecution or serious harm</b> <b>Article 7: Actors of protection</b> <b>Article 8: Internal protection</b>
Chapter III: Qualification for being a refugee	<b>Article 9: Acts of persecution</b> <b>Article 10: Reasons for persecution</b> Article 11: Cessation Article 12: Exclusion
Chapter IV: Refugee status	<b>Article 13: Granting of refugee status</b> Article 14: Revocation of, ending of or refusal to renew refugee status
Chapter V: Qualification for subsidiary protection	<b>Article 15: Serious harm</b> Article 16: Cessation Article 17: Exclusion
Chapter VI: Subsidiary protection status	<b>Article 18: Granting of subsidiary protection status</b> Article 19: Revocation of, ending of or refusal to renew subsidiary protection status
Chapter VII: Content of international protection	Article 20: General rules Article 21: Protection from <i>refoulement</i> Article 22: Information Article 23: Maintaining family unity Article 24: Residence permits Article 25: Travel document Article 26: Access to employment Article 27: Access to education Article 28: Access to procedures for recognition of qualifications Article 29: Social welfare Article 30: Healthcare Article 31: Unaccompanied minors Article 32: Access to accommodation Article 33: Freedom of movement within the Member State Article 34: Access to integration facilities Article 35: Repatriation
Chapter VIII: Administrative cooperation	Article 36: Cooperation Article 37: Staff
Chapter IX: Final provisions	Article 38: Reports Article 39: Transposition Article 40: Repeal Article 41: Entry into force

## Interpretation of the QD (recast)

Being an instrument established under EU primary law (Article 78(1) TFEU), the matter of the correct interpretation of the QD (recast) is principally for the CJEU and the judgments of the CJEU have binding effect in all Member States. In its case-law, the CJEU has made it clear that the QD – and by extension the QD (recast) – ‘must be interpreted in the light of its general scheme and purpose, and in a manner consistent with the [Refugee Convention] and the other relevant treaties referred to in Article 78(1) of the TFEU’<sup>25</sup>. With regard to the relevance of the Refugee Convention for the interpretation of the QD (recast), the CJEU has held in the recent *Alo and Osso* judgment<sup>26</sup> that it is clear from recitals (4), (23) and (24) QD (recast) that the Refugee Convention constitutes the cornerstone of the international legal regime for the protection of refugees. It underlined that the provisions of the Directive for determining who qualifies for refugee status and the content of that status were adopted to guide the competent authorities of the Member States in the application of that Convention on the basis of common concepts and criteria<sup>27</sup>. Furthermore, the CJEU considered that:

In principle, [the considerations regarding the relevance of the Refugee Convention for the interpretation of the QD (recast) are] relevant only in relation to the conditions for determining who qualifies for refugee status and the content of that status, since the system laid down by the convention applies only to refugees and not to beneficiaries of subsidiary protection status, which is intended, as is apparent from recitals 6 and 33 of Directive 2011/95, to complement and add to the protection of refugees enshrined in the convention [...]. Nevertheless, recitals 8, 9 and 39 of Directive 2011/95 state that the EU legislature intended, in responding to the call of the Stockholm Programme, to establish a uniform status for all beneficiaries of international protection and that it accordingly chose to afford beneficiaries of subsidiary protection the same rights and benefits as those enjoyed by refugees, with the exception of derogations which are necessary and objectively justified. Thus, Chapter VII of Directive 2011/95, which relates to the content of international protection, is to apply, in accordance with Article 20(2) of the directive, both to refugees and to beneficiaries of subsidiary protection status, unless otherwise indicated<sup>28</sup>.

Accordingly, reference can be made to the Refugee Convention with regard to the provisions on international protection as to both refugees and persons eligible for subsidiary protection. This is also demonstrated by the CJEU’s application of these considerations to the present cases concerning the place-of-residence conditions attached to residence permits of two Syrian nationals who were granted subsidiary protection status, as the CJEU stated:

Whilst certain articles in Chapter VII contain such an indication to the contrary, that is not the case of Article 33 of Directive 2011/95. Rather, that article makes clear that the ‘freedom of movement’ it lays down is secured for ‘beneficiaries of international protection’, which means that refugees and beneficiaries of subsidiary protection status are, in that respect, subject to the same rules. Article 26 of the Geneva Convention, under which refugees are guaranteed the right to freedom of movement, expressly provides that that freedom includes not only the right to move freely in the territory of the State that has granted refugee status, but also the right of refugees to choose their place of residence in that territory. There is nothing to suggest that the EU legislature chose to include only the first of those rights in Directive 2011/95, but not the second<sup>29</sup>.

When interpreting the QD (recast), an ‘EU judge’<sup>30</sup> must have regard to EU primary law, including the [Charter of Fundamental Rights of the European Union](#) (EU Charter)<sup>31</sup>, and to ‘other relevant treaties’ referred to in Article 78(1) TFEU. The matter is dealt with in more detail in *An Introduction to the CEAS for Courts and Tribunals – A Judicial Analysis*<sup>32</sup>, but according to the CJEU, the interpretation of the QD must be consistent with the rights

<sup>25</sup> See, for instance, CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 40; CJEU, judgment of 19 December 2012, case C-364/11, *El Kott and Others v Bevándorlási és Állampolgársági Hivatal*, EU:C:2012:826, para. 43; and CJEU, judgment of 1 March 2016, joined cases C-443/14 and C-444/14, *Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover*, EU:C:2016:127, para. 29. The relevance of the Refugee Convention is further elaborated upon in EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, op. cit., fn. 3, Section 3.1. pp. 61–63.

<sup>26</sup> CJEU, *Alo and Osso* judgment, op. cit. fn. 25.

<sup>27</sup> *Ibid.*, para. 28.

<sup>28</sup> *Ibid.*, paras. 31–33.

<sup>29</sup> *Ibid.*, paras. 34 and 35.

<sup>30</sup> When national courts or tribunals are required to interpret the provisions of EU law, the national judge is required to act as an ‘EU judge’, as explained in EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, op. cit., fn. 3, p. 61.

<sup>31</sup> Charter of Fundamental Rights of the European Union of 18 December 2000, as adopted in 2007 [2012] OJ C 326/391 (entry into force: 1 December 2009).

<sup>32</sup> See EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, op. cit., fn. 3, Section 2.1.3, pp. 28–32.

recognised by the EU Charter<sup>33</sup>. Recital (16) emphasises as well that the QD (recast) ‘respects the fundamental rights and observes the principles recognised in particular by the [EU Charter]’<sup>34</sup>. According to its preamble, the EU Charter ‘reaffirms [...] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the [ECHR], the Social Charters adopted by the [Union] and by the Council of Europe and the case-law of the [CJEU] and of the European Court of Human Rights [ECtHR]’.

Article 78(1) TFEU does not define ‘other relevant treaties’ and the CJEU has yet to clarify its components. It may include those treaties identified in Article 9 and recitals (17), (18), (31) and (34), as well as other treaties that have been seen to be relevant to interpretation of the Refugee Convention. Table 3 below offers a possible (non-exhaustive) list; those referred to in the QD (recast) being highlighted in blue.

**Table 3: ‘Other relevant treaties’ relevant for the interpretation of the QD (recast)**

1	the Charter of the United Nations, 1945 <sup>35</sup>
2	the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950 <sup>36</sup>
3	the Convention relating to the Status of Stateless Persons, 1954 <sup>37</sup>
4	the International Covenant on Civil and Political Rights (ICCPR), 1966 <sup>38</sup>
5	the International Convention on the Elimination of All Forms of Racial Discrimination, 1966 <sup>39</sup>
6	the Convention on the Elimination of All Forms of Discrimination against Women, 1979 <sup>40</sup>
7	the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), 1984 <sup>41</sup>
8	the United Nations Convention on the Rights of the Child, 1989 <sup>42</sup>
9	the Rome Statute of the International Criminal Court, 1998 <sup>43</sup>
10	the Convention on the Rights of Persons with Disabilities, 2006 <sup>44</sup>

The interrelationship between EU law and ECHR jurisprudence<sup>45</sup> is dealt with in more detail in *An Introduction to the CEAS for Courts and Tribunals – A Judicial Analysis*<sup>46</sup>, but three particular points require emphasis here.

First, the CJEU has stated that the texts which constitute the CEAS signify that it was conceived in a context that supports the assumption that all Member States observe fundamental rights. This includes the rights based on the Refugee Convention and its Protocol, and on the ECHR<sup>47</sup>. As far as concerns fundamental rights as set forth in the EU Charter, they form part of primary EU law. However, Article 52(3) of the EU Charter prevents the institutions and bodies of the EU and the Member States from diminishing the protection provided by the ECHR where the provisions of the EU Charter and the ECHR are corresponding, although this must ‘not prevent EU law providing more extensive protection’.

Second, as noted in *An Introduction to the CEAS for Courts and Tribunals – A Judicial Analysis*<sup>48</sup>, the ECHR has a certain interpretive relevance in the context of defining persecution. Article 9(1)(a) QD (recast) incorporates a direct reference to Article 15(2) ECHR in relation to rights from which there may be no derogation (see Section

<sup>33</sup> See CJEU, judgment of 5 September 2012, Grand Chamber, joined cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y and Z*, EU:C:2012:518, para. 48; CJEU, *El Kott and Others* judgment, op. cit., fn. 25, para. 43; and CJEU, *Alo and Osso* judgment, op. cit. fn. 25, para. 29.

<sup>34</sup> Recital (16) also notes that the QD (recast) ‘[i]n particular [...] seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members and to promote the application of Articles 1, 7, 11, 14, 15, 16, 18, 21, 24, 34 and 35 of that Charter, and should therefore be implemented accordingly.’

<sup>35</sup> 1 UNTS 16, 26 June 1945 (entry into force: 24 October 1945).

<sup>36</sup> 213 UNTS 222, ETS No 005, 4 November 1950 (entry into force: 3 September 1953).

<sup>37</sup> 360 UNTS 117, 28 September 1954 (entry into force: 6 June 1960).

<sup>38</sup> 999 UNTS 171, 16 December 1966 (entry into force: 23 March 1976).

<sup>39</sup> 660 UNTS 195, 7 March 1966 (entry into force: 4 January 1969).

<sup>40</sup> 1249 UNTS 13, 18 December 1979 (entry into force: 3 September 1981).

<sup>41</sup> 1465 UNTS 85, 10 December 1984 (entry into force: 26 June 1987).

<sup>42</sup> 155 UNTS 3, 20 November 1989 (entry into force: 2 September 1990).

<sup>43</sup> 2187 UNTS 3, 17 July 1998 (entry into force: 1 July 2002). EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis* (op. cit., fn. 3, Section 3.4 pp. 70-80) elaborates on the obligations arising from international human rights law and the importance of international human rights treaties with regard to the interpretation of the secondary legislation comprised in the CEAS.

<sup>44</sup> 2187 UNTS 3, 17 July 1998 (entry into force: 1 July 2002).

<sup>45</sup> See for instance CJEU, judgment of 17 February 2009, case C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, EU:C:2009:94, para. 28; and CJEU, judgment of 18 December 2014, Grand Chamber, case C-542/13, *Mohamed M’Bodj v Etat belge*, EU:C:2014:2452, para. 40.

<sup>46</sup> EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, op. cit., fn. 3, Section 3.4.1., pp. 71-75.

<sup>47</sup> CJEU, judgment of 21 December 2011, Grand Chamber, joined cases C-411/10 and C-493/10, *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, EU:C:2011:865, para. 78.

<sup>48</sup> EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, op. cit., fn. 3, Section 3.4.1., pp. 71-75.

1.4.1.3 below, pp. 29-35), and the definition given in Article 15(b) QD (recast) to one type of serious harm as being ‘torture or inhuman or degrading treatment or punishment of an applicant in the country of origin’ closely corresponds to the wording of Article 3 ECHR (see Section 2.4.3 below, pp. 106-110).

Third, litigation before the CJEU concerning qualification for subsidiary protection may raise issues in respect of which there is relevant ECtHR case-law in relation to Articles 2, 3, 4(1) and 7 ECHR<sup>49</sup>.

Apart from direct references to the ECHR or rights corresponding to ECHR rights in Articles 9 and 15 of the QD (recast), the significance of ECHR principles is more likely to derive from their relevance to the interpretation of the fundamental rights set out in the EU Charter as a source of inspiration for fundamental rights recognised by EU law.

Besides the ECHR and the jurisprudence of the ECtHR as sources of interpretation in the specific respects identified above, the great importance of ‘horizontal judicial dialogue’ with regard to the interpretation of EU law is underlined in *An Introduction to the CEAS for Courts and Tribunals – A Judicial Analysis*<sup>50</sup>. For members of courts and tribunals tasked with acting as ‘EU judges’ and interpreting provisions of the QD (recast), the national case-law of other Member States may be significant, especially if the interpretation of a certain provision has not yet been clarified by the CJEU. Indeed in that context it has a relevance which the ECtHR does not have because, whereas national courts and tribunals are interpreting EU law, the ECtHR only interprets ECHR law. National case-law of other Member States may also set an example of how to translate a particular CJEU judgment to a specific case. However, when a question concerning the interpretation of the QD (recast) is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on that question is necessary to enable it to give judgment, request the CJEU to give a ruling thereon. If there is no judicial remedy under national law against that court or tribunal decision, it must refer the matter to the CJEU<sup>51</sup>.

The interpretation of the legislative provisions of the CEAS as well as the role of the CJEU and national courts and tribunals are addressed in more depth in *An Introduction to the CEAS for Courts and Tribunals – A Judicial Analysis*<sup>52</sup>.

## Best interests of the child

The principle of the best interests of the child is a general principle of (international and) EU law (Article 24(2) of the EU Charter), which is incorporated in the QD (recast): recital (18), last sentence of recital (27), recital (28), Article 20(5) and Article 31 of the QD (recast). There should be no doubt that in the case of an applicant who is a child, the principle of the best interests of the child must be a primary consideration when assessing the eligibility criteria for international protection. The principle also has relevance to the interpretation and application of procedural rules and standards. For more on this principle, see Sections 1.4.2.6.2 (pp. 42) and 1.5.2.4.2 (pp. 50).

## Application for international protection

Article 2(h) QD (recast) defines an ‘application for international protection’ as:

[A] request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately.

This definition, together with the definition of ‘applicant’ in Article 2(i) makes clear that an applicant means a third-country national or stateless person. This is elaborated upon in Section 1.3 below (pp. 23).

<sup>49</sup> See, for instance, CJEU, *NS and ME* judgment, op. cit. fn. 47, paras. 88 and 112; and CJEU, *Elgafaji* judgment, op. cit., fn. 45, paras. 28 and 44. The ECtHR, in turn, may have to assess the extent to which subsidiary protection is comparable to protection under Article 3 ECHR: see for instance ECtHR, judgment of 28 June 2011, *Sufi and Elmi v the United Kingdom*, applications nos 8319/07 and 11449/07, paras. 225 and 226.

<sup>50</sup> EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, op. cit., fn. 3, Section 3.6, pp. 84-89.

<sup>51</sup> Art. 267 TFEU.

<sup>52</sup> EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, op. cit., fn. 3, Section 3, pp. 61-89.

According to Article 2(a) QD (recast), **international protection can only mean refugee status and subsidiary protection status as defined in Articles 2(e) and (g) QD (recast)**. A request for either status constitutes an application for international protection, as Article 2(h) QD (recast) provides. Regarding subsidiary protection, the use of the term ‘subsidiary’ and the wording of Article 2(f) QD (recast) (which states that a person eligible for subsidiary protection means a person ‘who does not qualify as a refugee’) indicate that subsidiary protection status is intended for third-country nationals or stateless persons who do not qualify for refugee status<sup>53</sup>. In *HN* the CJEU elaborated, that ‘an application for subsidiary protection should not, in principle, be considered before the competent authority has reached the conclusion that the person seeking international protection does not qualify for refugee status’<sup>54</sup>. Moreover, the CJEU highlighted that, as applicants for international protection may not be ‘in a position to ascertain the kind of protection applicable to their application’<sup>55</sup>, it is for the authorities of the Member States to ‘determine the status that is most appropriate to the applicant’s situation’<sup>56</sup>. It is for the applicant to make an application but it is then for the determining authority of the Member State to decide whether he/she meets the requirements for refugee status or, if not refugee status, subsidiary protection status.

Article 3(1) of the recast Asylum Procedures Directive 2013/32/EU<sup>57</sup> (APD (recast)) defines the **territorial scope**<sup>58</sup> of an application for international protection: an application must be made ‘in the territory, including at the border, in the territorial waters or in the transit zones of the Member States’<sup>59</sup>. The APD (recast) does not apply to requests for diplomatic or territorial asylum submitted to representations of Member States (Article 3(2) APD (recast)). The CJEU has yet to rule on this matter, but it may be that this definition of the territorial scope will be seen to apply for QD (recast) purposes also<sup>60</sup>.

## More favourable standards (Article 3)

Article 3 QD (recast) provides that:

Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.

This provision only applies to situations where an applicant requests international protection, based on the grounds that he/she is a refugee within the meaning of Article 2(d) QD (recast) or that he/she is eligible for subsidiary protection (recital (14) QD (recast)). Asylum-seekers who are granted protection on a **discretionary basis** on compassionate or humanitarian grounds fall outside the scope of the QD (recital (9)) and the QD (recast) (recital (15)), as the CJEU decided in its judgments *B and D*<sup>61</sup> and *M’Bodj*<sup>62</sup>.

In the judgment *B and D*, the CJEU decided on the preliminary question whether Article 3 QD must be interpreted as restricting a Member State (in that case Germany) from recognising that a person excluded from being a refugee pursuant to the exclusion clause in the QD has a right of asylum under its constitutional law. The CJEU clarified that ‘in view of the purpose underlying the grounds for exclusion [in the QD], which is to maintain the credibility of the protection system provided for in [the QD] in accordance with the [Refugee Convention]’ a provision granting refugee status to such a person would be incompatible with the QD<sup>63</sup>. However, the CJEU confirmed that granting ‘another kind of protection’ outside the scope of the Directive to a person excluded from refugee status

<sup>53</sup> CJEU, *HN* judgment, op. cit., fn. 24, paras. 29 and 30. See also recital (33).

<sup>54</sup> CJEU, *HN* judgment, op. cit., fn. 24, para. 35.

<sup>55</sup> *Ibid.*, para. 34.

<sup>56</sup> *Ibid.*

<sup>57</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60.

<sup>58</sup> In-depth considerations about the territorial scope of an application for international protection will be provided in EASO, *Access to Procedures governing International Protection and the Non-Refoulement Principle – A Judicial Analysis*, forthcoming.

<sup>59</sup> It should be noted that the ECtHR held in *Hirsi Jamaa* that returning migrants to Libya after the Italian authorities intercepted them on the high seas without providing access to a procedure for examining their *nonrefoulement* claim amounted to a violation of, inter alia, Arts. 3 and 13 ECHR. According to the ECtHR, the migrants were ‘in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, [...] under the continuous and exclusive de jure and de facto control of the Italian authorities’ and, therefore, the ECtHR found that Italy was exercising jurisdiction extraterritorially within the meaning of Art. 1 of the ECHR (judgment of 23 February 2012, *Hirsi Jamaa and Others v Italy*, application no 27765/09, para. 81). For more information, also see ECtHR, judgment of 21 October 2014, *Sharifi et autres c Italie et Grèce*, application no 16643/09, paras. 210-212, in which the ECtHR also found the interception of migrants on the high seas in violation with, inter alia, Arts. 3 and 13 ECHR.

<sup>60</sup> Apart from Art. 3, Arts. 2(b) and 6 APD (recast) also contain provisions relating to applications for international protection.

<sup>61</sup> CJEU, judgment of 9 November 2010, Grand Chamber, joined cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v B and D*, EU:C:2010:661, para. 118.

<sup>62</sup> CJEU, *M’Bodj* judgment, op. cit., fn. 45, para. 46.

<sup>63</sup> CJEU, *B and D* judgment, op. cit., fn. 61, para. 115.

is not precluded by the QD, provided that this **protection can be distinguished** from refugee status or subsidiary protection status<sup>64</sup>.

The case of *M'Bodj*<sup>65</sup> concerned a third-country national whose application for international protection had been rejected but who had been granted leave to reside in the territory of the Member State under national legislation as he was suffering from an illness occasioning a real risk to his life or physical integrity and there was no appropriate medical treatment in his country of origin. The question before the CJEU was whether he was entitled to social welfare and health care benefits under the QD. The CJEU stated that serious harm, as defined in Article 15 QD, does not cover a situation in which inhuman or degrading treatment, such as that referred to by the national legislation at issue, to which an applicant suffering from a serious illness may be subjected if returned to his/her country of origin, is the result of the fact that appropriate treatment is not available in that country, unless such an applicant is intentionally deprived of health care<sup>66</sup>. The CJEU clarified that the phrase 'in so far as those standards are compatible with [the QD]' in Article 3 QD precludes Member States from introducing or retaining a provision granting subsidiary protection in this situation<sup>67</sup>. According to the CJEU, it would be contrary to the general scheme and objectives of the QD to grant refugee status and subsidiary protection status to third-country nationals in situations which have no connection with the rationale of international protection<sup>68</sup>. Therefore, a provision granting leave to reside in this situation cannot be regarded, for the purpose of Article 3, as introducing a more favourable standard for determining who is eligible for subsidiary protection<sup>69</sup>. In addition, the CJEU reiterated that persons who are granted leave to reside in this situation on a discretionary basis on compassionate or humanitarian grounds fall outside the scope of the QD<sup>70</sup>.

The CJEU had occasion to confirm its decision that requests for other kinds of protection fall outside the scope of the QD in *Abdida*; although its judgment in this case actually related to the Returns Directive 2008/115/EC<sup>71</sup>. The *Abdida* case concerned a third-country national who had appealed a decision to reject his application for leave to reside on medical grounds. Although, he had not applied for international protection, one of the questions before the CJEU asked whether the Member State was obliged under the QD, the Asylum Procedures Directive 2005/85/EC<sup>72</sup> and Reception Conditions Directive 2003/9/EC<sup>73</sup> to provide for a remedy with suspensive effect in respect of the decision to refuse leave to reside and whether it must make provision for the basic needs of the third-country national to be met pending a ruling on his appeal against that decision. The CJEU noted that the applications submitted under the national legislation were not applications for international protection under the QD. Referring to its judgment in *M'Bodj*, the CJEU reiterated that:

[Articles 2(c) and (e), 3 and 15 of the QD (now Articles 2(d) and (f), 3 and 15 QD (recast))] are to be interpreted to the effect that applications submitted under that national legislation do not constitute applications for international protection within the meaning of Article 2(g) of that Directive [now Article 2(h) QD (recast)]. It follows that the situation of a third country national who has made such an application falls outside the scope of that directive, as defined in Article 1 thereof<sup>74</sup>.

The principles illustrated in the *M'Bodj* and *Abdida* judgments can be drawn on to construct a framework on what types of national protection fall outside the scope of the QD (recast). In general, international protection covered by the QD (recast) requires an **actor of persecution** or **serious harm** (Article 6) (see Sections 1.6 and 2.5 below, respectively at pp. 55 and pp. 110). This implies that cases in which the **actor of persecution** or **serious harm** is absent generally have no connection with the rationale of international protection. Therefore, deprivation of basic human rights caused by extreme poverty, such as after a catastrophic event, does not meet the requirements of the QD (recast) for international protection. Also, the granting of a national protection status to a third-country national who has had a traumatic experience or incident in the country of origin entirely unrelated to a current fear of being persecuted or a current real risk of suffering serious harm is likely to constitute another kind of protection. Such a national protection status could be considered to be on a discretionary basis

<sup>64</sup> *Ibid.*, paras. 113-121.

<sup>65</sup> CJEU, *M'Bodj* judgment, op. cit., fn. 45.

<sup>66</sup> *Ibid.*, para. 41.

<sup>67</sup> *Ibid.*, para. 43.

<sup>68</sup> *Ibid.*, para. 44.

<sup>69</sup> *Ibid.*, para. 45.

<sup>70</sup> *Ibid.*, para. 46.

<sup>71</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

<sup>72</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13.

<sup>73</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18.

<sup>74</sup> CJEU, judgment of 18 December 2014, Grand Chamber, case C-562/13, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida*, EU:C:2014:2453, paras. 32-33.

on compassionate or humanitarian grounds but it does not fall within the scope of the QD (recast). As a result, the Directive is not applicable to those situations.

These judgments of the CJEU only provide examples of situations which fall outside the scope of the QD (recast). It remains unclear when more favourable standards are within the scope of the QD (recast), particularly when the issue concerns more favourable rules that describe the requirements for qualification and that determine eligibility for refugee status or subsidiary protection<sup>75</sup>. In that regard, the purpose of the QD (recast) should also be taken into account, i.e. to introduce common standards and a higher level of approximation of rules on the recognition and content of international protection. The Slovenian *Upravno Sodišče* (Administrative Court) held that it could not introduce higher standards for protection than those defined in Article 9 QD (recast) on acts of persecution because Article 9(1) QD (recast) uses the expression ‘must be’. Moreover, the QD (recast) is no longer based on minimum standards, but rather on common standards<sup>76</sup>.

<sup>75</sup> H. Dörig, in K. Hailbronner and D. Thym (eds.), *EU Immigration and Asylum Law: Commentary* (2nd edn., C.H. Beck, Hart & Nomos, 2016), p. 1128 (para. 4).

<sup>76</sup> Administrative Court (Republic of Slovenia), judgment of 8 January 2014, *Berisha & Pireva*, I U 766/2013, ECLI:SI:UPRS:2014:I.U.766.2013, para. 42. This judgment was upheld by the Supreme Court in the appellate procedure.

# Part 1: Refugee protection

## 1.1 Introduction

As stated before, Part 1 concerns the concept of refugee status. The provisions in the QD (recast) regarding eligibility for and granting of refugee status largely reflect the Refugee Convention. With respect to the Refugee Convention, the CJEU has frequently stated that ‘the [Refugee Convention] constitutes the cornerstone of the international legal regime for the protection of refugees’ and that the QD aims to guide the authorities of the Member States in the application of the Refugee Convention ‘on the basis of common concepts and criteria’<sup>77</sup>. Similarly, recitals (24) and (25) QD (recast) note that ‘common criteria’ must be introduced with regard to the recognition of applicants for asylum as refugees within the meaning of Article 1A(2) of the Refugee Convention. This particularly refers to ‘protection needs arising *sur place*, sources of harm and protection, internal protection and persecution, including the reasons for persecution’. Recital (22) indicates that the United Nations High Commissioner for Refugees (UNHCR) may ‘provide valuable guidance’ regarding the determination of refugee status in line with Article 1A(2) of the Refugee Convention<sup>78</sup>. The role of UNHCR is further explained in *An Introduction to the CEAS for Courts and Tribunals – A Judicial Analysis*<sup>79</sup>.

The requirements for refugee status in the QD (recast) are discussed in the following sections:

- Section 1.2 (pp. 22): who is a refugee?
- Section 1.3 (pp. 23-26): the personal and territorial scope of the refugee definition (Article 2(d));
- Section 1.4 (pp. 26-43): acts of persecution (Article 9);
- Section 1.5 (pp. 43-55): reasons for persecution (Article 10);
- Section 1.6 (pp. 55-60): actors of persecution or serious harm (Article 6);
- Section 1.7 (pp. 60-71): actors of protection against persecution or serious harm (Article 7);
- Section 1.8 (pp. 72-80): internal protection in a different part of the country of origin (Article 8);
- Section 1.9 (pp. 80-92): the requirement of a well-founded fear of being persecuted (Articles 2(d), 4(4) and 5); and
- Section 1.10 (pp. 93-98): the granting of refugee status (Article 13).

## 1.2 Who is a refugee?

Article 2(d) QD (recast) defines the term ‘refugee’ as follows:

[...] a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.

This definition largely corresponds to the definition of the term ‘refugee’ in Article 1A(2) of the Refugee Convention<sup>80</sup>.

<sup>77</sup> E.g. CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 39; and CJEU, *Alo and Osso* judgment, op. cit. fn. 25, para. 28. See recital (23) QD (recast).

<sup>78</sup> See also CJEU, judgment of 30 May 2013, case C-528/11, *Zuheyir Freyeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerski savet*, EU:C:2013:342, para. 44, in which the CJEU has held with regard to UNHCR publications that ‘it should be recalled that documents from the UNHCR are among the instruments likely to enable the Member States to assess the functioning of the asylum system in the Member State indicated as responsible by the [Dublin II Regulation]’ and that those documents ‘are particularly relevant in that assessment in the light of the role conferred on the UNHCR by the [Refugee Convention]’.

<sup>79</sup> EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, op. cit., fn. 3, Section 3.1, pp. 62 and 63.

<sup>80</sup> According to Art. 1A(2) of the Refugee Convention and its 1967 Protocol, the term ‘refugee’ shall apply to any person who owing to 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/her nationality and is unable or, owing to such fear, is unwilling to avail him/herself of the protection of that country; or who, not having a nationality and being outside the country of his/her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.



## 1.3 Personal and territorial scope

The definition of the term ‘refugee’ in Article 2(d) QD (recast) clarifies that the personal scope of the QD (recast) is **limited to third-country nationals or stateless persons** who have requested international protection, which is the first requirement for refugee status. These limits are discussed in Sections 1.3.1 (pp. 23) and 1.3.2 (pp. 25).

As regards territorial scope, the QD (recast) applies to applicants who are **outside their country of nationality** in the case of third-country nationals **or outside their country of former habitual residence** in the case of stateless persons. This is the second requirement for refugee status and is discussed in Section 1.3.3 (pp. 26).

### 1.3.1 Third-country national

Defining a refugee by reference to a third-country national entails that nationals of EU Member States – i.e. Union (EU) citizens – are excluded from the refugee definition under the QD (recast). The exclusion of nationals of EU Member States flows from [Protocol No 24 on Asylum for Nationals of Member States of the European Union](#) (also known as the Aznar Protocol) which provides that ‘Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters’ (Sole Article). However, an application under the Refugee Convention, outside the CEAS, by a national of a Member State cannot be excluded. An EU national who fears persecution in his/her Member State of nationality and seeks protection against return to that Member State may apply for recognition as a refugee under the Refugee Convention in another Member State. Although very rarely arising as a relevant issue in cases, the Protocol provides that any such application may be ‘taken into consideration or declared admissible for processing by another Member State’ only in the following four cases<sup>81</sup>:

- (a) Where the Member State of which the applicant is a national takes measures derogating in its territory from its obligations under the ECHR;
- (b) Where suspension proceedings under Article 7(1) of the [Treaty on European Union](#) (TEU) have been initiated by the Council<sup>82</sup>;
- (c) Where the Council has adopted a decision under Article 7(1) or 7(2) (serious and persistent breach by the Member State concerned of the values referred to in Article 2 TEU);
- (d) If the Member State to whom the application is made should decide unilaterally to accept the application for processing, the Council must be informed and the application dealt with on the basis that it is manifestly unfounded<sup>83</sup>.

As is made clear by the territorial requirement that a person must be ‘outside the country’ of nationality or (if stateless) of former habitual residence (see below at Section 1.3.3, pp. 26), an applicant for international protection has to show a well-founded fear of persecution in the country of nationality or (if stateless) former habitual residence.

In many applications for international protection lodged by third-country nationals, the nationality of an applicant will not be in dispute but there are cases where this is very much a live issue. The CJEU has not yet been asked to respond to the question of how to determine a case in which the nationality of the applicant is disputed, indeterminate or in which the applicant has changed his/her nationality. The national court or tribunal member must come to a decision whether a person’s stated nationality can be accepted for the purposes of the assessment of qualification for international protection in accordance with Article 4 QD (recast) on the assessments of facts and circumstances<sup>84</sup>. In this regard, members of courts or tribunals may take the guidelines provided in Table 4 below into consideration.

<sup>81</sup> See for example Council of State (France), judgment of 30 December 2009, *OFPRA c MC*, application no 305226; and National Asylum Court (France), judgment of 30 March 2011, *ML*, application no 10013804, in *Contentieux des réfugiés, Jurisprudence du Conseil d’Etat et de la Cour nationale du droit d’asile, Année 2011*, 2012, pp. 17 and 18.

<sup>82</sup> Treaty on European Union (consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009)) [2012] OJ C 326/13. This is a complex and extreme process requiring a reasoned proposal supported by one-third of Member States and a four-fifths majority of the Council members, with the consent of the European Parliament, in cases of clear risk of serious breach of the area of freedom, security and justice pursuant to Art. 2 TEU. It has never been invoked in practice.

<sup>83</sup> Sole Article of Protocol No 24. For further discussion on the Protocol, see EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, op. cit., fn. 3, Section 2.1.4, p. 33.

<sup>84</sup> For further detail see EASO, *Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis*, op. cit., fn. 22.

**Table 4: Guidelines for establishing a person's nationality**

1	<b>States' national legislation regarding formal attribution of nationality</b>	<p>It is a recognised principle of international law that every State determines who its nationals are under its own law<sup>85</sup>. This has to be accepted by States insofar as it is consistent with applicable international conventions, customary international law and principles of law generally recognised with regard to nationality.</p> <p>The <b>predominant modes of acquiring nationality</b> are by descent from a national or by birth within the territory of a particular State, in addition to naturalisation which is usually based upon habitual residence and fulfillment of integration requirements or other real connections with a State.</p> <p>The fact that a person might have a possible entitlement to nationality in view of the eligibility requirements for naturalisation based on discretionary criteria is normally considered irrelevant for the purposes of the Refugee Convention<sup>86</sup>. Rather the focus must be on automatic acquisition of nationality under national legislation and practices.</p>
2	<b>Practice of States</b>	<p>Establishing nationality is not, however, a simple matter of 'reading off' from the nationality legislation of the relevant country of origin. When seeking to establish whether an individual is or is not considered a national under operation of the law of a particular State, the term 'law' should be interpreted broadly as encompassing other forms of quasi-legal process, such as ministerial decrees and 'customary practice'<sup>87</sup>.</p> <p>At the same time, an applicant who has an apparent automatic entitlement to nationality but denies it, can be required to take reasonable steps to obtain recognition and evidence of his/her nationality<sup>88</sup>.</p>
3	<b>In case of doubt</b>	<p>If the entitlement to nationality is doubtful, criteria similar to those used by the International Court of Justice in the <i>Nottebohm</i> judgment<sup>89</sup> may be taken into account. According to the Court, in order to be entitled to exercise the right of diplomatic protection, a State must show the existence of a 'genuine connection'. In order to determine whether nationality is of a 'real and effective' character, it is acceptable to rely on factors such as habitual residence, the centre of interest and family ties. However, the Court did not decide upon the limits of a State to grant naturalisation, but rather on whether the nationality conferred on an individual by means of naturalisation gives a State a title to the exercise of protection. In the context of an application for international protection, these criteria may be used by analogy if, for example, there is a clear absence of any genuine connection with the State of which the applicant claims to be a national.</p>

Issues relating to the types of evidence to which courts and tribunals deciding asylum cases can have regard to in deciding on whether a person is a national, or dual or multiple national, or stateless, or of indeterminate nationality are dealt with in *Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis*<sup>90</sup>.

As attested to by Article 2(n) QD (recast), which in defining 'country of origin' refers to 'the country or countries of nationality', an applicant may have **more than one country of nationality**. In that case, the applicant is only eligible for refugee status if he/she is unable or, owing to a well-founded fear of being persecuted, is unwilling to avail himself/herself of the protection of both or all countries concerned<sup>91</sup>. In order to determine eligibility for

<sup>85</sup> See Art. 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Law, 179 LNTS 89, 13 April 1930 (entry into force: 1 July 1937); see also Permanent Court of International Justice, advisory opinion of 7 February 1923, *Nationality Decrees in Tunis and Morocco*, PCIJ Series B, No 4.

<sup>86</sup> Upper Tribunal (UKUT), judgment of 21 February 2011, *KK and others (Nationality: North Korea) Korea CG* [2011] UKUT 92 (IAC), paras. 79 and 80.

<sup>87</sup> Supreme Court (UK), judgment of 25 March 2015, *Pham v Secretary of State for the Home Department* [2015] UKSC 19, para. 25.

<sup>88</sup> Court of Appeal of England and Wales (EWCA), judgment of 2 April 2009, *MA (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 289. See also UKUT, judgment of 30 June 2011, *ST (Ethnic Eritrean – Nationality – Return) Ethiopia CG* [2011] UKUT 252 (IAC).

<sup>89</sup> International Court of Justice, judgment of 6 April 1955, *Nottebohm Case (Liechtenstein v Guatemala)*; *Second Phase*, ICJ Reports 1955, p. 4.

<sup>90</sup> EASO, *Evidence and Credibility Assessment in the Context of the Common European Asylum System – A Judicial Analysis*, op. cit., fn. 22.

<sup>91</sup> Art. 1A(2) of the Refugee Convention. See also Council for Alien Law Litigation (Belgium), decision of 26 April 2016, no 166.543, para. 3.8: 'It follows [from Article 1A(2) of the Refugee Convention] that the asylum application must be examined with regard to each of the countries of nationality of the applicant. If the applicant has no fear of persecution or faces no real risk of suffering serious harm in one of these countries, [...], then this is sufficient to reject the asylum application' (authors' translation).

protection in such a case, it will be necessary for the court or tribunal to assess whether the applicant has shown that he/she qualifies for international protection in both or all countries concerned<sup>92</sup>.

Another possibility is that an applicant holds the nationality of a certain country and, in addition, has had **habitual residence in a different country**. For example, the Czech *Nejvyšší správní soud* (Supreme Administrative Court) had to decide on such a case and held that the question whether the applicant has a well-founded fear of being persecuted should be examined with regard to the country of nationality<sup>93</sup>. This is in line with the text of Article 2(d), (f) and (n) QD (recast) that a country of former habitual residence is only relevant as a State of reference for stateless persons.

The country of former residence of a third-country national may however be of importance with regard to the application of the safe third country concept<sup>94</sup>. If the applicant holds the nationality of a certain country but he/she has had habitual residence in a third country (see Article 38(2)(a) APD (recast)), it should be assessed whether he/she is entitled to re-enter and reside permanently in the country of habitual residence<sup>95</sup>. Only once this has been assessed, is it possible to evaluate if the country of habitual residence is a safe third country. For example, the Belgian *Conseil du contentieux des étrangers* (Council for Alien Law Litigation) held in a case regarding an applicant who claimed to be of Somali nationality, but was born and had lived in Djibouti, that if the nationality of an applicant cannot be established, the country of habitual residence should have been taken into account. According to the Council, the decision-maker had neglected to examine whether the applicant had access to protection from the authorities of Djibouti<sup>96</sup>. Furthermore, the Swedish *Migrationsdomstolen* (Migration Court) considered that, with regard to three applicants who claimed to be Eritreans but also had previously had residence in Saudi Arabia, Saudi Arabia could not be considered a safe third country for the applicants because, were they able to enter Saudi Arabia, they would be at risk of being returned to Eritrea<sup>97</sup>.

### 1.3.2 Stateless person

The QD (recast) does not contain a definition of a stateless person, but in Article 1(1) of the [Convention Relating to the Status of Stateless Persons](#)<sup>98</sup>, a stateless person is defined as a ‘person who is not considered as a national by any State under the operation of its law’. According to Article 67(2) TFEU, stateless persons shall be treated as third-country nationals in the framework of the area of freedom, security and justice. The QD (recast) provides for equal protection of stateless persons as they can also be eligible for refugee status and subsidiary protection. However, in some cases the proclaimed statelessness of an applicant is disputed by the authorities of the Member State in which he/she seeks protection.

To date, the CJEU has not yet clarified how to examine a case in which the statelessness of an applicant is doubted. The principles governing determination of statelessness are to be drawn from international law and, from the aforementioned definition of a ‘stateless person’. Similarly to nationality, the national court or tribunal member must come to a decision whether a person’s claimed statelessness can be accepted for the purposes of the assessment for qualification for international protection in accordance with Article 4 QD (recast) on the assessments of facts and circumstances. According to the UK Supreme Court, when seeking to establish whether an individual is not considered as a national under operation of the law of his/her State of nationality, the term ‘law’ should be interpreted broadly as encompassing other forms of quasi-legal process, such as ministerial decrees and ‘customary practice’<sup>99</sup>.

From Article 4(1) QD (recast) it follows that Member States may consider it the duty of the applicants to substantiate their statelessness. However, considering the nature of statelessness, applicants will often not be able

<sup>92</sup> See Council for Alien Law Litigation (Belgium), decision of 21 September 2010, no 48.327, para. 4.2.

<sup>93</sup> Supreme Administrative Court (Czech Republic), judgment of 25 November 2010, *VS v Ministry of Interior*, case no 6 Azs 29/2010-85 (see [English summary](#) by the European Database of Asylum Law (EDAL)).

<sup>94</sup> See Art. 38 APD (recast).

<sup>95</sup> See recital (44) APD (recast): ‘Member States should not be obliged to assess the substance of an application for international protection where the applicant, due to a sufficient connection to a third country as defined by national law, can reasonably be expected to seek protection in that third country, and there are grounds for considering that the applicant will be admitted or readmitted to that country. Member States should only proceed on that basis where that particular applicant would be safe in the third country concerned.’

<sup>96</sup> Council for Alien Law Litigation (Belgium), decision of 19 May 2011, no 61.832 (see [EDAL English summary](#)).

<sup>97</sup> Migration Court (Administrative Court of Malmö; Sweden), judgment of 10 November 2011, UM 1796-11 (see [EDAL English summary](#)).

<sup>98</sup> Convention Relating to the Status of Stateless Persons, 360 UNTS 117, 28 September 1954 (entry into force: 6 June 1960). Cyprus, Estonia, Malta and Poland are not party to this Convention.

<sup>99</sup> Supreme Court (UK), *Pham v Secretary of State for the Home Department*, op. cit., fn. 87, para. 25.

to provide documentation to support their claim<sup>100</sup>. When it has been established that the applicant for international protection is stateless, the country of former habitual residence must be determined<sup>101</sup>. According to the German *Bundesverwaltungsgericht* (Federal Administrative Court) the habitual residence of a stateless person does not need to have been lawful<sup>102</sup>. Instead, habitual residence can be sufficient when a stateless person did not merely spend a short time in a country, but his/her life was centred in that country<sup>103</sup>. According to the same Court, it is also required that in such a case the authorities of that country did not take measures to terminate his/her residence<sup>104</sup>. Just because an applicant is accepted to be a stateless person does not mean that he/she is exempt from having to meet the same requirements as apply to nationals in regard to establishing a well-founded fear of being persecuted in accordance with the QD (recast)<sup>105</sup>.

### 1.3.3 Outside the country of nationality or of former habitual residence

The requirement that the applicant must be outside the country of nationality or of former habitual residence is the second element for determining refugee status. When the country of nationality or of former habitual residence has been identified, the question whether the applicant is outside this country is merely a matter of fact. ‘Outside’ denotes a purely physical criterion of non-presence. This requirement entails that an applicant who claims asylum at a foreign embassy whilst still in his/her country of origin does not fall within the territorial scope of the Directive (see above the Section on application for international protection, pp. 18)<sup>106</sup>.

## 1.4 Acts of persecution (Article 9(1) and (2))

In accordance with Article 2(d) QD (recast), a refugee means a third-country national who, inter alia, has a well-founded fear of **being persecuted**. Article 9 QD (recast) on acts of persecution has a **three-part structure** illustrated in Table 5 below.

**Table 5: Structure of Article 9 QD (recast)**

<b>1</b>	<b>Article 9(1)</b>	the <b>definition of acts of persecution</b>
<b>2</b>	<b>Article 9(2)</b>	a <b>non-exhaustive list of acts</b> which may constitute persecution
<b>3</b>	<b>Article 9(3)</b>	the <b>connection between the acts of persecution and the reasons for persecution or the absence of protection</b> against such acts

The present Section focuses on the first two elements, namely the definition of acts of persecution laid down in Article 9(1) (Section 1.4.1, pp. 27) and the illustrative list of acts of persecution provided in Article 9(2) (Section 1.4.2, pp. 36). As is made apparent in the decision trees (see Appendix A, pp. 122-128), determination of any connection between the acts of persecution and the reasons for persecution or the absence of protection is to be made at a later stage, when analysing the reasons for persecution. Such connection is thus addressed below in Section 1.5.1 (pp. 44).

<sup>100</sup> That issue will be addressed in EASO, *Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis*, op. cit., fn. 22. See also the UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons*, 2014.

<sup>101</sup> See for instance: Immigration and Asylum Tribunal (UK) (UKIAT), judgment of 28 January 2005, *SG (Stateless Nepalese: Refugee? Removal Directions) Buthan* [2005] UKIAT 00025, paras. 8-11, and Federal Administrative Court (Germany), judgment of 26 February 2009, BVerwG 10 C 50.07, BVerwG:2009:260209U10C50.07.0, paras. 29-30, available in English at [www.bverwg.de](http://www.bverwg.de).

<sup>102</sup> Federal Administrative Court (Germany), BVerwG 10 C 50.07, op. cit., fn. 101, paras. 31-33, available in English at [www.bverwg.de](http://www.bverwg.de). See also Council of State (France), judgment of 18 June 2014, application no 362703, in *Contentieux des réfugiés, Jurisprudence du Conseil d’Etat et de la Cour nationale du droit d’asile, Année 2014*, 2015, pp. 61 and 62.

<sup>103</sup> Federal Administrative Court (Germany), BVerwG 10 C 50.07, op. cit., fn. 101. See also Council for Alien Law Litigation (Belgium), decision of 24 June 2010, no 45.396 (see EDAL English summary) in which it determined that Kosovo could be considered as the country of former habitual residence, since the applicant had stated that he was of Roma ethnicity, that his place of birth was in Kosovo and he had also lived a large part of his life there.

<sup>104</sup> Federal Administrative Court (Germany), BVerwG 10 C 50.07, op. cit., fn. 101, para. 34, available in English at [www.bverwg.de](http://www.bverwg.de). See also Council for Alien Law Litigation (Belgium), decision of 24 June 2014, no 126.144, para. 2.8.

<sup>105</sup> EWCA (UK), judgment of 31 July 2000, *Revenko v Secretary of State for the Home Department* [2000] EWCA Civ 500.

<sup>106</sup> For an example of a Member State which makes provision in its national law for applicants to apply for international protection from its embassies and consulates in third countries provided that the applicant is not a national of the country in which the diplomatic representation is located, see Art. 38 of the Spanish legislation (Law 12/2009 on the right of asylum and subsidiary protection).

### 1.4.1 Definition of acts of persecution (Article 9(1))

The Refugee Convention provides no definition of the term ‘being persecuted’ but one is provided in EU law through Article 9(1) QD (recast) which provides that:

1. In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva [Refugee] Convention, an act must:
  - (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the [ECHR]; or
  - (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).

The provision thus makes explicit reference to Article 1A of the Refugee Convention (Section 1.4.1.1, pp. 27), before setting out two conditions both requiring an act to be sufficiently serious to amount to persecution (Section 1.4.1.2, pp.27) and which must be alternatively fulfilled (Sections 1.4.1.3, pp. 29, and 1.4.1.4, pp. 35).

#### 1.4.1.1 Reference to Article 1A of the Refugee Convention

The QD is in fact the first international instrument which elaborates in detail on the **concept of ‘being persecuted’ in the context of Article 1A of the Refugee Convention**. Article 1A does not specify which acts may constitute persecution. Attempts to define persecution had been unsuccessful due (it has been said) to the impossibility of enumerating, in advance, all of the forms of ill-treatment which might legitimately entitle persons to benefit from the protection of a foreign State<sup>107</sup>. Consequently, it was left to States Parties to interpret this fundamental term which sometimes led to divergent jurisprudence<sup>108</sup>. The Directive is intended to remedy that by guiding the competent authorities of the Member States in the application of the Refugee Convention on the basis of common concepts and criteria<sup>109</sup>.

The criteria of Article 9(1) QD (recast) largely reflect common attempts to specify the term ‘being persecuted’ in Article 1A of the Refugee Convention in state practice and academic writings. Whether human rights violations or other acts or accumulation of acts as defined in Article 9(1)QD (recast) constitute persecution has to be assessed under Article 4(3) QD (recast) on an individual basis taking into account all the relevant facts as they relate to the country of nationality or of former habitual residence at the time of taking a decision on the application, the relevant statements and documentation presented by the applicant, and the individual position and personal circumstances of the applicant<sup>110</sup>.

#### 1.4.1.2 Common denominator of Article 9(1)(a) and (b): sufficient seriousness of an act of persecution

It is clear from the reference to Article 1A(2) of the Refugee Convention that what is being attempted in Article 9(1) QD (recast) is a definition of the meaning of persecution (or more precisely, ‘being persecuted’) within the meaning of Article 1A(2). In this context the provision sets out two alternative conditions for an act to amount to persecution. Common to these two alternatives is the requirement that the **act be sufficiently serious or severe** to be considered as an act of persecution. The threshold of sufficient seriousness can be crossed by the nature of one single act as a severe violation of basic human rights or alternatively by the repetition of such acts which, if committed as a single act, might not yet qualify as a severe violation. The difference between the second alternative of Article 9(1)(a) (repeated acts) and Article 9(1)(b) (accumulation of various measures) is that the

<sup>107</sup> UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 1979, reissued December 2011, p. 14 (UNHCR Handbook).

<sup>108</sup> See G.S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, OUP, 1996) p. 62; H. Storey, ‘Persecution: Towards a Working Definition’, in V.Chetail and C.Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar, 2014), pp. 462-463.

<sup>109</sup> CJEU, *X, Y and Z* judgment, op. cit., fn. 20, paras. 39 and 51.



<sup>110</sup> See CJEU, judgment of 26 February 2015, case C-472/13, *Andre Lawrence Shepherd v Bundesrepublik Deutschland*, EU:C:2015:117, para. 25.

latter has a wider scope of application. Measures under Article 9(1)(b) need not be ‘basic human rights violations’ provided that they are sufficiently severe violations of human rights to affect an individual in a similar manner.

To apply Article 9 in practice, no sharp distinction between Article 9(1)(a) and Article 9(1)(b) needs to be drawn, particularly if it is doubtful if an interference with individual rights amounts to a violation of ‘basic’ human rights. The decisive element of persecution is the **severe effect of an act upon an individual’s rights** rather than the attribution of the violated rights to formal rankings<sup>111</sup>. Consistent with this understanding, the CJEU does not draw a sharp distinction between the different forms of persecutory acts described in Article 9(1)(a) and Article 9(1)(b). The Court refers to the purpose of the Directive being to guide the competent authorities of Member States in the application of the Refugee Convention<sup>112</sup> and interprets the provisions of Article 9 as a definition of the elements which support the finding that acts constitute persecution within the meaning of Article 1A of the Refugee Convention<sup>113</sup>.

Both alternative conditions require a specific assessment to be made by courts or tribunals of Member States as detailed in the present Section and schematised in Table 6 below. For methodological purposes, this table provides a schematic presentation of the questions entailed by the test of sufficient seriousness for an act to qualify as persecution under Article 9(1) QD (recast). In practice, it will appear that no such sharp distinctions however exist between the different questions and their answers which often overlap with one another.

**Table 6: The test of sufficient seriousness for an act to qualify as persecution (Article 9(1))<sup>114</sup>**

<b>1. Is the act, by its nature or repetition, sufficiently serious as to constitute a severe violation of basic human rights (Article 9(1)(a))?</b>		<p>i) Does a basic human right risk being violated or has it already been violated?</p>	<p>a) Is the right at stake a non-derogable right? If the right is one of those listed as non-derogable under Article 15(2) ECHR, it is automatically to be considered as a basic human right. It would appear that other non-derogable rights than those listed in the ECHR may also qualify as basic human rights.</p>
			<p>b) If the right is not a non-derogable one, is it of a fundamental nature and thus comparable to non-derogable rights? While for non-derogable rights no limitation can ever be legitimate (Article 15(2) ECHR), for derogable rights it has to be assessed whether the alleged infringement would be legally justified as a derogation or as a limitation.</p>
		<p>ii) Does the violation risk being or is it in fact severe? To be assessed taking into account the personal circumstances of the applicant (Article 4(3) QD (recast))</p>	<p>a) Is the act sufficiently serious by its nature to constitute a severe violation? While the violation of non-derogable rights may be considered as severe, the violation of derogable rights has to be of a severity equivalent to infringements of non-derogable rights.</p>
			<p>b) If the act is not sufficiently serious by its nature to constitute a severe violation, is the act sufficiently serious by its repetition?</p>
		<p>If the act meets these two cumulative conditions (conditions i) and ii)), it has to be considered as an act of persecution within the terms of Article 9(1)(a) and the meaning of Article 1A of the Refugee Convention. If the act does not fulfil these two cumulative conditions, it can still amount to an act of persecution provided it fulfils the conditions laid down in step 2 below (Article 9(1)(b)).</p>	

<sup>111</sup> See CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 66.

<sup>112</sup> CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 39.

<sup>113</sup> In the judgment *X, Y and Z*, the Court stated: ‘It is clear from those provisions that for a violation of fundamental rights to constitute persecution within the meaning of Article 1(A) of the Geneva [Refugee] Convention, it must be sufficiently serious’ (*ibid.*, para. 52).

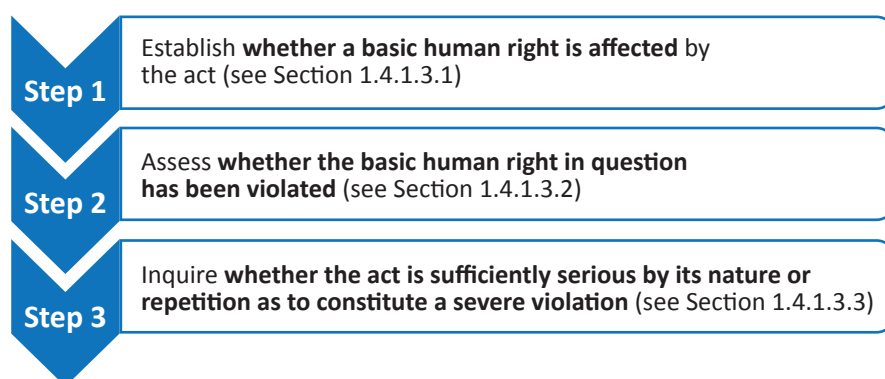
<sup>114</sup> This table reads from left to right.

<p><b>2. Is the act an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect the individual in a similar manner as in Article 9(1)(a) (Article 9(1)(b))?</b></p>	<p>The measures in their combined effect must be assessed in the light of the personal circumstances of an applicant taking into account all acts to which the applicant has been, or risks being, exposed (Article 4(3)).</p> <p>The term ‘measures’ covers in a wide sense all measures which may affect an individual in the same manner as a severe violation of basic human rights.</p> <p>The accumulation of various measures constitutes persecution only if it affects the applicant in a similar manner as a violation under Article 9(1)(a). The decisive element is the severity of a violation of an individual’s rights.</p>
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### 1.4.1.3 Act sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights (Article 9(1)(a))

The threefold assessment illustrated in Figure 1 below needs to be made to apply Article 9(1)(a).

**Figure 1: Threefold assessment to determine if an act is sufficiently serious by its nature or repetition to constitute a severe violation of basic human rights (Article 9(1)(a))**



#### 1.4.1.3.1 Basic character of a human right

Article 9(1)(a) QD (recast) requires a violation of ‘basic’ human rights. From this wording it is clear that only the violation of a specific category of human rights qualifies as persecution. The QD (recast) does not define the concept of ‘basic’ human rights, but its provisions do shed some light on the matter.

Article 9(1)(a) refers to **non-derogable rights under Article 15(2) ECHR** in particular. These are the right to life, freedom from torture, inhuman or degrading treatment or punishment, from slavery and servitude, and from retroactive criminal liability (Articles 2, 3, 4(1) and 7 ECHR). Thus the violation of a non-derogable right under Article 15(2) ECHR may be considered to constitute a severe violation of basic human rights<sup>115</sup>.

However, the reference to Article 15(2) ECHR is **not exclusive** as the provision is worded ‘in particular’. Therefore rights other than non-derogable rights may constitute ‘basic human rights’ in the sense of Article 9(1)(a)<sup>116</sup>. In

<sup>115</sup> A. Klug, ‘Harmonization of Asylum in the European Union – Emergence of an EU Refugee System?’, German Yearbook of International Law (2004) pp. 594 and 602. See National Asylum Court (France), judgment of 24 March 2015, *Mlle EF*, application no 10012810 (see EDAL English summary), concerning a Nigerian woman from Edo State (Bening City) and where the Court qualified sex trafficking of human being as persecution. The judgment makes reference to the United Nations Convention on Transnational Organized Crimes (2225 UNTS 209, 15 November 2000 (entry into force: 29 September 2003)), its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2237 UNTS 319, 15 November 2000 (entry into force: 25 December 2003)), and its Protocol against Smuggling of Migrants by Land, Sea and Air (2241 UNTS 507, 15 November 2000 (entry into force: 28 January 2004)).

<sup>116</sup> See Federal Administrative Court (Germany), judgment of 5 March 2009, BVerwG 10 C 51.07, BVerwG:2009:050309U10C51.07.0, in *Neue Zeitschrift für Verwaltungsrecht* 2009, 1167, p. 1168, available in English at [www.bverwg.de](http://www.bverwg.de).

addition, the list of potential acts of persecution of Article 9(2) includes acts such as legal, administrative, police and judicial measures which do not normally by themselves imply non-derogable rights. Therefore, paragraph 1(a) is not restricted to the rights mentioned in Article 15(2) ECHR<sup>117</sup>. The reference to non-derogable rights would appear to convey that violations of those rights are sufficiently severe in themselves and for that reason always constitute persecution, but does not restrict ‘basic human rights’ to non-derogable rights<sup>118</sup>. That said, any wider content is subject to a comparability test.

Apart from referring to non-derogable rights under the ECHR, Article 9 QD (recast) does not provide criteria or a particular method according to which a human right listed in a human rights instrument or recognised in customary international law can be determined as ‘basic’ in the sense of Article 9(1)(a) to establish an application for international protection. Unless the human right in question is referred to in Article 9(1)(a) as a non-derogable human right under Article 15(2) of the ECHR, an assessment is needed as to the **comparability of the human right in question to the non-derogable rights** under Article 15(2) ECHR.

In its 2012 *Y and Z* judgment, the CJEU ruled that, although subject to derogations under the ECHR, freedom of religion is ‘one of the foundations of a democratic society and is a basic human right’. For the Court, this implies that:

[I]nterference with the religious freedom may be so serious as to be treated in the same way as the cases referred to in Article 15(2) of the ECHR, to which Article 9(1) of the Directive refers, by way of guidance, for the purpose of determining which acts must in particular be regarded as constituting persecution<sup>119</sup>.

A similar reasoning has been adopted by the German *Bundesverwaltungsgericht* (Federal Administrative Court) with regard to the right to nationality and the prohibition to deprive a person arbitrarily of his/her nationality under Article 15 of the [Universal Declaration of Human Rights](#)<sup>120</sup>. Although the right to nationality is not unlimited and a State may deprive a person of his/her nationality for reasons such as fraud even if the person becomes stateless<sup>121</sup>, an arbitrary withdrawal deprives a person of his/her fundamental status as a citizen and rights of residence and protection. Thus, it may be considered as sufficiently severe to constitute persecution<sup>122</sup>. This does not mean that deprivation of nationality automatically equates to persecution; whether it does, is a question of fact and degree in any particular case<sup>123</sup>.

The CJEU’s reasoning in *Y and Z* indicates a potential overlap in defining the *acts* of persecution and the *reasons* for persecution<sup>124</sup>. Persecution on the ground of religion always interferes in the last instance with the freedom of religion but the act of persecution itself may be ill-treatment or other severe punishment inflicted in response to the exercise of religious freedom. In most cases, the persecution lies in a violation of a basic human right such as the right to life, the right not to be ill-treated, the right to personal liberty and security, etc. In practical terms a conflict however will usually not arise since the test of sufficient severity of a violation of human rights such as the right of religion or expression will only be met if a prohibition or restriction is enforced by sanctions which constitute a severe violation of basic human rights.

In the CJEU’s 2013 *X, Y and Z* judgment, the right of persons to live according to their individual sexual orientation as an expression of the right to respect one’s private and family life (Article 7 of the EU Charter, corresponding to Article 8 ECHR) has also been determined by the Court as fundamental, yet not falling among the fundamental rights from which no derogation is possible. Although the Court has not explicitly interpreted Article 7 of the

<sup>117</sup> H. Battjes, *European Asylum Law and International Law* (Martinus Nijhoff Publishers, 2006), p. 234, para. 291.

<sup>118</sup> H. Dörig, in K. Hailbronner and Thym (eds.), op. cit., fn. 75, D III, Art. 9, 168, p. 1194; R. Marx, *Handbuch zum Flüchtlingsschutz, Erläuterungen zur Qualifikationsrichtlinie* (2nd edn, Wolters/Kluwer Law International, 2012) p. 30, para. 27.

<sup>119</sup> 190 CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 57. In the same sense, see the referring Federal Administrative Court (Germany), judgment of 10 December 2010, BVerwG 10 C 19.09, BVerwG:2010:091210B10C19.09.0, para. 20, available in English at [www.bverwg.de](#).

<sup>120</sup> Federal Administrative Court (Germany), BVerwG 10 C 50.07, op. cit., fn. 101, para. 18, available in English at [www.bverwg.de](#). See also for example EWCA (UK), judgment of 7 November 2007, *JV (Tanzania) v Secretary of State for the Home Department* [2007] EWCA Civ 1532, paras. 6 and 10; EWCA (UK), judgment of 13 February 1997, *Boban Lazarevic v Secretary of State for the Home Department* [1997] EWCA Civ 1007; and EWCA (UK), judgment of 31 July 2007, *EB (Ethiopia) v Secretary of State for the Home Department* [2007] EWCA Civ 809, paras. 54 and 75. Refer also to H. Dörig, ‘German Courts and their Understanding of the Common European Asylum System’, *IJRL* (2013) p. 770.

<sup>121</sup> Art. 7(3) of the *European Convention of Nationality*, ETS No 166, 6 November 1997 (entry into force: 1 March 2000). See K. Hailbronner, in K. Hailbronner, G. Renner and H.-G. Maaßen (eds.), *Staatsangehörigkeitsrecht* (3rd edn, C.H. Beck, 2010) pp. 96 and 210; R. de Groot, ‘Survey on Rules on Loss of Nationality in International Treaties and Case Law’, CEPS Paper No 57, 2013, pp. 20 and ff.

<sup>122</sup> The German Federal Administrative Court has left open whether the violation can be considered as sufficiently severe if the person possesses a second nationality: BVerwG 10 C 50.07, op. cit., fn. 101, para. 66, available in English at [www.bverwg.de](#). See also the French National Asylum Court concerning the Lothshampa minority from Bhutan who were deprived of their nationality by the authorities: judgment of 27 November 2009, *M P*, application no 643384/09002208, in *Contentieux des réfugiés, Jurisprudence du Conseil d’Etat et de la Cour nationale du droit d’asile, Année 2009*, 2010, pp. 90 and 91.

<sup>123</sup> See EWCA (UK), *MA (Ethiopia) v Secretary of State for the Home Department*, op. cit., fn. 88, para. 59.

<sup>124</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33.



EU Charter, its reasoning shows that the criterion used is whether violations of the right may be so serious that they meet the threshold of Article (9)(1)(a). The essential question is whether the violation can be considered as ‘sufficiently serious’<sup>125</sup>. Not all violations of fundamental rights will necessarily reach that threshold<sup>126</sup>. Under these circumstances, the Court considers the mere existence of legislation criminalising homosexual acts ‘cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution’ within the meaning of Article 9(1)<sup>127</sup>. However, a term of imprisonment which accompanies such a legislative provision and is actually applied in the country of origin may be disproportionate or discriminatory and thus constitute persecution<sup>128</sup>. If criminal legislation providing for imprisonment is not actually applied in practice, the violation may not be considered as sufficiently severe to establish an act of persecution. It follows from the Court’s reasoning that a violation of derogable human rights such as the rights protected by Article 7 of the EU Charter/Article 8 ECHR must surmount a higher threshold of seriousness, while a violation of non-derogable rights may constitute persecution by the very nature of the act.

To **identify other human rights as basic rights** one may have recourse to the travaux préparatoires and to the general scheme and purpose of the Directive which has to be interpreted in a manner consistent with the EU Charter, the Refugee Convention and the other relevant treaties referred to in Article 78(1) TFEU<sup>129</sup>.

A possible source of interpretation of ‘basic human rights’ is provided by the **legislative history of Article 9**. The original version of the Article referred to **life, freedom and physical integrity** as examples of basic human rights<sup>130</sup>, a wording taken from Chapter 4 of the 1996 Joint Position<sup>131</sup>. The wording ‘life and freedom’ corresponds to Article 33(1) of the Refugee Convention. The subsequent version contained the ‘right to life, the right not to be subjected to torture or the right to liberty and security of a person’ as examples<sup>132</sup>. Subsequently, the draft Article 11(1)(a) was changed and in particular referred to ‘the rights from which derogation cannot be made under Article 15(2) ECHR’<sup>133</sup>. The right to life is still contained in this version, whereas ‘freedom’ is only covered by the freedom from slavery and servitude (Article 4(1) ECHR). It follows from the wording of Article 33(1) of the Refugee Convention that a threat to life or freedom<sup>134</sup> at least if sufficiently serious, always constitutes persecution<sup>135</sup>.

Another possible source for identifying the basic character of a human right other than those listed as non-derogable rights in the ECHR may be derived from the **proximity of a human right to human dignity**. Human dignity, guaranteed in Article 1 of the EU Charter must be considered in itself as a basic human right and at the same time as the underlying basis of fundamental rights<sup>136</sup>, such as the rights laid down in Title I of the EU Charter.

Moreover, Article 78 TFEU authorises reference to ‘**other relevant treaties**’ and these may shed possible light on the notion of basic human rights under Article 9(1)(a). In this context, basic human rights, whose violation if sufficiently severe may constitute persecution, may be considered to include the rights enumerated by the ICCPR from which no derogation is permitted, even in times of compelling national emergency (all EU Member States being parties to the ICCPR)<sup>137</sup>. In addition to the rights mentioned by Article 15(2) ECHR, Article 4(2) ICCPR mentions as non-derogable: the right to recognition as a person before the law<sup>138</sup>, freedom of thought, conscience

<sup>125</sup> CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 53.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*, para. 55.

<sup>128</sup> *Ibid.*, paras. 54-56.

<sup>129</sup> See *ibid.*, para. 40; and CJEU, *Shepherd* judgment, op. cit., fn. 110, para. 22. See further EASO, *An Introduction to the Common European Asylum System (CEAS) – A Judicial Analysis*, op. cit., fn. 3, Part 3, pp. 61-89.

<sup>130</sup> European Council, Asylum Working Party, Outcome of Proceedings, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, 9 September 2002, EU Doc 11356/02 ASILE 40, p. 13.

<sup>131</sup> Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term ‘refugee’ in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees (96/196/JHA) [1996] OJ L 63/2.

<sup>132</sup> European Council, Asylum Working Party, Outcome of Proceedings, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, 23 October 2002, EU Doc 12620/02 ASILE 54, p. 13.

<sup>133</sup> European Council, Asylum Working Party/SCIFA/Corperer, Outcome of Proceedings, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, 8 November 2002, EU Doc 13648/02 ASILE 61, p. 13.

<sup>134</sup> UNHCR Handbook, op. cit., fn. 107, para. 51.

<sup>135</sup> Cf. H. Storey, ‘Persecution’, op. cit., fn. 108, pp. 492 and ff.

<sup>136</sup> H. Dörig, in K. Hailbronner and D. Thym (eds.), op. cit., fn. 75, Art. 9 Directive 2011/95, para.2 referring to the Explanations Relating to the EU Charter of Fundamental Rights ([2007] OJ C 303/17).

<sup>137</sup> J.C. Hathaway and M. Foster, *The Law of Refugee Status* (2nd edn, CUP, 2014) p. 109; International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, 16 December 1966 (entry into force: 23 March 1976), Art. 4: ‘1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from art.6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.’

<sup>138</sup> Art. 16 ICCPR.

and religion<sup>139</sup> and the prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation. Acts threatening these rights may thus be considered as to whether they satisfy the threshold of sufficient seriousness so as to amount to acts of persecution<sup>140</sup>.

In addition, it cannot be excluded that acts threatening derogable rights guaranteed by the ICCPR may be considered as to whether they constitute acts of persecution if the conditions for a derogation of such rights are not fulfilled and the deprivation goes beyond what is strictly required to respond to the emergency or impacts disproportionately on certain subgroups of the population<sup>141</sup>.

Other basic human rights could be derived from **customary international law and human rights instruments**. See Table 7 below:

**Table 7: Human rights instruments from which other basic human rights may be derived**

1	the Universal Declaration of Human Rights, 1948 <sup>142</sup>
2	the International Covenant on Civil and Political Rights, 1966 <sup>143</sup>
3	the International Convention on the Elimination of All Forms of Racial Discrimination, 1966 <sup>144</sup>
4	the Convention on the Elimination of All Forms of Discrimination against Women, 1979 <sup>145</sup>
5	the Convention on the Rights of the Child, 1989
6	the Convention on the Rights of Persons with Disabilities, 2006 <sup>146</sup>

Whether the human rights listed in these Conventions can be considered to qualify as ‘basic’ will be a matter of analysis but in general terms they will only do so if they satisfy a test of fundamental importance.

Whether **social and economic rights** as guaranteed in the [European Social Charter](#) of 1961<sup>147</sup> or the [International Covenant on Economic, Social and Cultural Rights](#) of 1966<sup>148</sup> can be considered as ‘basic’ human rights depends on the potential severity of an interference with the basic living conditions of a person. In general, economic and social rights do not meet the test of potential seriousness comparable to an infringement of non-derogable rights. With regard to social and economic rights guaranteed in Part II of the European Social Charter, and given the requirement of an additional declaration of the States Parties to consider themselves bound by at least five of the rights among Articles 1, 5, 6, 12, 13, 16 and 19, the limited scope of EU-wide applicability must also be taken into consideration in determining the fundamental character of such rights.

By an accumulation of various measures, violations of economic and social rights laid down in human rights treaties may under exceptional circumstances amount to persecution provided the measures are sufficiently severe. Not every unlawful or unfair treatment related to an enumerated right supports a finding of persecution<sup>149</sup>. Accumulated measures must result in a sufficiently severe deprivation of living conditions equivalent to a violation of such basic human rights from which no derogations are allowed. In addition, in general serious infringements of economic and social rights, in order to qualify as persecution, must be attributable to an actor (see Section 1.6, pp. 55, below on actors of persecution or serious harm under Article 6 QD (recast)).

<sup>139</sup> Art. 18 ICCPR.

<sup>140</sup> J.C. Hathaway and M. Foster, op. cit., fn. 137, p. 109.

<sup>141</sup> *Ibid.*, p. 110. See also G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edn, OUP, 2007) p. 93 who refer to the right to liberty and security of the person, including freedom from arbitrary arrest and detention and the right to freedom from arbitrary interference in private, home, and family life in view of the frequent close connection between persecution and personal freedom.

<sup>142</sup> UN General Assembly, Resolution 217 (III), 10 December 1948.

<sup>143</sup> 999 UNTS 171, 16 December 1966 (entry into force: 23 March 1976).

<sup>144</sup> 660 UNTS 195, 7 March 1966 (entry into force: 4 January 1969).

<sup>145</sup> 1249 UNTS 13, 18 December 1979 (entry into force: 3 September 1981).

<sup>146</sup> 2515 UNTS 3, 13 December 2006 (entry into force: 3 May 2008).

<sup>147</sup> See [European Social Charter](#), ETS No 35, 18 October 1961 (entry into force: 26 February 1965); and the [Revised European Social Charter](#), ETS No 163, 3 May 1996 (entry into force: 1 July 1999).

<sup>148</sup> 993 UNTS 3, 16 December 1966 (entry into force: 3 January 1976).

<sup>149</sup> J.C. Hathaway and M. Foster, op. cit., fn. 137, p. 120.

### 1.4.1.3.2 Violation

The right identified must have been or be at real risk of being violated. Even with respect to a basic human right, there may be **justifications for a limitation** unless the right is declared as non-derogable. The CJEU has judged that acts amounting to limitations on the exercise of a basic human right which are permitted by Article 52(1) of the Charter cannot be regarded as acts of persecution<sup>150</sup>. Yet the relevance of acts which are not covered by this Article of the Charter, but which may be authorized under derogation clauses in time of war or in a public emergency situation (Article 15(1) ECHR) or under a limitation clause provided by the ECHR or by other human rights instruments is still open to debate. The CJEU is yet to rule on the interpretation to be applied in such a case. The UK Upper Tribunal (UKUT) held that '[w]here Article 15 [ECHR] operates, a state cannot be expected to protect against non-securement of derogable rights because such non-securement does not amount to persecution'<sup>151</sup>.

In case of limitations based upon public order and security, the character of an infringement as a violation of a basic human right must be examined taking into account the general situation in the country of origin and the individual circumstances of the applicant for international protection.

The French *Cour nationale du droit d'asile* (National Court of Asylum Law) has for instance denied the grant of protection to activists of an African resistance movement promoting the interests of a white minority in Namibia who had been imprisoned several times under legislation to protect the public interest and prevent incitement of racial hatred<sup>152</sup>. With regard to freedom of religion, in the jurisprudence of the ECtHR, restrictions on wearing full face veils or religious symbols in public have been considered justified by the public interest in the preservation of the conditions of 'living together'<sup>153</sup>. Acts limiting the exercise of the basic right to freedom of religion provided for by law and which do not violate that right are thus automatically excluded from the scope of application of Article 9<sup>154</sup>.

### 1.4.1.3.3 Severity of a violation

An act must be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights. To determine whether this level has been achieved, the claim must be assessed in light of Article 4(3) taking into account the individual position and personal circumstances of the applicant. The notion of personal integrity and human dignity as well as the manner and degree of any harm or threat of harm as it affects the individual situation of the applicant, including factors, particularly those related to vulnerability, such as background, gender and age, are relevant elements of this assessment<sup>155</sup>. A violation of a basic human right may be qualified as severe due to its particular impact upon a specific applicant. All acts to which a person has been, or risks being, exposed to must be taken into account (see Article 4(3) QD (recast)). For further detail see *Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis*<sup>156</sup>.

Severity is determined on the basis of either the **nature** or **repetition** of the respective act of persecution. Whereas 'nature' is a qualitative criterion, 'repetition' contains a quantitative dimension. A single act which may not be sufficiently serious by its nature to constitute a severe violation of basic human rights may, by its repetition, constitute a severe violation of basic human rights if it exerts a similarly grave effect upon an individual<sup>157</sup>.

**Whether a violation of human rights is by the type of act and its effect upon the applicant concerned sufficiently severe to constitute persecution within the meaning of Article 9(1)(a) must be examined in each individual case.** Violations of basic rights, such as of the right to life or freedom for reasons of race, religion, nationality, political opinion or membership of a particular social group<sup>158</sup> or human dignity, are frequently considered as

<sup>150</sup> See CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 60. The Court identified the right to religious freedom enshrined in Article 10(1) of the Charter as corresponding to the right guaranteed by Article 9 of the ECHR, and stated: Acts amounting to limitations on the exercise of the basic right to freedom of religion within the meaning of Article 10(1) of the Charter which are provided for by law, without any violation of that right arising, are thus automatically excluded as they are covered by Article 52(1) of the Charter.

<sup>151</sup> UKUT, judgment of 3 December 2013, *MS (Coptic Christians) Egypt CG* [2013] UKUT 00611 (IAC), para. 120.

<sup>152</sup> National Court of Asylum Law (France), judgment of 12 May 2012, application no 8919247.

<sup>153</sup> ECtHR, judgment of 1 July 2014, Grand Chamber, *SAS v France*, application no 43835/11.

<sup>154</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 60.

<sup>155</sup> See *ibid.*, para. 68; H. Dörig, in K. Hailbronner and D. Thym (eds.), op. cit., fn. 75, Art. 9 Directive 2011/95, para. 27.

<sup>156</sup> EASO, *Evidence and Credibility Assessment in the Context of the Common European Asylum System – A Judicial Analysis*, op. cit., fn. 22.

<sup>157</sup> See Immigration Appeal Tribunal (UK), judgment of 19 July 2000, *Mustafa Doymus v Secretary of State for the Home Department* [2000] HX-80112-99; and the observations of Kirby J in High Court (Australia), judgment of 16 November 2000, *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* [2000] HCA 55.

<sup>158</sup> UNHCR Handbook, op. cit., fn. 107, para. 51.

automatically meeting the severity test<sup>159</sup>. The German *Bundesverwaltungsgericht* (Federal Administrative Court) has acknowledged that ‘in the event of interference with physical integrity or physical freedom, persecution is to be assumed automatically, provided the interference is covered by Article 3 of the ECHR’<sup>160</sup>. The same conclusion may be drawn by analogy with regard to grave violations of international criminal law, such as genocide or crimes against humanity<sup>161</sup>. Equally, the violation of a non-derogable right under the ECHR indicates such a severe violation of basic human rights.

In general, however the requirement of sufficient severity must be examined individually. Minor deprivations of freedom such as a single short unlawful arrest may not suffice to qualify as a severe violation<sup>162</sup>, while the repetition of such measures may amount to persecution. The application in practice of a sanction of a term of imprisonment which is disproportionate or discriminatory has also been recognised as relevant for the assessment of persecution by the CJEU in its *X, Y and Z* judgment<sup>163</sup>. It follows that a violation of a human right, even if it is to be considered as basic, must pass the test of severity on the basis of the particular impact it has on the applicant<sup>164</sup>.

With regard to infringements of the right conferred by Article 10 of the EU Charter and Article 9 ECHR (freedom of thought, conscience and religion), the CJEU has decided that, notwithstanding the basic character of this right, acts which undoubtedly infringe the right, but whose gravity is not equivalent to that of an infringement of the basic human rights from which no derogation can be made by virtue of Article 15(2) ECHR, cannot be regarded as constituting persecution within the meaning of Article 9(1) of the Directive<sup>165</sup>. It follows that not all infringements of the right to freedom of religion constitute persecution within the meaning of Article 9(1) QD (recast).

To determine comparability, no distinction can be made between an interference with religious activities in private (*forum internum*) and religious activities in public (*forum externum*). A restriction of freedom of religion may constitute a severe violation whether it affects an applicant’s right to practise his/her faith in private circles or publicly, either alone or in community with others. According to the 2012 *Y and Z* judgment of the CJEU, it is therefore the severity of the measures and sanctions to be adopted or liable to be adopted, on account of the intrinsic nature of the act as well as the severity of their consequences for the person concerned, which determine whether a violation of the right to freedom of thought, conscience and religion guaranteed by Article 10(1) of the Charter constitutes persecution<sup>166</sup>.

A real risk that a person’s participation in formal worship in public will, inter alia, be prosecuted or subjected to inhuman or degrading punishment by one of the actors referred to in Article 6 QD (recast) establishes the degree of seriousness required to constitute persecution<sup>167</sup>.

The CJEU has rejected the need to take into account the possibility for an applicant to avoid the risk of persecution by abstaining from the religious practice and, consequently, renouncing the protection of refugee status which the Directive is intended to afford the applicant (see Section 1.9.4, pp. 85, on the issue of discretion)<sup>168</sup>. The fundamental importance of a religious practice for the individual is a significant factor in determining whether sanctions may constitute a real risk of persecution:

In assessing such a risk, the competent authorities must take account of a number of factors, both objective and subjective. The subjective circumstance that the observance of a certain religious practice in public, which is subject to the restrictions at issue, **is of particular importance to the person concerned** in order to preserve his religious identity is a relevant factor to be taken into account in determining the

<sup>159</sup> R. Bank, ‘The Transposition of the Qualification Directive in Germany’, in K. Zwaan (ed.), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers, 2007) p. 124.

<sup>160</sup> Federal Administrative Court (Germany), BVerwG 10 C 51.07, op. cit., fn. 94, para. 116, available in English at [www.bverwg.de](http://www.bverwg.de).

<sup>161</sup> G.S. Goodwin-Gill and J. McAdam, op. cit., fn. 141, p. 94.

<sup>162</sup> See for instance Judicial Department of the Council of State (Afdeling Bestuursrechtspraak van de Raad van State; Netherlands), decision of 30 July 2002, 200203043/1, where it was stated that: ‘The State Secretary for Security and Justice was right in taking the position that the discrimination against the applicant was not so severe that her situation had become unbearable or would become so within reasonable time.’

<sup>163</sup> CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 56.

<sup>164</sup> The Administrative Court of the Republic of Slovenia in judgment of 19 September 2014, I U 1627/2013-17, para. 87, which was upheld by the Supreme Court in the appellate procedure, stated that the term ‘severe’ violation of basic human rights from Art. 9(1)(a) QD (recast) is ‘legally problematic’ given that the provision refers primarily to absolute human rights. Therefore, the Court went on, the term ‘severe’ cannot be interpreted with a grammatical method – which is not the most important method of interpretation under EU law – but rather with a teleological method taking into account the purpose of international protection under EU law as a whole in conjunction with the particular circumstances of the applicant and the case-law of the ECtHR in relation to absolute protection under Art. 3 ECHR (Art. 6(3) TEU and Art. 52(3) of the EU Charter).

<sup>165</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 61.

<sup>166</sup> *Ibid.*, paras. 65 and 66.

<sup>167</sup> *Ibid.*, para. 67.

<sup>168</sup> *Ibid.*, para. 78.

level of risk to which the applicant will be exposed in his country of origin on account of his religion, even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned<sup>169</sup>.

Implementing the CJEU judgment, the referring Court, the German *Bundesverwaltungsgericht* (Federal Administrative Court), decided to remit the cases to the lower courts in order to find out the degree of objective and subjective severity. It observed that acts directed against such exercises of faith are to be considered as sufficiently serious if they exert intensive pressure on a person's decision to practise his/her faith in a manner felt as obligatory to maintain religious identity<sup>170</sup>.

#### 1.4.1.4 Accumulation of measures (Article 9(1)(b))

##### 1.4.1.4.1 A two-step procedure

Generally, the examination of Article 9(1) QD (recast) requires a two-step procedure. If an act, either by its nature or repetition, does not qualify as a severe violation of a basic human right, it must be examined **whether various acts or measures in their cumulative effect constitute persecution** within the meaning of Article 9(1)(b). For instance, deprivation or exclusion from social/local membership of the community without a right of employment and a possibility to enforce rights before courts has been held to be capable of constituting persecution<sup>171</sup>. While Article 9(1)(a) requires a severe violation of a basic human right, other human rights violations and/or 'measures' causing harm or exerting a repressive effect on an individual may constitute persecution under Article 9(1)(b). The decisive element of persecution is the severity of a violation of an individual's rights. The measures in their combined effect must be assessed in the light of the personal circumstances of an applicant taking into account all acts to which the applicant has been, or risks being, exposed<sup>172</sup>. No sharp distinction needs to be drawn between persecution in the form of (a) or (b) if acts or measures in their cumulative effect constitute persecution. A comparative assessment that the applicant concerned is affected in a similar manner as in case of a severe violation of a basic human right, is however indispensable<sup>173</sup>.

##### 1.4.1.4.2 Wide interpretation of the term 'measures'

The term 'measures' in Article 9(1)(b) QD (recast) covers in a wide sense **all measures which may affect an individual in the same manner as a serious violation of human rights**. Violations of human rights which do not qualify as basic may be included. Whether discriminatory measures in connection with a general atmosphere of insecurity as suggested by UNHCR<sup>174</sup> qualifies as persecution can only be decided on the basis of the test of sufficient severity as to affect an individual in a similar manner as mentioned in Article 9(1)(a). However it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. It depends on all the circumstances, including the particular geographical, historical and ethnological context<sup>175</sup>, whether a combination of measures can be qualified as persecution.

##### 1.4.1.4.3 Applicants to be affected in a similar manner as in the case of a severe violation of a basic human right

The accumulation of various measures constitutes persecution only if it **affects the applicant in a similar manner as a violation under Article 9(1)(a) QD (recast)**. 'Similar' does not mean that the same effect is achieved. The term 'similar' is to be interpreted on the basis of the protection needs in accordance with Article 1A of the Refugee Convention. The German *Bundesverwaltungsgericht* (Federal Administrative Court) refers to the cumulative approach of the UNHCR Handbook in stating that, with regard to the severity of a violation of the right to religious freedom, various acts or measures with discriminatory effect – such as restrictions of access to educational or

<sup>169</sup> *Ibid.*, para. 70 (emphasis added).

<sup>170</sup> Federal Administrative Court (Germany), judgment of 20 February 2013, BVerwG 10 C 23.12, BVerwG:2013:200213U10C2312.0, para. 70, available in English at [www.bverwg.de](http://www.bverwg.de), para. 39. See H. Dörig, in K. Hailbronner and D. Thym (eds.), *op. cit.*, fn. 75, Art. 9 Directive 2011/95, para. 26.

<sup>171</sup> See with regard to a former prostitute from Nigeria, National Asylum Court (France), *Mlle EF*, *op. cit.*, fn. 115 (see EDAL English summary).

<sup>172</sup> CJEU, *Y and Z* judgment, *op. cit.*, fn. 33, para. 68.

<sup>173</sup> Federal Administrative Court (Germany), BVerwG 10 C 23.12, *op. cit.*, fn. 170, para. 37, available in English at [www.bverwg.de](http://www.bverwg.de). See also National Asylum Court (France), *Mlle EF*, *op. cit.*, fn. 115, concerning a Nigerian victim of a prostitution network and where the Court considered the different reprisals, threats, stigma and ostracism she would face if returned to her country as an accumulation of acts which as a whole constituted persecution.

<sup>174</sup> UNHCR Handbook, *op. cit.*, fn. 107, para. 55.

<sup>175</sup> *Ibid.*

health facilities or substantial restrictions of occupational or economic possibilities to earn a living – must be taken into account<sup>176</sup>. The Austrian *Verwaltungsgerichtshof* (Supreme Administrative Court) has likewise considered that the various discriminatory measures against women in Afghanistan preventing access to medical treatment affected women in a similar way as a serious violation of a basic human right under Article 9(1)(a)<sup>177</sup>.

Discrimination may constitute persecution if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned; for example, deprivation of a right to earn a livelihood, of the right to practise one's religion, or denial of any access to normally available educational facilities<sup>178</sup>. In this regard, the question whether a cumulative element is involved may become especially important<sup>179</sup>.

## 1.4.2 Enumeration of possible acts of persecution (Article 9(2))

Article 9(2) QD (recast) aims to identify inexhaustively those acts or measures which may, inter alia, potentially qualify as persecution. The list ranges from the general to the particular<sup>180</sup> and is reproduced in Table 8 below:

**Table 8: Non-exhaustive list of acts of persecution in Article 9(2) QD (recast)**

(a)	acts of physical or mental violence, including acts of sexual violence;	see Section 1.4.2.1, pp. 37
(b)	legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;	see Section 1.4.2.2, pp. 38
(c)	prosecution or punishment which is disproportionate or discriminatory;	see Section 1.4.2.3, pp. 38
(d)	denial of judicial redress resulting in a disproportionate or discriminatory punishment;	see Section 1.4.2.4, pp. 39
(e)	prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2);	see Section 1.4.2.5, pp. 39
(f)	acts of a gender-specific or child-specific nature.	see Section 1.4.2.6, pp. 41

The wording 'inter alia' indicates that the enumeration of acts of persecution is non-exhaustive. Thus, other types of acts may also constitute acts of persecution<sup>181</sup>. A likely example would be the arbitrary deprivation of nationality. For example, UK courts have long recognised that, in some circumstances, deprivation of nationality may amount to persecution, if the act of deprivation or revocation can be said to be a wilful denial of nationality for a 'capricious or discriminatory reason' and, the denial is for a Refugee Convention reason<sup>182</sup>.

The principal purpose of Article 9(2) is to aid in the identification of what type of acts potentially falls within the material scope of Article 9. The appearance on the list given in Article 9(2) relieves the decision-maker of the task of examining whether a type of act can potentially be persecutory. The list of acts does not negate the need for the examination in any particular case of whether one of the acts enumerated in Article 9(2) does fulfil the requirements of Article 9(1)(a) or (b).

<sup>176</sup> Federal Administrative Court (Germany), *BVerwG 10 C 23.12*, op. cit., fn. 170, para. 36, available in English at [www.bverwg.de](http://www.bverwg.de).

<sup>177</sup> Supreme Administrative Court (Austria), judgment of 16 April 2002, application no 99/20/0483, para. 5. See also UKUT, judgment of 18 May 2012, *AK (Article 15(c) Afghanistan CG* [2012] UKUT 00163 (IAC).

<sup>178</sup> UNHCR Handbook, op. cit., fn. 107, para. 54.

<sup>179</sup> *Ibid.*, para. 55.

<sup>180</sup> G.S. Goodwin-Gill and J. McAdam, op. cit., fn. 141, p. 91.

<sup>181</sup> For instance the French National Asylum Court considered that the implementation of judiciary proceedings against a Bangladesh national of Hindu religion which resulted in deprivation of property in the well-known context of corruption in the country amounted to persecution: judgment of 14 November 2013, *M C*, application no 12024083 C, in *Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2013*, 2014, pp. 53 and 54.

<sup>182</sup> By way of example, see: EWCA (UK), *JV (Tanzania) v Secretary of State for the Home Department*, op. cit., fn. 120, paras. 6 and 10; and EWCA (UK), *Boban Lazarevic v Secretary of State for the Home Department*, op. cit., fn. 120. See also: Federal Administrative Court (Germany), *BVerwG 10 C 50.07*, op. cit., fn. 101; and National Asylum Court (France), judgment of 23 December 2010, *M D*, application no 09002572, in *Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2010*, 2011, pp. 33-36 regarding Negro-Mauritanians from Mauritania deprived of their rights and nationality in 1988, where on the facts the French National Asylum Court did not accept that deprivation had been proved. Refer also to the following instructive paper: H. Lambert, 'Refugee Status, Arbitrary Deprivation of Nationality, and Statelessness within the Context of Article 1A(2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees', UNHCR, Legal and Protection Policy Research Series, 2014.

## 1.4.2.1 Acts of physical or mental violence (Article 9(2)(a))

### 1.4.2.1.1 Interference with physical or mental integrity

Interferences with physical or mental integrity may often be considered as **ill-treatment under Article 3 ECHR**. Acts of physical or mental violence qualify as persecution within the meaning of Article 9(1) if they are of such intensity that they substantially infringe an individual's physical integrity or mental capacity of independent decision-making. For more on this, see Section 2.4.3 below (pp. 106).

### 1.4.2.1.2 Acts of sexual violence

Acts of sexual violence have explicitly been included to put beyond doubt that such acts can be considered as acts of persecution. Their inclusion reflects the fact that **rape** is now recognised as a typical form of sexual violence qualifying as persecution<sup>183</sup>, provided it can be linked to a reason for persecution<sup>184</sup>. Acts of rape were for instance acknowledged as persecution by the Belgian *Conseil du Contentieux des Etrangers* (Council for Alien Law Litigation) because of the nature, intensity and repeated character of the sexual abuses on an applicant in Afghanistan<sup>185</sup> and taken cumulatively with other acts as a common method used in Sudan against women<sup>186</sup>. **Other less severe forms of sexual violence** may also constitute persecution if they pass the test of sufficient seriousness or have a similar severe effect as part of various measures under Article 9(1)(b). Any act of violence, attempt or threat of a sexual nature that results, or is likely to result, in physical, psychological or emotional harm of sufficient severity qualifies as an act of persecution<sup>187</sup>. **Domestic sexual violence** passing the test of sufficient seriousness may constitute persecution if the additional requirements of Article 9(3) are fulfilled<sup>188</sup>.

Sexual violence constitutes a severe violation of basic human rights and is a severe violation of international humanitarian law if it is committed in an armed conflict<sup>189</sup>. According to Article 8 of the 1998 *Rome Statute of the International Criminal Court*, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity are classified as war crimes in international or non-international armed conflicts<sup>190</sup>. A variety of international instruments considers the systematic or widespread use of forms of sexual violence against the civilian population in an armed conflict as a crime against humanity<sup>191</sup>.

## 1.4.2.2 Legal, administrative, police and/or judicial measures (Article 9(2)(b))

**Persecution must be distinguished from prosecution** or punishment for an offence. Persons fleeing prosecution or punishment for an offence are normally not refugees<sup>192</sup>. Persecution may, however, occur where a person

<sup>183</sup> Based on the reference to the UNHCR's *Guidelines on International Protection No. 9 (Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, UN Doc HCR/GIP/12/09, p. 7) and to the *X, Y and Z* judgment of the CJEU (op. cit., fn. 20, para. 53), the Administrative Court of the Republic of Slovenia in judgment of 24 April 2015, I U 411/2015-57, para. 70, which was upheld by the Supreme Court in the appellate procedure, decided that a rape under the circumstances, as they were described by the applicant in the given case, constitutes sexual violence in the sense of Art. 9(2)(a) QD (recast) and as such can qualify as an act of persecution. In the earlier judgment of 16 March 2005, U 153/2005-6, the Administrative Court of the Republic of Slovenia in the final judgment used the classification of types of sexual violence from the UNHCR's *Guidelines for Prevention and Response: Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons* (May 2003) as potential acts of persecution under the QD. In the same case and with the reference to the judgment of the ECtHR in case of *Aydin v Turkey* (judgment of 25 September 1997, Grand Chamber, application no 23178/94) the Administrative Court of the Republic of Slovenia decided that a rape, which was executed in the premises of the local authority, cannot be considered as a private act of a non-State actor.

<sup>184</sup> Failing the existence of such a nexus, rape nevertheless qualifies as a serious harm under the terms of Art. 15(b) QD (recast) justifying the granting of subsidiary protection. See for instance: Council for Alien Law Litigation (Belgium), decision of 17 January 2012, no 73.344 where sexual aggression did not qualify as an act of persecution because it was not linked with one of the reasons for persecution but was recognised as a serious harm under the terms of Article 15(b). See also Council for Alien Law Litigation (Belgium), decision of 19 February 2010, no 38.977.

<sup>185</sup> Council for Alien Law Litigation (Belgium), decision of 4 February 2013, no 96.572.

<sup>186</sup> Council for Alien Law Litigation (Belgium), decision of 11 December 2012, no 93.324. See also Council for Alien Law Litigation (Belgium), decision of 24 November 2015, no 156.927 where rape was considered as an act of persecution on political grounds.

<sup>187</sup> See Council for Alien Law Litigation (Belgium), decision of 8 December 2015, no 157.905. See also UNHCR, *Guidelines for Prevention and Response*, op. cit., fn. 183, Chapter 1, p. 10.

<sup>188</sup> See for instance Council for Alien Law Litigation (Belgium), decision of 30 June 2010, no 45.742 where domestic sexual violence committed by the applicant's husband were considered as acts of persecution because of membership of a particular social group defined on the basis of gender. A. Zimmermann and C. Mahler, 'Article 1 A, para. 2 (Definition of the Term "Refugee"/Définition du terme "réfugiés")', in A. Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP, 2011), p. 413. See Supreme Administrative Court (Poland), judgment of 8 May 2008, No II OSK 237/07 (see EDAL English summary).

<sup>189</sup> UNHCR Executive Committee, *Refugee Protection and Sexual Violence*, ExCom Conclusion No 73 (XLIV), 8 October 1993.

<sup>190</sup> Art. 7(1)(g) of the Rome Statute.

<sup>191</sup> United Nations Security Council, *Resolution 1820(2008)* (19 June 2008) UN Doc S/Res/1820(2008), para. 1; Art. 27 of the *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287, 12 August 1949 (entry into force: 21 October 1950).

<sup>192</sup> UKUT, judgment of 13 November 2012, *MN and Others (Ahmadis – Country Conditions – Risk) Pakistan CG* [2012] UKUT 00389 (IAC). See also UNHCR Handbook, op. cit., fn. 107, para. 56.

guilty of an offence may be liable to excessive or discriminatory punishment, which may amount to persecution within the meaning of the definition (Article 9(2)(c) QD (recast)). Moreover, criminal prosecution for a reason mentioned in the definition may in itself amount to persecution<sup>193</sup>.

Article 9(2)(b) concerns **measures which are either persecutory by nature or have the appearance of legality and are misused for the purpose of persecution, or are carried out in breach of the law**<sup>194</sup>. Whether legislation amounts to persecution depends on whether it is applied in practice<sup>195</sup>. General measures to safeguard public order, state security or public health do not constitute persecution as long as they meet the requirements for valid limitation of or derogation from human rights obligations established by international law<sup>196</sup>. Article 9(2)(b) as well as Article 9(2)(c) refer to measures whose discriminatory or disproportionate nature is sufficiently serious to be considered an infringement of fundamental rights constituting persecution within the meaning of Article 1A(2) of the Refugee Convention<sup>197</sup>.

Less favourable treatment as a result of differences in the treatment of various groups does not of itself constitute persecution<sup>198</sup>. Discriminatory legislation or application of the law may only qualify as an act of persecution if there are very severe aggravating circumstances such as consequences of a substantially prejudicial nature for the applicant. Serious restrictions of a person's right to earn a livelihood, the right to practise a religion or access to educational facilities<sup>199</sup> may in their accumulated effect with other restrictions amount to persecution if they affect an individual in a similar manner as a severe violation of a basic human right under Article 9(1)(a). In this context all individual circumstances must be taken into account and in particular the effect of an accumulation of discriminatory measures upon a person's living conditions.

### 1.4.2.3 Disproportionate or discriminatory prosecution or punishment (Article 9(2)(c))

Criminal prosecution or punishment for breach of an ordinary law of general application does not qualify as persecution<sup>200</sup>. Persons fleeing prosecution or punishment for such an offence are normally not refugees, but this may be different in the case of **excessive punishment or if penal prosecution may in itself amount to persecution**<sup>201</sup>. Thus those measures may amount to persecution, if the country of origin engages in **disproportionate or discriminatory prosecution or punishment**<sup>202</sup>. Persecution may also take place if the exercise of a fundamental international human right is punished or an individual is forced to commit acts which are in violation of basic norms of international law<sup>203</sup>.

The term **'disproportionate'** may raise difficult issues as to the applicable standards for assessing proportionality in different legal systems and cultures. Article 9 – indeed all the refugee provisions of the QD (recast) – is to be interpreted in accordance with the Refugee Convention as 'the cornerstone of the international legal regime for the protection of refugees' to which all EU Member States are parties (see recital (4)). Recourse to the EU Charter, generally recognised human rights treaties, and general principles of public international law can be used as further guidelines to assess the proportionality of criminal sanctions.

Concerning **whether a prosecution and/or penalties for refusal to perform military service is/are disproportionate**, the CJEU has stated that it is necessary to consider whether such acts go beyond what is necessary for the State concerned in order to exercise its legitimate right to maintain an armed force<sup>204</sup>. This may entail taking into account various factors of a political and strategic nature, on which the legitimacy of that right and the conditions for its exercise are based. The imposition of a custodial sentence of up to five years and a dishonourable discharge from the army do not go beyond what is necessary for a State concerned to exercise its legitimate

<sup>193</sup> See UKIAT, judgment of 28 June 2002, *Muzafar Iqbal (Fair Trial – Pre-Trial Conditions) Pakistan CG* [2002] UKIAT 02239. See also UNHCR Handbook, op. cit., fn. 107, para. 57.

<sup>194</sup> See European Commission, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, 12 September 2001, COM(2001) 510 final, p. 20 (QD Proposal).

<sup>195</sup> CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 55, cf. H. Storey, 'Persecution', op. cit., fn. 108, p. 500.

<sup>196</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 60.

<sup>197</sup> CJEU, *Shepherd* judgment, op. cit., fn. 110, para. 49.

<sup>198</sup> UNHCR Handbook, op. cit., fn. 107, para. 54.

<sup>199</sup> *Ibid.*, paras. 54 and 55.

<sup>200</sup> *Ibid.*, para. 56.

<sup>201</sup> *Ibid.*

<sup>202</sup> See European Commission, QD Proposal, op. cit., fn. 194, p. 20.

<sup>203</sup> See *ibid.* See also UKIAT, *Muzafar Iqbal (Fair Trial – Pre-Trial Conditions) Pakistan CG*, op. cit., fn. 193.

<sup>204</sup> CJEU, *Shepherd* judgment, op. cit., fn. 110, para. 52.



rights. The CJEU however attributes the task of examining all relevant facts in the country of origin to the national authorities of Member States<sup>205</sup>.

In many cases the question of whether prosecution or punishment is discriminatory will not arise. By virtue of Article 9(3) QD (recast), the fact that there needs to be a connection with the reasons mentioned in Article 10 indicates that prosecution has to be discriminatory. Thus prosecution of political opponents based on disturbance of public order for the commission of acts which are protected by human rights treaties and which has potentially severe consequences may be considered discriminatory and capable of qualifying as persecution.

#### 1.4.2.4 Denial of judicial redress (Article 9(2)(d))

Denial of judicial redress can constitute a **violation of the right to a fair trial** which is a right guaranteed in Article 47 of the EU Charter and Article 6 ECHR. It is established in the ECtHR's case-law that an issue might exceptionally be raised under Article 6 ECHR by an expulsion or extradition decision in circumstances where the fugitive suffered or risks suffering a flagrant denial of justice in a destination State<sup>206</sup>. The Court however has applied a stringent test of unfairness, stating that '[w]hat is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article'<sup>207</sup>. Article 9(2)(d) deviates somewhat from this standard by requiring (only) a denial of judicial redress. The difference may in practice be small since a denial of judicial redress may amount to persecution only if it results in a disproportionate or discriminatory punishment<sup>208</sup>.

#### 1.4.2.5 Prosecution or punishment for refusal to perform military service in a conflict (Article 9(2)(e))

Article 9(2)(e) is the outcome of a compromise between different approaches to the relevance of a refusal to perform military service and the recognition of a right of conscientious objection. The original Commission Proposal corresponded to the UNHCR Handbook and its Guidelines on International Protection No. 10 on claims to refugee status related to military service according to which prosecution amounts to persecution if the deserter or draft evader faces disproportionately severe or discriminatory punishment<sup>209</sup>, or if military service would require participation in military action contrary to the applicant's genuine political, religious, moral or conscientious objections<sup>210</sup>. The provision was highly contested during negotiations in the Council. Many Member States objected to a recognition of refusal to perform military service based on subjective opinions or political convictions of the applicant on the legality or legitimacy of a military action<sup>211</sup>. They suggested objective criteria to be established by referring, for example, to international humanitarian law<sup>212</sup>.

The provision was then changed to read:

Prosecution or punishment for refusal to perform military service in a conflict, which has been condemned by relevant bodies of the United Nations (UN) or where performing military service would include acts falling under the exclusion clauses of this Directive<sup>213</sup>.

<sup>205</sup> *Ibid.*, para. 53.

<sup>206</sup> ECtHR, judgment of 7 July 1989, *Soering v the United Kingdom*, application no 14038/88, para. 113; ECtHR, judgment of 17 January 2012, *Othman (Abu Qatada) v the United Kingdom*, application no 8139/09, para. 258.

<sup>207</sup> ECtHR, *Othman (Abu Qatada) v the United Kingdom*, op. cit., fn. 206, para. 260.

<sup>208</sup> The ECtHR has left open the question whether a flagrant denial of justice only arises when the trial in question would have serious consequences for the applicant (*Ibid.*, para. 262) because in the present case it was not disputed that the consequences would be severe.

<sup>209</sup> UNHCR Handbook, op. cit., fn. 107, para. 169; and UNHCR, *Guidelines on International Protection No. 10: Claims to Refugee Status Related to Military Service within the Context of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees*, 12 November 2014, HCR/GIP/13/10/Corr. 1.

<sup>210</sup> UNHCR Handbook, op. cit., fn. 107, para. 170; and UNHCR, *Guidelines on International Protection No. 10*, op. cit., fn. 209, paras. 17 and ff.

<sup>211</sup> European Council, Asylum Working Party, Outcome of Proceedings, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, 24 April 2002, EU Doc 7882/02 ASILE 20, p. 15; European Council, Asylum Working Party, Outcome of Proceedings, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, 17 June 2002, EU Doc 9038/02 ASILE 25, p. 15; and European Council, Asylum Working Party, Outcome of Proceedings, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, 9 July 2002, EU Doc 10596/02 ASILE 36, p. 17.

<sup>212</sup> See the documents referred to in fn. 209.

<sup>213</sup> European Council, Asylum Working Party, Outcome of Proceedings (EU Doc 11356/02), op. cit., fn. 130, p. 14; European Council, Asylum Working Party, Outcome of Proceedings (EU Doc 12620/02), op. cit., fn. 132, p. 14.

However, the reference to condemnation by UN bodies was subsequently deleted<sup>214</sup>; and Article 9(2)(e) now states that acts of persecution as qualified by Article 9(1) can, inter alia, take the form of '[p]rosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2)'<sup>215</sup>. Article 9(2)(e) is therefore narrower than the approach to conscientious objection taken in the UNHCR Handbook, its Guidelines on International Protection No. 10, as well as the practice of some Member States as it addresses only situations where performing military service would include acts falling within Article 12(2) QD (recast) and, a fortiori, Article 1F of the Refugee Convention<sup>216</sup>.

The interpretation of this act of persecution has been clarified by the CJEU in its 2015 *Shepherd* judgment concerning a US national applying for asylum on account of his prosecution for failure to perform military service<sup>217</sup>. As underlined by the Court, **four elements** are to be taken into consideration in interpreting this particular act of persecution (see Table 9 below):

**Table 9: Four definitional elements of prosecution or punishment for refusal to perform military service in a conflict as an act of persecution**

<b>1</b>	the <b>existence of a conflict</b> ;
<b>2</b>	the <b>inclusive personal scope</b> covering all military personnel;
<b>3</b>	the <b>risk for the applicant to be actually involved in war crimes</b> ; and
<b>4</b>	the <b>available alternatives</b> to refusal of military service.

#### 1.4.2.5.1 Existence of a conflict

The CJEU first held that Article 9(2)(e) refers **only to conflict situations**. Hence, outside such conflicts, any refusal to perform military service, irrespective of motives, does not fall within the ambit of the paragraph<sup>218</sup>. This does not preclude recourse to any other provision of Article 9(2)(a)-(f) if an applicant is affected by an act outside the realm of a conflict which may qualify as persecution under other provisions of Article 9(2) or directly under Article 9(1).

#### 1.4.2.5.2 All military personnel covered

One of the major questions referred to the Court was the situation of military personnel who, like the applicant, are not part of the combat troops but serve in a unit providing logistical or technical support. In this connection, the CJEU ruled that Article 9(2)(e) covers **all military personnel, including logistical or support personnel**<sup>219</sup>. It does not require that the person concerned is a member of the combat troops. This conclusion is drawn from an analysis of the wording and purpose of the provision. The CJEU held that the EU legislature intended the general context in which military service is performed to be objectively taken into account. Consequently, the fact that an applicant, because of the merely indirect nature of his/her participation in the commission of war crimes, could not be prosecuted under criminal law for war crimes, cannot preclude protection arising from Article 9(2)(e)<sup>220</sup>.

<sup>214</sup> Against the opposition of the Netherlands. See European Council, Presidency Note to the Permanent Representative Committee, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, 15 November 2002, EU Doc 14308/02 ASILE 65, p. 13.

<sup>215</sup> The CJEU has yet to consider directly whether a different approach to conscientious objection should be taken in light of ECtHR, judgment of 7 July 2011, Grand Chamber, *Bayatyan v Armenia*, application no 23459/03.

<sup>216</sup> H. Battjes, op. cit., fn. 117, p. 234, para. 292; UNHCR, *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004)*, January 2005, p. 21; A. Klug, op. cit., fn. 115, p. 604. Apart from conflict, the French National Asylum Court regularly grants refugee status to nationals of Eritrea who fled their country to escape to military service or who fled from a military camp (see for instance, National Asylum Court (France), judgment of 6 March 2012, *M DS*, application no 11023420). Similarly refugee status may be granted to Kurds from Turkey who refused to do military service alleging they would be sent to regions under conflict and did not want to fight against members of their community (National Asylum Court (France), judgment of 13 March 2014, *M FG*, application no 13016100). See also House of Lords (UK), judgment of 23 March 2003, *Sepet & Anor, R (on the application of) v Secretary of State for the Home Department* [2003] UKHL 15.

<sup>217</sup> CJEU, *Shepherd* judgment, op. cit., fn. 110, para. 21.

<sup>218</sup> *Ibid.*, para. 35.

<sup>219</sup> *Ibid.*, paras. 33 and 46.

<sup>220</sup> *Ibid.*, para. 37.

#### 1.4.2.5.3 Risk for the applicant to be actually involved in war crimes

Nevertheless, applicants can invoke the likelihood of acts referred to in Article 12(2) QD (recast) being committed only if their task ‘could sufficiently directly and reasonably plausibly lead them to participate in such acts’<sup>221</sup>. It is not required that acts of the unit to which the applicant is attached has already committed war crimes or that acts of that unit have been penalised by the International Criminal Court, even if the latter had jurisdiction to do so<sup>222</sup>.

Whether a **sufficient degree of likelihood exists to give rise to a real risk of being actually involved in committing or participating in the commission of a war crime** for the purposes of Article 9(2)(e) QD (recast) is a matter to be ascertained by the courts or tribunals of Member States. The factual assessment to be carried out by the national authorities under the supervision of courts and tribunals must aim to determine the situation of the military service concerned and must be based on a body of evidence. The evidence must be capable of establishing, in view of all the circumstances of the case, that the situation in question makes it credible that alleged war crimes would be committed. All relevant facts as they relate to the country of origin at the time of taking a decision on the application and to the individual position and personal circumstances of the applicant must be taken into account<sup>223</sup>.

While the assessment of facts is within the competence of national courts or tribunals, the CJEU notes that certain events such as, inter alia, the past conduct of the applicant’s unit or criminal sentences passed on members of that unit may constitute indicia that it is probable that the unit will commit further war crimes. However, such events cannot by themselves automatically establish the likelihood that such crimes will be committed. The Court noted that an armed intervention engaged upon pursuant to a resolution of the UN Security Council or on the basis of a consensus on the part of the international community, or that the State or States conducting the operations prosecute war crimes ‘are circumstances which have to be taken into account in the assessment that must be carried out by the national authorities’<sup>224</sup>.

#### 1.4.2.5.4 Available alternative to refusal of military service

Finally, the refusal to perform military service must constitute **the only means by which the applicant could avoid participating in the alleged war crimes**. In that respect it must be taken into account whether an applicant enlisted voluntarily in the armed forces at a time when they were already involved in the conflict and whether the applicant could have applied for a conscientious objector status unless it is proven that no such procedure was available to the applicant in his/her specific situation<sup>225</sup>.

### 1.4.2.6 Acts of gender-specific or child-specific nature (Article 9(2)(f))

#### 1.4.2.6.1 Gender-specific acts of persecution

Article 9(2)(f) QD (recast) echoes the requirements of Article 4(3)(c) whereby it is the duty of Member States to take into account:

the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant’s personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm.

Gender-specific acts are forms of persecution that are specific to a gender. In order to understand their nature, it is essential to define and distinguish between the terms ‘gender’ and ‘sex’. Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another; while sex is a biological determination. Gender is not

<sup>221</sup> *Ibid.*, paras. 38 and 39.

<sup>222</sup> *Ibid.*, para. 39.

<sup>223</sup> *Ibid.*, para. 40.

<sup>224</sup> *Ibid.*, para. 41, 42 and 46. See for instance National Asylum Court (France), judgment of 9 November 2015, *M MS*, application 14014878, where the Court granted refugee status to a Palestinian applicant who had his habitual residence in Syria and fled as he refused enlistment with the military service under the Syrian authorities because of their criminal actions. The Court referred to UN resolutions that condemned abuses committed by the Syrian forces in the current conflict.

<sup>225</sup> CJEU, *Shepherd* judgment, op. cit., fn. 110, paras. 44 and 45.

static or innate but acquires socially and culturally constructed meaning over time. This is apparent from the wording of recital (30) QD (recast) which provides that ‘issues arising from an applicant’s gender, including gender identity and sexual orientation, [...] may be related to certain legal traditions and customs’. Gender identity is indeed an aspect of gender, while sexual orientation is intimately linked to gender. These two notions are defined by the 2007 Yogyakarta Principles as follows:

- 1) sexual orientation is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or of the same gender or more than one gender.
- 2) gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correct with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms<sup>226</sup>.

While shedding some light on the concept of gender, recital (30) QD (recast) quoted above is however not concerned with gender-specific acts but with persecution for reason of membership of a particular social group defined on the basis of gender (see Section 1.5.2.4.2 below, pp. 50). Gender-specific acts and gender-based persecution are to be distinguished from one another. Indeed, while gender-specific acts of persecution may be inflicted for reason of membership of a particular social group defined on the basis of gender, the two are not necessarily tied to one another. Hence, gender-specific acts can also constitute acts of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group where the social group is defined on a basis other than gender. Conversely, gender-based persecution may be the result of acts not specific to a certain gender. This can for instance be the case of a transgender woman who is so severely discriminated against in her social, economic or religious sphere that it becomes unbearable for her to remain in her country of origin<sup>227</sup>.

The distinction between gender-specific acts and gender-based persecution remains nevertheless tenuous. Indeed, the acts that can be deemed gender-specific have frequently been approached as gender-based persecution in the case-law of courts or tribunals of Member States. Female genital mutilation, which arguably constitutes a gender-specific act, has often been a decisive factor leading to acceptance of the existence of a particular social group defined by gender<sup>228</sup>. In many cases, gender-specific acts of persecution are committed because of gender-based grounds for persecution. Nevertheless, it cannot be excluded that gender-specific acts such as sexual violence or forced abortion may be carried out for other discriminatory reasons such as race, religion, nationality or political opinion.

Moreover it should be kept in mind that, while the great majority of applications involving gender-specific acts concern women, gender-specific acts can also be committed against men. Gender-specific acts can for instance cover genital mutilation, forced sterilisation and forced abortion (as cited in recital (30) QD (recast)). Sexual violence, forced prostitution and forced marriage could also be qualified as gender-specific acts of persecution.

#### 1.4.2.6.2 Child-specific acts of persecution

When assessing applications for international protection from minors, Member States should have regard to child-specific forms of persecution (recital (28) QD (recast)). Children may be subjected to **specific forms of persecution that are influenced by their age, lack of maturity or vulnerability**<sup>229</sup>. The fact that the applicant is a child may be a central factor in the harm inflicted or feared<sup>230</sup>. This may be because the alleged persecution only applies to, or disproportionately affects, children or because specific child rights may be infringed<sup>231</sup>. Persecutory acts may include under-age recruitment, child trafficking and severe discrimination of children born outside strict family planning rules<sup>232</sup>.

<sup>226</sup> The Yogyakarta Principles, Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 2007, p. 6.

<sup>227</sup> As entailed by the Asylum Court (Austria), judgment of 29 January 2013, E1 432053-1/2013 (see EDAL English translation).

<sup>228</sup> See for instance Council for Alien Law Litigation (Belgium), decision of 17 October 2012, no 89.927 (see EDAL English summary); Migration Court of Appeal (Sweden), judgment of 12 October 2012, UM 1173-12 (see EDAL English summary).

<sup>229</sup> A. Zimmermann and C. Mahler, op. cit., fn. 188, pp. 407 and ff.

<sup>230</sup> See for instance Council for Alien Law Litigation (Belgium), decision of 29 June 2016, no 170.819. See also UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, UN Doc HCR/GIP/09/08, p. 9.

<sup>231</sup> *Ibid.*

<sup>232</sup> *Ibid.*

The [Convention on the Rights of the Child](#), of which specific mention is made in recital (18) QD (recast), contains a number of specific human rights. Breach of some of these rights may either by its nature or repetition constitute a violation of a basic human right in the sense of Article 9(1)(a) or by accumulation of various measures be considered an infringement of fundamental rights constituting persecution within the meaning of Article 9(1)(b). Their character as a ‘basic human right’ may be derived from the fundamental importance of a specific right for a child’s living conditions and its proximity to the rights under Article 15(2) ECHR from which no derogation is allowed. The two Optional Protocols to the Convention, on the prohibition of compulsory recruitment of children in armed forces during an armed conflict and on the sale of children, child prostitution and child pornography, support the assumption that the rights of children laid down in these Protocols are to be considered by their nature as basic human rights<sup>233</sup>. The infringement of other human rights may qualify as persecution under Article 9(1)(b).

In either case, restrictions of individual rights of the child which are subject to limitations such as freedom to manifest one’s religion or beliefs (Article 14) or freedom of association or assembly (Article 15) constitute persecution only if the violation of the right is sufficiently severe. The test of whether accumulated acts or measures affect the child in a similar manner as a violation of a non-derogable basic human right applies with regard to interferences with individual human rights as well as with the rights of a child to receive adequate protection against all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (Article 19).

The precise nature and extent of the impact of Article 24(2) of the EU Charter (which states that ‘[i]n all actions relating to children, [...], the child’s best interests must be a primary consideration’) on the assessment of child-specific acts of persecution and the assessment of their sufficient seriousness in the light of Article 9 QD (recast) has yet to be clarified by the CJEU. For a possible comparison with the impact of this right on child-specific acts of persecution, see, for example, the interpretation of the CJEU in the case *MA, BT and DA* which concerned the transfer of unaccompanied minors from one Member State to another under the Dublin II Regulation<sup>234</sup>. In this case the CJEU states that Article 6(2) of the Dublin II Regulation cannot be interpreted in such a way that it disregards the fundamental right set out in Article 24(2) of the Charter<sup>235</sup>. The Court went on to add:

Consequently, although express mention of the best interest of the minor is made only in the first paragraph of Article 6 [of the Dublin II Regulation], the effect of Article 24(2) of the Charter, in conjunction with Article 51(1) thereof, is that the child’s best interests must also be a primary consideration in all decisions adopted by the Member States on the basis of the second paragraph of Article 6<sup>236</sup>.

## 1.5 The reasons for persecution (Articles 9(3) and 10)

The QD (recast), like the Refugee Convention on which it is based, offers refugee protection only to those whose fear of persecution arises ‘for reasons of race, religion, nationality, political opinion or membership of a particular social group’ (Article 2(d) QD (recast))<sup>237</sup>. As laid down in recital (29) QD (recast), these reasons for persecution have to be connected to the acts of persecution or the absence of protection against such acts in accordance with the Refugee Convention. Recital (29) states:

One of the conditions for qualification for refugee status within the meaning of Article 1(A) of the Geneva [Refugee] Convention is the existence of a causal link between the reasons for persecution, namely race, religion, nationality, political opinion or membership of a particular social group, and the acts of persecution or the absence of protection against such acts.

<sup>233</sup> See [Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict](#), 2173 UNTS 222, 25 May 2000 (entry into force: 12 February 2002); and [Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography](#), 2171 UNTS 227, 25 May 2000 (entry into force: 18 January 2002).

<sup>234</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1; now replaced by the Dublin III Regulation (Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31).

<sup>235</sup> CJEU, judgment of 6 June 2013, case C-648/11, *MA, BT and DA v Secretary of State for the Home Department*, EU:C:2013:367, para. 58.

<sup>236</sup> *Ibid.*, para. 59.

<sup>237</sup> See also Art. 1A(2) of the Refugee Convention. The same wording is used in Art. 2(c) QD.

This Section first focuses on this nexus requirement (Section 1.5.1, pp. 44-45) before turning to the five reasons for persecution defined in Article 10 QD (recast) (Section 1.5.2, pp. 46-55).

### 1.5.1 Connection between the reasons for persecution and the acts of persecution or the absence of protection (Article 9(3))

Article 9(3) prescribes that:

In accordance with point (d) of Article 2, there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1 of this Article or the absence of protection against such acts.

In other words, the required nexus can be of two kinds as the reasons for persecution must either be connected to:

- the **acts of persecution** (Section 1.5.1.1, pp. 44); or
- the **absence of protection against such acts** (Section 1.5.1.2, pp. 45).

#### 1.5.1.1 Connection with the acts of persecution

The connection makes clear that acts of persecution as such do not qualify a person as a refugee unless they are committed **for one of the reasons for persecution**. There is general agreement that in order to establish the required causal link the acts do not need to be solely motivated by one of the five reasons. There may be other reasons why a persecutory act has been performed in addition to the motives of race, religion, nationality, membership of a particular social group or political opinion.

The required connection under Article 9(3), like that under the Refugee Convention, is demonstrated if one of the reasons is a **substantial contributing factor**<sup>238</sup>. Thus if one of the reasons for persecution is a substantial contributing factor, it does not have to be the only or primary one. To similar effect, although using the language of decisiveness, the Czech *Nejvyšší správní soud* (Supreme Administrative Court) stated that:

The plurality of motives of the authorities does not mean that the applicant does not meet the grounds of persecution and that he should be disqualified from refugee status. There is no need that race, religion, nationality, membership of a particular social group, political opinion or gender should be the only and exclusive grounds as to why the applicant is persecuted. It is enough if one of them is the decisive ground to cause serious harm or to refuse protection<sup>239</sup>.

**How should the existence of a reason for persecution be determined?** An applicant may not be able to show subjective persecutory intentions on the part of the perpetrator particularly where persecution occurs as an element of a general policy of discrimination, which clearly falls into the scope of application of Article 9(3). The causal link to the persecutory consequences of an act or measures can be shown either by the **subjective motivation of the persecutor or by the objective impact of the measure in question**<sup>240</sup>. In the words of the UK House of Lords: ‘The persecutory treatment need not be motivated by enmity, malignity or animus on the part of the persecutor, whose professed or apparent motives may or may not be the real reason for the persecution. What matters is the real reason’<sup>241</sup>. When assessing the available evidence, it may be unrealistic to expect the perse-

<sup>238</sup> See House of Lords (UK), judgment of 25 March 1999, *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL 20. See also J.C. Hathaway, R.P.G. Haines, M. Kagan et al., ‘*The Michigan Guidelines on Nexus to a Convention Ground*’, Michigan Journal of International Law (2002) 211-221, para. 13.

<sup>239</sup> Supreme Administrative Court (Czech Republic), judgment of 30 September 2008, *SN v Ministry of Interior*, 5 Azs 66/2008-70 (see EDAL English summary). See further ‘*The Michigan Guidelines on Nexus to a Convention Ground*’, op. cit., fn. 238, para. 13.

<sup>240</sup> Federal Constitutional Court (Germany), judgment of 10 July 1989, 2 BvR 502/86, Volume 80, 315, 335. See H. Dörig, in K. Hailbronner and D. Thym (eds.), op. cit., fn. 75, Art. 9 Directive 2011/95, para. 57.

<sup>241</sup> House of Lords (UK), judgment of 18 October 2006, *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, para. 17. See further ‘*The Michigan Guidelines on Nexus to a Convention Ground*’, op. cit., fn. 238, para. 9 and the High Court (Australia), *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* [2000] 170 ALR 553, para. 73.

ctors to have clearly identified themselves or to have claimed responsibility for their actions: an appropriate inference may be drawn from the evidence as a whole<sup>242</sup>.

### 1.5.1.2 Connection with the absence of protection

To address potential protection gaps, the Commission's Proposal for Amendment of the Directive said that there should be explicit provision that the requirement of a connection between the acts of persecution and the reasons for persecution is also fulfilled where there is a connection between the acts of persecution and the absence of protection against such acts<sup>243</sup>. The Proposal was adopted and recital (29) QD (recast) accordingly amended to provide for the causal link between a reason for persecution and the act of persecution or the absence of protection against such acts. Thus, while Article 9(3) QD refers only to the connection with acts of persecution, Article 9(3) QD (recast) provides for another alternative: the reasons for persecution can also be **connected to the absence of protection against acts of persecution**.

With this addition, newly introduced by the QD (recast), Article 9(3) addresses the issue of a causal link if persecution is inflicted by non-State actors alone or a combination of non-State and State actors. The EU Commission has noted that in many cases where persecution emanates from non-State actors, such as militia, clans, criminal networks, local communities or families, the act of persecution may not have been committed for reasons related to a Refugee Convention ground but, for instance, for criminal motivations or for private revenge. However, it often happens in such cases that the **State is unable or unwilling to provide protection to the individual concerned because of a reason that is in fact related to the Refugee Convention**. If for instance a State does not grant police protection for ethnic or racial groups against criminal activities by private groups or individuals, the unwillingness to afford protection may amount to persecution<sup>244</sup>. This was aptly illustrated by the UK House of Lords in the *Shah and Islam* case when Lord Hoffmann noted:

A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? Again, in my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question 'Why was he attacked?' would be 'because a competitor wanted to drive him out of business.' But another answer, and in my view the right answer in the context of the Convention, would be 'he was attacked by a competitor who knew that he would receive no protection because he was a Jew'<sup>245</sup>.

As detailed below in Section 1.7 (pp. 60), the absence of state protection against persecution implies that the State is unwilling and/or unable to provide protection which is effective, durable and accessible to the applicant.

<sup>242</sup> See 'The Michigan Guidelines on Nexus to a Convention Ground', op. cit., fn. 238, paras. 12 and 13.

<sup>243</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, 21 October 2009, COM(2009) 551 final, pp. 7-8 (QD (recast) Proposal).

<sup>244</sup> See Verwaltungsgericht München (Administrative Court of Munich, Germany), judgment of 19 April 2016, M 12 K 16.30473, para. 28; Council for Alien Law Litigation (Belgium), decision of 11 September 2013, no 109.598; Council for Alien Law Litigation (Belgium), decision of 29 September 2009, no 32.222; Council for Alien Law Litigation (Belgium), decision of 12 October 2010, no 49.339; and Council for Alien Law Litigation (Belgium), decision of 17 December 2015, no 158.868.

<sup>245</sup> House of Lords (UK), *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, ex parte Shah*, op. cit., fn. 238, per Lord Hoffmann.

## 1.5.2 The different reasons for persecution (Article 10)

The different reasons for persecution listed in Article 2(d) QD (recast) are reproduced in Table 10 below:

**Table 10: The different reasons for persecution in Articles 2(d) and 10 QD (recast)**

1	race;	see Section 1.5.2.1, pp. 47
2	religion;	see Section 1.5.2.2, pp. 47
3	nationality;	see Section 1.5.2.3, pp. 48
4	membership of a particular social group; and/or	see Section 1.5.2.4, pp. 48
5	political opinion.	see Section 1.5.2.5, pp. 53

Neither the QD (recast) nor the Refugee Convention attaches any significance to the ordering in which they are listed; there is no hierarchy. Moreover, the reasons may overlap, such as where a political opponent belongs to a religious or national group which also attracts antagonism.

In the absence of being able to show at least one reason for persecution, an applicant cannot qualify as a refugee. Victims of famine or natural disaster, for example, will not have a viable claim for international protection without some additional factor present, as the required nexus with one of the Directive's reasons will be absent (and additionally their claim is unlikely to arise from a threat of persecution); equally civilians who are at risk of truly indiscriminate violence arising in circumstances where there is no reason for persecution behind the harm they fear would have no viable claim.

As laid down in Article 10(2) QD (recast), the critical focus must be on the **actions of the persecutor**:

When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.

The text of Article 10 reflects the central axiom of refugee law that, ultimately, what matters when assessing the risk of 'being persecuted' on a relevant ground is **not who or what people are but how they are perceived by the actors of persecution**. Indeed, there may even be circumstances where claiming asylum itself (e.g. if such an action was viewed as striking a hostile posture to the government of the country of origin and thus constituting the holding of an opinion, thought or belief on a matter related to the potential actors of persecution) leads to the imputation of an adverse political opinion. Experience suggests that this will be rare in practice but equally that it cannot be ruled out<sup>246</sup>. Persecutors and victims may even share the same identified characteristic which is the reason for persecution, without preventing mistreatment of one by the other being for a reason for persecution (as where the protagonists of female genital mutilation have themselves suffered the process): 'Those who have already been persecuted are often expected to perpetuate the persecution of succeeding generations [...]'<sup>247</sup>.

Article 10(1) QD (recast) sets out a series of elements which must be taken into account when the reasons for persecution are assessed. These seek to provide definitional detail to the Convention reasons found in Article 1A(2) of the Refugee Convention (which the Convention does not define). They are essential components of the refugee definition, and an application will fail, notwithstanding the existence of persecution against which neither state protection nor internal protection (for those Member States that apply Article 8) is available, if no reason is applicable. As noted above, there is a requirement both for a reason for persecution, and for a **connection** between the reason and the persecution. Each element is qualified by the term 'in particular', indicating that these are relevant factors but not exhaustive ones<sup>248</sup>.

<sup>246</sup> For example see the UNHCR Handbook, op. cit., fn. 107, para. 83.

<sup>247</sup> House of Lords (UK), *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department*, op. cit., fn. 241, para. 110.

<sup>248</sup> European Council, Asylum Working Party, Outcome of Proceedings, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, 25 September 2002, EU Doc 12199/02 ASILE 45; and European Council, Asylum Working Party, Outcome of Proceedings (EU Doc 12620/02), op. cit., fn. 132, both cited by K. Hailbronner and S. Alt, 'Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, Articles 1-10', in K. Hailbronner (ed.), *European Immigration and Asylum Law: A Commentary* (Hart, 2010) p. 1080.



### 1.5.2.1 Race (Article 10(1)(a))

Article 10(1)(a) QD (recast) states that ‘the concept of race shall, in particular, include considerations of colour, descent, or membership of a particular ethnic group’. The breadth of race is shown by the [International Convention on the Elimination of All Forms of Racial Discrimination](#) which identifies discrimination based on ‘race, colour, descent, or national or ethnic origin’<sup>249</sup>.

Anti-discriminatory objectives are central to the European human rights regime. The TEU itself at Article 2 stresses the centrality of non-discrimination to the values common to Member States. Article 21 of the EU Charter prohibits discrimination on grounds including race, and such discrimination may, when a claim is considered under the ECHR, be a factor leading to a finding of degrading treatment<sup>250</sup>. For example, a case involving race arose in practice in a decision of the Greek *Συμβούλιο της Επικρατείας* (Council of State), where the government decision-maker was found not to have taken account of an Afghan national’s Hazara ethnicity before rejecting his asylum claim<sup>251</sup>.

### 1.5.2.2 Religion (Article 10(1)(b))

Article 10(1)(b) QD (recast) provides that:

[T]he concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief.

As the CJEU puts it, religion under the Directive ‘encompasses all its constituent components, be they public or private, collective or individual’<sup>252</sup>. The concept extends to atheism. Advocate General Bot in his opinion in *Y and Z* observed that freedom of religion ‘concerns the freedom to have a religion, to have none, or to change faith’<sup>253</sup>. Nevertheless, the individual’s actions must truly express the belief concerned, whether or not motivated by it<sup>254</sup>.

For example, a decision of the Austrian *Asylgerichtshof* (Asylum Court) has recognised that persecution might take place on religious grounds where an Afghan woman might face serious harm having refused to be subject to the rites and customs associated with the religion<sup>255</sup>.

As previously noted in Section 1.4.1 (pp. 27), this broad protection of religious rights, paying attention to both beliefs and also the right to express those beliefs (separate legal interests sometimes designated *forum internum* and *forum externum*, both of which are recognised as protected<sup>256</sup>) reflects the various international law instruments in this area, including most notably Article 10 EU Charter. Advocate General Bot in *Y and Z* gave his opinion that it would be meaningless to define the core protected area as only freedom of private conscience without similarly protecting that freedom’s external manifestation<sup>257</sup>. In its judgment the Court agreed that Article 10(1) (b) encompassed protection from serious acts interfering with the applicant’s freedom not only to practise his/her faith in private circles but also to live that faith publicly<sup>258</sup>.

<sup>249</sup> Art. 1(1). The European Commission against Racism and Intolerance (ECRI) has defined direct racial discrimination as any differential treatment ‘based on a ground such as race, colour, language, religion, nationality or national or ethnic origin’: see the *ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination*, 13 December 2002, cited by ECtHR, judgment of 13 November 2007, Grand Chamber, *DH and Others v the Czech Republic*, application no 57325/00, para. 60. The QD Proposal of the European Commission (op. cit., fn. 194, p. 21) stated that race ‘should be interpreted in the broadest of terms to include all kinds of ethnic groups and the full range of sociological understandings of the term.’

<sup>250</sup> European Commission on Human Rights, report of 14 December 1973, *East African Asians v the United Kingdom*, applications nos 4403/70-4419/70, 4422/70, 4423/70, 4434/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70 and 4526/70-4530/70; ECtHR, judgment of 10 May 2001, Grand Chamber, *Cyprus v Turkey*, application no 25781/94, para. 306; ECtHR, judgment of 15 June 2010, *SH v the United Kingdom*, application no 19956/06.

<sup>251</sup> Council of State (Greece), decision of 31 December 2008, 4056/2008.

<sup>252</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 63. See also UNHCR Handbook, op. cit., fn. 107, para. 71.

<sup>253</sup> Opinion of Advocate General Bot of 19 April 2012, joined cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y and Z*, EU:C:2012:224, para. 34.

<sup>254</sup> European Commission on Human Rights, report of 12 October 1978, *Arrowsmith v the United Kingdom*, application no 7050/75, para. 71.

<sup>255</sup> Asylum Court (Austria), judgment of 6 December 2012, C16 427465-1/2012 (see EDAL English summary).

<sup>256</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 62.

<sup>257</sup> Opinion of Advocate General Bot in *Y and Z*, op. cit., fn. 252, para. 46.

<sup>258</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 63.

### 1.5.2.3 Nationality (Article 10(1)(c))

Article 10(1)(c) QD (recast) states that:

[T]he concept of nationality shall not be confined to citizenship or lack thereof but shall, in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State.

There appears to be very little exploration of this reason for persecution in decisions of the courts or tribunals of Member States<sup>259</sup> and the subject is untouched at CJEU level. In these special circumstances it is appropriate to look at interpretations that have been suggested in secondary non-binding sources. The broad exposition of the content of nationality laid down in the QD (recast) reflects that set out many years earlier in the UNHCR Handbook:

The term ‘nationality’ in this context is not to be understood only as ‘citizenship’. It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term ‘race’. Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution<sup>260</sup>.

This ground has a contribution to make in terms of filling gaps that might otherwise exist in the protection regime. National courts outside the EU and academic writers have suggested that it may deal with the persecution visited on refugees or stateless persons on account of their status as ‘foreigners’<sup>261</sup>. It may also address the many problems associated with those awarded only ‘second-class citizenship’ or subordinate forms of ‘nationality’, and with the situation where new territories are carved out of previously existing ones, where those expressing allegiance to the antecedent rulers suffer persecution<sup>262</sup>.

### 1.5.2.4 Membership of a particular social group (Article 10(1)(d))

Article 10(1)(d) QD (recast) states:

[A] group shall be considered to form a particular social group where in particular:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.

#### 1.5.2.4.1 Definition of a particular social group

As is apparent from the wording of Article 10(1)(d) QD (recast), a particular social group is defined by two elements as shown in Table 11 below:

<sup>259</sup> UKUT, *ST (Ethnic Eritrean – Nationality – Return) Ethiopia CG*, op. cit., fn. 88, considers the question of arbitrary deprivation of nationality and, though the case is an interesting example of the circumstances in which such deprivation will be *persecution*, it does not discuss the Convention reason dimension.

<sup>260</sup> UNHCR Handbook, op. cit., fn. 107, para. 74.

<sup>261</sup> Refugee Status Appeals Authority (New Zealand), decision of 30 April 1992, *Refugee Appeal no 1/92 Re SA*, see particularly the discussion under the heading of statelessness.

<sup>262</sup> J.C. Hathaway and M. Foster, op. cit., fn. 137, p. 398.

**Table 11: Two definitional elements of a particular social group in Article 10(1)(d) QD (recast)**

<b>1</b>	An innate shared characteristic or common background that cannot be changed, or a shared characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it; and
<b>2</b>	A distinct identity based on a perception of being different by the surrounding society.

An illustration of these two elements is given in a decision of the Czech *Nejvyšší správní soud* (Supreme Administrative Court) involving former members of the armed forces in Iraq, noting that:

[The group was] quite easily defined, as these are the persons who, before the fall of Saddam Hussein’s regime, were involved in the Iraqi army and in other armed bodies, or are those who participated in exercising power. This is why they are perceived by the rest of the population to be supporters or representatives of the former regime, especially when they also follow the Sunni religion. This is a group of persons that may be quite accurately identified as they have identical or similar status and these persons could be exposed, according to the mentioned recommendation of the UNHCR, to the risk of persecution by armed groups and attacks, something that the Iraqi government is not able to prevent at the moment<sup>263</sup>.

Article 10(1)(d) uses the conjunctive ‘and’ suggesting that the two requirements are, in EU law, both required. In 2006, the UK House of Lords indicated concern that to demand both requirements ‘propounds a test more stringent than is warranted by international authority’<sup>264</sup>. However, in 2013, the CJEU stated that these two conditions must both be met, although there has not so far been a reference for a preliminary ruling that actually turns on this point<sup>265</sup>. Although UNHCR’s view is a non-binding one, UNHCR has long argued that the case-law of the common law countries breaks down, on analysis, into two approaches: ‘protected characteristics’ and ‘social perception’, and that it is appropriate to reconcile the two in order to ensure that the Refugee Convention offers comprehensive and principled protection<sup>266</sup>. The synthesis proposed by UNHCR of the two is that:

[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights<sup>267</sup>.

The ‘distinct identity’ may be demonstrated by **discrimination**. As the UK House of Lords put it:

[T]he concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect. [...] In choosing to use the general term ‘particular social group’ rather than an enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention<sup>268</sup>.

Compared to innate/shared characteristic or belief or common background, the distinct identity of the social group refers to how such a **group is perceived to be different by the surrounding society**. This can for instance be the case of victims of human trafficking as, according to the French *Conseil d’Etat* (Council of State), ‘beyond the procuring network from which they were at risk, surrounding society or institutions [may] perceive[...]

<sup>263</sup> Supreme Administrative Court (Czech Republic), judgment of 2 August 2012, *HR v Ministry of the Interior*, 5 Azs 2/2012-49 (see EDAL English summary).

<sup>264</sup> House of Lords (UK), *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department*, op. cit., fn. 241, para. 16.

<sup>265</sup> CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 45.

<sup>266</sup> UNHCR, *Guidelines on International Protection No. 2: ‘Membership of a Particular Social Group’ within the Context of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 7 May 2002, UN Doc HCR/GIP/02/02. Another important study is M. Foster, ‘The “Ground with the Least Clarity”: A Comparative Study of Jurisprudential Developments relating to ‘Membership of a Particular Social Group’, UNHCR Legal and Protection Policy Research Series, 2012.

<sup>267</sup> UNHCR, *Guidelines on International Protection No. 2*, op. cit. fn. 266, para. 11.

<sup>268</sup> House of Lords (UK), *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, ex parte Shah*, op. cit., fn. 238, per Lord Hoffmann.

them as having a particular identity that would constitute a social group within the meaning of the [Refugee] Convention<sup>269</sup>.

Importantly, however, as noted in a UK case, the mere fact of persecution cannot be the only element that gives content to members of a group, as that would be to deprive this ground of any meaningful content:

If a group can have existence solely based on fear of being subjected to persecution, then any person who can establish that he would be persecuted for a reason other than race, religion, nationality or political opinion could automatically claim to be part of the social group and meet the requirements of Article 1. Had this interpretation been intended, the words ‘or any other reason’ could have been substituted for the words ‘membership of a particular social group’<sup>270</sup>.

Nonetheless, as ruled by the CJEU, the existence of laws that stigmatise a particular class of individual may demonstrate that they are recognised and targeted by a particular society: ‘[T]he existence of criminal laws [...] which specifically target homosexuals, supports a finding that those persons form a separate group which is perceived by the surrounding society as being different’<sup>271</sup>.

#### 1.5.2.4.2 Illustrations of particular social groups

The last paragraph of Article 10(1)(d) makes specific reference to sexual orientation and gender as common characteristics that may define a particular social group. Other social groups have also been identified by courts or tribunals, such as the family, children or victims of human trafficking.

**Concerning sexual orientation and gender identity**, recital (30) QD (recast) illustrates an aspect of the definition of particular social group on such grounds as follows:

For the purposes of defining a particular social group, issues arising from an applicant’s gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant’s well-founded fear of persecution<sup>272</sup>.

The QD (recast) expressly acknowledges that sexual orientation might be a common characteristic<sup>273</sup>. The CJEU has accepted that:

[A] person’s sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it [...] it is important to state that requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person’s identity that the persons concerned cannot be required to renounce it<sup>274</sup>.

Persecution may result where identity or behaviour attracts persecution: individuals are not expected to accept any limitation on their behaviour (see further the discussion of discretion below in Section 1.9.4, pp. 85) subject to claims triggered by sexual behaviour that would invite criminal sanction amongst Member States. The CJEU has pointed out that, just as Article 10(1)(b) protects the public and private spheres with respect to religion, ‘nothing in the wording of Article 10(1)(d) suggests that the European Union legislature intended to exclude certain other types of acts or expression linked to sexual orientation from the scope of that provision’<sup>275</sup>.

The prohibition on refugee claims where the sexual orientation relies on conduct that would be criminal amongst Member States has been interpreted strictly. However, as was stated in *X, Y and Z*, this provision should not

<sup>269</sup> Council of State (France), judgment of 25 July 2013, application no 350661, para. 5 (see EDAL English summary). The case was sent back to the French National Asylum Court after the former judgment was quashed. The Court followed the French Council of State’s approach and identified the social perception to decide that there was a particular social group (see National Asylum Court (France), *Mlle EF*, op. cit., fn. 115 (see EDAL English summary)).

<sup>270</sup> EWCA (UK), judgment of 30 June 1995, *Savchenkov v Secretary of State for the Home Department* [1995] EWCA Civ 47, para. 28.

<sup>271</sup> CJEU, *X, Y and Z* judgment, op. cit., fn. 20, paras. 48 and 49.

<sup>272</sup> Art. 10 QD (recast) does include a group ‘based on a common characteristic of sexual orientation’.

<sup>273</sup> Art. 10(1)(d) QD: ‘Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation’.

<sup>274</sup> CJEU, *X, Y and Z* judgment, op. cit., fn. 20, paras. 46 and 70.

<sup>275</sup> *Ibid.*, para. 67. See further Tribunal Supremo (Supreme Court, Spain), judgment of 21 September 2012, 65/2012, ECLI:ES:TS:2012:5907; and Supreme Court (Spain), judgment of 21 September 2012, 75/2012, ECLI:ES:TS:2012:5908.

be interpreted so as to limit other types of acts or expression linked to sexual orientation from the scope of protection<sup>276</sup>.

In France, the existence of particular social groups on the ground of sexual orientation has been recognised for applicants from certain countries where homosexuality is criminally penalised, such as in Cameroon<sup>277</sup>, Jamaica<sup>278</sup> and Pakistan<sup>279</sup>.

**Women** have been recognised as being capable of suffering persecution for reasons of their membership in a particular social group both by reason of their gender alone, and more particularly where they form sub-groups such as women accused of transgressing social mores (in particular adultery and disobedience to husbands) and who are unprotected by their husbands or other male relatives<sup>280</sup>. In a case dealing with the latter sub-group, the UK House of Lords pointed out that:

The unchallenged evidence in this case shows that women are discriminated against in Pakistan. I think that the nature and scale of the discrimination is such that it can properly be said the women in Pakistan are discriminated against by the society in which they live. The reason why the appellants fear persecution is not just because they are women. It is because they are women in a society which discriminates against women<sup>281</sup>.

As that case emphasises, identification of a particular social group is dependent on the evidence regarding the operation of the society in question. Thus women will not constitute a particular social group in those societies that do not discriminate against them.

Applications for refugee status involving female genital mutilation have been accepted as being based on membership of a particular social group. For instance, the French *Conseil d'Etat* (Council of State) ruled that:

[...] in a population in which female sexual mutilation is widely practised to the point of constituting a social norm, children and adolescents who are not mutilated constitute a social group. However, in order to establish the merits of the application for protection, the Council of State required the party concerned to supply detailed information, specifically in relation to family, geography and sociology, concerning the risks that she personally faced<sup>282</sup>.

Similarly, the UK House of Lords (again, vis-à-vis a particular social context, in which women suffered discrimination and where non-conformity was distinctly identified within that society) held that:

[...] FGM [female genital mutilation] is an extreme expression of the discrimination to which all women in Sierra Leone are subject, as much those who have already undergone the process as those who have not. I find no difficulty in recognising women in Sierra Leone as a particular social group for purposes of article 1A(2). [...] If, however, that wider social group were thought to fall outside the established jurisprudence, a view I do not share, I would accept the alternative and less favoured definition advanced by the second appellant and the UNHCR of the particular social group to which the second appellant belonged: intact women in Sierra Leone. [...] There is a common characteristic of intactness. There is a perception of these

<sup>276</sup> *Ibid.*, para. 66.

<sup>277</sup> See for instance, National Asylum Court (France): judgment of 10 January 2011, *M Noumbo*, application 09012710 C+, in *Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2011*, 2012, p. 80; judgment of 21 November 2011, *Mlle Megne Mbobda*, application no 11010494 C, in *ibid.*, pp. 81 and 82; judgment of 18 October 2012, *M Biyack Nyemeck*, application no 12013647 C, in *Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2012*, 2013, pp. 62 and 63; and judgment of 3 June 2014, *M Noutemwou Mauaffo*, application no 14000522 C, in *Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2014*, 2015, pp. 48 and 49.

<sup>278</sup> See for instance, National Asylum Court (France): judgment of 29 July 2011, *M Watson*, application 08015548 C, in *Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2011*, 2012, pp. 86 and 87; and judgment of 26 June 2014, *Mme Douglas*, application no 13023823 C, in *Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2014*, 2015, pp. 46 and 47.

<sup>279</sup> See National Asylum Court (France): judgment of 4 July 2011, *M Khurshid*, application no 11002234 C, in *Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2011*, 2012, pp. 90 and 91; and judgment of 16 March 2015, *M Ashfaq*, application no 14032693.

<sup>280</sup> House of Lords (UK), *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, ex parte Shah*, op. cit., fn. 238. The Special Appeal Committee of Greece (decision of 26 June 2011, application no 95/126761 (see EDAL English summary)) found that a woman's non-conformist behaviour with the traditional or cultural conventions and practices of Islam showed her membership in a particular social group. In Germany the Administrative Court of Augsburg (judgment of 16 June 2011, *Au 6 K 30092*, see EDAL English summary) found that: 'The persecution threatening the applicant is linked to the persecution ground of her gender affiliation and the membership of a particular social group – unmarried women from families whose traditional self-image also demands a forced marriage.' See further Supreme Court (Spain), judgment of 6 July 2012, 6426/2011, ECLI:ES:TS:2012:4824; and Supreme Court (Spain), judgment of 15 June 2011, 1789/2009, ECLI:ES:TS:2011:4013.

<sup>281</sup> House of Lords (UK), *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, ex parte Shah*, op. cit., fn. 238, per Lord of Craighead.

<sup>282</sup> Council of State (France), judgment of 21 December 2012, *Ms DF*, application no 332491 (see EDAL English summary).

women by society as a distinct group. And it is not a group defined by persecution: it would be a recognisable group even if FGM were entirely voluntary, not performed by force or as a result of social pressure<sup>283</sup>.

**Concerning the family**, applicants may base their application for refugee status on having been targeted because of their membership of a particular family. So-called ‘blood feuds’ may be an example of persecution based on family membership. This may arise whether or not the original source of antagonism arises for one of the reasons for persecution.

The UK House of Lords explained in this respect that:

The ties that bind members of a family together, whether by blood or by marriage, define the group. It is those ties that set it apart from the rest of society. Persecution of a person simply because he is a member of the same family as someone else is as arbitrary and capricious, and just as pernicious, as persecution for reasons of race or religion. As a social group the family falls naturally into the category of cases to which the Refugee Convention extends its protection<sup>284</sup>.

A practical application of this approach is seen in a decision of the Polish *Naczelny Sąd Administracyjny* (Supreme Administrative Court):

[The Court] found that the persecution did not directly relate to the Applicant. It should be noted that the Geneva Convention links the recognition of refugee status with a well-founded fear of persecution for the reasons cited therein. One such reason is membership of a particular social group. To recognise that the Applicant is a member of a group at risk of persecution means, therefore, that the persecution has an individual character. If, therefore, there are grounds for believing that being a family member of a recognised refugee meets the condition of membership of a particular social group, then it is only by demonstrating the absence of a well-founded fear of persecution for this reason that refusal of the application can be justified<sup>285</sup>.

**Concerning children**, their best interests are a central consideration in status determination given that the QD (recast) makes this a primary consideration<sup>286</sup> and that child-specific forms of persecution should be given careful attention (see above the Section on the best interests of the child, pp. 18, and Section 1.4.2.6.2 on child-specific acts of persecution, pp.42)<sup>287</sup>. Being a child is an innate characteristic, and where children have a distinct identity in a particular society their application for refugee status may well be found to arise for reasons of membership of a particular social group<sup>288</sup> (see generally the Section on the best interests of the child, pp. 18).

**Concerning victims of human trafficking**, it is possible that their characteristics, which may include coming from a group that has suffered discrimination, being united by the common experience of trafficking (‘a common background that cannot be changed’) and subsequently being stigmatised and alienated (and thus ‘perceived as being different’) by society, will satisfy both limbs of Article 10(1)(d).

This is, for instance, the view of the UKUT:

We do find, however, that the appellant falls into a narrower social group; that of ‘young females who have been victims of trafficking for sexual exploitation’. We do not seek to define a specific age group but the appellant as a woman in her early twenties when she was trafficked can clearly be described as young. We [...] find that women who have been victims of sexual violence in the past are linked by an immutable characteristic which is at once independent of and the cause of their current ill-treatment [...] are certainly capable of constituting a particular social group under the Convention<sup>289</sup>.

The French *Cour nationale du droit d’asile* (National Court of Asylum Law), setting aside the administrative decision and granting refugee status in a case concerning a Nigerian woman who had been subjected to trafficking,

<sup>283</sup> House of Lords (UK), *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department*, op. cit., fn. 241, para. 31.

<sup>284</sup> *Ibid.*, para. 45.

<sup>285</sup> Supreme Administrative Court (Poland), judgment of 12 March 2013, II OSK 126/07, see EDAL English summary which identifies the court in the third person.

<sup>286</sup> Recital (18) QD (Recast).

<sup>287</sup> Art. 9(2)(f) and recital (28) QD (Recast).

<sup>288</sup> See for instance UNHCR, *Guidelines on International Protection No. 8*, op. cit., fn. 230, paras. 49-51.

<sup>289</sup> UKUT, judgment of 8 April 2010, *AZ (Trafficked Women) Thailand CG* [2010] UKUT 118 (IAC), para. 140 citing House of Lords (UK), judgment of 10 March 2005, *In re B Regina v Special Adjudicator, ex parte Hoxha* [2005] UKHL 19, para. 37, per Baroness Hale of Richmond.

has echoed this approach. It held that victims of trafficking from Edo state do share a common background and distinct identity. The Court made reference to the juju ritual used to ensure loyalty to the trafficking network, the years of exploitation, threats made if the victims try to leave the network, and the possible social alienation upon return to Nigeria in determining that the definition of a particular social group was met<sup>290</sup>.

### 1.5.2.5 Political opinion (Article 10(1)(e))

Article 10(1)(e) QD (recast) states that:

[T]he concept of political opinion shall, in particular, include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.

#### 1.5.2.5.1 Broad nature of political opinion

It has long been recognised that political opinion should be **construed generously** in order to give full effect to the objective of the Refugee Convention to protect certain interests: for example, it has been said, albeit by secondary sources, that it may constitute ‘any opinion on any matter in which the machinery of state, government, and policy may be engaged’<sup>291</sup>. The Refugee Convention forms part of a wider international human rights regime and so political opinion should be construed with this in mind:

The need for the ‘political opinion’ ground to be construed broadly arises in part from the role of the Refugee Convention in the protection of fundamental human rights, which prominently include the rights to freedom of thought and conscience, of opinion and expression and of assembly and association<sup>292</sup>.

Examples of relevant cases in which political opinions are recognised include those from the French courts with regard to these beliefs:

- being part of an association fighting against slavery, racism, oppression and discrimination towards black people;
- being a female lawyer from Algeria supporting the cause of women there;
- being a judge refusing to commit acts against the rule of his profession<sup>293</sup>.

Given that the QD (recast) focuses on the attribution of political opinions to individuals (Article 10(2)), actions may be deemed political in the country of origin in question notwithstanding that they may be low-level or not even overtly political. Actions not overtly political can include the nursing of sick rebel soldiers or conduct which is seen as challenging the exercise of authority by the authorities in the country of origin even though its political dimension is not necessarily overt<sup>294</sup>.

Non-State actors may **impute political opinions** to state representatives, where ‘the State institution [...] subjects access to employment within it to the adherence to such opinions, or acts on these grounds only, or fights exclusively all the persons who oppose these opinions’<sup>295</sup>. The UK Immigration and Asylum Tribunal (UKIAT) has expressed a similar view:

<sup>290</sup> National Asylum Court (France), *Mlle EF*, op. cit., fn. 115 (see EDAL English summary). See further: Appeal Committee of Vyronas (Greece), decision of 23 April 2013, application no 4/1188365 (see EDAL English summary).

<sup>291</sup> J.C. Hathaway and M. Foster, op. cit., fn. 137, p. 406 citing the Supreme Court (Canada), *Attorney General v Ward* [1993] 2 SCR. 689, itself citing G.S. Goodwin-Gill, *The Refugee in International Law* (OUP, 1983).

<sup>292</sup> UKIAT, judgment of 24 November 2000, *Gomez (Non-state actors: Acero-Garcés disapproved)* (Colombia) [2000] UKIAT 00007, para. 30, generally approved by the UK Supreme Court in *RT (Zimbabwe) & Ors v Secretary of State for the Home Department* [2012] UKSC 38.

<sup>293</sup> Those three cases are respectively from: National Asylum Court (France), judgment of 12 December 2014, *M B*, application no 14007634, in *Contientieux des réfugiés, Jurisprudence du Conseil d’Etat et de la Cour nationale du droit d’asile, Année 2014*, 2015, pp. 30-32; Refugee Appeals Board (France), decision of 17 February 1995, *Ms M*, application no 94006878; and Refugee Appeals Board (France), decision of 17 February 1995, *M A*, application no 94010533.

<sup>294</sup> See for example UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, UN Doc HCR/GIP/02/01, para. 33; Refugee Status Appeals Authority (New Zealand), decision of 11 September 2008, Refugee Appeal no 76044; European Commission, QD Proposal, op. cit., fn. 194: ‘An action may also be, or be deemed to be by a persecutor, an expression of a political opinion.’

<sup>295</sup> Council of State (France), judgment of 14 June 2010, *OFPPA c M A*, application no 323669 (see EDAL English summary).

[...] a person who is himself an agent of the state, e.g. a civil servant or policeman, may be at risk of persecution on political opinion grounds if the circumstances are such that non-state actors impute a political opinion opposed to theirs. The decision as to whether a civil servant is at risk of persecution on the grounds of political opinion should never be made by reference to an a priori argument based on a fixed notion that all that can be imputed to a person in such a position is that he is doing his job. It will always be necessary to examine whether or not the normal lines of political and administrative responsibility have become distorted by history and events in that particular country<sup>296</sup>.

Where opinions are imputed, the existence of actual political activity is not required: the key question is the **perception of the persecutor** regarding the persecuted and the activities that the persecutor defines and considers as ‘political activities’<sup>297</sup>. Given the focus on the views of the persecutor, there should not be undue attention on whether or not the applicant was actually a member of a party or an active politician:

The membership of a political party is one, but not the only opportunity to participate in public life and express political views. The very fact that the applicant was not a member, but only a supporter of the opposition party, does not lead to the conclusion that he did not express his political views sufficiently. It is all the more so if in this country the mere participation in demonstrations, organised by opposition parties, usually leads to persecution by representatives of state power. Therefore, one of the conditions is, that the applicant has some political opinion, he is able to present it adequately, and credibly describe the injustice caused for this reason<sup>298</sup>.

For example, former child soldiers might face the imputation of political opinions because of the actions with which they are associated during their military service<sup>299</sup>.

#### 1.5.2.5.2 Prosecution and reason for persecution: the case of military service evasion

Expressing opinions as to government policies in the form of objecting to military service may have a political dimension. In the *Sepet and Bulbul* judgment of the UK Court of Appeal of England and Wales (EWCA), it was noted that:

[...] the Convention should be read sufficiently broadly to place secular pacifism and religious pacifism on the same footing for the purposes of art 1A(2); and the means of doing so would be to attribute a political quality to secular pacifism<sup>300</sup>.

The provisions of the QD (recast) that address prosecution and persecution (see Section 1.4.2 above, pp. 36) demonstrate that discrimination or the imposition of disproportionate sanctions within the criminal justice process may lead to legal, administrative, police, and/or judicial measures becoming persecutory (Article 9(2)(b) and (c)). If the motivation in question is generated by race, religion, nationality, social group or political opinion, then in turn this may show that a Convention reason is present. For example, in *Shepherd*<sup>301</sup>, the CJEU was seized of a case concerning an applicant who objected to serving for the US armed forces in Iraq on the grounds that he believed he would therefore be supporting the systematic, indiscriminate and disproportionate use of weapons without regard to the civilian population<sup>302</sup>. The Advocate General noted in her Opinion that an objection to military service because of a concern as to participation in war crimes amounted to holding a relevant political opinion, thought or belief on a matter related to a State and its policies or methods<sup>303</sup>. She further underlined that it might also constitute one as a member of a particular social group, if the evidence showed that there was a serious and insurmountable conflict between what an applicant reasonably anticipated that that obligation to

<sup>296</sup> UKIAT, *Gomez (Non-state actors: Acero-Garces disapproved) (Colombia)*, op. cit., fn. 292, para. 46.

<sup>297</sup> Supreme Court (Spain), judgment of 24 February 2010, 429/2007 (see EDAL English summary).

<sup>298</sup> Supreme Administrative Court (Czech Republic), *SN v Ministry of Interior*, op. cit., fn. 239 (see EDAL English summary).

<sup>299</sup> See National Asylum Court (France), judgment of 20 December 2010, *M N*, application no 10004872 in *Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2010, 2011*, p. 48.

<sup>300</sup> EWCA (UK), judgment of 11 May 2001, *Sepet and Bulbul v Secretary of State for the Home Department* [2001] EWCA Civ 681, para. 82. A similar position was taken by the Administrative Court of the Republic of Slovenia in a judgment of 23 January 2015 (*Hussein*, I U 923/2014-34, para. 101), which was upheld by the Supreme Court in the appellate procedure, where the asylum-seeker was a member of a Kurdish community in Syria who evaded military service partly because he did not want to fight against Kurdish people. The Directive clearly countenances military service claims succeeding in some circumstances, see Art. 9(2)(e) and Section 1.4.2 above, pp. 36.

<sup>301</sup> CJEU, *Shepherd* judgment, op. cit, fn. 110.

<sup>302</sup> *Ibid.*

<sup>303</sup> Opinion of Advocate General Sharpston of 11 November 2014, case C-472/13, *Andre Lawrence Shepherd v Bundesrepublik Deutschland*, EU:C:2014:2360, para. 48.



serve would entail and their conscience, and that it was reasonable to suppose that persons holding such beliefs were regarded differently and were subject to particular treatment by society in general<sup>304</sup>.

## 1.6 Actors of persecution or serious harm (Article 6)

In the same wording as the QD, Article 6 QD (recast) provides that:

Actors of persecution or serious harm include:

- (a) the State;
- (b) parties of organisations controlling the State or a substantial part of the territory of the State;
- (c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

As underlined by the CJEU in its *M'Bodj* judgment, persecution or serious harm 'must take the form of conduct on the part of a third party'<sup>305</sup>, that is, a human agency. It thus excludes persecution or serious harm arising from dire socio-economic or health conditions in the country of origin without any identifiable actor of persecution or serious harm<sup>306</sup>. On this basis, the Belgian *Conseil du Contentieux des Etrangers* (Council for Alien Law Litigation) has for instance refused applications for international protection based on the outbreak of the Ebola virus in Guinea and Liberia<sup>307</sup>.

This need for an actor of persecution or serious harm is explicitly acknowledged in the list provided in Article 6 QD (recast) (see Table 12 below):

**Table 12: Actors of persecution or serious harm in Article 6 QD (recast)**

<b>(a)</b>	<b>The State.</b>
<b>(b)</b>	<b>Parties or organisations controlling the State or a substantial part of the territory of the State.</b>
<b>(c)</b>	<b>Non-State actors</b> , if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

Article 6 has its origins in the fact that the source of persecution is not defined in the Refugee Convention which simply refers to refugees as persons who, because of a well-founded fear of persecution for a particular reason, are unwilling or unable to avail themselves of the protection of their country of origin (Article 1A(2)). This silence left unclear whether entities other than a State could be actors of persecution. Member States' interpretation varied<sup>308</sup>. By introducing Article 6, the EU legislature decided to codify the majority view insofar as it rules that international protection can be granted in cases of both state and non-state persecution as long as protection

<sup>304</sup> *Ibid.*, paras. 49-60.

<sup>305</sup> CJEU, *M'Bodj* judgment, op. cit., fn. 45, para. 35.

<sup>306</sup> *Ibid.* The Court provided that serious harm 'cannot therefore simply be the result of general shortcomings in the health system of the country of origin'. Although the judgment concerned subsidiary protection, Art. 6 applies to both types of international protection. Hence the CJEU conclusion is equally valid when it comes to refugee status. Taking a line through the ECtHR judgment in *Sufi and Elmi v the United Kingdom*, interpreting Art. 3 ECHR, human agency can be shown so long as it constitutes a 'predominant cause' of the ill-treatment. Thus, ill-treatment suffered as a result of drought may be able to qualify if it can be shown that the predominant causes of the drought were the acts of powerful entities e.g. warlords. See ECtHR, *Sufi and Elmi v the United Kingdom*, op. cit., fn. 49, para. 282: 'If the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought, the test in *N. v. the United Kingdom* may well have been considered to be the appropriate ones'.

<sup>307</sup> Council for Alien Law Litigation (Belgium): decision of 14 April 2015, no 143.271; and decision of 19 March 2015, no 141.258.

<sup>308</sup> Overall, two main approaches existed prior to the adoption of the QD: the accountability one, limiting the benefit of refugee status to those risking persecution committed by de jure or de facto state entities, and the protection one, focusing on the existence of effective protection against persecution in the country of origin rather than on the actor of persecution (see for instance, House of Lords (UK), judgment of 6 July 2000, *Horvath v Secretary of State for the Home Department*[2001] AC 489 [2000] UKHL 37, per Lord Hope of Craighead). For a detailed account of these two approaches, see most notably: C. Phuong, 'Persecution by Non-State Agents: Comparative Judicial Interpretations of the 1951 Refugee Convention', EJML (2003) 531; V. Türk, 'Non-State Agents of Persecution', in V. Chetail and V. Gowlland-Debbas (eds), *Switzerland and the International Protection of Refugees / La Suisse et la protection internationale des réfugiés* (Kluwer Law International, 2002) 95; and W. Kälin, 'Non-State Agents of Persecution and the Inability of the State to Protect', *Georgetown Immigration Law Journal* (2000-2001) 415.

cannot be provided in the country of origin<sup>309</sup>. Article 6 is thus complemented by Article 7 on protection against persecution and serious harm, listing the actors of protection and defining the required degree of protection (see below Section 1.7, pp. 60)<sup>310</sup>. These two Articles are closely interlinked: to assess whether effective protection against persecution or serious harm exists in the country of origin and, if so, by whom it can be provided is contingent on identifying the source of such persecution or serious harm.

The issue has yet to be addressed by the CJEU but given that, Article 6 uses **non-exhaustive – i.e. indicative – language to describe its list of actors of persecution or serious harm**<sup>311</sup>, its three-fold heads would appear capable of encompassing any type of actor of persecution or serious harm. This reflects the fact that it was intended to be broadly interpreted<sup>312</sup>.

This Section is concerned with the three entities listed in Article 6 that can be recognised by Member States as actors of persecution or serious harm: the State (Section 1.6.1, pp. 56), parties or organisations controlling the State or a substantial part of its territory (Section 1.6.2, p. 58) and non-State actors (Section 1.6.3, pp. 59). As will be apparent, the distinction between these actors of persecution or serious harm is sometimes not straightforward. It may be that in one and the same case there will be actors of persecution or serious harm falling under more than one of the Article 6(a)-(c) subcategories<sup>313</sup>.

## 1.6.1 The State (Article 6(a))

Article 6(a) first includes the State among the potential actors of persecution or serious harm. This reflects the fact that despite the emergence of non-State actors in the context of applications for international protection, the State is still the **traditional and prime actor of persecution** for it remains vested with sovereign functions, including the use of force.

No definition of ‘State’ is given in Article 6(a) or in the QD (recast). The ordinary meaning of this term in light of the scheme and purpose of the QD (recast) nevertheless supports a broad understanding. Indeed, if Article 6 is meant to provide a non-exhaustive list of actors of persecution or serious harm, the notion of State cannot be limited to certain manifestations of State activities.

**Table 13: The State as an actor of persecution or serious harm**

<b>De jure organs</b>	<b>1</b>	Any organ of the State exercising legislative, executive, judicial or any other functions and acting at any level.
<b>De facto organs</b>	<b>2</b>	Persons or entities empowered to exercise governmental authority.
	<b>3</b>	Private individuals or groups acting under the control or direction of the State.
	<b>4</b>	Organs placed at the disposal of a State by another State and exercising governmental authority.

<sup>309</sup> See European Commission, *QD Proposal*, op. cit., fn. 194, p. 17. This approach is also the one followed by the ECtHR which recognises risks stemming from non-State actors as raising an issue under Art. 3 ECHR in case of *non-refoulement*. See most notably ECtHR, judgment of 29 April 1997, Grand Chamber, *HLR v France*, application no 24573/94, para. 40. For more recent ECtHR case-law endorsing this position, see for instance: ECtHR, judgment of 4 June 2015, *JK and Others v Sweden*, application no 59166/12, para. 50; ECtHR, judgment of 14 April 2015, *Tatar v Switzerland*, application no 65692/12, para. 41; ECtHR, judgment of 24 July 2014, *AA and Others v Sweden*, application no 34098/11, para. 50; ECtHR, judgment of 8 July 2014, *ME v Denmark*, application no 58363/10, para. 50; ECtHR, judgment of 3 April 2014, *AAM v Sweden*, application no 68519/10, para. 59; ECtHR, judgment of 27 March 2014, *WH v Sweden*, application no 49341/10, para. 57; ECtHR, judgment of 19 December 2013, *BKA v Sweden*, application no 11161/11, para. 34; ECtHR, judgment of 19 December 2013, *TA v Sweden*, application no 48866/10, para. 34; ECtHR, judgment of 19 December 2013, *TKH v Sweden*, application no 1231/11, para. 41; ECtHR, judgment of 5 September 2013, *KAB v Sweden*, application no 886/11, para. 69; ECtHR, judgment of 27 June 2013, *SA v Sweden*, application no 66523/10, para. 42; ECtHR, judgment of 27 June 2013, *MYH and Others v Sweden*, application no 50859/10, para. 53; ECtHR, judgment of 27 June 2013, *NANS v Sweden*, application no 68411/10, para. 24; ECtHR, judgment of 27 June 2013, *DNM v Sweden*, application no 28379/11, para. 44; ECtHR, judgment of 27 June 2013, *NMY and Others v Sweden*, application no 72686/10, para. 24; ECtHR, judgment of 27 June 2013, *MKN v Sweden*, application no 72413/10, para. 26; ECtHR, judgment of 27 June 2013, *NMB v Sweden*, application no 68335/10, para. 28; ECtHR, judgment of 27 June 2013, *AGAM v Sweden*, application no 71680/10, para. 30.

<sup>310</sup> See High Court (Ireland), judgment of 25 June 2012, *WA v Minister for Justice and Equality, Ireland and the Attorney General* [2012] IEHC 251, para. 36.

<sup>311</sup> European Commission, ‘Detailed Explanation of the Proposal’, p. 3 (annexed to the QD (recast) Proposal, op. cit., fn. 243) where the Commission distinguishes the exhaustive list of actors of protection under Art. 7 from the open list of actors of persecution in Art. 6.

<sup>312</sup> See in this sense, High Court (Ireland), judgment of 1 March 2012, *JTM v Minister for Justice and Equality, Ireland and the Attorney General* [2012] IEHC 99, paras. 32-34 and 46.

<sup>313</sup> See EWCA (UK), judgment of 31 January 2002, *Rolandas Svazas v Secretary of State for the Home Department* [2002] EWCA Civ 74.

As illustrated in Table 13 above, what is meant by the State as an actor of persecution or serious harm is **any act of persecution or serious harm emanating from de jure or de facto State organs**. These cover any officials exercising governmental functions<sup>314</sup>, irrespective of whether they pertain to the judiciary, executive or legislative branches of a government, and working at any level, thereby including local authorities<sup>315</sup>. Acts which can be attributed to the State can also extend in certain circumstances to include: (i) acts of persons or entities empowered to exercise governmental authority<sup>316</sup>; and (ii) acts done by private individuals or groups acting under the control or direction of organs or entities empowered to exercise governmental authority<sup>317</sup>. It is also noteworthy that governmental authority may be exercised by organs of another State placed at the disposal of the State<sup>318</sup>.

An organic understanding of the State is illustrated by the CJEU judgment in *Y and Z* when the Court ruled that prohibition of participation in public worship can constitute persecution where ‘it gives rise to a genuine risk that the applicant will, inter alia, be prosecuted or subject to inhuman or degrading treatment or punishment by one of the actors referred to in Article 6 of the Directive’<sup>319</sup>. Whilst the Court stated that the criminalisation of homosexual acts alone does not in itself constitute persecution, if it is accompanied by a term of imprisonment sanctioning such acts which is applied in practice, this constitutes an act of persecution. This implies that the legislative branch of a government can be considered as the source of an act of persecution<sup>320</sup>, as can indeed the judiciary, when it enacts laws prohibiting participation in public worship leading to disproportionate or discriminatory punishment as held by the CJEU in its *X, Y and Z* judgment<sup>321</sup>.

Persecution or serious harm is often inflicted by agents entitled to use force, namely law-enforcement officials and military personnel<sup>322</sup>. The Hungarian *Fővárosi Törvényszék* (Metropolitan Court), for instance, granted refugee status to the applicant, a pharmacist, who risked persecution by the Syrian security forces which suspected him of providing assistance to the insurgents by selling them medical drugs<sup>323</sup>. As transpires from a 2009 judgment of the Czech *Nejvyšší správní soud* (Supreme Administrative Court), persecution by the State may materialise even when state agents act outside the sphere of their competence<sup>324</sup>. Similarly to the rules of state responsibility under international law where acts performed *ultra vires* are automatically attributable to the State<sup>325</sup>, any state agents, whether acting outside their competence (as ‘rogue state actors’<sup>326</sup>) or not, will be considered as part of the State under Article 6 for the purpose of qualification for international protection. The issue will then be whether the State intervenes ‘promptly and effectively’ to prevent such harms in the sense of Article 7 QD (recast) (see Section 1.7, pp. 60, below on actors of protection)<sup>327</sup>.

<sup>314</sup> See National Asylum Court (France), judgment of 18 October 2012, *Mlle K*, application no 12015618 (see EDAL English summary) and National Asylum Court (France), judgment of 14 April 2010, *M K*, application no 09004366 (see EDAL English summary) both concerning political authorities.

<sup>315</sup> H. Dörig, in K. Hailbronner and D. Thym (eds.), op. cit., fn. 75, Commentary on Article 6, para 8. See similarly Home Office (UK), *Asylum Policy Instruction, Assessing Credibility and Refugee Status*, 6 January 2015, p. 25, defining the State as ‘the apparatus of governance or the means by which the government gives effect to its will. It includes central government (the executive, legislature, and judiciary), the machinery of central government (for example the civil service, armed forces, security and police forces), and state-controlled organisations.’ In the different context of state responsibility under international law, an organ of the State is defined as ‘any person or entity which has that status in accordance with the internal law of the State’ and which ‘exercises legislative, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State’. See Art. 4(1) and (2) of the International Law Commission (ILC) report on *Responsibility of States for Internationally Wrongful Acts*, United Nations General Assembly Resolution 56/83, 12 December 2001.

<sup>316</sup> ILC, *Responsibility of States for Internationally Wrongful Acts*, op. cit., fn. 315, Art. 5.

<sup>317</sup> *Ibid.*, Art. 8.

<sup>318</sup> *Ibid.*, Art. 6.

<sup>319</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 69.

<sup>320</sup> See also Federal Administrative Court (Germany), judgment of 20 February 2013, BVerwG 10 C 23.12, op. cit., fn. 170 (available in English at [www.bverwg.de](http://www.bverwg.de)).

<sup>321</sup> CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 61. See also National Asylum Court (France), judgment of 4 November 2013, *M F*, application no 13007332 C, in *Contentieux des réfugiés, Jurisprudence du Conseil d’Etat et de la Cour nationale du droit d’asile, Année 2013*, 2014, pp. 54 and 55; and National Asylum Court (France), judgment of 23 May 2013, *M U*, application no 11010862 C+, in *Contentieux des réfugiés, Jurisprudence du Conseil d’Etat et de la Cour nationale du droit d’asile, Année 2013*, 2014, p. 71.

<sup>322</sup> See for instance Supreme Administrative Court (Czech Republic), judgment of 21 April 2009, *SH v Ministry of Interior*, 2 Azs 13/2009-60 (see EDAL English summary), where the Court recognised the Albanian People’s Army in Kosovo as a potential actor of persecution.

<sup>323</sup> Metropolitan Court (Hungary), judgment of 11 July 2013, *MAA v Office of Immigration and Nationality*, 6.K.31830/2013/6 (see EDAL English summary).

<sup>324</sup> See in this sense Supreme Administrative Court (Czech Republic), judgment of 22 May 2009, *AR v Ministry of the Interior*, 5 Azs 7/2009-98 (see EDAL English summary).

<sup>325</sup> ILC, *Responsibility of States for Internationally Wrongful Acts*, op. cit., fn. 315. See also, *Estate of Jean-Baptiste Caire (France) v United Mexican States*, 5 RIAA 516, p. 530.

<sup>326</sup> Home Office (UK), *Asylum Policy Instruction, Assessing Credibility and Refugee Status*, op. cit., fn. 315, p. 26.

<sup>327</sup> EWCA (UK), *Rolandas Svazas v Secretary of State for the Home Department*, op. cit., fn. 313, para. 16. See similarly J.C. Hathaway and M. Foster, op. cit., fn. 137, p. 301. In *PS (Sri Lanka) v Secretary of State for the Home Department* (judgment of 6 November 2008 [2008] EWCA Civ 1213, para. 8), Lord Justice Sedley noted that, the applicant having been repeatedly sexually abused by state military personnel in Jaffna, ‘there was no sensible possibility of state protection from conduct bearing clear hallmarks of toleration and impunity, that is why she fled’.

## 1.6.2 Parties or organisations controlling the State or a substantial part of its territory (Article 6(b))

Article 6(b) secondly refers to parties or organisations controlling the State or a substantial part of its territory. Two instances can be distinguished as illustrated in Table 14 below:

**Table 14: Parties or organisations controlling the State or a substantial part of its territory as actors of persecution or serious harm**

<b>1</b>	parties or organisations amounting to <b>de facto state actors because they exercise elements of governmental authority</b> ; or
<b>2</b>	parties or organisations <b>controlling a substantial part of the State's territory in the context of an armed conflict</b> .

The **first scenario of de facto state actors** refers to instances where parties or organisations amount to de facto state actors by exercising elements of governmental authority over the state territory or part thereof in the absence of a de jure state authority. This can arguably be considered to be the case for the regions of Puntland and Somaliland which have both set up their own administrations, distinct and autonomous from those of Somalia<sup>328</sup>. A similar conclusion could arguably be drawn with regard to the Kurdish Autonomous Authority (KAA) in northern Iraq during the period of the Saddam Hussein regime and after its fall as the Iraqi State no longer in practice exercised power over the territory occupied by the KAA.

The **second scenario** relates to **parties or organisations controlling a substantial part of the State's territory in the context of an armed conflict**. According to the French *Commission des recours des réfugiés* (Refugee Appeals Board) and the *Cour nationale du droit d'asile* National Court of Asylum Law, this was for instance the case for the Darod clan in Somalia in 2005<sup>329</sup> and of rebels in the Kunduz province in northern Afghanistan in 2013<sup>330</sup>. The Revolutionary Armed Forces of Colombia (FARC) has also been recognised as a party or organisation controlling a substantial part of the Colombian territory<sup>331</sup>. This could arguably be the case of the Liberation Tigers of Tamil Eelam (LTTE) during the conflict with the Sri Lankan Government and, in recent times, of Al-Shabaab in Somalia, although this would require particular consideration of the degree of control it exercises as the latter is fluctuating<sup>332</sup>. During the period 2014-early 2016, the so-called Islamic State of Iraq and Syria (ISIS) could arguably be considered as a party or organisation under the terms of Article 6(b) given the substantial control it exercised over parts of the Iraqi and Syrian territories<sup>333</sup>.

It must be noted that the dividing line between parties or organisations controlling the State or a substantial part of its territory and non-State actors is not always a sharp one. While such distinction is not central for identifying the actor of persecution or serious harm, it nonetheless remains important for determining the existence of effective protection in the country of origin (see Section 1.7 below, pp. 60) and that of internal protection (see Section 1.8 below, pp. 72). The main criterion for distinguishing between such parties or organisations and non-State actors lies therefore in the control the former exercises over the State or a substantial part of its territory. Without such control, the entity does not fall within Article 6(b) but under the terms of Article 6(c) as a non-State actor.

<sup>328</sup> See in this sense UKIAT, judgment of 31 March 2005, *NM and Others (Lone Women – Ashraf) Somalia CG* [2005] UKIAT 00076, paras. 84 and 101 which, although concerned with the possibility of internal protection in Somaliland and Puntland, is instructive as to the degree of autonomy and authority exercised by these two regions. This judgment was left unaltered by subsequent country guidance as far as the situation of Puntland and Somaliland is concerned. See for instance, UKUT, judgment of 25 November 2011, *AMM and Others (Conflict; Humanitarian Crisis; Returnees; FGM) Somalia CG* [2011] UKUT 445 (IAC); and UKUT, judgment of 3 October 2014, *MOJ & Ors (Return to Mogadishu) Somalia CG* [2014] UKUT 00442 (IAC). See also, EASO, *Country of Origin Information Report, South and Central Somalia: Country Overview*, August 2014, p. 27.

<sup>329</sup> Refugee Appeals Board (France), decision of 29 July 2005, *Mlle A*, application no 487336, in *Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des recours des réfugiés, Année 2005*, 2006, pp. 65 and 66.

<sup>330</sup> National Asylum Court (France), judgment of 12 March 2013, *M YK*, application no 12025577 C, in *Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2013*, 2014, pp. 83 and 84.

<sup>331</sup> See arguably, Supreme Court (Spain), judgment of 16 February 2009, 6894/2005, p. 10.

<sup>332</sup> Concerning Al-Shabaab in Mogadishu, compare for instance UKUT, *MOJ & Ors (Return to Mogadishu) Somalia CG*, op. cit., fn. 328, para. 368 where it is noted that the armed group withdrew from Mogadishu, with UKUT, *AMM and Others (conflict; Humanitarian Crisis; Returnees; FGM) Somalia CG*, op. cit., fn. 328, most notably paras. 75 and 90-91 detailing the degree of control Al-Shabaab exercised at the time. See also, EASO, *Country of Origin Information Report, South and Central Somalia*, op. cit., fn. 328, especially pp. 83-95.

<sup>333</sup> As to the extent of such control, see for instance Home Office (UK), *Country Information and Guidance, Iraq: Security Situation*, November 2015, especially the map reproduced on p. 10; and Home Office (UK), *Country Information and Guidance, Syria: Security and Humanitarian Situation*, December 2014, paras. 2.13.19-2.3.21.

### 1.6.3 Non-State actors (Article 6(c))

Article 6(c) encompasses non-State actors among the list of actors of persecution or serious harm. According to this provision, non-State actors cannot simply be recognised as actors of persecution or serious harm but **only those against which no effective protection exists** in the country of origin. Article 6(c) identifies as actors of persecution or serious harm:

non-State actors, **if** it can be demonstrated that the actors mentioned in points (a) and (b) [i.e. the State or parties or organisations controlling the State or a substantial part of its territory], including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7<sup>334</sup>.

In case of persecution or serious harm by non-State actors, courts or tribunals of Member States must determine whether protection exists against persecution or serious harm under the terms of Article 7 QD (recast)<sup>335</sup>. As ruled by the CJEU in its *Abdulla* judgment, the ability of actors of protection to ensure protection against persecution or serious harm ‘constitutes a crucial element in the assessment’ of status determination<sup>336</sup>. This is even more so in the case of persecution or serious harm by non-State actors as, contrary to state persecution or serious harm (see recital (27) QD (recast) and Section 1.7.1.1 below, pp. 62), there exists no presumption that protection is unavailable. Hence, as noted by the High Court of Ireland, and similarly advanced by the Polish *Wojewódzki Sąd Administracyjny w Warszawie* (Regional Administrative Court in Warsaw)<sup>337</sup>, “non-State actors” can become “actors of [persecution or] serious harm” only where it is shown that the State of nationality is unable or unwilling to prevent the harm perpetrated by the non-State actors<sup>338</sup>. As further analysed in Section 1.7.1.2 below (pp. 64), this is also the case if parties or organisations, including international organisations, controlling the State or a substantial part of its territory are neither willing nor able to offer protection (Article 7(1)(b) QD (recast)).

Just as the term ‘State’ is not defined in the QD (recast), neither is the notion of non-State actor. In light of the wording, scheme and purpose of Article 6, it should nonetheless **be broadly interpreted** as the aim of Article 6 is indeed not to limit refugee status but to ensure it is granted to those genuinely persecuted. As underlined by the German *Bundesverwaltungsgericht* (Federal Administrative Court), this notion encompasses all non-State actors without any limitation, including single persons, as long as they perform persecutory acts<sup>339</sup>. This broad definition is shared by courts or tribunals of other Member States, as reflected in the range of non-state entities recognised as non-State actors of persecution or serious harm illustrated in Table 15 below.

<sup>334</sup> Emphasis added. See in this sense, Council for Alien Law Litigation (Belgium), decision of 20 October 2010, no 49.821, para. 4.8.1; Supreme Administrative Court (Czech Republic), judgment of 18 December 2008, *SCh v Ministry of Interior*, 1 Azs 86/2008-101 (see EDAL English summary).

<sup>335</sup> See Supreme Administrative Court (Czech Republic), judgment of 15 May 2013, *AS v Ministry of the Interior*, 3 Azs 56/2012-81 (see EDAL English summary).

<sup>336</sup> CJEU, judgment of 2 March 2010, Grand Chamber, joined cases C-175/08, C-176/08, C-178/08 and C-179/08, *Aydin Salahadin Abdulla and Others v Bundesrepublik Deutschland*, EU:C:2010:105, para. 68.

<sup>337</sup> Regional Administrative Court in Warsaw (Poland), judgment of 30 September 2015, IV SA/Wa 961/15.

<sup>338</sup> High Court (Ireland), *WA v Minister for Justice and Equality, Ireland and the Attorney General*, op. cit., fn. 310, para. 40.

<sup>339</sup> Federal Administrative Court (Germany), judgment of 18 July 2006, BVerwG 1 C 15.05, para. 23. See similarly, *UNHCR Handbook*, op. cit., fn. 107, para. 65 which notes that non-State actors also include sections of the population or the local populace.

**Table 15: Illustrations of non-state entities recognised as non-State actors of persecution or serious harm**

1	clans and tribes <sup>340</sup>
2	guerrillas and paramilitaries <sup>341</sup>
3	warlords, extremist religious groups or terrorists <sup>342</sup>
4	criminals, gangs, and mafia <sup>343</sup>
5	political parties <sup>344</sup>
6	family and extended family members <sup>345</sup>

## 1.7 Actors of protection (Article 7)

As indicated in Section 1.6 above (pp. 55), the QD and the QD (recast) have endorsed the protection approach for interpreting the refugee definition. Hence, the focus is now placed on the **existence of effective and non-temporary protection against actors of persecution or serious harm** in the country of origin. This is in accordance with the wording of Article 1A(2) of the Refugee Convention which prescribes that, because of their well-founded fear of persecution, refugees are unable or unwilling to avail themselves of the protection of their country of nationality (or former habitual residence). This is also in line with the purpose of the Refugee Convention which is for the international community to offer surrogate protection to ‘[...] the person who no longer has the benefit of protection against persecution for a Convention reason in his own country [...]’<sup>346</sup>.

Article 7 QD (recast) identifies both the actors of protection and the form such protection has to take under the following terms:

1. Protection against persecution or serious harm can only be provided by:
  - (a) the State; or
  - (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State;

provided they are willing and able to offer protection in accordance with paragraph 2.

2. Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.

<sup>340</sup> See for instance Cagliari Court (Italy), judgment of 3 April 2013, No RG 8191/12, pp. 7 and 8 (see EDAL English summary) concerning female genital mutilation as current practice of the tribe to which the applicant pertains.

<sup>341</sup> See for instance, Supreme Court (Spain), judgment of 19 February 2010, 5051/2006 which granted refugee status because of persecution from the FARC in Colombia. Concerning ECtHR case-law, see for instance: ECtHR, judgment of 17 December 1996, *Ahmed v Austria*, application no 25964/94, para. 22; and ECtHR, *DNM v Sweden*, op. cit., fn. 309, para. 54.

<sup>342</sup> See for instance, Administrative and Labour Court of Budapest (Hungary), judgment of 18 June 2013, *RY (Afghanistan) v Office of Immigration and Nationality*, 17.K.31893/2013/3-IV (see EDAL English summary) concerning persecution from the Taliban in Afghanistan; National Asylum Court (France), *M C*, op. cit., fn. 181 on persecution by Muslim fundamentalists; and National Asylum Court (France), judgment of 29 November 2013, *M M*, application no 13018952 C+, in *Contentieux des réfugiés, Jurisprudence du Conseil d’Etat et de la Cour nationale du droit d’asile, Année 2013, 2014*, pp. 63 and 64 entailing a real risk of serious harm, inter alia, by religious extremists. For ECtHR case-law, see for instance, ECtHR, *AAM v Sweden*, op. cit., fn. 309, para. 66.

<sup>343</sup> See for instance, Refugee Board (Poland), decision of 8 September 2010, *RdU-439-1/S/10* (see EDAL English summary) and UKUT, judgment of 18 February 2010, *AM and BM (Trafficked Women) Albania CG* [2010] UKUT 80 (IAC), paras. 165 and 167-170 both concerning human trafficking network; and Council for Alien Law Litigation (Belgium), judgment of 6 November 2008, no 18.419 in the context of a vendetta.

<sup>344</sup> See for instance Administrative Court of Berlin (Germany), judgment of 7 July 2011, 33 K 79.10 A.

<sup>345</sup> See for instance, Council for Alien Law Litigation (Belgium), decision 89.927, op. cit., fn. 228, para. 4.9; National Asylum Court (France), judgment of 12 March 2013, *Mme HK épouse G*, application no 12017176 C, in *Contentieux des réfugiés, Jurisprudence du Conseil d’Etat et de la Cour nationale du droit d’asile, Année 2013, 2014*, pp. 72 and 73; Administrative Court of Augsburg (Germany), *Au 6 K 30092*, op. cit., fn. 280 (see EDAL English summary); High Court (Ireland), *JTM v Minister for Justice and Equality, Ireland and the Attorney General*, op. cit., fn. 312; Council for Refugees (Poland), judgment of 23 August 2012, *RdU-82/8/S/10* (see EDAL English summary); Migration Court of Appeal (Sweden), judgment of 21 April 2011, *UM 7851-10* (see EDAL English summary); Migration Court of Appeal (Sweden), judgment of 9 March 2011, *UM 3363-10 and 3367-10* (see EDAL English summary); UKUT, *AM and BM (Trafficked Women) Albania CG*, op. cit., fn. 343, para. 171. For ECtHR case-law, see for instance: ECtHR, *BKA v Sweden*, op. cit., fn. 309, para. 42; ECtHR, *SA v Sweden*, op. cit., fn. 309, para. 49.

<sup>346</sup> See House of Lords (UK), *Horvath v Secretary of State for the Home Department*, op. cit., fn. 308, 495 per Lord Hope of Craighead. See also House of Lords (UK), judgment of 16 December 1987, *R v Secretary of State for the Home Department; Ex parte Sivakumaran* [1988] 1 AC 958, 992-993 per Lord Keith of Kinkel and, more recently, Supreme Court (UK), judgment of 7 July 2010, *HJ (Iran) and HT (Cameroun) v Secretary of State for the Home Department* [2010] UKSC 31, paras. 13-15 per Lord Hope.

3. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Union acts<sup>347</sup>.

This is a **mandatory provision** for Member States that is central to qualification for international protection. As ruled by the CJEU in its 2010 *Abdulla* judgment,

[...] the circumstances which demonstrate the country of origin's inability or, conversely, its ability to ensure protection against acts of persecution constitute a crucial element in the assessment which leads to the granting of, or, as the case may be, by means of the opposite conclusion, to the cessation [or refusal] of refugee status<sup>348</sup>.

Although *Abdulla* concerns cessation of refugee status under Article 11 QD (now Article 11 QD (recast)), the Court's reasoning in respect of the meaning of protection would appear to apply, *pari passu*, to Article 7 QD (recast).

Article 7 also reflects the emphasis put by the ECtHR in its jurisprudence on the existence of effective protection<sup>349</sup>. According to the ECtHR, clans, tribes, and families can perform protective functions, and in addition there can be very important personal factors that affect protection, such as the asylum-seeker's health, age, sex, knowledge of foreign language and ability<sup>350</sup>. However, the CJEU has yet to consider the extent to which the ECtHR's approach can inform the interpretation of who qualifies as an actor of protection under 7 QD (recast)<sup>351</sup>. It is clear from the wording of Article 7 QD (recast) that actors of protection are confined to the State or parties or organisations controlling the State or a substantial part of the State.

Mirroring the structure of Article 7, the present Section examines the issue of protection starting with the actors of protection (Section 1.7.1, pp. 61) and then turns to the quality of protection required (Section 1.7.2, pp. 66). As will be apparent, Article 7 QD (recast) has undergone significant modifications compared to the QD so as to ensure a limited interpretation of actors of protection and effective protection. These modifications are presented below whenever relevant.

### 1.7.1 Actors of protection willing and able to offer protection (Article 7(1) and (3))

As recalled by the European Commission<sup>352</sup>, Article 7(1) QD (recast) lays down an **exhaustive list of actors of protection**. Thus, only the State or parties or organisations, including international organisations, controlling the State or a substantial part of its territory can be considered as actors of protection by Member States.

In addition to this closed list, Article 7 QD (recast) underlines that these actors can only be recognised as valid actors of protection **if they are willing and able to offer protection**. This additional requirement has been introduced by the QD (recast) because Article 7 QD was found to lack clarity. It had thus been prone to overly broad

<sup>347</sup> See also recital (26) QD (recast) which provides that: 'Protection can be provided, where they are willing and able to offer protection, either by the State or by parties or organisations, including international organisations, meeting the conditions set out in this Directive, which control a region or a larger area within the territory of the State. Such protection should be effective and of a non-temporary nature.'

<sup>348</sup> CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 68. See similarly House of Lords (UK), *Horvath v Secretary of State for the Home Department*, op. cit., fn. 308, p. 3, per Lord Hope of Craighead.

<sup>349</sup> See most notably ECtHR, judgment of 11 January 2007, *Salah Sheekh v the Netherlands*, application no 1948/04, para. 147, where the Court held that: '[...] the existence of the obligation not to expel is not dependent on whether the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country, and Article 3 may thus also apply in situations where the danger emanates from persons or groups of persons who are not public officials [...]. What is relevant in this context is whether the applicant was able to obtain protection against and seek redress for the acts perpetrated against him.' See also: ECtHR, *SA v Sweden*, op. cit., fn. 309, para. 51; and ECtHR, *DNM v Sweden*, op. cit., fn. 309, para. 53.

<sup>350</sup> See ECtHR, *Salah Sheekh v the Netherlands*, op. cit., fn. 349, paras. 139 and 140: '[...] there is a marked difference between the position of, on the one hand, individuals who originate from those areas and have clan and/or family links there and, on the other hand, individuals who hail from elsewhere in Somalia and do not have such links in Somaliland or Puntland. On the basis of the available information, the Court is prepared to accept that the expulsion to Somaliland or Puntland of a failed asylum seeker belonging to the first group would not generally expose the person concerned to a real risk of being subjected to treatment in violation of Article 3. [...] The Court considers that it is most unlikely that the applicant, who is a member of the Ashraf minority – one of the groups making up the Benadiri (or Reer Hamar) minority group [...] and who hails from the south of Somalia, would be able to obtain protection from a clan in the "relatively safe" areas'. See also: ECtHR, judgment of 7 June 2016, *RBAB and Others v the Netherlands*, application no 7211/06, para. 57 (family as actor of protection); ECtHR, judgment of 10 September 2015, *RH v Sweden*, application no 4601/14, para. 73 (male protection network); ECtHR, *KAB v Sweden*, op. cit., fn. 309, paras. 82-85 (clan/family connections); and ECtHR, *AA and Others v Sweden*, op. cit., fn. 309, paras. 57-59 (clan connection).

<sup>351</sup> See Administrative Court (Republic of Slovenia), judgment of 19 November 2014, *Rahimi*, I U 424/2014-11, paras. 107 and 109.

<sup>352</sup> European Commission, 'Detailed Explanation of the Proposal', p. 3, annexed to the QD (recast) Proposal, op. cit., fn. 243.

interpretations of actors of protection ‘fall[ing] short of the standards set by the Geneva Convention on what constitutes adequate protection’<sup>353</sup>.

To avoid too broad an understanding of actors of protection, their identity is now expressly circumscribed in the QD (recast) to the State (Section 1.7.1.1, pp. 62) or parties or organisations controlling the State or a substantial part of the territory of the State (Section 1.7.1.2, pp. 64) provided that they are both willing *and* able to provide protection. While the list is exhaustive, it is not mutually exclusive. As implied by the CJEU in its *Abdulla* judgment when referring to ‘the actor or actors of protection’<sup>354</sup>, there can be multiple actors of protection against persecution or serious harm in the same case. In practice, while courts and tribunals of Member States have considered the State as the prime actor of protection, they have thus not excluded the complementary protective role played by the other actors referred to in Article 7(1)(b).

### 1.7.1.1 The State (Article 7(1)(a))

The **notion of the ‘State’** as an actor of protection is not defined in the QD (recast). It can be said to mirror the definition developed in Section 1.6.1 above (pp. 56), as reproduced in Table 16 below.

**Table 16: The State as an actor of protection**

De <i>jure</i> organs	1	Any organ of the State exercising legislative, executive, judicial or any other functions and acting at any level.
	2	Persons or entities empowered to exercise governmental authority.
De <i>facto</i> organs	3	Private individuals or groups acting under the control or direction of the State.
	4	Organs placed at the disposal of a State by another State and exercising governmental authority.

First and foremost, the State encompasses **de jure organs and officials, whether they are part of the judiciary, executive or legislative branches** of the government. Through its laws and policies, the State may indeed regulate various activities that can contribute to the existence of an effective protection against persecution (see further Section 1.7.2, pp. 66, concerning the quality of the protection that has to be provided). Such exercise of governmental functions moreover takes place at all levels, be it national, federal or local<sup>355</sup>.

By analogy with the theory on State responsibility, the State can also extend to include **de facto organs contracted out to perform governmental authority**<sup>356</sup>. Hence, in certain circumstances, the State can also cover (i) acts of persons or entities empowered to exercise governmental authority<sup>357</sup>, and (ii) acts done by private individuals or groups acting under the control or direction of organs or entities empowered to exercise governmental authority<sup>358</sup>. It is also noteworthy that governmental authority may be exercised by organs of another State placed at the disposal of the State<sup>359</sup>.

As the guarantor of law and order, the State is conceived as the **principal actor which can offer protection against persecution or serious harm**<sup>360</sup>. By definition, it normally has both the capacity and the duty to protect individuals under its jurisdiction. However, Article 7(1) recognises that this may not always be the case and thus requires the State to be both willing and able to provide protection against persecution or serious harm to be recognised as an actor of protection<sup>361</sup>.

<sup>353</sup> *Ibid.*

<sup>354</sup> CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 70.

<sup>355</sup> See for instance Administrative Court of Stuttgart (Germany), judgment of 30 December 2011, A 11 K 2066/11, p. 10 concerning a town registration office albeit not considered in this case to provide effective protection.

<sup>356</sup> See J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (OUP, 2010).

<sup>357</sup> ILC, *Responsibility of States for Internationally Wrongful Acts*, op. cit., fn. 315, Art. 5.

<sup>358</sup> *Ibid.*, Art. 8.

<sup>359</sup> *Ibid.*, Art. 6.

<sup>360</sup> See House of Lords (UK), *Horvath v Secretary of State for the Home Department*, op. cit., fn. 308, p. 8; and High Court (Ireland), *WA v Minister for Justice and Equality, Ireland and the Attorney General*, op. cit., fn. 310, para. 34. See also ECRE, *Asylum Aid, Fluchtelingen Werk Nederland and Hungarian Helsinki Committee, Actors of Protection and the Application of the Internal Protection Alternative*, 2014, p. 53.

<sup>361</sup> This is also recognised by the ECtHR. See most notably, ECtHR, judgment of 26 July 2005, *N v Finland*, application no 38885/02, para. 164.



The distinction between a State’s (un)willingness and (in)ability to provide protection is not always a sharp one in decisions of courts or tribunals of Member States. As noted by the UKUT, ‘[i]t is unnecessary for us to decide to what extent this failure stems from an unwillingness to protect or an inability to protect, although it seems to us that whether it is one or the other or both depends on the particular time and place and the specific actors involved’<sup>362</sup>. For the purpose of this Judicial Analysis, four scenarios are nevertheless schematically represented in Table 17 and explained in light of relevant case-law:

**Table 17: State’s (un)willingness and (in)ability to provide protection: diverse scenarios**

	Able	Unable
Willing	<b>Scenario 1</b> Refusal of international protection	<b>Scenario 3</b> Grant of international protection
Unwilling	<b>Scenario 2</b> Grant of international protection	<b>Scenario 4</b> Grant of international protection

**Scenario 1** refers to instances where the State is **both willing and able to offer protection** against persecution or serious harm. In such cases, and provided protection is effective, non-temporary and accessible to the applicant, refugee status and subsidiary protection has to be denied for the applicant cannot be considered to be in need of international protection<sup>363</sup>.

**Scenario 2** relates to instances where, although able, the State is **unwilling to provide protection**, especially when it is itself the actor of persecution or serious harm or tolerates acts of persecution or serious harm<sup>364</sup>. In this regard, recital (27) QD (recast) makes clear that, ‘Where the State or agents of the State are the actors of persecution or serious harm, there should be a presumption that effective protection is not available to the applicant.’ In Belgium, for instance, the *Conseil du Contentieux des Etrangers* (Council for Alien Law Litigation) ruled that Article 7 was not applicable in the case of state persecution and that, as a result, it was for the asylum authorities to prove the contrary<sup>365</sup>.

**Scenario 3** concerns situations where the State is or might be willing to offer protection but **unable to effectively do so** because of, for instance, lack of financial or human resources or lack of control over part of their territory due to an armed conflict or a state of emergency or heightened security situation<sup>366</sup>. As underlined by the European Commission, ‘mere “willingness to protect” may not be deemed sufficient in the absence of the “ability to protect”’<sup>367</sup>. This was recognised by the French *Commission des recours des réfugiés* (Refugee Appeals Board) in a 2005 judgment on persecution in Somalia. The ability to provide effective protection could not be presumed from the setting up of the transitional federal government as the latter had been struggling to effectively re-establish its authority over its territory<sup>368</sup>. The French *Cour nationale du droit d’asile* (National Court of Asylum Law) also concluded that there was an inability of Algeria to protect an Algerian applicant who had converted to

<sup>362</sup> UKUT, *MS (Coptic Christians) Egypt CG*, op. cit., fn. 151, para. 123.

<sup>363</sup> See House of Lords (UK), *Horvath v Secretary of State for the Home Department*, op. cit., fn. 308, 495 per Lord Hope of Craighead.

<sup>364</sup> Concerning persecution tolerated or condoned by the State, see for instance: Council of State (France), judgment of 27 July 2012, *M B*, application no 349824, para. 3; EWCA (UK), *PS (Sri Lanka) v Secretary of State for the Home Department*, op. cit., fn. 327, para. 8; and Supreme Administrative Court (Czech Republic), judgment of 30 September 2013, *II v Minister of the Interior*, 4 Azs 24/2013-34 (see EDAL English summary). See also, National Asylum Court (France), judgment of 29 November 2013, *M A*, application 13018825 C, in *Contentieux des réfugiés, Jurisprudence du Conseil d’Etat et de la Cour nationale du droit d’asile, Année 2013, 2014*, pp. 59 and 60.

<sup>365</sup> Council for Alien Law Litigation (Belgium), judgment of 28 January 2009, no 22.175, para. 3.3. On state persecution and state protection, see also Special Appeal Committee (Greece), decision of 20 June 2012, *HK v the General Secretary of the (former) Ministry of Public Order*, application no 95/48882 (see EDAL English summary).

<sup>366</sup> See for instance, Administrative Court of Berlin (Germany), judgment 33 K 79.10 A, op. cit., fn. 344, concerning the inability of Afghanistan to offer protection from persecution because of lack of control and sanctions against human rights violations; Supreme Court (Spain), judgment 6894/2005, op. cit., fn. 331, p. 10 concerning the lack of control of the Colombian government over the FARC; National Asylum Court (France), judgment of 6 February 2012, *M et Mme M*, applications nos 09002796 and 09002797 C, in *Contentieux des réfugiés, Jurisprudence du Conseil d’Etat et de la Cour nationale du droit d’asile, Année 2012, 2013*, pp. 55 and 56; Refugee Appeals Board (France), decision of 25 June 2004, plenary session, *M B*, application no 446177 (see EDAL English summary). See in this sense, 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, UN Doc HCR/GIP/03/04, para. 15.

<sup>367</sup> European Commission, Detailed Explanation of the Proposal, p. 3, annexed to the QD (recast) Proposal, op. cit., fn. 243.

<sup>368</sup> Refugee Appeals Board (France), *Mlle A*, op. cit., fn. 329.

Christianity and was persecuted by extremist Muslims<sup>369</sup>. Where there is an issue about ability to protect on the part of a State in a state of emergency, the UKUT held (in respect of Egypt at that time) that when assessing the adequacy of protection in a country in which there exists a valid state of emergency, at least in respect of measures taken that are strictly required by the exigencies of the situation, a State cannot be expected to secure the non-derogable rights of its citizens<sup>370</sup>. The inability of the State to provide protection can also occur, inter alia, in situations of domestic violence<sup>371</sup>, forced marriage of applicants by their families<sup>372</sup> or female genital mutilations in the private circle of tribes or families<sup>373</sup>.

Finally, **scenario 4** refers to instances where the State **is or might be neither willing nor able to provide protection** against persecution<sup>374</sup>. This was for instance the case in judgments of German administrative courts which found that the Afghan and Iranian authorities were unwilling and unable to offer protection against forced marriage<sup>375</sup>. Similarly, the German *Verwaltungsgericht Köln* (Administrative Court of Cologne) ruled that Guinea would neither be able nor willing to protect the applicant against persecution on ground of sexual orientation because of Guinean Islamic culture and laws<sup>376</sup>. It should be noted, however, that some of these examples are about a general inability and unwillingness on the part of the State to protect certain groups or in certain types of situations; whereas some are about a State's specific inability and unwillingness to protect in a particular case.

In practice, the willingness and ability requirements have so far been assessed by courts or tribunals of Member States by taking into consideration factors such as widespread corruption<sup>377</sup>, indifference of State authorities and effective inability<sup>378</sup>. The effective (in)ability of a State to provide protection is moreover intimately linked to the type of protection that has to be provided by virtue of Article 7(2). At all times protection needs to be effective, non-temporary and accessible (see Section 1.7.2 below (pp. 66).

### 1.7.1.2 Parties or organisations, including international organisations (Article 7(1)(b) and (3))

Parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State are the second type of entities recognised by the QD (recast) as potential actors of protection. By including these actors of protection within Article 7(1)(b), the Directive's drafters demonstrated that they did not accept the argument of UNHCR and a number of other commentators that, under the Refugee Convention, only States can provide protection, and not parties or organisations as defined in Article 7(1)(b)<sup>379</sup>.

The terms 'parties and organisations' are not defined in the QD (recast), save for the simple reference to '**international organisations**'. The fact that parties or organisations include international organisations was notably reaffirmed by the CJEU in its 2010 *Abdulla* judgment when it ruled that: 'Article 7(1) of the Directive does not preclude protection from being guaranteed by international organisations, including protection ensured through the presence of a multinational force in the territory of the third country'<sup>380</sup>. This means that parties or organisations as actors of protection are not limited to international organisations provided they fulfil requirements examined below.

<sup>369</sup> National Asylum Court (France), judgment of 9 March 2016, *M NY*, application no 15024258.

<sup>370</sup> UKUT, *MS (Coptic Christians) Egypt CG*, op. cit., fn. 151, paras. 119 and 120.

<sup>371</sup> See for instance, Supreme Administrative Court (Czech Republic), judgment of 24 July 2013, *DB v The Ministry of Interior*, 4 Azs 13/2013-34 (see EDAL English summary).

<sup>372</sup> See, Administrative Court of Gelsenkirchen (Germany), judgment of 18 July 2013, 5a K 4418/11.A, p. 10.

<sup>373</sup> Cagliari Court (Italy), RG 8191/12 judgment, op. cit., fn. 340, pp. 7 and 8; National Asylum Court (France), judgment of 2 April 2008, *Mlle N*, application no 574495, in *Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2008*, April 2009, pp. 59 and 60.

<sup>374</sup> See for instance Administrative Court of Berlin (Germany), judgment 33 K 79.10 A, op. cit., fn. 344, p. 13.

<sup>375</sup> Administrative Court of Augsburg (Germany), Au 6 K 30092, op. cit., fn. 280 (see EDAL English summary).

<sup>376</sup> Administrative Court of Köln (Germany), judgment of 12 October 2011, 15 K 6103/10.A. See also Court of Rome (Italy), judgment of 20 December 2013, No RG 4627/2010 and National Asylum Court (France), judgment of 6 April 2009, *M K*, application no 616907.

<sup>377</sup> See for instance, Council for Alien Law Litigation (Belgium), decision 49.821, op. cit., fn. 334, paras. 4.8.3 and 4.9 concerning the link between the prostitution network and the Macedonian authorities; UKUT, *AM and BM (Trafficked Women) Albania CG*, op. cit., fn. 343, especially paras. 182 and 216 concerning corruption in Albania and the inability of the State to thus provide protection against persecution. But see Court of Session (Scotland), *SAC & MRM v The Secretary of State for the Home Department* [2014] CSOH 8, para. 52 where the Court upheld the position of the Secretary of State for the Home Department, noting that, despite instances of corruption within the police and judiciary in Bangladesh, 'it is not accepted that this indicates that Bangladeshi authorities are unable or unwilling to assist [the applicant]. It is considered that Bangladesh has an effective legal system for the detention, prosecution and punishment of acts constituting persecution or serious harm that that [the applicant] would have access to the system.'

<sup>378</sup> ECRE et al., *Actors of Protection and the Application of the Internal Protection Alternative*, op. cit., fn. 360, p. 49.

<sup>379</sup> See for instance UNHCR, *UNHCR Comments on the European Commission's Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted* (COM(2009)551, 21 October 2009), July 2010, p. 5; J.C. Hathaway and M. Foster, op. cit., fn. 137, pp. 289-292; M. O'Sullivan, 'Acting the Part: Can Non-State Entities Provide Protection under International Refugee Law?', *JURL* (2012) 85-110.

<sup>380</sup> CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 75.

Despite the lack of general definition, Article 7 prescribes two cumulative conditions for parties or organisations to be recognised as actors of protection (see Table 18 below).

**Table 18: Two cumulative conditions for parties or organisations as actors of protection**

<b>1</b>	they <b>must control the State or a substantial part of its territory</b> ; and
<b>2</b>	they <b>must be willing and able to offer effective, non-temporary and accessible protection</b> against persecution in accordance with the terms of Article 7(2).

**First**, concerning the requirement for such parties or organisations to **control the State or a substantial part of its territory**, the type of control that needs to be exercised is not defined in the QD (recast). Its recital (26) only refers to ‘control [over] a region or a larger area within the territory of the State’. Given that parties or organisations have in addition to be able – and not only willing – to offer effective, non-temporary and accessible protection, it can be assumed they have to exercise effective control. Indeed, without such effective control, the party or organisation would arguably not be in a position to offer protection as defined in Article 7(2) (see Section 1.7.2 below, pp. 66).

Concerning international organisations more specifically, Article 7(3) further specifies that, to determine whether they control a State or a substantial part of its territory and provide protection, ‘Member States shall take into account any guidance which may be provided in relevant Union acts’. Since Article 7(3) QD made reference to ‘relevant Council acts’, the same logic applies. During the drafting of the QD, it was explained that:

[The EU] will endeavour to provide guidance on the question of whether an international organisation is actually in control of a State or a substantial part of its territory and whether this international organisation provides protection from persecution or suffering of serious harm, based on an assessment of the situation in the State or territory concerned<sup>381</sup>.

Whenever available, Member States thus have the obligation to seek guidance from such EU acts. If there is no such guidance and also no CJEU guidance, courts and tribunals will have to assess the matter for themselves or address the issue to the CJEU for a preliminary ruling.

**Second**, the requirement that parties or organisations have to be **willing and able to provide protection against persecution** as defined in Article 7(2) considerably limits the scope of such actors. Hence, the scope of parties or organisations as actors of protection is accordingly more circumscribed than that of parties or organisation as actors of persecution or serious harm under Article 6(b) for the former have in addition to be willing and able to offer effective and non-temporary protection. This more limited interpretation is not only in line with the ordinary meaning of the provision and the scheme of the Directive but also with the purpose of Article 7 and the QD (recast) which is, inter alia, to grant international protection to those persecuted or at risk of serious harm and not benefiting from any effective protection in their country of nationality or former habitual residence.

Against these two definitional requirements, **three main types of parties or organisations** have been discussed so far in the practice of courts or tribunals of Member States under the terms of Article 7.

**First**, given the 2010 *Abdulla* judgment of the CJEU, **international organisations** can only qualify as actors of protection if they control the State or a substantial part of the territory of the State. In practice, international organisations have not been considered as sole actors of protection in their own right but in light of their actual protective functionality supporting that of the State. For instance, in assessing sufficiency of protection against threats by Al Shabaab in Somalia, the UKUT not only took into account armed operations carried out by the Somali National Army, but also by the African Union Mission in Somalia<sup>382</sup>.

<sup>381</sup> European Council, Presidency Note to the Permanent Representatives Committee (EU Doc 14308/02), op. cit., fn. 214, p. 11, fn. 1. In the original quotation, reference was made to relevant Council acts in accordance with the wording of Art. 7(3) QD.

<sup>382</sup> UKUT, *MOJ & Ors (Return to Mogadishu) Somalia CG*, op. cit., fn. 328, para. 358.

**Second, non-governmental organisations (NGOs)** have not been considered to be valid actors of protection for the purpose of Article 7 as it is virtually impossible for them to fulfil the requirements of Article 7(1) whereby they have to control the State or a substantial part of the territory of the State and be willing and able to offer protection. This was confirmed by the Czech *Nejvyšší správní soud* (Supreme Administrative Court)<sup>383</sup> and the Belgian *Conseil du Contentieux des Etrangers* (Council for Alien Law Litigation) which dismissed a human rights NGO combating slavery as an actor of protection<sup>384</sup>. This understanding also reflects the position taken by the European Commission which excludes from the scope of actor of protection ‘entities (such as political parties or non-governmental organisations) which may wish and try to provide protection but do not have the (military, legal, etc.) power to effectively do so’<sup>385</sup>.

**Third**, though largely relevant when assessing internal protection only (see further Section 1.8 below, pp. 72), **clans and tribes** have been recognised by some courts or tribunals of Member States as actors of protection, especially when such clans exercise de facto authority over regions such as in the case of Puntland and Somaliland. In this context, the UK case law in 2009-2010 considered clans and tribes in Somalia as ‘the primary entities to which individuals turn for protection’<sup>386</sup>. To come to the conclusion that protection can be afforded by clans, due consideration is nonetheless given by courts to the type of clans – i.e. as minority or majority clans – and the personal circumstances of the applicant. In *HH*, for instance, the UK EWCA concluded that the applicant would not obtain protection upon return in Mogadishu as he ‘was from a clan which was in the minority in Mogadishu [...] and] he had not been there for some 15 years [...]’<sup>387</sup>. The applicant’s (continued) affiliation to a specific clan is thus an important factor to take into account to assess whether he/she would benefit from such protection upon return. On the other hand, the extent of the protection granted to the applicant seems to be contingent on the type of clan and the type of control it exercises; for majority clans would be in a better position to provide protection than minority clans. The ECtHR case-law on *non-refoulement* under Article 3 ECHR has considered clan protection, especially by majority clans, as effective protection, for example, in the context of internal relocation to the ‘relatively safe’ areas of Puntland and Somaliland<sup>388</sup>.

So far as Article 7(1)(b) is concerned, in the aforementioned case-law in some Member States, clans will nevertheless only qualify as actors of protection if they control the State or a substantial part of the territory of the State and are willing and able to offer protection. If not, they will not be recognised as actors of protection although the protective functions they sometimes perform may not be irrelevant in assessing whether or not the State provides effective protection under Article 7(1)(a)<sup>389</sup>.

## 1.7.2 Quality of protection (Article 7(2))

Compared to the QD<sup>390</sup>, Article 7(2) QD (recast) explicitly defines protection in the country of nationality or former habitual residence on the basis of three conditions (see Table 19 below):

<sup>383</sup> Supreme Administrative Court (Czech Republic), judgment of 27 October 2011, *DK v Ministry of Interior*, 6 Azs 22/2011 (see EDAL English summary).

<sup>384</sup> Council for Alien Law Litigation (Belgium), decision of 9 June 2011, no 62.867, para. 4.8.2. See also, Council for Alien Law Litigation (Belgium), decision 49.821, op. cit., fn. 334, concerning associations combating forced prostitution in Macedonia.

<sup>385</sup> European Commission, ‘Detailed Explanation of the Proposal’, p. 3, annexed to the QD (recast) Proposal, op. cit., fn. 243. For Member States’ case-law on NGOs as potential actors of protection, see: Supreme Administrative Court (Czech Republic), *DK v Ministry of Interior*, op. cit., fn. 383 (see EDAL English summary); Council for Alien Law Litigation (Belgium), decision 62.867, op. cit., fn. 384, para. 4.8.2; Council for Alien Law Litigation (Belgium), decision 49.821, op. cit., fn. 334, para. 4.8.2; Council for Alien Law Litigation (Belgium), decision 45.742, op. cit. fn. 188, para. 5.8.1. For Member States’ practice, see further: ECRE et al., *Actors of Protection and the Application of the Internal Protection Alternative*, op. cit., fn. 360, p. 52.

<sup>386</sup> UKIAT, judgment of 27 January 2009, *AM & AM (Armed Conflict: Risk Categories) Somalia CG* [2008] UKIAT 00091, para. 164. See also EWCA (UK), judgment of 23 April 2010, *HH (Somalia) and Others v Secretary of State for the Home Department* [2010] EWCA Civ 426, paras. 113.

<sup>387</sup> EWCA (UK), *HH (Somalia) and Others v Secretary of State for the Home Department*, op. cit., fn. 386, para. 119.

<sup>388</sup> ECtHR, *Salah Sheekh v the Netherlands*, op. cit., fn. 349, para. 139, where the Court held that ‘[c]lan affiliation has been [...] described as the most important common element of personal security across all of Somalia [...]’. The Court further noted that ‘there is a marked difference between the position of, on the one hand, individuals who originate from those areas and have clan and/or family links there and, on the other hand, individuals who hail from elsewhere in Somalia and do not have such links in Somaliland or Puntland’. In this specific case, the applicant was considered by the Court to fall in the second category of individuals and that it was thus ‘most unlikely’ that he ‘would obtain protection from a clan in the relatively “safe areas”’. *Ibid.*, para. 140. For other similar ECtHR judgments, see: ECtHR, *AA and Others v Sweden*, op. cit., fn. 309, paras. 57-59; ECtHR, *KAB v Sweden*, op. cit., fn. 309, paras. 80-85; ECtHR, judgment of 16 October 2012, *MS v the United Kingdom*, application no 56090/08, para. 26; ECtHR, judgment of 18 September 2012, *Hassan Ahmed Abdi Ibrahim v the United Kingdom*, application no 14535/10, paras. 34 and 35; and ECtHR, *Sufi and Elmi v the United Kingdom*, op. cit., fn. 49, paras. 272-277 and 295-304.

<sup>389</sup> See for instance UKUT, judgment of 29 May 2015, *NA and VA (Protection: Article 7(2) Qualification Directive) India* [2015] UKUT 00432 (IAC), para. 14 analysed in Section 1.7.2.1 below, pp. 67.

<sup>390</sup> Art. 7(2) QD provides that: ‘Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.’

**Table 19: Three cumulative conditions concerning the quality of protection to be provided by actors of protection**

<b>1</b>	Protection must be <b>effective</b>	see Section 1.7.2.1, pp. 67-70
<b>2</b>	Protection must be <b>non-temporary</b>	see Section 1.7.2.2, pp. 70-71
<b>3</b>	Protection must be <b>accessible</b> to the applicant	see Section 1.7.2.3, pp. 71-71

Protection within the meaning of Article 7 will thus be considered to exist when all three of these cumulative conditions are fulfilled<sup>391</sup>.

### 1.7.2.1 Effectiveness

The effectiveness of protection is defined by Article 7(2) as being:

generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.

**Reasonable steps taken by actors of protection to prevent persecution or serious harm** are thus the central element to determine whether the protection generally provided in the country of nationality or former habitual residence is effective. The assessment to be undertaken by courts or tribunals of Member States has been detailed by the CJEU in its 2010 *Abdulla* judgment. In the words of the Court:

That verification means that the competent authorities must assess, in particular, the conditions of operation of, on the one hand, the institutions, authorities and security forces and, on the other, all groups or bodies of the third country which may, by their action or inaction, be responsible for acts of persecution against the recipient of refugee status if he returns to that country<sup>392</sup>.

While the reasonableness of such steps is not defined in the QD (recast), the 2000 *Horvath* judgment of the UK House of Lords is instructive, all the more so as Article 7(2)'s 'wording closely mirrors' the *Horvath* conclusions<sup>393</sup>. Reasonableness is here defined as a 'practical standard' which recognises that complete protection against persecution or serious harm cannot be expected from actors of protection<sup>394</sup>. Hence, 'certain levels of ill-treatment may still occur even if steps to prevent this are taken by the state to which we look for our protection'<sup>395</sup>.

As provided by Article 7(2), such reasonable steps can take the form of 'operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution [...]'. For instance, in the case of an applicant who is a victim of rape, the Slovenian *Upravno Sodišče* (Administrative Court) considered the fact that both actors who persecuted her were not punished and still employed as local policemen in her home town as highly relevant for determining the existence of such as an effective legal system<sup>396</sup>. The UKUT underlined the 'broad array of measures' that can be embraced here such as:

an efficacious witness protection model'; 'home security, enhanced police protection; simple warnings and security advice to the person concerned; the grant of a firearms licence; or, *in extremis*, [...] a change of identity accompanied by appropriate financial and logistical support<sup>397</sup>.

<sup>391</sup> See CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 70.

<sup>392</sup> *Ibid.*, para. 71.

<sup>393</sup> UKIAT, judgment of 31 July 2007, *IM (Sufficiency of Protection) Malawi* [2007] UKIAT 00071, para. 50; UKUT, judgment of 11 November 2010, *AW (Sufficiency of Protection) Pakistan* [2011] UKUT 31 (IAC), para. 22.

<sup>394</sup> House of Lords (UK), *Horvath v Secretary of State for the Home Department*, op. cit., fn. 308, per Lord Hope of Craighead. See also UKIAT, *IM (Sufficiency of Protection) Malawi*, op. cit., fn. 393, para. 45. See also, Home Office (UK), *Asylum Policy Instruction, Assessing Credibility and Refugee Status*, op. cit., fn. 315, p. 36 noting that: 'The standard of protection to be applied is not one that eliminates all risk to its citizens. [...] No country can offer 100% protection and certain levels of ill treatment may still occur even if a government acts to prevent it.' The practical standard to assess whether reasonable steps are taken by the State is also confirmed by the ECtHR. See for instance, ECtHR, judgment of 28 October 1998, Grand Chamber, *Osman v the United Kingdom*, application no 23452/94, paras. 115-116.

<sup>395</sup> House of Lords (UK), *Horvath v Secretary of State for the Home Department*, op. cit., fn. 308, per Lord Hope of Craighead.

<sup>396</sup> Administrative Court (Republic of Slovenia), I U 411/2015-57, op. cit., fn. 183.

<sup>397</sup> UKUT, *NA and VA (Protection: Article 7(2) Qualification Directive) India*, op. cit., fn. 389, para. 17 (original emphasis).

As indicated by the term ‘*inter alia*’, effective protection is not limited to such an effective legal system. On the one hand, depending on the actor of protection and subject to the conditions identified above in Section 1.7.1.2 (pp. 64), it can materialise in a system based on custom, as may be the case when clans or tribes control the State or a substantial part of its territory<sup>398</sup>. On the other hand, as underlined by the Dutch *Raad van State* (Council of State), the operation of such an effective legal system does not constitute an independent criterion for assessing the effectiveness of protection<sup>399</sup>. Hence, the absence of such system does not automatically equate with lack of effective protection<sup>400</sup>.

Moreover, given its wording, the provision arguably leaves the door open to approaching the issue of whether the State provides protection in a more holistic way, that is, as the sum of all instances of protection effectively available to individuals, be they directly provided or only permitted by the State. From that perspective, consideration can also be given to certain forms of protection provided, for instance, by civil society actors where such forms have the result that overall the State can be said to afford effective protection<sup>401</sup>. Although there does not appear to have been much judicial practice to this effect, the UKUT has held that while actors other than the State will unlikely be recognised as actors of protection, they may contribute to effective protection against persecution through an ‘apparatus of protection’<sup>402</sup>. Such apparatus, in the context of Somalia at the time, may be constituted of ‘the armed forces, the police force, the district police composed mainly of dominant clan members, the “nuclear family”, armed private guards and a functioning central government’<sup>403</sup>. Giving an additional illustration, the Tribunal stated that ‘the availability of womens’ shelters in Pakistan guarded by armed bodyguards should be considered in assessing the overall system of protection’<sup>404</sup>.

This assessment has not only to be made in light of the conditions in the country of nationality or former habitual residence but also of the **applicant’s individual circumstances**<sup>405</sup>. Such a case-by-case assessment is supported by the wording of Article 7(2) which prescribes that ‘protection is **generally** provided’ if reasonable steps are taken<sup>406</sup>. As held by the UKIAT, ‘It is not stated that the taking of “reasonable steps to prevent the persecution [...] by operating an effective legal system [...]” will amount to provision of adequate protection in every case, although it is said that it will in the generality of cases’<sup>407</sup>. The specific case of an applicant might indicate the need of additional protection for it to be effective<sup>408</sup>.

In the view of the UKUT, the combination of the terms ‘*inter alia*’ and ‘generally’ have ‘certain other effects’<sup>409</sup>. The Tribunal described these as follows:

First, they clearly confer choice, or discretion, on the state concerned. Article 7(2) does not *compel* a state to devise any particular measures of protection. Second, Article 7(2) prescribes neither minima nor maxima. Thus it is conceivable that, in certain states, practical and effective protection could be provided by measures and arrangements which, viewed through the lens of an advanced first world country, do not equate to an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm and access thereto by the individual. For example, a measure of pure deterrence or prevention based on fear of clan or family reprisals might have to be reckoned in a given context. This is consistent with the intrinsically individual nature of each case and the fact sensitive context to which the judicial inquiry will be directed<sup>410</sup>.

<sup>398</sup> H. Dörig, in K. Hailbronner and D. Thym (eds.), op. cit., fn. 75.

<sup>399</sup> Council of State (Netherlands), decision of 5 August 2008, *AJDCoS*, 200708107/1 (see EDAL English summary). See also Council of State (Netherlands), decision of 29 May 2012, *ABRvS*, 201108872/1/V1 (see EDAL English Summary).

<sup>400</sup> See Council of State (Netherlands), *ABRvS*, op. cit., fn. 399 (see EDAL English Summary).

<sup>401</sup> It is interesting to observe that in *RH v Sweden* (op. cit., fn. 350, para. 70), the ECtHR observed that ‘[w]omen are unable to get protection from the police and the crimes are often committed with impunity, as the authorities are unable or unwilling to investigate and prosecute reported perpetrators. It is also clear that women are generally discriminated against in Somali society and that they hold a subordinate position to men’. Nevertheless, the Court concluded that in RH’s case she would not face a real risk of treatment contrary to Article 3 because the evidence was that she had access to ‘both family support and male protection network’ (*ibid.*, para. 73).

<sup>402</sup> UKUT, *NA and VA (Protection: Article 7(2) Qualification Directive) India*, op. cit., fn. 389, para. 15, citing UKUT, *MOJ & Ors (Return to Mogadishu) Somalia CG*, op. cit., fn. 328, paras. 358-363.

<sup>403</sup> UKUT, *NA and VA (Protection: Article 7(2) Qualification Directive) India*, op. cit., fn. 389, para. 15, citing UKUT, *MOJ & Ors (Return to Mogadishu) Somalia CG*, op. cit., fn. 328, paras. 358-363.

<sup>404</sup> UKUT, *NA and VA (Protection: Article 7(2) Qualification Directive) India*, op. cit., fn. 389, para. 15.

<sup>405</sup> *Ibid.*, paras. 70 and 71. See also See also EWCA (UK), judgment of 11 November 2003, *Bagdanavicius & Anor, R (on the application of) v Secretary of State for the Home Department* [2003] EWCA Civ 1605, para. 55, sub-para. 6; UKUT, *AW (Sufficiency of Protection) Pakistan*, op. cit., fn. 393, paras. 24-33; Migration Court of Appeal (Sweden), UM 3363-10 and 3367-10, op. cit., fn. 345 (see EDAL English summary); and UKUT, *AM and BM (Trafficked Women) Albania CG*, op. cit., fn. 343, para. 182.

<sup>406</sup> Emphasis added. See UKUT, *NA and VA (Protection: Article 7(2) Qualification Directive) India*, op. cit., fn. 389, para. 13.

<sup>407</sup> UKIAT, *IM (Sufficiency of Protection) Malawi*, op. cit., fn. 393, para. 50

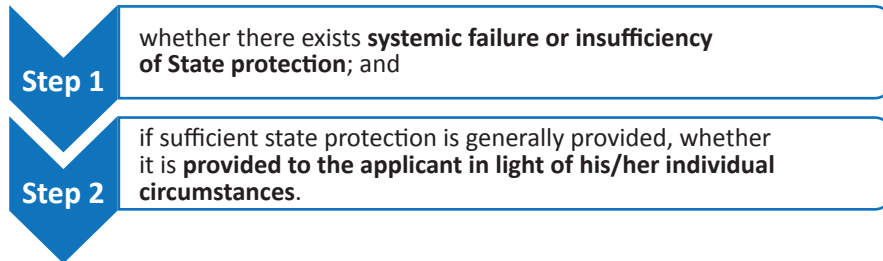
<sup>408</sup> *Ibid.*, para. 45.

<sup>409</sup> UKUT, *NA and VA (Protection: Article 7(2) Qualification Directive) India*, op. cit., fn. 389, para. 14.

<sup>410</sup> *Ibid.* (original emphasis).

As further conceptualised by the UKUT and based on the decision of the UK EWCA in the cases of *Atkinson* and *Bagdanavicius*<sup>411</sup>, determining the existence of effective protection against persecution, or conversely here the non-existence, is thus a two-step process as illustrated in Figure 2 below.

**Figure 2: Two-step assessment for determining the (non-)existence of effective protection<sup>412</sup>**



Although framed here in the context of State protection, this two-step assessment is arguably equally valid in case of protection provided by parties or organisations under the terms of Article 7(1)(b).

**The first step** relates to the **conditions in the country of origin**. In this respect, the CJEU recalled in its *Abdulla* judgment that, ‘[i]n accordance with Article 4(3) of the Directive, relating to the assessment of facts and circumstances, [...] the laws and regulations of the country of origin and the manner in which they are applied, and the extent to which basic human rights are guaranteed in that country’ may inter alia be taken into account<sup>413</sup>. According to the Irish High Court, the mere existence of a police complaint procedure is insufficient if it is not accompanied by an effective system for the detection, investigation, prosecution and convictions of crimes<sup>414</sup>. The penalisation of certain crimes in national legislation is also not considered as protection in the sense of Article 7(2) when not effectively and sufficiently enforced through prosecution<sup>415</sup>. Emphasis is also put on the preventive side of the system so that mere penalisation is deemed insufficient protection if mechanisms are not in place to prevent crimes in the first place<sup>416</sup>. Moreover, in addition to the criminal law system, consideration should also be given to civil laws ‘(e.g. non-molestation injunctions) [which] can play a part in the overall system of protection’<sup>417</sup>. If there is a systemic failure on the part of the State to protect, then an applicant who faces acts of persecution or serious harm will be able to establish a well-founded fear of persecution or real risk of serious harm respectively. If, however, there is a general sufficiency of State protection, then it will be necessary to proceed to the second step.

**The second step** concerning the **applicant’s individual circumstances** is necessary because notwithstanding a general sufficiency of State protection an applicant may still be able to establish a well-founded fear of persecution or real risk of suffering serious harm by virtue of such circumstances. This second step overlaps to a certain extent with the determination of a well-founded fear of persecution or of a real risk of serious harm (see Section 1.9, pp. 80, and Section 2.8, pp. 114), although the two remain ‘two separate analytical steps’<sup>418</sup>. For instance, the fact that the applicant may have been subject to past persecution or serious harm against which he/she did not receive effective protection is particularly important to determine whether he/she would be provided with such protection at the time of the hearing<sup>419</sup>. Moreover, as discussed in Section 1.7.2.3 below (pp. 71), consideration of the applicant’s individual circumstances also requires a determination of whether he/she has effective access to the protection generally provided. As ruled by the Swedish *Migrationsöverdomstolen* (Migration Court of Appeal), this might, for instance, not be the case for minors who remain dependent on their parents and might thus be precluded from benefiting from protection against persecution or serious harm<sup>420</sup>.

<sup>411</sup> EWCA (UK), judgment of 1 July 2004, *Michael Atkinson v Secretary of State for the Home Department* [2004] EWCA Civ 846, para. 21; and EWCA (UK), *Bagdanavicius & Anor, R (on the application of) v Secretary of State for the Home Department*, op. cit., fn. 405, para. 55.

<sup>412</sup> UKUT, *AW (Sufficiency of Protection) Pakistan*, op. cit., fn. 393, especially paras. 34 and 35.

<sup>413</sup> CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 71.

<sup>414</sup> High Court (Ireland), judgment of 9 December 2009, *ASO v Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform* [2009] IEHC 607, para. 12.

<sup>415</sup> Court of Cagliari (Italy), judgment of 3 April 2013, No RG 8192/2012 (see EDAL English summary); and Council for Alien Law Litigation (Belgium), decision 62.867, op. cit., fn. 384, para. 4.8.4.

<sup>416</sup> EWCA (UK), *Bagdanavicius & Anor, R (on the application of) v Secretary of State for the Home Department*, op. cit., fn. 405, para. 55, sub-para. 5. See also Metropolitan Court (Hungary), judgment of 5 October 2011, *KH v Office of Immigration and Nationality*, 6.K. 34.440/2010/20 (see EDAL English summary).

<sup>417</sup> UKIAT, judgment of 22 February 2007, *AB (Protection – Criminal Gangs – Internal Relocation) Jamaica CG* [2007] UKIAT 00018, para. 143.

<sup>418</sup> *Ibid.*, para. 141.

<sup>419</sup> UKUT, *AW (Sufficiency of Protection) Pakistan*, op. cit., fn. 393, paras. 37-40. On the significance of past persecution under Art. 4(4) QD (recast), see Section 1.9.2 below, pp. 83.

<sup>420</sup> Supreme Migration Court (Sweden), UM 3363-10 and 3367-10, op. cit., fn. 345 (see EDAL English summary).

The European Commission provides an illustrative list of factors that should be considered by courts or tribunals of Member States with a view to determining whether effective protection is provided. These factors are reproduced in Table 20 below:

**Table 20: Illustrative list of factors to assess effectiveness of protection<sup>421</sup>**

(a)	general conditions in the country of origin;
(b)	the State's complicity with respect to the infliction of the harm at stake;
(c)	the nature of State's policies with respect to the harm at stake, including whether there is in force a criminal law which makes violent attacks by persecutors punishable by sentences commensurate with the gravity of their crimes;
(d)	the influence the alleged persecutors have with State officials;
(e)	whether any official action taken is meaningful or merely perfunctory, including an evaluation of the willingness of law enforcement agencies to detect, prosecute and punish offenders;
(f)	whether there is a pattern of State unresponsiveness;
(g)	denial of State's services;
(h)	whether any steps have been taken by the State to prevent infliction of harm.

The above list is confined to considerations of State action or inaction, but the effectiveness of protection can also be affected by, for example, the role of civil society actors. Whilst civil society actors cannot be actors of protection, they can by their protective functions reduce or obviate the need for State protection in certain instances. As with the assessment of whether persecution exists, there has to be a holistic approach for assessing whether the State effectively protects. Hence additional factors would include the extent and degree of protective functions performed by civil society actors.

### 1.7.2.2 Durability

While Article 7(b) explicitly requires the protection provided to the applicant to be non-temporary to obviate the real risk of persecution or serious harm, the provision does not give any definition of this durability criterion. As Article 11(2) QD (recast) uses the same term to qualify the change of circumstances grounding cessation of refugee status, regard can be had to the 2010 *Abdulla* judgment of the CJEU on this issue. The CJEU ruled that:

The change of circumstances will be of a 'significant and non-temporary' nature, within the terms of Article 11(2) of the Directive, when the factors which formed the basis of the refugee's fear of persecution may be regarded as having been permanently eradicated. The assessment of the significant and non-temporary nature of the change of circumstances thus implies that there are no well-founded fears of being exposed to acts of persecution amounting to severe violations of basic human rights within the meaning of Article 9(1) of the Directive<sup>422</sup>.

The German *Bundesverwaltungsgericht* (Federal Administrative Court) examined, again in the cessation context, whether the risk had ceased sustainably. The Court came to the conclusion that the specific risk of persecution which existed under Saddam Hussein had 'permanently ceased to exist' because the **dictator's fall from power** and the end of his regime was 'irreversible'<sup>423</sup>. However, stricter criteria apply when there is no complete change in the persecutory State but a **liberalisation within a former persecutory system**. According to the same court in a 2011 judgment involving an Algerian applicant, such a case requires a **higher standard**:

The greater the risk of persecution, even if it remains below the threshold of a considerable probability, the more permanent, and the more accessible to forecasting as such, the stability of the change in circumstances must be. If – as in the present case – changes that are thought to result in the termination of

<sup>421</sup> European Commission, QD Proposal, op. cit., fn. 194, pp. 17 and 18.

<sup>422</sup> CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 73.

<sup>423</sup> Federal Administrative Court (Germany), judgment of 24 February 2011, BVerwG 10 C 3.10, BVerwG:2011:240211U10C3.10.0, para. 20, available in English at [www.bverwg.de](http://www.bverwg.de). See similarly National Asylum Court (France), judgment of 25 November 2011, *M K*, application no 10008275 (see EDAL English summary) concerning the situation in Kosovo since 1986.



refugee status must be assessed within a regime that still remains in power, a higher standard must likewise be required for their permanence. [...] Nevertheless, one also cannot demand a guarantee that the changed political circumstances will continue indefinitely in the future<sup>424</sup>.

Transposing this reasoning to Article 7(2), protection against persecution or serious harm shall be **durable**. In this regard, the Belgian *Conseil du Contentieux des Etrangers* (Council for Alien Law Litigation) found the protection afforded to Tibetans in India not to be temporary despite the fact that Tibetans have no right to permanent residence in India but need to possess renewable registration certificates of temporary validity<sup>425</sup>.

### 1.7.2.3 Accessibility

The accessibility of protection is explicitly required by the wording of Article 7(2) and was identified by the CJEU in *Abdulla* as a definitional element of protection<sup>426</sup>. This third requirement has not been an issue of contention in decisions of courts or tribunals of Member States<sup>427</sup>. According to the Belgian *Conseil du Contentieux des Etrangers* (Council for Alien Law Litigation), accessibility has to be assessed in light of **both legal and practical obstacles to protection**<sup>428</sup>, though lack of financial means to bring a case to court is deemed ‘insufficient to conclude on the impossibility for the applicant to access protection from the authorities’<sup>429</sup>. Conversely, accessibility to protection against persecution or serious harm cannot be made contingent on exhaustion of domestic remedies in the country of origin. However, in cases concerning threats of a general criminal character (e.g. threat of violent attacks as a reprisal for the alleged debts of the applicant, racketeering etc.) by non-State actors (such as a local mafia) in States which generally operate a prima facie effective legal system to punish such criminal activities, the case-law of the Czech *Nejvyšší správní soud* (Supreme Administrative Court) requires that the applicant proves that he/she has first unsuccessfully sought protection from the police or other competent authorities in the country of origin or that he/she provides a credible explanation as to why he/she has not done so<sup>430</sup>. Nevertheless, this approach can under no circumstances be generalised to either all cases of non-State actors or all countries of origin<sup>431</sup>. As underlined by the Polish *Naczelny Sąd Administracyjny* (Supreme Administrative Court), what matters is ‘whether, in the given circumstances, [the applicant] would have obtained help from the state had [he/]she requested it’, that is, ‘whether there is a genuine opportunity to seek it’<sup>432</sup>.

The European Commission gives an illustrative list of factors that should be taken into consideration by courts or tribunals of Member States in assessing the accessibility of protection. These factors are reproduced in Table 21 below:

**Table 21: Illustrative list of factors to assess accessibility of protection<sup>433</sup>**

<b>(i)</b>	evidence by the applicant that the alleged persecutors are not subject to the State’s control;
<b>(j)</b>	the qualitative nature of the access the applicant has to whatever protection is available, bearing in mind that applicants as a class must not be exempt from protection by the law;
<b>(k)</b>	steps, if any, by the applicant to obtain protection from State officials and the State response to these attempts.

<sup>424</sup> Federal Administrative Court (Germany), judgment of 1 June 2011, BVerwG 10 C 25.10, BVerwG:2011:010611U10C25.10.0, para. 24, available in English at [www.bverwg.de](http://www.bverwg.de).

<sup>425</sup> Council for Alien Law Litigation (Belgium), decision of 17 March 2015, no 141.198.

<sup>426</sup> CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 70.

<sup>427</sup> See in this regard the account of Member States’ practice done by ECRE et al. which states that Austria, Belgium, Germany, Sweden and the UK assess this requirement in their decisions (*Actors of Protection and the Application of the Internal Protection Alternative*, op. cit., fn. 360, p. 45). See also Supreme Administrative Court (Czech Republic), judgment of 25 January 2011, *RS v Ministry of Interior*, 6 Azs 36/2010-274 (see EDAL English summary).

<sup>428</sup> Council for Alien Law Litigation (Belgium), decision of 14 March 2012, no 77.179. See the English translation of relevant parts of the decision in ECRE et al., *Actors of Protection and the Application of the Internal Protection Alternative*, National Report, Belgium, op. cit., fn. 360, p. 9, fn. 20: ‘The assessment of this issue supposes that not only the legal or judicial obstacles are taken into account, but also the practical obstacles that could prevent a person to have access to an effective protection [...]. The nature of the persecution and the way it is being perceived by the surrounding society and its authorities in particular can, in certain cases, constitute such a practical obstacle. The personal situation of the applicant, especially his vulnerability, can also contribute to prevent, in practice, the access [...] to a protection by his authorities’.

<sup>429</sup> Council for Alien Law Litigation (Belgium), decision of 6 March 2012, no 76.642, para. 5.3.3 (authors’ translation).

<sup>430</sup> Supreme Administrative Court (Czech Republic), judgment of 31 October 2008, *IG v Ministry of Interior*, 5 Azs 50/2008-62.

<sup>431</sup> Supreme Administrative Court (Czech Republic), *SIC v Ministry of Interior*, op. cit., fn. 331 (see EDAL English summary).

<sup>432</sup> Supreme Administrative Court of Poland, OSK 237/07, op. cit., fn. 188 (see EDAL English summary).

<sup>433</sup> European Commission, QD Proposal, op. cit., fn. 194, p. 18.

## 1.8 Internal protection (Article 8)

Article 8 QD (recast) is an **optional provision** that may be applied by Member States and which provides that:

1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she:
  - (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or
  - (b) has access to protection against persecution or serious harm as defined in Article 7;

and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.

2. In examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering serious harm, or has access to protection against persecution or serious harm in a part of the country of origin in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant in accordance with Article 4. To that end, Member States shall ensure that precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office.

Yet, if a Member State does opt to apply the concept of internal protection, then Article 8(1) and (2) are applicable and need to be adhered to in their entirety. As underlined by the German *Bundesverwaltungsgericht* (Federal Administrative Court):

In case the region of origin [...] is out of the question as a destination because of the danger threatening the foreigner there, he may be expelled to another region of the country [...] only subject to the restrictive requirements of Article 8<sup>434</sup>.

The QD included the notion of internal protection in Article 8. The QD (recast) introduced detailed preconditions for the viability of internal protection (mostly deriving from the ECtHR judgment in *Salah Sheekh*<sup>435</sup>) and removed Article 8(3), which allowed the concept to apply despite technical obstacles to return to the country of origin. By virtue of use of the word ‘settle’ in the QD (recast) as distinct from ‘stay’ in the QD, it may be that a situation of greater stability is envisaged<sup>436</sup>. The notion of internal protection in Article 8(1) QD (recast) now also employs a reference to access to protection as an alternative precondition for relying on this concept. The QD (recast) also introduced a reference to the obligation of the authorities to obtain precise and up-to-date information on the general situation in the country of origin (Article 8(2)).

Article 8 refers to the assessment of the application for international protection, hence providing for common criteria applicable with respect to both types of international protection, i.e. refugee status and subsidiary protection.

The CJEU has not yet had an opportunity to directly address Article 8 issues except the indirect references to internal protection in the *Elgafaji* case, where it stated that:

[I]n the individual assessment of an application for subsidiary protection [...] the following may be taken into account [...] the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned<sup>437</sup>.

When applying Article 3 ECHR in expulsion cases, the ECtHR has also acknowledged that:

<sup>434</sup> Federal Administrative Court (Germany), judgment of 31 January 2013, BVerwG 10 C 15.12, BVerwG:2013:300713U1C5.12.0, para. 14, available in English at [www.bverwg.de](http://www.bverwg.de).

<sup>435</sup> ECtHR, *Salah Sheekh v the Netherlands*, op. cit., fn. 349.

<sup>436</sup> EASO, *Article 15(c) Qualification Directive (2011/95/EU) – A Judicial Analysis*, December 2014, p. 35.

<sup>437</sup> CJEU, *Elgafaji* judgment, op. cit., fn. 45, para. 40.

[...] Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual’s claim that a return to his country of origin would expose him to a real risk of being subjected to treatment proscribed by that provision [...]<sup>438</sup>.

The further analysis of Article 8 will first address the quality of internal protection (Section 1.8.1, pp. 73). It will then focus on the requirements of examination, including the stage of examination (Section 1.8.2, pp. 78).

### 1.8.1 Quality of internal protection (Article 8(1))

The notion of internal protection, as set out in Article 8, essentially provides that an applicant does not qualify as a refugee or a beneficiary of subsidiary protection **when he/she may be protected in a part of the country of origin**. The term ‘protection’ implies that the notion may only be relied on where it is established or assumed, in the first place, that an applicant has a well-founded fear of being persecuted or is at real risk of suffering serious harm in his/her region of origin (home region). If it is then determined that settlement in ‘a part of the country of origin’ fulfils the criteria provided for in Article 8, a Member State is entitled to conclude that an applicant is not in need of international protection.

In this respect, the need to **clearly identify a particular area or areas of the country of origin** where internal protection is available is a key precondition for the application of the concept<sup>439</sup>.

According to the Austrian *Verfassungsgerichtshof* (Constitutional Court), the risk assessment should be based on the actual destination of the applicant<sup>440</sup>. Likewise, according to the Swedish case-law, it is necessary to find an area where the actor of persecution cannot threaten the person<sup>441</sup>.

UNHCR also suggests that the wording of Article 8 QD implies that, first, a well-founded fear is established and, secondly, the possibility of internal protection in a particular area is examined. When internal protection is being examined, a particular area or particular areas must be identified<sup>442</sup>. If an applicant is to be sent back to a different region of his/her home country than the area in which he/she has previously lived, this new region has to be assessed according to the internal protection criteria<sup>443</sup>.

It appears, however, that a court or tribunal is free to conclude that internal protection is available in a specific area without necessarily inferring that it is the only safe area in the country. This is because, pursuant to Article 8 (1) QD (recast), an applicant is not in need of international protection where ‘a part of the country of origin’ fulfils the relevant substantive criteria.

In this respect, Article 8(1) lays down **three criteria** to determine if internal protection can be found in a part of an applicant’s country of origin (see Table 22 below):

**Table 22: Three cumulative criteria of internal protection**

<b>1</b>	A part of the country of origin has to be <b>safe for the applicant</b> ;	see Section 1.8.1.1, pp. 74-76
<b>2</b>	The applicant has <b>access to that part of the country of origin</b> ; and	see Section 1.8.1.2, pp. 76-77
<b>3</b>	The applicant can <b>reasonably be expected to settle there</b> .	see Section 1.8.1.3, pp. 77-78

<sup>438</sup> ECtHR, *Sufi and Elmi v the United Kingdom*, op. cit., fn. 49, para. 266.

<sup>439</sup> Constitutional Council (France), decision of 4 December 2003, decision no 2003-485-DC, para. 17, in *journal officiel*, 11 December 2003, 21085; Council of State (France), judgment of 11 February 2015, *Ms S*, application no 374167; and Migration Court of Appeal (Sweden), judgment of 14 January 2009, UM 4118-07, MIG:2009:4 (see EDAL English summary).

<sup>440</sup> Constitutional Court (Austria), judgment of 12 March 2013, U1674/12, para. 2.1 (see EDAL English summary).

<sup>441</sup> Migration Court of Appeal (Sweden), UM 4118-07, op. cit., fn. 439 (see EDAL English summary) as quoted in ECRE et al., *Actors of Protection and the Application of the Internal Protection Alternative*, op. cit., fn. 360, p. 59.

<sup>442</sup> UNHCR, *Guidelines on International Protection No. 4*, op. cit., fn. 366, paras. 34 and 35.

<sup>443</sup> H. Dörig, in K. Hailbronner and D. Thym (eds.), op. cit., fn. 75.

### 1.8.1.1 Safety in a part of the country of origin

The **existence of a safe area in the country of origin** is a central element of the notion of internal protection as set out in Article 8. The first criterion of safety as stipulated in Article 8(1)(a) relates to the condition that an applicant ‘has no well-founded fear of being persecuted or is not at real risk of suffering serious harm’ in that part of the country of origin (Section 1.8.1.1.1, pp. 74). Alternatively, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin, he/she ‘has access to protection against persecution or serious harm as defined in Article 7’ under the terms of Article 8(1)(b) (Section 1.8.1.1.2, pp. 75).

It is important to underline that the concept of internal protection is based on a distinction being made between a person’s home area and an alternative part or parts of the country. When identifying the home area, the strength of the applicant’s connections with this area needs to be assessed and relevant factors in assessing this will include whether the applicant subsequently lived in and settled in another part or parts of the country before departure. In cases where close connections have been established with a new area, that will ordinarily be taken to be that person’s home area, rather than that person’s area of birth and upbringing.

#### 1.8.1.1.1 Absence of persecution or serious harm (Article 8(1)(a))

Article 8(1)(a) requires that the applicant has no well-founded fear of being persecuted or is not at real risk of suffering serious harm in the part of the country suggested as offering internal protection. The original or any new form of persecution or serious harm in a part of the country will preclude the application of the concept of internal protection (unless access to protection is available pursuant to Article 8(1)(b)). This reading may also be further supported *mutatis mutandis* by the findings of the CJEU in the case of *Abdulla* which concerned the interpretation to be given to Article 11(1)(e) QD (also Article 11(1)(e) of the QD (recast) on cessation. The Court concluded that not only should the original circumstances which justified the person’s fear of persecution no longer exist, but that the person should have ‘no other reason to fear being “persecuted”’<sup>444</sup>.

A similar approach may be found in the jurisprudence of courts and tribunals of Member States. According to the case-law of the Swedish *Migrationsdomstolen* (Migration Court of Appeal), it is vital to be satisfied that the applicant in the proposed area of internal protection would not face other kinds of threats or other forms of persecution<sup>445</sup>. In a similar vein, the French Cour nationale du droit d’asile (National Court of Asylum Law) held in two cases that internal protection was not available for the concerned female Somali applicants, since women who flee violence in the Southern and Central regions of the country suffer from abuse or abductions when they find refuge in camps for internally displaced persons<sup>446</sup>. UNHCR likewise suggests that the assessment of whether the applicant is exposed to a risk of being persecuted or other serious harm upon relocation includes the original or any new form of persecution or other serious harm in the area of relocation<sup>447</sup>.

The State is assumed to have operational capacity to act across the national territory. Consequently, in cases involving the State as an actor of persecution or serious harm the safety criteria, as set out in Article 8(1)(a), would normally not be fulfilled. Yet, the situation may be different where the State is not able to carry out acts amounting to persecution or serious harm in certain areas of the country, for example, in the case of a loose federal State<sup>448</sup>.

When **the actor of persecution or serious harm is a non-State actor** (see Section 1.6.3, pp. 59), the territorial scope of the risk of being persecuted or suffering serious harm should be evaluated first. In addition, the question whether the persecutor is likely to follow the applicant to the area of internal protection should be answered. Pursuant to the case-law of the Swedish *Migrationsdomstolen* (Migration Court of Appeal), internal protection may only be considered in an area where the actor of persecution cannot threaten the person. If there is a real risk that the actor of persecution can reach the person, it is necessary to establish that state protection is

<sup>444</sup> CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para.76.

<sup>445</sup> Migration Court of Appeal (Sweden), UM 4118-07, op. cit., fn. 439 (see EDAL English summary) as quoted in in the ECRE et al., *Actors of Protection and the Application of the Internal Protection Alternative*, op. cit., fn. 360, p. 59.

<sup>446</sup> National Asylum Court (France), judgment of 24 July 2012, application no SOM08FSPVUL and National Asylum Court (France), judgment of 8 December 2011, application no SOM09FSPVUL, as quoted in in the ECRE et al., *Actors of Protection and the Application of the Internal Protection Alternative*, op. cit., fn. 360, p. 15.

<sup>447</sup> UNHCR, *Guidelines on International Protection No. 4*, op. cit., fn. 366, para. 7.

<sup>448</sup> For an example of a case where the state agents were held not to have nationwide reach see High Court (Ireland), judgment of 16 July 2015, *KMA (Algeria) v Refugee Appeals Tribunal & Anor* [2015] IEHC 472.

available in the area<sup>449</sup>. When examining the ability of the actor of persecution to reach the applicant, the Dutch *Raad van State* (Council of State) took into account the fact that the influence of the employer over the applicant did not extend throughout the country<sup>450</sup>. In Germany, in a case involving a female applicant who claimed to be at risk of forced marriage, the *Verwaltungsgericht Augsburg* (Administrative Court Augsburg) pointed out, inter alia, that the applicant's father would soon know of his daughter's return to Kabul, since this fact would get around sooner or later through tribal connections<sup>451</sup>.

In a similar vein, in the cases *DNM v Sweden* and *SA v Sweden*, the ECtHR examined, in the context of Article 3 ECHR, the territorial scope of the risk of ill-treatment posed by family members in Iraq seeking to avenge the honour of the family. The ECtHR noted that one factor possibly weighing against the reasonableness of internal relocation is that a person is persecuted by a powerful clan or tribe with influence at governmental level. However, if the clan or tribe in question is not particularly influential, internal protection might be reasonable in many cases. The ECtHR observed the lack of evidence to support the applicants' claims that the families in question were particularly influential, or powerful or had connections with the authorities in Iraq, and thus would have the means and connections to find the applicant in the area of internal protection<sup>452</sup>. In the *AAM* case, the ECtHR accepted that relocation to the Kurdistan Region of Iraq in early 2014 was a viable alternative for the applicant fearing ill-treatment by al-Qaeda in Mosul and other parts of Iraq where that organisation had a strong presence<sup>453</sup>.

According to the UNHCR:

[I]t is not sufficient simply to find that the original agent of persecution has not yet established a presence in the proposed area. Rather, there must be reason to believe that the reach of the agent of persecution is likely to remain localised and outside the designated place of internal relocation<sup>454</sup>.

#### 1.8.1.1.2 Protection against persecution or serious harm is available (Article 8(1)(b))

As a complement to the requirement set out in Article 8(1)(a) that the applicant has no well-founded fear of being persecuted or is not at real risk of suffering serious harm, Article 8(1)(b) requires that the applicant has access to protection against persecution or serious harm as defined in Article 7 within the proposed area of internal protection. Consequently, internal protection against persecution or serious harm must emanate from **the actors of protection stipulated in Article 7(1) QD (recast) and be effective and non-temporary in accordance with Article 7(2) QD (recast)**. The analysis of Section 1.7 above (pp. 60) thus equally applies when assessing protection against persecution or serious harm for the purpose of internal protection.

Effective protection should be **accessible** for the applicant within the area of internal protection hence enabling him/her to live without, for example, hiding his/her sexual orientation, political or religious beliefs or restraining themselves from other important aspects of their private life, freedom of expression, of association, of religion, etc<sup>455</sup>.

Moreover, according to recital (27) QD (recast), 'where the State or agents of the State are the actors of persecution or serious harm, there should be a presumption that effective protection is not available to the applicant' (see Section 1.6 above, pp. 55). As specified by the Belgian *Conseil du Contentieux des Etrangers* (Council for Alien Law Litigation), when the State is the actor of persecution there is a presumption that there is no effective protection, since the State is assumed to have executive power on the whole of the territory<sup>456</sup>.

When the ECtHR examines the appropriateness of (what it refers to as) an internal flight alternative in expulsion cases falling under Article 3 ECHR, it follows a similar approach. Hence, in the *Chahal* case the ECtHR maintained that the applicant, of Sikh origin, was at particular risk of ill-treatment within the Punjab province but could not

<sup>449</sup> With reference to the decision of Migration Court of Appeal (Sweden), UM 4118-07, op. cit., fn. 439 (see EDAL English summary) as quoted in ECRE et al., *Actors of Protection and the Application of the Internal Protection Alternative*, op. cit., fn. 360, p. 59.

<sup>450</sup> Council of State (the Netherlands), decision of 21 March 2013, no 201105922/1 (Kazakhstan), as quoted in ECRE et al., *Actors of Protection and the Application of the Internal Protection Alternative*, op. cit., fn. 360, p. 59.

<sup>451</sup> Administrative Court Augsburg, Au 6 K 30092, op. cit., fn. 280 (see EDAL English summary).

<sup>452</sup> ECtHR, *DNM v Sweden*, op. cit., fn. 309, para. 57; ECtHR, *SA v Sweden*, op. cit., fn. 309, para. 56.

<sup>453</sup> ECtHR, *AAM v Sweden*, op. cit., fn. 309, paras. 66-74.

<sup>454</sup> UNHCR, *Guidelines on International Protection No. 4*, op. cit., fn. 366, para. 18.

<sup>455</sup> UKUT, judgment of 26 January 2011, *SA (Political Activist – Internal Relocation) Pakistan* [2011] UKUT 30 (IAC), para. 15; High Court (Ireland), judgment of 1 October 2014, *MCA v Refugee Appeals Tribunal & Ors* [2014] IEHC 504, para. 14.

<sup>456</sup> With reference to the decision of the Belgian Council for Aliens Law Litigation of 31 August 2013, application no DRC37FNSNO, as quoted in ECRE et al., *Actors of Protection and the Application of the Internal Protection Alternative*, op. cit., fn. 360, p. 66.

be considered to be safe elsewhere in India as the police in other areas were also reported to be involved in serious human rights violations. The Court was not persuaded, therefore, that the ‘internal flight’ option offers a reliable guarantee against the risk of ill-treatment where the violation of human rights by certain members of the security forces is a recalcitrant and enduring problem in the country<sup>457</sup>. In its *Hilal* judgment, the ECtHR similarly noted that due to the institutional links between the police in mainland Tanzania and the police in Zanzibar as part of the United Republic of Tanzania, it cannot be relied on as a safeguard against arbitrary action<sup>458</sup>.

UNHCR likewise considers that where the feared persecution emanates from or is condoned or tolerated by State actors, including the official party in one party States, as these are presumed to exercise authority in all parts of the country, internal protection normally does not exist. The local or regional bodies, organs or administrations within a State derive their authority from the State. Thus it maintains that:

The possibility of relocating internally may be relevant only if there is clear evidence that the persecuting authority has no reach outside its own region and that there are particular circumstances to explain the national government’s failure to counteract the localised harm<sup>459</sup>.

### 1.8.1.2 Access to part of the country of origin

Even if part of the country of origin is safe for the applicant within the meaning of Article 8(1)(a) or (b), Article 8(1) also imposes a duty on Member States to establish whether an applicant can ‘safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there’. The text of Article 8(1) QD (recast) thereby explicitly mentions **three requirements** for assessing access to internal protection in a part of the country which are reproduced in Table 23 below:

**Table 23: Three cumulative requirements for assessing access to internal protection in a part of the country of origin under Article 8 QD (recast)**

<b>The individual shall be able to:</b>	<b>1)</b>	<b>safely travel</b> to that part of the country;
	<b>2)</b>	<b>legally travel</b> there; and
	<b>3)</b>	<b>gain admittance</b> thereto.

With reference to the three requirements, the Commission’s Proposal referred to the need to ensure the compatibility of the concept of internal protection with Article 3 ECHR, as interpreted in the *Salah Sheekh* judgment of the ECtHR<sup>460</sup>. The three requirements for evaluating access to internal protection are closely followed by the ECtHR in *Salah Sheekh*, *Sufi and Elmi*, *MYH*, *KAB*, *AAM* and other cases falling under Article 3 ECHR<sup>461</sup>. In the *Salah Sheekh* case, the ECtHR observed that the authorities in three relatively safe areas of Somalia do not admit nationals who do not originate from those regions or have clan affiliations in that territory<sup>462</sup>. In the *Sufi and Elmi* case, the ECtHR concluded that a returnee could not safely travel to his region of destination within Somalia, if he had to pass an Al-Shabaab controlled area<sup>463</sup>. In the case of Kurdish Northern Iraq, the ECtHR ruled that there are direct flights from Sweden to that region and all Iraqis, irrespective of ethnic origin or religious beliefs, were free to enter the three Kurdish governorates<sup>464</sup>.

National courts apply this requirement also. According to the French *Conseil d’Etat* (Council of State), it is possible to deny protection to a person who risks female genital mutilation if she has alternative protection in her country, which must satisfy criteria of safe access, installation and normal family life<sup>465</sup>. In relation to the original QD, the German *Bundesverwaltungsgericht* (Federal Administrative Court) underlined that the applicant must be able to reach the internal protection area in a reasonable way. The Court required a fact-based reliable prediction

<sup>457</sup> ECtHR, judgment of 15 November 1996, Grand Chamber, *Chahal v the United Kingdom*, application no 22414/93, paras. 104 and 105.

<sup>458</sup> ECtHR, judgment of 6 March 2001, *Hilal v the United Kingdom*, application no 45276/99, paras. 67 and 68.

<sup>459</sup> UNHCR, *Guidelines on International Protection No. 4*, op. cit., fn. 366, paras. 13 and 14.

<sup>460</sup> European Commission, QD (recast) Proposal, op. cit., fn. 243, p. 7.

<sup>461</sup> ECtHR, *Salah Sheekh v the Netherlands*, op. cit., fn. 349, paras. 143 and 144; ECtHR, *Sufi and Elmi v the United Kingdom*, op. cit., fn. 49, para. 267; ECtHR, *MYH and Others v Sweden*, op. cit., fn. 309, paras. 64-66; ECtHR, *KAB v Sweden*, op. cit., fn. 309, paras. 80-85; ECtHR, *AAM v Sweden*, op. cit., fn. 309, paras. 70-73.

<sup>462</sup> ECtHR, *Salah Sheekh v the Netherlands*, op. cit., fn. 349, para. 142.

<sup>463</sup> ECtHR, *Sufi and Elmi v the United Kingdom*, op. cit., fn. 49, para. 277.

<sup>464</sup> ECtHR, *AAM v Sweden*, op. cit., fn. 309, paras. 70 and 72.

<sup>465</sup> Council of State (France), *Ms DF*, op. cit., fn. 282 (see EDAL English summary).

of actual accessibility. Not only existing deportation opportunities but also variants of the itinerary for voluntary departure in the country of origin should be considered. Given the humanitarian objective of refugee law, it must be shown that there is a safe route that must be reasonable for the person concerned, so that they can access the destination concerned without serious threats<sup>466</sup>. But the individual can be required to cooperate in the acquisition of transit visas<sup>467</sup>. Temporary non-availability of safe areas, for instance, as a result of intermittent transport links or typically superable difficulties in obtaining travel documents and transit visas are irrelevant<sup>468</sup>. The UK House of Lords requires that the applicant must be able to reach the internal protection area ‘without undue hardship or undue difficulty’<sup>469</sup>. According to the Finnish *Korkein hallinto-oikeus* (Supreme Administrative Court), it must be examined whether potential violence and attacks in regions nearby may prevent or considerably complicate the ability to return to the region of internal protection<sup>470</sup>.

### 1.8.1.3 Reasonableness for the applicant to settle in a part of the country of origin

The reasonableness requirement flows from Article 8(1) QD (recast) which allows Member States to apply the notion of internal protection in the assessment of an application only if the applicant ‘can **reasonably** be expected to settle’ in the proposed area of internal protection. The QD (recast), however, does not offer any relevant criteria that might be relied upon when establishing whether it would indeed be reasonable for the applicant to settle in a part of the country of origin that otherwise fulfills the requirements flowing from the notion of internal protection. In the absence of relevant CJEU jurisprudence, some insight may be drawn from the approach taken by courts and tribunals of Member States; ECtHR pronouncements which have applied very similar criteria; approaches advanced at national level; and UNHCR guidelines. In general, all these sources tend to rely on a **rights-based approach** when performing the reasonableness test, but the level to which basic human rights must be protected is not clearly defined and remains open to debate<sup>471</sup>.

The *Salah Sheekh* case appears to indicate that for the ECtHR the key criterion is whether an issue under Article 3 ECHR arises because the applicant would be exposed to treatment contrary to Article 3 ECHR in the internal protection area<sup>472</sup>. This approach was further elaborated in *Sufi and Elmi* where the ECtHR did not recognise the proposed internal protection area because the conditions there amounted to inhuman treatment prohibited by Article 3 ECHR:

[Internally displaced persons] in the Afgooye Corridor have very limited access to food and water, and shelter appears to be an emerging problem as landlords seek to exploit their predicament for profit. Although humanitarian assistance is available in the Dadaab camps, due to extreme overcrowding access to shelter, water and sanitation facilities is extremely limited. The inhabitants of both camps are vulnerable to violent crime, exploitation, abuse and forcible recruitment. [...] The refugees in the Dadaab camps are not permitted to leave and would therefore appear to be trapped in the camps until the conflict in Somalia comes to an end. In the meantime, the camps are becoming increasingly overcrowded as refugees continue to flee the situation in Somalia<sup>473</sup>.

In *AAM*, however, the ECtHR noted that internal relocation inevitably involves certain hardships and found no indication, based on the circumstances of the case that the general living conditions in the relocation region for the applicant ‘would be unreasonable or in any way amount to treatment prohibited by Article 3’<sup>474</sup>. At the same time, to consider that internal protection is only excluded if an applicant faces a violation of a non-derogable right such as Article 3 ECHR would be too stringent<sup>475</sup>. This flows logically from the fact that even if an applicant will not

<sup>466</sup> Federal Administrative Court (Germany), judgment of 29 May 2008, BVerwG 10 C 11.07, BVerwG:2008:290508U10C11.07.0, p. 186, para. 19.

<sup>467</sup> See in this regard, EWCA (UK), judgment of 23 October 2013, *HF (Iraq) & Ors v Secretary of State for the Home Department* [2013] EWCA Civ 1276, paras. 99-104 per Lord Justice Elias.

<sup>468</sup> Federal Administrative Court (Germany), BVerwG 10 C 11.07, op. cit., fn. 466, paras. 19 and 20.

<sup>469</sup> House of Lords (UK), judgment of 15 February 2006, *Januzi v Secretary of State for the Home Department*, [2006] UKHL 5, para. 47.

<sup>470</sup> Supreme Administrative Court (Finland), judgment of 18 March 2011, KHO:2011:25.

<sup>471</sup> As observed by a commentator, ‘there seems to be broad agreement that if life for the individual claimant in an [internal protection] would involve economic annihilation, utter destitution or existence below a bare subsistence level (*Existenzminimum*) or deny “decent means of subsistence” that would be unreasonable. On the other end of the spectrum a simple lowering of living standards or worsening of economic status would not’: H. Storey, *The Internal Flight Alternative Test: The Jurisprudence Re-Examined*, IJRL (1998), pp. 516 and 527, quoted in House of Lords (UK), *Januzi v Secretary of State for the Home Department*, op. cit., fn. 469, para. 20.

<sup>472</sup> ECtHR, *Salah Sheekh v the Netherlands*, op. cit., fn. 349.

<sup>473</sup> ECtHR, *Sufi and Elmi v the United Kingdom*, op. cit., fn. 49, para. 291.

<sup>474</sup> ECtHR, *AAM v Sweden*, op. cit., fn. 309, para. 73.

<sup>475</sup> See House of Lords (UK), judgment of 14 November 2007, *Secretary of State for the Home Department v AH (Sudan) and Others* [2007] UKHL 49.

face a new or fresh (real) risk of persecution in the other part of the country, he/she can still show he/she has no viable internal protection if able to show it would be unreasonable for him to settle there.

Pursuant to the UK case-law<sup>476</sup>, reasonable means it should not be unduly harsh to expect the applicant to relocate. The UK House of Lords examined different ‘reasonableness’ tests. In the *Januzi* case, Lord Bingham described the approach as follows:

Suppose a person is subject to persecution for Convention reasons in the country of his nationality. It is a poor country. Standards of social provision are low. There is a high level of deprivation and want. Respect for human rights is scant. [...] He could, with no fear of persecution, live elsewhere in his country of nationality, but would suffer there all the drawbacks of living in a poor and backward country. It would be strange if the accident of persecution were to entitle him to escape, not only from that persecution, but also from the deprivation to which his home country is subject. It would, of course, be different if the lack of respect for human rights posed threats to his life or exposed him to the risk of inhuman or degrading treatment or punishment<sup>477</sup>.

The German *Bundesverwaltungsgericht* (Federal Administrative Court) has decided in several judgments that an applicant can reasonably be expected to stay in the internal protection area only if the basis for subsistence is sufficiently assured<sup>478</sup>. This standard for economic survival goes beyond the absence of an existential plight. An appellant cannot be reasonably expected to lead a life at the margins of the minimum subsistence level. He/she cannot be expected to ensure the economic subsistence level by criminal activity<sup>479</sup>. However the Court has left open what additional economic and social standards must be met<sup>480</sup>.

## 1.8.2 Requirements of examination (Article 8(2))

Article 8(2) QD (recast) details the requirements for Member States (and hence all decision-making bodies within Member States) applying Article 8 to determine whether internal protection is available to an applicant in a part of his/her country of origin. These concern the prospective nature of the assessment that needs to be made (Section 1.8.2.2, pp. 79); and the factors to be taken into consideration, that is, general circumstances in the part of the country of origin and personal circumstances of the applicant (Section 1.8.2.3, pp. 79). Before examining these in turn, it is however worth first considering at what stage of status determination an examination of internal protection has to take place (Section 1.8.2.1, pp. 78).

### 1.8.2.1 Stage of examination

Since, as explained above, the application of the notion of internal protection may only be considered where it is established in the first place that an applicant has a well-founded fear of being persecuted or is at risk of serious harm in his/her region of origin, the existence of a localised fear (risk) needs to be established **before** examining the existence of internal protection in another particular area. This approach is indispensable for an adequate assessment of the availability of internal protection, notably as regards the assessment of the ability of actors of persecution or serious harm to trace the applicant in another part of the country and the feasibility of safe and legal travel to that area. This approach also entails that if an applicant has not established a well-founded fear of persecution or serious harm in his/her home area, there is no need for the national court or tribunal to go on to consider internal protection.

<sup>476</sup> See House of Lords (UK), *Januzi v Secretary of State for the Home Department*, op. cit., fn. 469; and House of Lords (UK), *Secretary of State for the Home Department v AH (Sudan) and Others*, op. cit., fn. 475.

<sup>477</sup> House of Lords (UK), *Januzi v Secretary of State for the Home Department*, op. cit., fn. 469, per Lord Bingham.

<sup>478</sup> Federal Administrative Court (Germany), BVerwG 10 C 15.12, op. cit., fn. 434, para. 20, available in English at [www.bverwg.de](http://www.bverwg.de).

<sup>479</sup> Federal Administrative Court (Germany), judgment of 1 February 2007, BVerwG 1 C 24.06, BVerwG:2007:010207U1C24.06.0, para. 11.

<sup>480</sup> See Dörig in: Hailbronner/Thym, op. cit., fn. 75, Art. 8 para. 16.



### 1.8.2.2 Forward-looking assessment

Article 8(2) QD (recast) requires Member States first of all to assess the availability of internal protection ‘**at the time of taking the decision on the application**’<sup>481</sup>.

In the second place, it follows from the need to establish whether there is a well-founded fear or real risk of serious harm and the requirement that protection be non-temporary and durable, that there is a forward-looking assessment. As observed by a Hungarian court:

[A]uthority has to make sure that the applicant would not be at risk of persecution or serious harm in the proposed region [...] not only at the time of making the decision but in the future as well. Countries that face armed conflicts usually cannot offer a safe internal protection alternative because moving front lines may render previously safe areas unsafe as the situation changes<sup>482</sup>.

### 1.8.2.3 General circumstances in the part of the country of origin and personal circumstances of the applicant

Article 8(2) requires Member States when applying Article 8(1) to ‘have regard to the **general circumstances prevailing in that part of the country** and to the **personal circumstances of the applicant** in accordance with Article 4’<sup>483</sup>. Such an assessment needs to ensure that ‘precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office’.

While the CJEU has not yet pronounced on this, the requirement to examine personal circumstances in addition to country of origin information is reflected in the case-law of the courts and tribunals of Member States applying the QD<sup>484</sup>. According to the Czech *Nejvyšší správní soud* (Supreme Administrative Court), when considering internal protection, it needs to be examined whether protection is available from a legal and factual point of view with regard to the particular situation of the applicant<sup>485</sup>. As demonstrated by a number of judgments in different Member States, areas which, in general, might be regarded as possible internal protection areas, may not be a viable internal protection area for a particular applicant due to his/her personal circumstances. For example, in Belgium, internal protection was not recognised as being a viable option for an applicant from Georgia with a significant history of psychopathological and psychological issues<sup>486</sup>. In the Czech Republic, a Court noted that the applicant from Congo was an unaccompanied woman and wife to a prominent political leader representing interests of their ethnic groups<sup>487</sup>. In Finland, the applicant, who for the first part of his life lived in a Hazara village in Afghanistan and the other part of his life in Iran, could not reasonably be expected to settle in other parts of Afghanistan<sup>488</sup>. In Norway, an applicant from Somalia was deemed not to be reasonably expected to settle in Puntland or Somaliland, because he did not belong to a majority clan and therefore he would not be able to support himself there<sup>489</sup>. In the UK, an applicant who was traumatised and suffering from anxiety and depression, was regarded as having more vulnerable personal circumstances than other women in Kampala, Uganda in general<sup>490</sup>.

The ECtHR has applied similar criteria in expulsion cases under Article 3 ECHR. For example, in *DNM*, the ECtHR, in addition to the general situation and violence in Iraq, also examined the personal circumstances of the applicant who was a Kurd and a Sunni Muslim and concluded that the applicant was not exposed to a real risk of

<sup>481</sup> By virtue of Article 46(3) APD (recast), an effective remedy against a negative decision requires there to be ‘a full and ex nunc examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to [the QD (recast)], at least in appeals procedures before a court or tribunal of first instance’.

<sup>482</sup> Administrative and Labour Court of Budapest (Hungary), judgment of 11 October 2011, 6.k.34.830/2010/19, as quoted in ECRE et al., *Actors of Protection and the Application of the Internal Protection Alternative*, op. cit., fn. 360, p. 59. The timing of the internal protection alternative assessment is elaborated in UNHCR, *Guidelines on International Protection No. 4*, op. cit., fn. 366, para. 8: ‘the determination of whether the proposed internal flight or relocation area is an appropriate alternative in the particular case requires an assessment over time, taking into account not only the circumstances that gave rise to the persecution feared, and that prompted flight from the original area, but also whether the proposed area provides a meaningful alternative in the future.’

<sup>483</sup> Emphasis added.

<sup>484</sup> See, for instance, UKUT (IAC), judgment of 31 January 2013, *CM (EM Country Guidance; Disclosure) Zimbabwe CG* [2013] UKUT 00059 (IAC).

<sup>485</sup> Supreme Administrative Court (Czech Republic), *IJ v Minister of the Interior*, op. cit., fn. 364 (see EDAL English summary).

<sup>486</sup> Council for Alien Law Litigation (Belgium), decision of 30 June 2011, no 64.233, para. 5.4.2.

<sup>487</sup> Supreme Administrative Court (Czech Republic), judgment of 24 January 2008, *EM v Ministry of Interior*, 4 Azs 99/2007-93 (see EDAL English summary).

<sup>488</sup> Supreme Administrative Court (Finland), KHO:2011:25, op. cit., fn. 470.

<sup>489</sup> Borgarting Court of Appeal (Norway), judgment of 23 September 2011, *Abid Hassan Jama v Utledningsnemnda*, 10-142363ASD-BORG/01 (see UNHCR case translation).

<sup>490</sup> EWCA (UK), judgment 22 May 2008, *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579, paras. 22-33.

ill-treatment by the general situation, nor by his personal circumstances within the internal protection area<sup>491</sup>. In *MYH*, the ECtHR took into account such personal circumstances of the applicants as their Christian religion, old age, poor health, female gender, and poor economic and social links to the Kurdistan region, but concluded that neither the general situation in that region, nor any of the applicants' personal circumstances indicated the existence of a real risk of ill-treatment<sup>492</sup>.

According to the UNHCR, 'the personal circumstances of an individual should always be given due weight in assessing whether it would be unduly harsh and therefore unreasonable for the person to relocate in the proposed area'<sup>493</sup>.

When the applicant is an **unaccompanied minor**, the availability of appropriate care and custodial arrangements, which are in the best interest of the unaccompanied minor, should form part of the assessment as to whether that protection is effectively available (recital (27) QD (recast)).

## 1.9 Well-founded fear

### 1.9.1 Well-founded fear (Article 2(d))

The phrase 'well-founded fear' means that there must be a valid objective basis for the applicant's fear of persecution. This element of the refugee definition deals with **the risk or chance of persecution occurring**. The fear is considered well-founded if it is established that there is a 'reasonable' chance of its realisation in future<sup>494</sup>. In order to make this determination, it is necessary to evaluate the applicant's statements in light of all the relevant circumstances of the case (Article 4(3) QD (recast)) and review circumstances existing in his/her country of origin and the conduct of actors of persecution<sup>495</sup>. Therefore, establishing the well-founded fear is closely related to the task of assessment of evidence and credibility governed primarily by Article 4 QD (recast). Evidence assessment, including credibility assessment is step 1. If the applicant's evidence is accepted as credible, the decision-maker then comes to step 2 which is whether the accepted facts and circumstances amount to a well-founded fear. This two-step approach was approved by the CJEU:

In actual fact, that 'assessment' takes place in two separate stages. The first stage concerns the establishment of factual circumstances which may constitute evidence that supports the application, while the second stage relates to the legal appraisal of that evidence, which entails deciding whether, in the light of the specific facts of a given case, the substantive conditions laid down by Articles 9 and 10 or Article 15 of Directive 2004/83 for the grant of international protection are met<sup>496</sup>.

Issues of evidence and credibility, though, will be primarily addressed in the separate Judicial Analysis: *Evidence and Credibility Assessment in the Context of the CEAS – A Judicial Analysis*<sup>497</sup>.

Like the Refugee Convention, the QD (recast) does not contain any definition of the term 'well-founded fear'. Nor does it stipulate the applicable standard of proof. The definition of a 'refugee' in Article 2(d) QD (recast) closely follows the Refugee Convention definition<sup>498</sup> and refers in particular, to a third-country national who is outside the country of his/her nationality 'owing to a well-founded fear of being persecuted' for reasons of race, religion,

<sup>491</sup> ECtHR, *DNM v Sweden*, op. cit., fn. 309, paras. 50 and 58.

<sup>492</sup> ECtHR, *MYH and Others v Sweden*, op. cit., fn. 309, paras. 68-73.

<sup>493</sup> In UNHCR's view, 'depending on individual circumstances, those factors capable of ensuring the material and psychological well-being of the person, such as the presence of family members or other close social links in the proposed area, may be more important than others. [...] Psychological trauma arising out of past persecution may be relevant in determining whether it is reasonable to expect the claimant to relocate in the proposed area'. UNHCR, *Guidelines on International Protection No. 4*, op. cit., fn. 366, paras. 25 and 26.

<sup>494</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 51; CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 43.

<sup>495</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 51; CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 43. See also the CJEU's earlier formulation in CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 57 (which does not include the explicit reference to actors of persecution).

<sup>496</sup> CJEU, judgment of 22 November 2012, case C-277/11, *MM v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, EU:C:2012:744, para. 64. This two-step approach has important consequences, as a different standard of proof may be applied to each step. While it is now widely accepted that the appropriate standard for the second step is 'reasonable fear' of future persecution (see Section 1.9.1.2 on the standard of proof, pp. 82), there is no accepted standard for the first step and each country appears to apply its own standard of proof.

<sup>497</sup> EASO, *Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis*, op. cit., fn. 22.

<sup>498</sup> See Art. 1A(2) of the Refugee Convention.

nationality, political opinion or membership of a particular social group and is unable or, ‘owing to such fear’, unwilling to avail himself of the ‘protection’ of that country<sup>499</sup>.

According to the CJEU, to satisfy the above definition:

[The applicant must] on account of circumstances existing in his country of origin and the conduct of actors of persecution, have a well-founded fear that he personally will be subject to persecution for at least one of the five reasons listed in the [Qualification] Directive and the [Refugee] [...] Convention<sup>500</sup>.

Demonstrating the above-mentioned circumstances ‘will indicate that the third country does not protect its national against acts of persecution’<sup>501</sup> and that:

Those circumstances form the reason why it is impossible for the person concerned, or why he justifiably refuses, to avail himself of the ‘protection’ of his country of origin within the meaning of [Article 2(d) Recast], that is to say, in terms of that country’s ability to prevent or punish acts of persecution<sup>502</sup>.

In addition to the definition of ‘refugee’ stipulated in Article 2(d) QD (recast), two more provisions of the QD (recast) are particularly important for understanding the concept of ‘well-founded fear’: recital (36) QD (recast) addresses the well-founded fear of the family members of a refugee and Article 4(4) QD (recast) sheds light on the significance of past persecution. In this context, it is important to emphasise that Article 4(4) QD (recast) concerns both refugee status and subsidiary protection, whereas Article 2(d) and recital (36) QD (recast) are applicable only to applicants for refugee status. Further guidance on the concept of well-founded fear was provided by the CJEU in particular in *Y and Z*<sup>503</sup>, *Abdulla*<sup>504</sup> and *X, Y and Z*<sup>505</sup>.

### 1.9.1.1 The bipartite test v the objective test

Traditionally, it has been asserted that ‘well-founded fear’ entails two elements:

- 1) a **subjective element**; the existence of fear in the mind of the applicant in the sense of trepidation; and
- 2) an **objective element**; a valid basis for that fear based on the situation in the country of origin and other factors.

For instance, the UNHCR Handbook opines that:

To the element of fear – a state of mind and a subjective condition – is added the qualification ‘well-founded’. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term ‘well-founded fear’ therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, **both elements** must be taken into consideration<sup>506</sup>.

This two-prong assessment of well-founded fear is often referred to as the bipartite or subjective/objective test. This bipartite test has been adopted by several national supreme courts without further analysis or modification<sup>507</sup>.

<sup>499</sup> See also CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 50; CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 42. See also the CJEU’s earlier formulation in CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 56.

<sup>500</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 51; CJEU, *X, Y, and Z* judgment, op. cit., fn. 20, para. 43. See also the CJEU’s earlier formulation in CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 57.

<sup>501</sup> CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 58.

<sup>502</sup> *Ibid.*, para. 59.

<sup>503</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33.

<sup>504</sup> CJEU, *Abdulla and Others* judgment, op. cit., fn. 336.

<sup>505</sup> CJEU, *X, Y and Z* judgment, op. cit., fn. 20.

<sup>506</sup> UNHCR Handbook, op. cit., fn. 107, para. 38 (emphasis added).

<sup>507</sup> See e.g. Federal Administrative Court (Germany), BVerwG 10 C 23.12, op. cit., fn. 170, para. 19, available in English at [www.bverwg.de](http://www.bverwg.de); High Court (Ireland), judgment of 29 March 2001, *Zgnat'ev v Minister for Justice, Equality and Law Reform* [2001] IHHC 70, para. 6; and Supreme Court (UK), *HJ (Iran) and HT (Cameroun) v Secretary of State for the Home Department*, op. cit., fn. 346, para. 17.

However, the subjective element has also been questioned by national courts and tribunals on several grounds<sup>508</sup>. First, there is an inherent danger of equating lack of credibility with absence of subjective fear. In fact, even where there is a finding that an applicant's testimony is not credible, in whole or in part, the decision-maker must nonetheless assess the actual risk faced by an applicant on the basis of other material evidence. Second, looking at the objective element alone avoids the enormous practical risks inherent in attempting objectively to assess the feelings and emotions of an applicant. Third, the absence of a subjective fear would not, on its own, be determinative as some applicants, such as young children and those with a mental disability, may not be able to perceive or express fear at all.

The QD (recast) does not take a stance on whether 'well-founded fear' entails a subjective as well as an objective element. The CJEU has not explicitly addressed it either. However, the fact that the relevant judgments of the CJEU discussing the notion of 'well-founded fear' do not mention the subjective element would seem to indicate that, according to the CJEU, the assessment of well-founded fear does not require evaluation of an applicant's state of mind, and thus the objective test alone is sufficient<sup>509</sup>. In other words, it would seem that the CJEU does not require the subjective element to be met **in addition** to the objective element.

However, application of the objective test requires careful consideration of matters which may be unique to the individual concerned, including his/her beliefs and commitments, in assessing whether the applicant's acts in her country of origin 'will give rise to a **genuine risk** that [he/she] will [...] be persecuted'<sup>510</sup>. In other words, the applicant's personal characteristics and circumstances should be taken into account in determining the level of risk to which the applicant will be exposed in the country of origin. In *Y and Z* the CJEU decided that:

The subjective circumstance that the observance of a certain religious practice in public [...] is **of particular importance to the person concerned** in order to preserve his religious identity is a relevant factor to be taken into account in **determining the level of risk** to which the applicant will be exposed in his country of origin on account of his religion, even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned<sup>511</sup>.

The issue of the objective standard for assessing well-founded fear is dealt with in more detail in *Evidence and Credibility Assessment in the Context of the CEAS – A Judicial Analysis*<sup>512</sup>.

### 1.9.1.2 The standard of proof

The QD (recast) does not prescribe the standard of proof required for the fear to be considered 'well-founded'. However, the CJEU in its *Y and Z* judgment clarified that when assessing whether an applicant has a well-founded fear of being persecuted the competent authorities are required:

in the system provided for by the [QD] [...] to ascertain whether or not the circumstances established constitute such a threat that the person concerned may *reasonably* fear, in the light of his individual situation, that he will in fact be subject to acts of persecution<sup>513</sup>.

The CJEU's '**reasonable fear**' test is in line with the tests for assessing well-founded fear developed by the national courts and tribunals of Member States. For the German *Bundesverwaltungsgericht* (Federal Administrative Court) the fear of persecution is well-founded if, in view of his/her individual situation, the third-country national is in fact threatened, i.e. with a remarkable **probability or real risk**, with persecution in the meaning of Article 2(d) because of the circumstances prevailing in his/her country of origin<sup>514</sup>. Since, despite this wording the same Court makes clear that this test is lower than one which requires more than 50 percent, it would appear

<sup>508</sup> See e.g. House of Lords (UK), *R v Secretary of State for the Home Department, ex parte Sivakumaran and Others*, op. cit., fn. 346, 998 ff; Refugee Appeals Board (France), decision of 20 October 1999, *Straracexka*, application no 140222; and High Court (Australia), judgment of 12 September 1989, *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62. For further details, see A. Zimmermann and C. Mahler, op. cit., fn. 188, pp. 338-341; J.C. Hathaway and M. Foster, fn. 137, pp. 95-105; J.C. Hathaway, R.P.G. Haines, M. Foster, K. Hailbronner et al., '*The Michigan Guidelines on Well-Founded Fear*', Michigan Journal of International Law (2005) 492-502, paras. 3-6; G.S. Goodwin-Gill and J. McAdam, op. cit., fn. 141, pp. 63 and 64.

<sup>509</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33; CJEU, *X, Y and Z* judgment, op. cit., fn. 20; and CJEU, *Abdulla and Others* judgment, op. cit., fn. 336.

<sup>510</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 69 (emphasis added).

<sup>511</sup> *Ibid.*, para. 70 (emphasis added).

<sup>512</sup> See EASO, *Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis*, op. cit., fn. 22.

<sup>513</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 76 (emphasis added). See also CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 89; and CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 72.

<sup>514</sup> Federal Administrative Court (Germany), *BVerwG 10 C 23.12*, op. cit., fn. 170, para. 19, available in English at [www.bverwg.de](http://www.bverwg.de).

to be much the same standard as applied by the British courts and tribunals. For the UK Supreme Court the fear is well-founded if there is a ‘**real and substantial risk**’ or a ‘**reasonable degree of likelihood**’ of persecution for a Convention reason<sup>515</sup>.

Most importantly, all of these tests hold that the fear is well-founded, notwithstanding that there is less than a 50 percent chance of persecution occurring. Similarly, the ECtHR in *Saadi v Italy* in the context of Article 3 ECHR held that the applicant is not obliged ‘[to prove] that being subjected to ill-treatment is more likely than not’<sup>516</sup>. The ‘**reasonable fear**’ test thus means that while the mere chance or remote possibility of being persecuted is insufficient risk to establish a well-founded fear, the applicant does not need to show that there is a more than 50 percent probability that he/she will be persecuted<sup>517</sup>. The issue of the objective standard for assessing well-founded fear is dealt with in more detail in *Evidence and Credibility Assessment in the Context of the CEAS – A Judicial Analysis*<sup>518</sup>.

## 1.9.2 Current risk and significance of past persecution (Article 4(4))

The word ‘fear’ reflects the forward-looking emphasis of the Refugee Convention and QD refugee definitions. The QD (recast) extends protection not only to persons who have actually been persecuted, but also to those at risk of ‘being persecuted’<sup>519</sup>. It also reflects acceptance that a threat of persecution can suffice to constitute persecution. Therefore, a person does not need to wait to have been persecuted before applying for international protection but may rather be ‘in fear of’ future persecution.

The CJEU stressed the **forward-looking nature of the well-founded fear** in *Y and Z*, where it held that:

[W]hen assessing whether, in accordance with Article 2(c) thereof, an applicant has a well-founded fear of being persecuted, the competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he **will in fact** be subject to acts of persecution<sup>520</sup>.

It also stressed that the ‘assessment of the extent of the risk must, in all cases, be carried out **with vigilance and care**’<sup>521</sup> and must be based solely on ‘a specific evaluation of the facts and circumstances, in accordance with the rules laid down in particular by Article 4 [QD]’<sup>522</sup>. Although not using the language of vigilance and care, the ECtHR in similar vein states that the existence of a real risk concerning a violation of Article 3 of the ECHR must necessarily be a rigorous one<sup>523</sup>.

An important element in assessing the current risk of persecution is **past persecution** of the applicant. Significance of past persecution is addressed in Article 4(4) QD (recast) which stipulates that:

The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a **serious indication** of the applicant’s well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated<sup>524</sup>.

Importantly, past persecution, as defined by Article 4(4) QD (recast), includes not only acts of persecution, but also threats of persecution<sup>525</sup>. Therefore, both earlier acts and threats of persecution are ‘**indications of the valid-**

<sup>515</sup> UK Supreme Court, *RT (Zimbabwe) & Ors v Secretary of State for the Home Department*, op. cit., fn. 292, para. 55.

<sup>516</sup> ECtHR, judgment of 28 February 2008, Grand Chamber, *Saadi v Italy*, application no 37201/06, para. 140.

<sup>517</sup> See cases cited in the previous five footnotes. See also J.C. Hathaway, R.P.G. Haines, M. Foster, K. Hailbronner et al., ‘*The Michigan Guidelines on Well-Founded Fear*’, op. cit., fn. 508, para. 6.

<sup>518</sup> See EASO, *Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis*, op. cit., fn. 22.

<sup>519</sup> See CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 74 and 75; and CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 63 and 64. See also UNHCR Handbook, op. cit., fn. 107, para. 45.

<sup>520</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 76 (emphasis added). See also CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 89; and CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 72.

<sup>521</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 77 (emphasis added). See also CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 90; and CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 73.

<sup>522</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 77.

<sup>523</sup> See ECtHR, *Chahal v the United Kingdom*, op. cit., fn. 457, para. 96; and ECtHR, *Saadi v Italy*, op. cit., fn. 516, para. 129.

<sup>524</sup> Emphasis added.

<sup>525</sup> See CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, paras. 94, 96 and 97.

ity of [applicant's] fear that the persecution in question will recur if he returns to his country of origin<sup>526</sup>. If the applicant has **already** been subject to persecution or to direct threats of persecution, then, in accordance with Article 4(4) QD, this would in and of itself be a 'serious indication of well-founded fear'<sup>527</sup>.

This means that there is **no requirement of past persecution**, but **evidence of past persecution is a serious indication** of the applicant's well-founded fear of persecution, unless there are good reasons to consider that such persecution will not be repeated.

However, **this serious indication is rebuttable**. Most importantly, the fear may no longer be well-founded if the circumstances in the country of origin have changed since occurrences of the past persecution. For instance, a regime change may provide good reasons to consider that such persecution will not be repeated<sup>528</sup>. In this sense, the criteria in the cessation clause stipulated in Article 11(2) QD (recast) have analogous relevance. According to the CJEU in *Abdulla*, this **change of circumstances** 'must be "of such a significant and non-temporary nature" that the refugee's fear of persecution can no longer be regarded as well founded'<sup>529</sup>. The change of circumstances will be of a 'significant and non-temporary' nature, within the terms of Article 11(2) QD (recast), 'when the factors which formed the basis of the refugee's fear of persecution may be regarded as having been **permanently eradicated**'<sup>530</sup>. In other words, the assessment of the significant and non-temporary nature of the change of circumstances 'implies that there are no well-founded fears of being exposed to acts of persecution amounting to severe violations of basic human rights within the meaning of Article 9(1) of the [Qualification] Directive'<sup>531</sup>. The words of 'serious indication' in Article 4(4) QD (recast) thus make clear that national decision-makers must always consider past persecution (and past serious harm) a serious indication of the well-founded fear (and the real risk).

In *Abdulla*, the CJEU also stated that where, in accordance with Article 4(4) QD (now Article 4(4) QD (recast)), applicants rely on past acts or threats of persecution to demonstrate a well-founded fear of being persecuted, they must also show that those acts or threats were connected with the same reason as for the future feared persecution<sup>532</sup> (see Section 1.5 above, pp. 43, on the reasons for persecution).

However, an applicant who, prior to departure from his/her country of origin, was not subject to persecution, nor directly threatened with persecution, can establish by other evidence a well-founded fear of being persecuted in the foreseeable future, as is logically implied by Article 5(1)QD (recast), which deals with international protection claims *sur place*. The acceptance of *sur place* claims thus makes clear that, in assessing the significance of past persecution, it is necessary to distinguish applicants who fled persecution and still have a current well-founded fear from those who have left their country of origin and only subsequently acquired a well-founded fear of persecution<sup>533</sup>. In addition, it must be borne in mind that an applicant may have been subject to harm in the past – which did not amount to persecution – but which is nevertheless relevant evidence in assessing well-founded fear of being persecuted in future.

### 1.9.3 Evidence of risk to persons similarly situated

Even though it is required that the applicant has 'a well-founded fear that he *personally* will be subject to persecution'<sup>534</sup>, the **considerations of well-foundedness do not necessarily need to be based on the applicant's own experience**<sup>535</sup>. For example, what has happened to family, friends and other members of the racial or social group of which the applicant is a member may indicate that his/her fear is well-founded, but further factual basis might be required<sup>536</sup>.

<sup>526</sup> *Ibid.*, para. 94 (emphasis added). See also CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 64; and Administrative Court (Republic of Slovenia), I U 411/2015-57, op. cit., fn. 183, para. 74 (stressing the importance of the term 'serious indication'). For further analysis of this issue, see also Administrative Court (Republic of Slovenia), judgment of 18 April 2014, *Essomba*, I U 1982/2013-45; Administrative Court (Republic of Slovenia), judgment of 24 April 2014, *Mustafa*, I U 1474/2013-26 (both referring to the judgment of the ECtHR in case of *Koktysh v Ukraine* (judgment of 10 December 2009, application no 43707/07, para. 90).

<sup>527</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 75; and CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 64.

<sup>528</sup> Federal Administrative Court (Germany), judgment of 7 February 2008, BVerwG 10 C 33.07, BVerwG:2008:070208B10C33.07.0, paras. 40 and 41.

<sup>529</sup> CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 72.

<sup>530</sup> *Ibid.*, para. 73 (emphasis added).

<sup>531</sup> *Ibid.* (emphasis added).

<sup>532</sup> CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 94.

<sup>533</sup> See Section 1.9.6 dealing with the concept of refugee *sur place*, pp. 86.

<sup>534</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 51; CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 43. See also the CJEU's earlier formulation in CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 57.

<sup>535</sup> UNHCR Handbook, op. cit., fn. 107, para. 43.

<sup>536</sup> See in this regard recital (36) QD (recast) which states '[f]amily members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status'. See also Section 1.5.2.4, pp. 48, dealing with the particular social group ground of persecution.

## 1.9.4 Issue of discretion

The issue of discretion is not addressed in the text of either the Refugee Convention or the QD (recast) but it has achieved prominence through applications for refugee status based on a fear of religious persecution or persecution on grounds of sexual orientation. The term is used to refer to the erroneous notion that applicants may be expected to conceal activities which may lead to them being persecuted and thus grounding denial of refugee status. In other words, through this erroneous notion, it has been suggested that if applicants may prevent their persecution by concealing their activities, their fear is no longer well-founded.

The **CJEU rejected the existence of such a requirement to exercise discretion** in the *Y and Z* and *X, Y and Z* judgments. In *Y and Z*, the CJEU was asked whether a fear of being persecuted is well-founded if, without being required to give up religious practice altogether, the person concerned can ‘avoid exposure to persecution [...] by abstaining from certain religious practices’<sup>537</sup>. The CJEU was subsequently asked a similar question in the joined cases of *X, Y and Z*, namely whether the applicant can be expected to avoid being persecuted by ‘conceal[ing] his homosexuality [from everyone in his country of origin] [...] or exercising restraint in expressing it’<sup>538</sup>.

In *Y and Z*, the CJEU then looked to the rules in Article 4 QD as a whole to determine whether an applicant could reasonably be expected to abstain from religious practices that would expose him/her to a risk of persecution. It held that:

None of [the rules in Article 4 QD] states that, in assessing the extent of the risk of actual acts of persecution in a particular situation, it is necessary to take account of the possibility open to the applicant of avoiding the risk of persecution by abstaining from the religious practice in question and, consequently, renouncing the protection which the Directive is intended to afford the applicant by conferring refugee status. It follows that, where it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status [...]. **The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant.** [...] In assessing an application for refugee status on an individual basis, [the competent] authorities cannot reasonably expect the applicant to abstain from those religious practices<sup>539</sup>.

However, it is relevant to take into account the importance of a particular practice for the applicant in determining the level of risk to which he/she would be exposed in the country of origin, as stated by the CJEU:

The subjective circumstance that the observance of a certain religious practice in public, which is subject to the restrictions at issue, is of particular importance to the person concerned in order to preserve his religious identity is a relevant factor to be taken into account in determining the level of risk to which the applicant will be exposed in his country of origin on account of his religion, even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned<sup>540</sup>.

Furthermore, when assessing whether an applicant has a well-founded fear of being persecuted ‘the competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subject to acts of persecution’<sup>541</sup> and that assessment of the extent of the risk ‘will be based solely on a specific evaluation of the facts and circumstances’<sup>542</sup>.

In *X, Y and Z*, the CJEU took an analogous approach and concluded that homosexual **applicants could not reasonably be expected to exercise restraint** in the expression of their sexual orientation in order to avoid a risk of being

<sup>537</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 73.

<sup>538</sup> CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 65.

<sup>539</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, paras. 78-80 (emphasis added). See also Section 1.5.2.2, pp. 47, on religion as a ground of persecution.

<sup>540</sup> CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 70.

<sup>541</sup> *Ibid.*, para. 76.

<sup>542</sup> *Ibid.*, para. 77. The Czech Supreme Administrative Court has followed the approach taken by the CJEU in *Y and Z* in a case concerning an Iranian convert to Christianity (judgment of 29 May 2014, *XY v Ministry of Interior*, Azs 2/2013–26, English summary presented and discussed at IARLJ Workshop in Berlin 1 June 2015 ‘Refugee Recognition and Discreet Behaviour’). In context of country of origin information indicating, inter alia, that despite of continued serious repressions against the converts in Iran (death penalty prescribed by law, torture, imprisonment), they are not sentenced to death penalty by Iranian courts, if they renounce the conversion during the trial, and that Iranian authorities usually tolerate if a non-Islamic religion is practised in privacy and not promoted in public places, the Supreme Administrative Court referred to the CJEU judgment in *Y and Z* and reiterated, that an applicant for international protection cannot be required to prevent his/her persecution in the country of origin by refraining from public expression of his/her faith.

persecuted<sup>543</sup>, **with the exception of acts that are considered to be criminal** in accordance with the national law of EU Member States<sup>544</sup>. Otherwise, for the purposes of determining the reasons for persecution, there is no limitation on ‘the attitude that the members of a particular social group may adopt with respect to their identity or to behaviour which may or may not fall within the definition of sexual orientation’<sup>545</sup>. Requiring members of a social group sharing the same sexual orientation to conceal that orientation is ‘incompatible with the recognition of a characteristic so fundamental to a person’s identity that the persons concerned cannot be required to renounce it’<sup>546</sup>. Nor can the applicants be expected to conceal their sexual orientation in order to avoid persecution<sup>547</sup>. The fact that an applicant could avoid the risk by exercising greater restraint than a heterosexual in expressing his/her sexual orientation is not to be taken into account in that respect<sup>548</sup>.

The German *Bundesverwaltungsgericht* (Federal Administrative Court) followed the approach when applying the CJEU judgment in *Y and Z* in the domestic proceedings that no restraint or discretion can be expected<sup>549</sup>. The abovementioned conclusions from the *Y and Z* and *X, Y and Z* judgments are, by analogy, applicable to political opinion as well.

### 1.9.5 Assessment of well-founded fear within the context of generalised violence

Assessment of well-founded fear within the context of generalised violence which features for example civil war, armed conflict, or tribal conflicts raises complex and specific issues that are closely intertwined with subsidiary protection based on Article 15(c) QD (recast)<sup>550</sup>. However, it is important to stress that the fact that an applicant has fled a situation of generalised violence does not mean that he/she is only eligible for subsidiary protection status under Article 15(c) QD (recast). In all cases, it is necessary to assess first whether the applicant faces a well-founded fear of being persecuted for one or more of the five reasons stipulated by the Refugee Convention and the QD (recast)<sup>551</sup>. For instance, while the situation in Mogadishu was generally grave in the 2000s and the risk of persecution and serious harm real for many, much depended on the particular circumstances<sup>552</sup> of individual clan members. Members of certain ethnic minorities in Somalia such as the Shekhal Gandhershe and the Shekhal Jasira were specifically targeted and thus qualified for refugee status<sup>553</sup>.

### 1.9.6 International protection needs arising *sur place* (Article 5)

A person who was not a refugee or a beneficiary of subsidiary protection when he/she left his/her country of origin, but who becomes a refugee or a beneficiary of subsidiary protection at a **later date**, is called a refugee or a subsidiary protection beneficiary *sur place*. A person becomes a **refugee *sur place*** – or a beneficiary of subsidiary protection *sur place* – due to significant changes in his/her country of origin (for example, due to a coup d’état) or because of actions taken by, or impacting, the applicant outside the country of origin (for example, because of his/her dissident political behaviour in the country of asylum).

The notion of refugee *sur place* or of beneficiary of subsidiary protection *sur place* is defined in Article 5 QD (recast). As apparent in the Table 24 below, each paragraph has a specific scope of application *ratione personae*:

<sup>543</sup> CJEU, *X, Y and Z* judgment, op. cit., fn. 20, paras. 74-76.

<sup>544</sup> *Ibid.*, paras. 66 and 67.

<sup>545</sup> *Ibid.*, paras. 67 and 68.

<sup>546</sup> *Ibid.*, para. 70.

<sup>547</sup> *Ibid.*, para. 71.

<sup>548</sup> *Ibid.*, para. 75.

<sup>549</sup> Federal Administrative Court (Germany), BVerwG 10 C 23.12, op. cit., fn. 170, para. 27, available in English at [www.bverwg.de](http://www.bverwg.de).

<sup>550</sup> For further details, see EASO, *Article 15(c) Qualification Directive (2011/95/EU) – A Judicial Analysis*, op. cit., fn. 436.

<sup>551</sup> See e.g. UKIAT, *AM & AM (Armed Conflict: Risk Categories) Somalia CG*, op. cit., fn. 386. See also J.C. Hathaway and M. Foster, op. cit., fn. 137, pp. 174-181.

<sup>552</sup> For a non-exhaustive list of these factors, see UKIAT, *AM & AM (Armed Conflict: Risk Categories) Somalia CG*, op. cit., fn. 386, para. 160.

<sup>553</sup> *Ibid.*, para. 168.



**Table 24: Article 5 QD (recast) – Personal scope of application**

Article 5	Nature of the provision	Personal scope of application
'1. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.'	Mandatory	Applicants for: <ul style="list-style-type: none"> <li>– refugee status; and</li> <li>– subsidiary protection.</li> </ul>
'2. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which the applicant has engaged in since he or she left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.'	Mandatory	Applicants for: <ul style="list-style-type: none"> <li>– refugee status; and</li> <li>– subsidiary protection.</li> </ul>
'3. Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin.'	Optional	Applicants for: <ul style="list-style-type: none"> <li>– refugee status.</li> </ul>

As illustrated above and implied by recital (25)<sup>554</sup>, it is clear that Article 5(1) and (2) are mandatory<sup>555</sup>, whereas Article 5(3) is optional. Therefore, a Member State that completely denies refugee *sur place* applications either on Article 5(1) ground or on Article 5(2) ground or both would be in breach of the QD (recast). As discussed below, it is also important to emphasise that Article 5 must be interpreted in conjunction with Article 4(3)(d) QD (recast), which requires any assessment to take into account:

whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country.

The CJEU has not had the opportunity to clarify the interpretation of *sur place* applications stipulated in Article 5 so far. However, there has been some consideration of its ambit in decisions of national courts and tribunals. For instance, the UK EWCA, having regard to Articles 4 and 5 QD, held that a difference exists between *sur place* activities pursued by a political dissident against his/her own government in the country where he/she is seeking asylum which may expose him/her to a risk of ill treatment or persecution and activities that were pursued solely with the motive of creating such a risk<sup>556</sup>. However, it opined that the QD should not be interpreted to prevent a priori a claim based on opportunism. Instead, the QD requires an assessment of whether the authorities in the country of origin are likely to observe and record the applicant's activities and recognises that those authorities may realise or be persuaded that the activity was insincere and, the fear of consequent ill-treatment not well-founded<sup>557</sup>.

The ECtHR has also dealt with the notion of *sur place* in the context of interpreting Article 3 ECHR. In *SF v Sweden*<sup>558</sup>, *AA v Switzerland*<sup>559</sup>, *HS and Others v Cyprus*<sup>560</sup>, and *FG v Sweden*<sup>561</sup>, the ECtHR addressed both the 'continuation' type as well as the 'brand new' type *sur place* activities in the context of Article 3 ECHR. Moreover, it emphasised that:

<sup>554</sup> This recital stipulates that: 'In particular, it is necessary to introduce **common concepts** of protection needs arising *sur place* [...]' (emphasis added).

<sup>555</sup> Although both Art. 5(1) and (2) use the word 'may' they are not permissive, but simply intended to be illustrative of forms of well-founded fear of being persecuted and real risk of suffering serious harm which are the mandatory conceptual elements for engaging the relevant form of international protection status. See also IARLJ, *A Manual for Refugee Law Judges Relating to the European Council Qualification Directive 2004/84/EC and European Council Procedures Directive 2005/85/EC*, 2007, p. 51; and H. Battjes, *op. cit.*, fn. 117, p. 544; *contra* K. Hailbronner and S. Alt, *op. cit.*, fn. 248, p. 1040.

<sup>556</sup> EWCA (UK), judgment of 15 April 2008, *YB (Eritrea) v the Secretary of State for the Home Department* [2008] EWCA Civ 360, para. 13.

<sup>557</sup> *Ibid.*, paras. 14 and 15.

<sup>558</sup> ECtHR, judgment of 15 May 2012, *SF v Sweden*, application no 52077/10, paras. 62-71.

<sup>559</sup> ECtHR, judgment of 7 January 2014, *AA v Switzerland*, application no 58802/12, paras. 38-43.

<sup>560</sup> ECtHR, judgment of 21 July 2015, *HS and Others v Cyprus*, applications no 41753/10 and 13 other applications, para. 277.

<sup>561</sup> ECtHR, judgment of 29 March 2016, Grand Chamber, *FG v Sweden*, application no 43611/11, paras. 123 and 144-158.

In respect of *sur place* activities [...] it is generally very difficult to assess whether a person is genuinely interested in the activity in question, be it a political cause or a religion, or whether the person has only become involved in it in order to create post-flight ground<sup>562</sup>.

The abovementioned four ECtHR's judgments operate as persuasive arguments in interpreting the concepts of refugee *sur place* and beneficiary of subsidiary protection *sur place*. However, the use of this Strasbourg case-law in the QD context should be approached with caution, since the ECtHR interprets neither the Refugee Convention nor the QD (recast), but is rather considering whether manufactured activities can expose an applicant to ill-treatment contrary to Article 3 ECHR<sup>563</sup>. In addition, due to the absolute character of Article 3 ECHR, the distinction between 'good faith' and 'bad faith' is never decisive for the ECtHR<sup>564</sup>. Further, the *SF*, *AA* and *FG* judgments deal with protection from *refoulement*, whereas Article 5(3) QD (recast) provides a ground for denial of refugee status (which are two different things)<sup>565</sup>.

### 1.9.6.1 Applications based on events occurring in the country of origin (Article 5(1))

Article 5(1) QD (recast) is mandatory: Member States must recognise a person as a refugee or as a beneficiary of subsidiary protection on the basis of events which have taken place since the applicant left the country of origin if these events result in a well-founded fear of being persecuted or in a real risk of suffering serious harm. The systematic context of this provision indicates that Article 5(1) covers events which occur independently of any subsequent activities undertaken by the applicant<sup>566</sup>. These events include situations of a **significant change of circumstances in the country of origin** (such as a coup d'état) at a time when the applicant is abroad for reasons wholly unrelated to a need of protection such as for a vacation, studies or business reasons<sup>567</sup>, as well as **situations which involve the dramatic intensification of pre-existing factors** since the departure of the applicant from the country of origin<sup>568</sup>. In the latter scenario, the applicant may have been aware of, or even motivated to depart by, the disturbing events in his/her country of origin at the moment of his/her departure, but a real chance of him/her being persecuted or suffering serious harm upon return exists only due to the escalation of events post-departure.

The words 'events which have taken place' in Article 5(1) QD (recast) do not necessarily imply events occurring in the country of origin<sup>569</sup>. For instance, the assassination of a government minister in a third country or a significant change of circumstances in the States neighbouring the country of origin (e.g. a civil war) may also be relevant for refugee *sur place* applications.

There is no clear cut distinction between applications based on events which have taken place since the applicant left the country of origin (Article 5(1)) and applications based on post-flight activities of the applicant (Article 5(2)). Quite often the conditions in the country of origin worsen and at the same time (or even because of this worsening) an applicant engages in post-flight activities. The relevant question in such cases is whether the change of circumstances in the country of origin and the post-flight activities of an applicant, considered cumulatively, result in a risk of being persecuted for reasons of an actual or imputed ground listed in Article 2(d) QD (recast) or of suffering serious harm as defined in Article 15<sup>570</sup>. For instance, the French *Cour nationale du droit d'asile* (National Court of Asylum Law) granted refugee status to an applicant from Mauritania, who had already been a famous rapper in his country of origin and whose activities on the internet and Facebook, after his departure from Mauritania, were considered to have worsened his position in the eyes of Mauritanian authorities<sup>571</sup>. However, the Court requires the applicant to substantiate that the authorities in the country of origin have or would acquire knowledge of his activities in France to consider that it worsens the risk of persecution<sup>572</sup>.

<sup>562</sup> *Ibid.*, para. 123 (internal references omitted).

<sup>563</sup> Moreover, it is not clear that the ECtHR attaches weight to the question of whether the *sur place* activities are manufactured or not. One may argue that the ECtHR just establishes the risk and in that context weighs the genuineness of the applicant's activities.

<sup>564</sup> See ECtHR, *FG v Sweden*, op. cit., fn. 561, para. 156.

<sup>565</sup> See also *ibid.*, paras. 125-127.

<sup>566</sup> K. Hailbronner and S. Alt, op. cit., fn. 248, p. 1040. In other words, Art. 5(1) QD (recast) is about events and not the activities undertaken by the applicant.

<sup>567</sup> *Ibid.*, p. 1041. For specific examples, see J.C. Hathaway, *The Law of Refugee Status* (Butterworths, 1991) pp. 33 and 34.

<sup>568</sup> K. Hailbronner and S. Alt, op. cit., fn. 248, p. 1041. For specific examples, see J.C. Hathaway, *The Law of Refugee Status*, op. cit., fn. 567, pp. 34-35.

<sup>569</sup> K. Hailbronner and S. Alt, op. cit., fn. 248, p. 1040.

<sup>570</sup> See, mutatis mutandis, ECtHR, *SF v Sweden*, op. cit., fn. 558, paras. 67 and 68; the same position was taken by Supreme Administrative Court (Poland), judgment of 14 December 2005, II OSK 1081/05.

<sup>571</sup> National Asylum Court (France), judgment of 4 February 2016, *MS*, application no 15016079.

<sup>572</sup> National Asylum Court (France), judgment of 19 December 2013, *Ms NG*, application no 13005020. For a similar conclusion, see EWCA (UK), *YB (Eritrea) v the Secretary of State for the Home Department*, op. cit., fn. 556, paras. 15 and 18.

### 1.9.6.2 Applications based on post-flight activities of the applicant (Article 5(2))

Article 5(2) QD (recast) is mandatory. It distinguishes **two types of post-flight activities** of the applicant (see Table 25 below).

**Table 25: Two types of post-flight activities under Article 5(2) QD (recast)**

<b>1</b>	<b>‘continuation’ type</b>	post-flight activities that constitute the expression and continuation of convictions or orientations already held <b>in the country of origin</b>
<b>2</b>	<b>‘brand new’ type</b>	post-flight activities that do not constitute the expression and continuation of convictions or orientations already held in the country of origin and started only <b>after the applicant left his/her country of origin</b>

The use of the words ‘in particular’ in Article 5(2) suggest that the first type of post-flight activity serves to strengthen an application for international protection but leaves open that the second type may also do so. If any issue arises as to whether the sole or main purpose behind an applicant’s *sur place* activities is to create the conditions for qualification for refugee status or subsidiary protection, Article 5 must be interpreted in conjunction with Article 4(3)(d)<sup>573</sup>.

The first **‘continuation’ type of post-flight activities** includes situations, when the low-level activity of the applicant in the country of origin does not in itself meet the threshold of the risk of being persecuted or suffering serious harm, but does so when coupled with *sur place* activities after departure from the country of origin<sup>574</sup>. However, the term ‘held’ does not mean that the orientation or conviction had to be expressed in the country of origin; it is sufficient if the person concerned had an inner conviction or belief, provided that such conviction or belief can be demonstrated<sup>575</sup>. In addition, the term ‘orientation’ is less restrictive than ‘conviction’<sup>576</sup>. Applicants who can show that their post-flight activities constitute the expression and continuation of convictions or orientations held already in the country of origin are in a better position to prove their credibility and the genuine nature of their application for international protection<sup>577</sup>. The more an attitude has already been expressed in the country of origin, the easier it will be to show that any post-flight activities are genuine<sup>578</sup>.

The second **‘brand new’ type post-flight activities** may also be sufficient to meet the requirement of the risk of being persecuted or suffering serious harm.

However, there is a significant disagreement among the Member States regarding when this is so. Some Member States distinguish between ‘brand new’ post-flight activities that are in good faith and those that are made in bad faith whilst other Member States do not<sup>579</sup>. In the absence of guidance on this matter from the CJEU, there is no consensus whether the QD (recast) allows this good faith/bad faith dichotomy<sup>580</sup>.

In those States that do not apply a ‘good faith’ requirement, significance has been attached to the fact that Article 5(2) QD (recast) interpreted in conjunction with Article 4(3)(d) QD (recast) appears to indicate that the QD

<sup>573</sup> Art. 4(3)(d) QD (recast) reads as follows: ‘The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account: [...] whether the applicant’s activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country’.

<sup>574</sup> See ECtHR, *SF v Sweden*, op. cit., fn. 558, paras. 67 and 68.

<sup>575</sup> K. Hailbronner and S. Alt, op. cit., fn. 248, p. 1041.

<sup>576</sup> *Ibid.*

<sup>577</sup> *Ibid.* See also, mutatis mutandis, ECtHR, *SF v Sweden*, op. cit., fn. 558, paras. 67 and 68; and ECtHR, *AA v Switzerland*, op. cit., fn. 559, para. 41.

<sup>578</sup> See K. Hailbronner and S. Alt, op. cit., fn. 248, p. 1041.

<sup>579</sup> See J.C. Hathaway and M. Foster, op. cit., fn. 137, pp. 88-90; G.S. Goodwin-Gill and J. McAdam, op. cit., fn. 141, p. 89; and IARLJ, *A Manual for Refugee Law Judges Relating to the European Council Qualification Directive 2004/84/EC and European Council Procedures Directive 2005/85/EC*, op. cit., fn. 555, pp. 50 and 51.

<sup>580</sup> On the one hand, the UK courts (see EWCA (UK), *YB (Eritrea) v the Secretary of State for the Home Department*, op. cit., fn. 556, paras. 13-15) rejected this dichotomy. On the other hand, German courts accepted this dichotomy: see Federal Administrative Court (Germany), judgment of 18 December 2008, BVerwG 10 C 27.07, BVerwG:2008:181208U10C27.07.0, paras. 14 and ff, available in English at [www.bverwg.de](http://www.bverwg.de); and Federal Administrative Court (Germany), judgment of 24 September 2009, BVerwG 10 C 25.08, BVerwG:2009:240909U10C25.08.0, paras. 22 and ff. Other courts (see for instance Judicial Department of the Council of State (Afdeling Bestuursrechtspraak van de Raad van State; Netherlands), judgment of 11 February 2016, 201410123/1/V2) have not taken the position on this issue, since the national legislature decided not to transpose Art. 5(3) QD (recast)).

(recast) does not intend to rule out that there can be so-called ‘bootstrap refugees’<sup>581</sup>, but an applicant relying on such claims faces a substantial evidentiary burden regarding his/her credibility<sup>582</sup>.

In contrast, some States apply a ‘good faith/bad faith’ dichotomy and reject the bad faith *sur place* claims as fraudulent. The **good faith** ‘brand new’ post-flight activities include in particular children who are not yet able to establish convictions because of their age<sup>583</sup>. Adults may also genuinely convert to another religion or change their political opinion<sup>584</sup> while abroad. One indicator of good faith may be how long prior to his/her asylum claim an applicant did so<sup>585</sup>. The **bad faith** ‘brand new’ post-flight activities concern the ‘bootstrap refugees’<sup>586</sup>. Some States have rejected such fraudulent applications on the basis of an argument that they are not in ‘good faith’, others do not<sup>587</sup>.

Factors which, if relevant, should be considered in applications based on post-flight activities of the applicant are illustrated in Table 26 below.

**Table 26: Factors to be considered in applications based on applicants’ post-flight activities**<sup>588</sup>

(i)	the type of <i>sur place</i> activity involved <sup>589</sup> ;
(ii)	the risk that a person will be identified [by the country of origin or, if stateless, of former habitual residence] as engaging in it <sup>590</sup> ;
(iii)	the factors triggering inquiry on return of the person; and
(iv)	in the absence of a universal check on all entering the country, the factors that would lead to identification at the airport on return or after entry <sup>591</sup> .

The **ultimate question** is thus whether the authorities in the country of origin are or may reasonably become aware of an applicant’s *sur place* activities, whether they will reasonably likely consider these activities as adverse, and whether the risk thereby engendered is both serious enough to amount to a risk of being persecuted based on actual or imputed opinion or of suffering serious harm<sup>592</sup>. Another relevant dimension will be to what extent agents of the State of the applicant’s country of origin monitor opponents in the country of asylum and the extent to which they assess an opponent as a significant threat.

Applications based on post-flight activities are commonly based on the activities of the applicant, but a claim may also arise indirectly from the actions of third parties. This is so, for instance, when political actions of third parties result in the risk of an applicant being persecuted by association with these third parties on the basis of imputed political opinion<sup>593</sup>. This notion of attribution of an adverse political opinion by a country of nationality or of former habitual residence is relevant also for *sur place* claims when an applicant faces the risk of being persecuted for

<sup>581</sup> The term ‘bootstrap refugees’ refers to applicants who have engaged in conduct abroad with the sole aim of creating a risk of persecution or serious harm if returned to their country of origin.

<sup>582</sup> See e.g. Supreme Administrative Court (Poland), judgment of 25 November 2015, II OSK 769/14, when deciding on the fifth application of a Russian national from Chechnya – in which the applicant raised a new ground that he had become a follower of the Scientology Church after leaving his country of origin – the Polish Court emphasised that applicant in his previous applications (submitted respectively in 2008 and 2010) never put forward this fact). See also EWCA (UK), *YB (Eritrea) v the Secretary of State for the Home Department*, op. cit., fn. 556, para. 18, holding that: ‘If, for example, any information [regarding the claimant] reaching the embassy is likely to be that the claimant identified in a photograph is a hanger-on with no real commitment to the oppositionist cause, that will go directly to the issue flagged up by art 4(3)(d) of the Directive’.

<sup>583</sup> See K. Hailbronner and S. Alt, op. cit., fn. 248, p. 1041, referring to the Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union, op. cit., fn. 131.

<sup>584</sup> For instance, due to the deteriorating situation in the country of origin or due to the exposure to new information not available in the country of origin.

<sup>585</sup> See ECtHR, *AA v Switzerland*, op. cit., fn. 559, para. 41.

<sup>586</sup> See fn. 578 above.

<sup>587</sup> See J.C. Hathaway and M. Foster, op. cit., fn. 137, pp. 88-90; G.S. Goodwin-Gill and J. McAdam, op. cit., fn. 141, p. 89; and IARLJ, *A Manual for Refugee Law Judges Relating to the European Council Qualification Directive 2004/84/EC and European Council Procedures Directive 2005/85/EC*, op. cit., fn. 555, pp. 50 and 51.

<sup>588</sup> See UKUT, judgment of 1 February 2011, *BA (Demonstrators in Britain – Risk on Return) Iran CG* [2011] UKUT 36 (IAC), para. 64 relied upon by the ECtHR in *SF v Sweden*, op. cit., fn. 558, paras. 46 and 68-70. See also ECtHR, *FG v Sweden*, op. cit., fn. 561, paras. 141-158.

<sup>589</sup> For instance, it may be helpful to distinguish between low level members or supporters of an opposition on the one hand (as in some countries of origin the state authorities will not seek to visit harm on low level oppositionists or those who merely attend a rally) and important opposition figures (who almost always attract the attention of state authorities in the country of origin) on the other. However, such claims are highly contextual as in some countries of origin the state authorities may want to tar an entire expatriate community with the same brush. See also, mutatis mutandis, ECtHR, *FG v Sweden*, op. cit., fn. 561, paras. 137 and 141.

<sup>590</sup> See also, mutatis mutandis, *ibid.*, para. 142.

<sup>591</sup> See also, mutatis mutandis, *ibid.*, para. 139.

<sup>592</sup> J.C. Hathaway and M. Foster, op. cit., fn. 137, p. 90. See also G.S. Goodwin-Gill and J. McAdam, op. cit., fn. 141, p. 89; and IARLJ, *A Manual for Refugee Law Judges Relating to the European Council Qualification Directive 2004/84/EC and European Council Procedures Directive 2005/85/EC*, op. cit., fn. 555, pp. 50-51. See also, mutatis mutandis, ECtHR, *FG v Sweden*, op. cit., fn. 561, paras. 144-158.

<sup>593</sup> See for instance UKIAT, judgment of 19 May 2008, *HS (Terrorist Suspect – Risk) Algeria CG* [2008] UKAIT 00048, para. 126. For further details, see A. Zimmermann and C. Mahler, op. cit., fn. 188, pp. 325-329; and J.C. Hathaway and M. Foster, op. cit., fn. 137, p. 77. See also Section 1.5.2, pp. 46, dealing with reasons of persecution.

unauthorised departure or stay abroad (*Republikflucht*)<sup>594</sup>. Under this doctrine, if the sanction attached to the illicit travel abroad is severe and the country of origin treats departure or stay abroad as an implied political opinion of disloyalty or defiance, the criteria of the refugee definition are satisfied<sup>595</sup>. Similarly, if the country of origin imposes severe sanctions for claiming asylum abroad (due to political opinion implied from lodging an asylum application abroad), a mere application for refugee status may in specific circumstances lead to a successful refugee *sur place* claim<sup>596</sup>.

### 1.9.6.3 Subsequent applications (Article 5(3))

Article 5(3) QD (recast) provides that:

Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin.

It is an **optional provision** that allows Member States ‘normally’ not to grant refugee status to an applicant who files a subsequent application **and** whose risk of persecution is based on circumstances which he/she has created by his/her own decision since leaving the country of origin<sup>597</sup>. These **two conditions** must be fulfilled cumulatively.

First, this provision relates only to applicants who have previously sought international protection which has been refused or whose international protection status has subsequently been revoked<sup>598</sup>.

Second, if there has been a change in circumstances in the country of origin between the first and subsequent asylum application, Article 5(3) does not apply as this change is beyond the power of an applicant to influence.

Finally, interpretation of Article 5(3) in conjunction with Article 5(2) and Article 4(3)(d) suggests that if an applicant’s activities between the first and subsequent asylum application are a continuation of his/her activities prior to his/her departure from the country of origin (that were not deemed sufficient in the first asylum application), his/her application cannot be rejected on the basis of Article 5(3). In such a case, the applicant’s risk of persecution was indeed not based ‘solely or mainly’ on circumstances which he/she has created by his/her own decision since leaving the country of origin.

The word ‘normally’ can be interpreted in two ways. Some EU Member States take the view that this provision establishes the rule that persons are not to be granted refugee status if the conditions of applicability of Article 5(3) are met<sup>599</sup> and have introduced a statutory presumption against refugee status in the case of subsequent manufactured *sur place* claims<sup>600</sup>.

For instance, the German *Bundesverwaltungsgericht* (Federal Administrative Court), relying heavily on the Council’s Joint Position of 4 March 1996<sup>601</sup>, held that a creation of a risk of persecution through post-flight activities should fall under the **suspicion of abuse** if created after the first asylum proceedings<sup>602</sup>. The **critical date** for applying this rule is the date of the (unsuccessful) termination of the initial proceedings. For post-flight reasons created by the individual him/herself after that date, an abuse of the claim of refugee protection is presumed as a rule. However, this statutory presumption of abuse is **rebutted** if the applicant refutes the suspicion that after the rejection of the first application he/she developed or intensified post-flight activities solely or primarily with

<sup>594</sup> A. Grahl-Madsen, ‘*International Refugee Law Today and Tomorrow*’, 20 Archiv des Völkerrechts (1982) 411, p. 421.

<sup>595</sup> UNHCR Handbook, op. cit., fn. 107, p. 77.

<sup>596</sup> See for instance Council for Alien Law Litigation (Belgium), decision of 28 January 2009, no 22.144; or EWCA (UK), judgment of 13 April 2011, *RM (Zimbabwe) v Secretary of State for the Home Department* [2011] EWCA Civ 428. For a different view, see for instance UKIAT, judgment of 7 October 2005, *AA (Involuntary returns to Zimbabwe) Zimbabwe CG* [2005] UKAIT 00144, paras. 35 and 36. For an example where it was **not** considered there was such a risk see UKIAT, judgment of 12 August 2015, *BM and Others (Returnees-Criminal and Non-Criminal) DRC CG* [2015] UKUT 293 (IAC). For further details, see also J.C. Hathaway and M. Foster, op. cit., fn. 137, pp. 77-80.

<sup>597</sup> Note that the term ‘subsequent application’ and procedures applying to them are defined in Arts. 33(2)(d) and 40 APD.

<sup>598</sup> IARLJ, *A Manual for Refugee Law Judges Relating to the European Council Qualification Directive 2004/84/EC and European Council Procedures Directive 2005/85/EC*, op. cit., fn. 555, p. 51.

<sup>599</sup> See K. Hailbronner and S. Alt, op. cit., fn. 248, p. 1042. See also H. Dörig, in K. Hailbronner and D. Thym (eds), op. cit., fn. 75, Art. 5 marginal 12 to 18.

<sup>600</sup> See Federal Administrative Court (Germany), BVerwG 10 C 27.07, op. cit., fn. 580, para. 14, available in English at [www.bverwg.de](http://www.bverwg.de). See also P. Übersax and B. Rudin (eds.), *Ausländerrecht* (Helbing Lichtenhahn Verlag, 2009) p. 542 (regarding Switzerland).

<sup>601</sup> The Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union, op. cit., fn. 131, paras. 59 and ff.

<sup>602</sup> Federal Administrative Court (Germany), BVerwG 10 C 27.07, op. cit., fn. 580, para. 14, available in English at [www.bverwg.de](http://www.bverwg.de).

an eye to obtaining refugee status<sup>603</sup>. A special rule applies for a **young applicant**, who can also rebut the statutory presumption of abuse if he/she can demonstrate that in the course of his/her first international protection proceeding he/she was not yet able – due to his/her youth and lack of maturity – to develop a firm political or other conviction<sup>604</sup>. The German *Bundeverwaltungsgericht* (Federal Administrative Court) regards this position as being in accordance with the Refugee Convention<sup>605</sup>.

On the other hand, some courts have argued that interpretation of Article 5(3) QD (recast) is limited by the caveat '[w]ithout prejudice to the Geneva [Refugee] Convention' and that the Refugee Convention affords no licence to distinguish between the needs arising in an original and subsequent application<sup>606</sup>. For instance, the UK EWCA held that Article 5(3) QD 'recognise[s] that opportunistic activity *sur place* is not an automatic bar to asylum', because:

[The applicant whose conduct in the UK has been entirely opportunistic] has [...] already been believed about his activity and (probably) disbelieved about his motive. Whether his consequent fear of persecution or ill-treatment is well-founded is then an objective question. And if it *is* well-founded, then to disbelieve him when he says it is a fear he now entertains may verge on the perverse<sup>607</sup>.

The recent ECtHR judgments in *AA v Switzerland* and *FG v Sweden* are other examples of acceptance of *sur place* claims based exclusively on activities conducted between the first and subsequent asylum applications<sup>608</sup>. However, it is important to approach the *AA* and *FG* judgments with caution as they concern protection from *refoulement*, whereas Article 5(3) QD (recast) provides a ground for denial of refugee status (which are two different things). In addition, many applicants may legitimately change or develop their views since the first application<sup>609</sup>. This applies for instance to applicants who were minors at the moment of their first asylum application<sup>610</sup>. On this construction, Article 5(3) does not provide Member States with an opportunity to introduce a presumption against refugee status in the case of subsequent *sur place* claims, but merely indicates the added difficulty<sup>611</sup> which such an applicant – someone who has already failed in his/her earlier claim or claims – will face in terms of general credibility<sup>612</sup>. It may be that this is a point of difference that will only be resolved by a preliminary reference to the CJEU.

<sup>603</sup> *Ibid.*

<sup>604</sup> See, for instance, Federal Administrative Court (Germany), BVerwG 10 C 25.08, op. cit., fn. 580, paras. 22 and ff.

<sup>605</sup> Federal Administrative Court (Germany), BVerwG 10 C 27.07, op. cit., fn. 580, paras. 17 and ff, available in English at [www.bverwg.de](http://www.bverwg.de).

<sup>606</sup> See EWCA (UK), *YB (Eritrea) v the Secretary of State for the Home Department*, op. cit., fn. 556, para. 14, describing this provision as 'odd'. See also J.C. Hathaway and M. Foster, op. cit., fn. 137, p. 84; G.S. Goodwin-Gill and J. McAdam, op. cit., fn. 141, pp. 88 and 89; R. Bank, op. cit., fn. 159, p. 125; IARLJ, *A Manual for Refugee Law Judges Relating to the European Council Qualification Directive 2004/84/EC and European Council Procedures Directive 2005/85/EC*, op. cit., fn. 555, p. 52; H. Storey, 'The EU Qualification Directive: A Brave New World?', IJRL (2008) p. 27.

<sup>607</sup> EWCA (UK), *YB (Eritrea) v the Secretary of State for the Home Department*, op. cit., fn. 556, para. 13. See also Judicial Department of the Council of State, Afdeling Bestuursrechtpraak van de Raad van State (the Netherlands), 201410123/1/V2, op. cit., fn. 580.

<sup>608</sup> ECtHR, *AA v Switzerland*, op. cit., fn. 559, paras. 38-43; and ECtHR, *FG v Sweden*, op. cit., fn. 561, paras. 144-158.

<sup>609</sup> See ECtHR, *FG v Sweden*, op. cit., fn. 561, para. 123.

<sup>610</sup> This is accepted even by the German Federal Administrative Court; see e.g. its judgment BVerwG 10 C 25.08, op. cit., fn. 580, paras. 22 and ff.

<sup>611</sup> In other words, there is a burden placed upon the applicants to explain the change or development of their views. See also ECtHR, *FG v Sweden*, op. cit., fn. 561, paras. 144-158.

<sup>612</sup> IARLJ, *A Manual for Refugee Law Judges Relating to the European Council Qualification Directive 2004/84/EC and European Council Procedures Directive 2005/85/EC*, op. cit., fn. 555, p. 52. See also J.C. Hathaway and M. Foster, op. cit., fn. 137, p. 84; G.S. Goodwin-Gill and J. McAdam, op. cit., fn. 141, pp. 88 and 89; and H. Storey, 'The EU Qualification Directive', op. cit., fn. 606, pp. 27 and 28. For a different position, see K. Hailbronner and S. Alt, op. cit., fn. 248, p. 1042.

## 1.10 Refugee status

After having analysed the different eligibility requirements for refugee status, this Section focuses more specifically on the notion of refugee status, including the rights and benefits granted to refugees (Section 1.10.1, pp. 93) and the situation of family members of refugees not qualifying for refugee status in their own right (Section 1.10.2, pp. 96).

### 1.10.1 Refugee status (Article 13)

#### 1.10.1.1 Definition of refugee status

Article 13 QD (recast) stipulates that ‘Member States shall grant refugee status to a third-country national or a stateless person who qualifies as a refugee in accordance with Chapters II and III.’ This is a **mandatory provision** of the QD (recast). It provides for an enforceable right for the person and shall be implemented in line with Chapters II (assessment of applications for international protection) and III (qualification as a refugee). Article 2(e) QD (recast) defines ‘refugee status’ as ‘the **recognition** by a Member State of a third-country national or a stateless person as a refugee’<sup>613</sup>. The CJEU has confirmed the mandatory nature of Article 13 in its *HT* judgment<sup>614</sup>.

The QD (recast) distinguishes between the criteria for being recognised as a ‘refugee’ and the criteria for being granted ‘refugee status’<sup>615</sup>. As underlined by UNHCR:

While in general persons qualifying as ‘refugees’ are entitled to be granted ‘refugee status’, the QD (recast) allows Member States to exceptionally decide not to grant refugee status – or to revoke, end or refuse to renew the refugee status that has already been granted to refugees<sup>616</sup>.

Article 14 QD (recast) sets out provisions on the revocation of, ending of or refusal to renew refugee status. Member States shall revoke, end or refuse to renew refugee status of third-country nationals or stateless persons when they can demonstrate, on an individual basis, that such persons have ceased to be or have never been a refugee in accordance with Article 11 (Article 14(1) and (2)); and where it is established following the grant of refugee status that:

- (a) the third-country national should have been or is excluded from being a refugee in accordance with Article 12;
- (b) his or her misrepresentation or omission of facts, including the use of false documents, was decisive for the granting of refugee status (Article 14(3)).

In contrast to Article 14(1), (2) and (3) which are mandatory provisions, Article 14(4) and (5) are facultative provisions which permit Member States to revoke, end or refuse to renew the status granted to a refugee, or decide not to grant status to a refugee where such a decision has not yet been taken when:

- (a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;
- (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State<sup>617</sup>.

<sup>613</sup> Emphasis added.

<sup>614</sup> CJEU, judgment of 24 June 2015, case C-373/13, *HT v Land Baden-Württemberg*, EU:C:2015:413, para. 63.

<sup>615</sup> See further *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC*, op. cit., fn. 216, pp. 10 and 11 (emphases added): ‘[...] the term “refugee status” may, depending on the context, cover two different notions. As also mentioned in Recital 14 of the QD and paragraph 28 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, “refugee status” means the condition of being a refugee. In contrast, the Qualification Directive appears to use the term “refugee status” to mean the set of rights, benefits and obligations that flow from the recognition of a person as a refugee. This second meaning is, in UNHCR’s view, better described by the use of the word “asylum” and recommends, accordingly, that the Directive be interpreted in this sense’.

<sup>616</sup> UNHCR, *The Case Law of the European Regional Courts: The Court of Justice of the European Union and the European Court of Human Rights: Refugees, Asylum-Seekers, and Stateless Persons*, 2015, p. 45.

<sup>617</sup> By its resolution of 16 June 2016 No. 5 Azs 189/2015-36 in case *M v the Ministry of Interior* the Czech Supreme Administrative Court has made a request for preliminary ruling asking the CJEU the following question: Are provisions of Art. 14 (4) and (6) QD (recast) invalid due to their incompatibility with Art. 18 of the EU Charter, Art. 78 (1) TFEU and with general principles of EU law according to Art. 6 (3) TEU? The pending case has been registered by the CJEU as C-391/16 *M*.

Article 14(4) is worded in the same terms as the exception to the prohibition of *refoulement* contained in Article 33(2) of the Refugee Convention. Article 14(4) QD (recast) refers to a ‘status granted to a refugee’ rather than ‘refugee status’. Recital (32) QD (recast) states that ‘status’ as referred to in Article 14 can also include refugee status. Thus, it is implied that ‘status granted to a refugee’ may be a term which has a broader meaning than refugee status. In the words of UNHCR:

‘Status granted to a refugee’ is understood to refer to the *asylum* (*‘status’*) granted by the State rather than refugee status in the sense of Article 1A (2) of the 1951 Convention. States are therefore nonetheless obliged to grant the rights of the 1951 Refugee Convention which do not require lawful residence and which do not foresee exceptions for as long as the refugee remains within the jurisdiction of the State concerned<sup>618</sup>.

The CJEU has not yet pronounced on the interpretation of Article 14(4) or (5) in the context of obligations to grant refugee status under the QD (recast). However, persons to whom Article 14(4) or (5) apply are nevertheless entitled to certain rights set out in the Refugee Convention according to Article 14(6) QD (recast)<sup>619</sup>.

The drafting process of the QD confirms that the term ‘refugee status’ referred to a status granted by a Member State to a person who is a refugee and is admitted as such to the territory of this Member State<sup>620</sup>. The drafting history of Article 13 and Chapter IV QD also shows that refugee status confers certain rights and benefits. Secondly, it refers to a specific administrative procedure leading to a specific decision, which is authoritative for all public authorities of the particular Member State and avoids contradictory decisions about that issue<sup>621</sup>.

Further information can be found in the forthcoming EASO Judicial Analysis on Ending International Protection.

### 1.10.1.2 Declaratory nature of refugee status

According to recital (21) QD recast, the recognition of refugee status is a **declaratory act**. The declaratory nature of refugee status is also implied in Article 21(2) QD (recast) which suggests that protection from *refoulement*, in accordance with international obligations, applies whether a refugee has been formally recognised or not. As stated by UNHCR:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee<sup>622</sup>.

As such, there are procedural guarantees of access to certain limited rights in advance of any formal recognition of status. The APD (recast) provides for a right to stay pending a decision by the determining authority in its Article 9 and recital (25). Article 46(5) APD (recast) stipulates that Member States shall allow applicants to remain in the territory until the outcome of the remedy<sup>623</sup>. Finally, the recast Reception Conditions Directive 2013/33/EU provides for social rights for applicants for international protection<sup>624</sup>. One situation where recital (21) may have practical relevance is when refugee status or a residence permit is revoked.

<sup>618</sup> UNHCR *Annotated Comments on the EC Council Directive 2004/83/EC*, op. cit., fn. 216, p. 31.

<sup>619</sup> For an indepth analysis of Article 14 QD (recast), see EASO, *Ending International Protection – A Judicial Analysis*, op. cit., fn. 23.

<sup>620</sup> European Commission, *QD Proposal*, op. cit., fn. 194, Art. 2(d).

<sup>621</sup> K. Hailbronner and D. Thym (eds.), op. cit., fn. 75, p. 7.

<sup>622</sup> UNHCR *Handbook*, op. cit., fn. 107, para. 28 in a similar way states that: ‘A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee’.

<sup>623</sup> However, the right to suspensive effect is not absolute. For instance, suspensive effect on an appeal brought against a decision not to examine a subsequent application for asylum is not required. See, CJEU, judgment of 17 December 2015, case C239/14, *Abdoulaye Amadou Tall v Centre public d’action sociale de Huy*, EU:C:2015:824.

<sup>624</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180/96.



### 1.10.1.3 Refugee status, residence permit and international protection

Persons granted refugee status benefit from international protection as set out in Chapter VII QD (recast) ('Content of international protection'). Under the terms of Article 14(6) QD (recast), persons who are recognised as refugees but who are denied refugee status on the grounds stated in Article 14(4) or (5) QD (recast) do not benefit from international protection but are entitled to the 'rights set out in or similar to those in Articles 3, 4, 16, 22, 31, 32 and 33 of the [Refugee Convention] in so far as they are present in the Member State'. Thus in the case of revocation of the status granted to a refugee under Article 14(4) or (5), the QD (recast) allows for enjoyment of certain refugee rights only, as the CJEU considered in its *HT* judgment:

[I]n the event that a Member State, pursuant to Article 14(4) of [the QD], revokes, ends or refuses to renew the refugee status granted to a person, that person is entitled, in accordance with Article 14(6) of that directive, to rights set out inter alia in Articles 32 and 33 of the Geneva Convention<sup>625</sup>.

Article 24(1) QD (recast) provides that Member States shall issue to beneficiaries of refugee status a residence permit 'as soon as possible' after international protection has been granted, unless compelling reasons of national security or public order otherwise require and without prejudice to Article 21(3) QD (recast)<sup>626</sup>. Even though Member States have an **obligation to issue a residence permit** as a consequence of granting refugee status, refugee status and the corresponding enjoyment of international protection is nevertheless not dependent on the existence of a residence permit as demonstrated by the CJEU case-law. The link between refugee status, a residence permit and enjoyment of international protection was clarified by the CJEU in the *HT* case<sup>627</sup>. The refugee retains refugee status even if a residence permit is revoked, and international protection shall be provided. More specifically, the Court emphasised that:

[T]he refugee whose residence permit is revoked pursuant to Article 24(1) of Directive 2004/83 retains his refugee status, at least until that status is actually ended. Therefore, **even without his residence permit, the person concerned remains a refugee** and as such remains entitled to the benefits guaranteed by Chapter VII of that directive to every refugee, including protection from refoulement, maintenance of family unity, the right to travel documents, access to employment, education, social welfare, healthcare and accommodation, freedom of movement within the Member State and access to integration facilities. In other words, a Member State has no discretion as to whether to continue to grant or to refuse to that refugee the substantive benefits guaranteed by the directive<sup>628</sup>.

Furthermore the CJEU went on to consider that Article 24(1) QD pertains only to the refusal to issue a residence permit to a refugee and to the revocation of that residence permit, and not to the *refoulement* of that refugee<sup>629</sup>. Revocation of a residence permit pursuant to Article 24(1) QD does not effectuate the revocation of refugee status<sup>630</sup>.

Although there is no obligation under the QD (recast) to require a residence permit for the enjoyment of international protection, the QD (recast) allows Member States to require that a residence permit may be necessary to access certain benefits. Recital (40) QD (recast) stipulates that:

Within the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, healthcare and access to integration facilities requires the prior issue of a residence permit<sup>631</sup>.

<sup>625</sup> CJEU, *HT* judgment, op. cit., fn. 614, para. 71.

<sup>626</sup> Art. 21(3) QD (recast) states that Member States may refuse to grant a residence permit to a refugee to whom Art. 21(2) QD (recast) applies (danger to the security or conviction by a final judgment of a particularly serious crime and constituting a danger to the community of that Member State).

<sup>627</sup> CJEU, *HT* judgment, op. cit., fn. 614, paras. 71 and 72.

<sup>628</sup> *Ibid.*, para. 95 (emphasis added).

<sup>629</sup> Art. 24(1) QD (recast) makes reference to Art. 21(3) QD (recast), which states that Member States may refuse to grant a residence permit to a refugee to whom Art. 21(2) QD (recast) applies (danger to the security or conviction by a final judgment of a particularly serious crime and constituting a danger to the community of that Member State).

<sup>630</sup> CJEU, *HT* judgment, op. cit., fn. 614, paras. 73 and 74.

<sup>631</sup> In its comments on the QD, ECRE expressed concern about this provision. It noted that a residence permit is essentially only an identity document establishing that an individual has been recognised as a refugee or as a beneficiary of subsidiary protection, and any attached rights should accrue from the decision to grant the status rather than be dependent on the issuing of a residence permit. ECRE, *ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, October 2004, pp. 14 and 15.

Some Member States use this discretion and provide that, regardless of its declaratory nature, the recognition of a person as refugee has no automatic effect on the exercise of all rights derived from refugee status<sup>632</sup>.

#### 1.10.1.4 Relationship of refugee status with subsidiary protection status and asylum

Both refugee status and subsidiary protection status provided for in Article 13 and Article 18 QD (recast) respectively are separate, but closely interrelated<sup>633</sup>. The QD (recast) establishes the primacy of refugee status as subsidiary protection status may only be granted to a third-country national or a stateless person who does not qualify for refugee status. By introducing a subsidiary form of protection, the Union legislature did not intend to offer the possibility of choosing between one form of international protection or the other. Its objective was to guarantee the ‘primacy’ of the Refugee Convention, by making sure that subsidiary forms of protection established in the EU do not erode the importance of that Convention. That purpose is apparent from the *travaux préparatoires* for the QD<sup>634</sup>. Complementarity of subsidiary protection status in relation to that of refugee status has been repeatedly emphasised also in the CJEU case-law, thus ‘an application for subsidiary protection should not, in principle, be considered before the competent authority has reached the conclusion that the person seeking international protection does not qualify for refugee status’<sup>635</sup>. Thirdly, the CJEU confirms that the obligation to ascertain the kind of protection applicable rests, in principle, on the determining national authority, which shall determine the status that is most appropriate to the applicant’s situation<sup>636</sup>.

In situations where the applicant clearly does not qualify as a refugee and is understood to be asking for subsidiary protection, the Member State may accelerate the examination of qualification for refugee status under Article 23(4)(b) APD, but the Union legislature does not in any circumstances relieve it of the duty to carry out that prior examination<sup>637</sup>.

### 1.10.2 Family members of refugees not qualifying for refugee status in their own right (Article 23)

#### 1.10.2.1 Derivative status

Recognition of a person as a refugee has consequences for family members. **The QD (recast) does not provide for an automatic derivative status** (the same status as the principal applicant), as the Commission proposed in respect of the original QD. The drafting history of the QD shows that the Commission’s Proposal included a different provision in draft Article 6. It guaranteed the extension of international protection to accompanying family members by ensuring that they were entitled to the same status as the applicant for international protection, except for those excluded from protection. This provision made ‘clear that dependent family members were entitled to a status equal to that of the main applicant for asylum and that such entitlement is derived simply from the fact that they are family members’<sup>638</sup>. The CJEU has not yet pronounced on the derivative status of refugee family members. In practice, several EU Member States provide for such a status for family members of refugees<sup>639</sup>.

<sup>632</sup> Federal Administrative Court (Germany), judgment of 13 February 2014, BVerwG 1 C 4.13, BVerwG:2014:130214U1C4.13.0, para. 15.

<sup>633</sup> CJEU, judgment of 30 January 2014, case C-285/12, *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides*, EU:C:2014:39, para. 33; CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, paras. 78 and 79; and CJEU, *Alo and Osso* judgment, op. cit. fn. 25, paras. 32 and 33. See also: Opinion of Advocate General Mengozzi of 18 July 2013, C-285/12, *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides*, EU:C:2013:500, para. 60 (original emphasis); Opinion of Advocate General Mazák of 15 September 2009, joined cases C-175/08, C-176/08, C-178/08 and C-179/08, *Aydin Salahadin Abdulla and Others v Bundesrepublik Deutschland*, EU:C:2009:551, para. 51.

<sup>634</sup> Opinion of Advocate General Bot of 7 November 2013, C-604/12, *HN v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, EU:C:2013:714, para. 43, see also paras. 41 and 44.

<sup>635</sup> CJEU, *Diakité* judgment, op. cit., fn. 633, para. 33; CJEU, *HN* judgment, op. cit., fn. 24, paras. 31 and 35, see also para. 42. See also Section 2.1 below, pp. 99 concerning subsidiary protection.

<sup>636</sup> CJEU, *HN* judgment, op. cit., fn. 24, para. 34; Opinion of Advocate General Bot in *HN*, op. cit., fn. 634, para. 48.

<sup>637</sup> Opinion of Advocate General Bot in *HN*, op. cit., fn. 634, para. 45.

<sup>638</sup> European Commission, *QD Proposal*, op. cit., fn. 194, p. 14 (emphasis added).

<sup>639</sup> For instance, the Czech Republic grants family members of a refugee ‘asylum for family reasons’, although on discretionary basis (Act 325/1999, Art. 13), Slovakia grants under specific conditions derivative refugee status (asylum) for family members of those granted refugee status on the Refugee Convention grounds, Slovak Law on Asylum (Act 480/2002, Art. 10).

Although the QD (recast) obliges Member States to ensure that **family unity** is maintained (Article 23(1)), it permits the grant of a different status to family members of a refugee who do not individually qualify for international protection. But according to Article 23(2) and (3), they nevertheless shall be entitled to claim the benefits referred to in Articles 24 to 35 of Chapter VII QD (recast) (travel documents, residence permit and freedom of movement within the Member State, specific measures for unaccompanied minors, access to employment, education, recognition of professional qualifications, social welfare, health care, access to accommodation and integration), except if the family member is or would be excluded from international protection. Article 23(2) also requires the claim to such benefits to:

- 1) be made in accordance with national procedures; and
- 2) be compatible with the personal legal status of the family member.

For instance, the Belgian *Conseil du Contentieux des Etrangers* (Council for Alien Law Litigation) considered the condition of compatibility of personal legal status in a case of extension of refugee status to children. It held that in the case of a child whose parents are holding two different types of status and the nationality of the child cannot be established, ‘the child should be given the status that is most beneficial to him/her’<sup>640</sup>. It was decided that the most beneficial was the status of their father so they were granted refugee status.

The claim to or enjoyment of benefits according to Article 23(4) QD (recast) is not absolute. Member States may refuse, reduce or withdraw the benefits referred to in Articles 24 to 35 QD (recast) for reasons of national security or public order. Further, some national courts have judged that the right to maintain family unity under Article 23 QD (recast), which is not absolutely protected, can be limited also based on other reasons, provided that this is in accordance with the principle of proportionality (Article 7 in conjunction with Article 52(1) of the EU Charter)<sup>641</sup>.

### 1.10.2.2 Concept of family unity (Article 2(j))

Article 2(j) QD (recast) defines who should be considered as **family members of a refugee** (see Table 27 below):

**Table 27: The notion of family members of a refugee under Article 2(j) QD (recast)**

<b>1</b>	a spouse or unmarried partner in a stable relationship (where the law or practice of the Member State concerned treats unmarried couples in a comparable way to married couples under its law on third-country nationals),
<b>2</b>	minor unmarried children,
<b>3</b>	father, mother or another adult responsible for an unmarried minor (a minor being a third-country national or stateless person below the age of 18 years) <sup>642</sup> .

According to this definition (expanded under the QD (recast)) a minor’s father, mother or another adult responsible for him/her are treated as ‘family members’. Member States may also apply Article 23 QD (recast) on maintaining family unity to **other close relatives** who lived together as part of the family at the time of leaving the country of origin and who were wholly or mainly dependent on the beneficiary of international protection at that

<sup>640</sup> ‘Article 23 of the Qualification Directive, which has no direct effect, does not create a right for the family member of a beneficiary of refugee or subsidiary protection status to benefit from the same status, and reminds the Member States of the necessity to take into account the personal legal status of the family member (e.g. different nationality)’: Council for Alien Law Litigation (Belgium), decisions of 18 June 2010, nos 45.095, 45.096, 45.098.

<sup>641</sup> For example, in the judgment of 15 April 2015, *Hassan* (I U 362/2015-7), which was upheld by the Supreme Court in the appellate procedure, the Administrative Court of the Republic of Slovenia rejected a claim which was examined under the 2003 Family Reunification Directive by using the principle of proportionality and in observance of the case-law of the ECtHR (judgment of 30 July 2013, *Bersiha v Switzerland*, application no 848/12, para. 61; judgment of 3 October 2014, *Jeunesse v the Netherlands*, application no 12738/10, para. 121) and with reference to the standards of ‘additional element of dependence’ (*Bersiha v Switzerland*, op. cit., fn. 641, para. 45) and ‘real existence of close personal ties’ (judgment of 20 December 2011, *AH Khan v the United Kingdom*, application no 6222/10, para. 150) taken from the case-law of the ECtHR.

<sup>642</sup> Art. 2(k) QD (recast).

time (Article 23(5) QD (recast))<sup>643</sup>. There are **two limitations to the notion of family** in Article 2(j) QD (recast) as illustrated in Table 28 below:

**Table 28: Two limitations to the notion of family in Article 2(j) QD (recast)**

1	the family needs to have already existed in the country of origin <sup>645</sup> ; and
2	the family has to be present in the same Member State as the beneficiary of international protection.

Article 23(2) thus does not apply to family members who are not present in the same Member State as the beneficiary of international protection. If family members are in another State, the **2003 Family Reunification Directive**<sup>645</sup> may enable the family members of a refugee – but not family members of a beneficiary of subsidiary protection (Article 3(2)(c) Family Reunification Directive) – present in other States to join the refugee in the Member State of recognition.

Two additional conditions apply to family members who are not in a marital relationship:

- 1) their relationship has to be stable; and
- 2) the law or practice of the Member State must treat unmarried couples in a comparable way to married couples under its law relating to third-country nationals.

Equal treatment of married and unmarried couples in a stable relationship is currently established inter alia in Belgium, Bulgaria, Finland, France, the Netherlands, Portugal, Spain, Sweden and the UK, but not in Germany, Italy, or Austria<sup>646</sup>.

Any differences that may arise between the notions of family under EU secondary legislation and under the ECHR, may be effectively accommodated by using the discretionary clause of Article 23(5) QD (recast). For instance, the ECtHR recognises as family life different types of relationship illustrated in Table 29 below:

**Table 29: Illustrative list of relationships recognised as family life by the ECtHR**

1	divorced parents and their child, despite the fact they were residing separately <sup>647</sup>
2	parents and children born out of wedlock <sup>648</sup>
3	same sex couples in a stable partnership relationship <sup>649</sup>
4	a minor child and his caregiver <sup>650</sup>

The evidentiary requirements to demonstrate family links are not addressed in this Judicial Analysis, as it will be dealt with in *Evidence and Credibility Assessment in the Context of the CEAS – A Judicial Analysis*<sup>651</sup>.

<sup>643</sup> See the Administrative Court of the Republic of Slovenia in a judgment of 15 May 2013 (*Musse*, I U 576/2013-7) and in several other disputes on the same subject used Art. 23(5) QD (recast) in order to reconcile the case-law of the ECtHR, which is not based on a particular definition which relatives can form a family (judgment of 13 June 1979, *Marckx v Belgium*, application no 6833/74; judgment of 27 October 1994, *Kroon and Others v the Netherlands*, application no 18535/91; judgment of 1 June 2004, *Lebbink v the Netherlands*, application no 45582/99) and Art. 2(j) QD (recast) which defines who can form a family. By relying on the principle of effective and loyal application of EU law, the Administrative Court of the Republic of Slovenia ignored the national provision, which defined family members without transposing the option from Art. 23(5) QD (recast) and applied Art. 23(5) directly. In the later case on the same subject, the Constitutional Court (judgment of 21 November 2013, Up-1056/11-15) confirmed the solution of the Administrative Court by deciding that national legal provision, which does not allow family reunification to those relatives who are not explicitly mentioned in International Protection Act is in contradiction with the Constitution Act and with Art. 8 ECHR.

<sup>644</sup> The text of the QD (recast) differs from the proposals of UNHCR and NGOs that advocated for elimination of the restriction that the family must have already existed in the country of origin. See ECRE, *ECRE Information Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, October 2013, p. 4.

<sup>645</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

<sup>646</sup> H. Dörig, in K. Hailbronner, D. Thym (eds.), op. cit., fn. 75.

<sup>647</sup> ECtHR, judgment of 21 June 1988, *Berrehab v the Netherlands*, application no 10730/84.

<sup>648</sup> ECtHR, *Marckx v Belgium*, op. cit., fn. 643.

<sup>649</sup> ECtHR, judgment of 22 April 1997, *X, Y and Z v the United Kingdom*, application no 21830/93; ECtHR, judgment of 24 June 2010, *Schalk and Kopf v Austria*, application no 30141/04.

<sup>650</sup> ECtHR, judgment of 12 July 2001, *K and T v Finland*, application no 25702/94.

<sup>651</sup> EASO, *Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis*, op. cit., fn. 22.

## Part 2: Subsidiary protection

### 2.1 Introduction

The rules in the QD (recast) with respect to refugee status are supplemented by rules on subsidiary protection. This form of protection does not derive from the Refugee Convention and is unique to EU law. As implied by the word ‘subsidiary’, subsidiary protection should serve as an additional form of international protection that is complementary to refugee protection (recital (33) QD (recast))<sup>652</sup>. The complementary nature of subsidiary protection can similarly be derived from the definition of a ‘person eligible for subsidiary protection’ in Article 2(f) QD (recast). This definition requires that the person concerned ‘**does not qualify as a refugee**’<sup>653</sup>. This phrase underlines that a person should only be granted subsidiary protection if the requirements for refugee status are not satisfied, which is based on the notion that the Refugee Convention ‘should be given a full and inclusive interpretation’<sup>654</sup>. This was also highlighted by the CJEU in *HN*:

[...] an application for subsidiary protection should not, in principle, be considered before the competent authority has reached the conclusion that the person seeking international protection does not qualify for refugee status<sup>655</sup>.

The decision trees in Appendix A (pp. 122) reflect this ordering.

In *Diakité* the CJEU furthermore confirmed that:

The minimum requirements for granting subsidiary protection must help to complement and add to the protection of refugees [...] through the identification of persons genuinely in need of international protection and through such persons being offered an appropriate status<sup>656</sup>.

Although subsidiary protection is complementary and additional to refugee protection, for the most part the QD (recast) seeks to apply the same criteria to its key modalities, such as actors of persecution or serious harm, internal protection and *sur place* claims (apart from Article 5(3) of the QD (recast))<sup>657</sup>.

The QD (recast) imposes an obligation for Member States to confer the rights and benefits laid down in the QD (recast) to beneficiaries of subsidiary protection. Although Member States provided for some kind of subsidiary/complementary protection prior to the adoption of the QD (besides protection based on the Refugee Convention), the application and nature of this subsidiary protection varied in the Member States<sup>658</sup>. By developing a common set of criteria for eligibility and approximating access to benefits attached to subsidiary protection, the QD has become the first supranational instrument to undertake such an effort<sup>659</sup>.

The foundations of subsidiary protection are reflected in recital (34) QD (recast): ‘[The criteria for subsidiary protection] should be drawn from **international obligations** under human rights instruments and **practices existing in Member States**’<sup>660</sup>. In this regard, the obligation of *non-refoulement* linked with Article 3 ECHR – i.e. the obligation not to return an individual to a country where that individual will face a real risk of ill-treatment – is of particular importance<sup>661</sup>. The principle of *non-refoulement* can also be derived from Article 3 of the Convention against Torture<sup>662</sup> and Article 7 ICCPR<sup>663</sup>. However, it must be noted that the QD (recast) establishes its own

<sup>652</sup> See CJEU, *HN* judgment, op. cit., fn. 24, para. 32.

<sup>653</sup> Emphasis added.

<sup>654</sup> J. McAdam, ‘The Qualification Directive: An Overview’, in K. Zwaan (ed.), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers, 2007) p. 17.

<sup>655</sup> CJEU, *HN* judgment, op. cit., fn. 24, para. 35.

<sup>656</sup> See CJEU, *Diakité* judgment, op. cit., fn. 633, para. 33. See also CJEU, *Alo and Osso* judgment, op. cit. fn. 25, para. 31.

<sup>657</sup> See Chapter II and recital (39) of the QD (recast).

<sup>658</sup> J. McAdam, ‘The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime’, *JURL* (2005), p. 463-464.

<sup>659</sup> *Ibid.*, p. 462.

<sup>660</sup> Emphasis added.

<sup>661</sup> European Council, Note from the Presidency to the Asylum Working Party, Discussion Paper on Subsidiary Protection, 19 November 1999, EU Doc 13167/99 ASILE 41, p. 2.

<sup>662</sup> *Ibid.*

<sup>663</sup> See, for instance: Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para. 9; Human Rights Committee, views of 30 July 1993, *Joseph Kindler v Canada*, communication no 470/1991, para. 13.1; and Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, para. 12.

subsidiary protection regime which is distinct from Article 3 ECHR and other similar obligations under international human rights law<sup>664</sup>. Hence, an individual may be refused subsidiary protection but can still be protected from *refoulement*<sup>665</sup>. This can happen, for example, when the applicant is refused subsidiary protection because he/she falls within the exclusion clauses of Article 17 QD (recast)<sup>666</sup>.

Moreover, as is apparent from recital (16), all provisions of the QD (recast) must observe the specific human rights guarantees and principles enshrined in the EU Charter. Like any other, the provisions on subsidiary protection in the QD (recast) therefore have to be interpreted in a manner consistent with the rights recognised by the EU Charter<sup>667</sup>. These do not correspond to ECHR rights in every respect<sup>668</sup>.

To a large extent, Part 2 of this Judicial Analysis has a structure that is analogous to the structure of Part 1. This is for the reason already noted, namely that although subsidiary protection is complementary and additional to refugee protection, the QD (recast) seeks as far as possible to apply the same criteria to their key modalities. Accordingly, in some sections, reference is made to Part 1 on refugee protection in order to avoid repetition when the QD (recast) provisions are identical for both types of status. After this introduction, the remainder of Part 2 is structured as follows:

- Section 2.2, pp. 100: who is eligible for subsidiary protection?;
- Section 2.3, pp. 101: the personal and territorial scope of subsidiary protection (Article 2(f));
- Section 2.4, pp. 102: the definition of ‘serious harm’ (Article 15);
- Section 2.5, pp. 110: the actors of serious harm (Article 6);
- Section 2.6, pp. 111: the actors of protection (Article 7);
- Section 2.7, pp. 112: internal protection (Article 8);
- Section 2.8, pp. 114: substantial grounds for believing that the person concerned would face a real risk (Articles 2(f), 4(4) and 5); and
- Section 2.9, pp. 119: the status granted to subsidiary protection beneficiaries.

## 2.2 Who is eligible for subsidiary protection?

Article 2(f) QD (recast) defines the term ‘person eligible for subsidiary protection’ as follows:

[A] third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

The assessment of whether an applicant satisfies the criteria of Article 2(f), read in conjunction with Article 15, must, according to Article 4, *inter alia*, be carried out on an individual basis and by reference to certain relevant facts and circumstances<sup>669</sup>. This includes the statements and documentation presented by the applicant and the individual position and personal circumstances of the applicant. Article 4 applies identical criteria for the assessment of qualification for refugee and subsidiary protection statuses.

<sup>664</sup> See, for example, CJEU, *Elgafaji* judgment, *op. cit.*, fn. 45, para. 28, and CJEU, *Diakité* judgment, *op. cit.*, fn. 633.

<sup>665</sup> CJEU, *M'Bodj* judgment, *op. cit.*, fn. 45, para. 40.

<sup>666</sup> See EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, *op. cit.*, fn. 3, Section 3.4.1, pp. 71-75.

<sup>667</sup> CJEU, *El Kott and Others* judgment, *op. cit.*, fn. 25, para. 43.

<sup>668</sup> See EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, *op. cit.*, fn. 3, Section 2.1.3, pp. 28-32.

<sup>669</sup> For further detail see EASO, *Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis*, *op. cit.*, fn. 22.

The key notion around which the regime of subsidiary protection revolves is that of serious harm. Article 15 subdivides serious harm into **three different categories of harm** (see Table 30 below).

**Table 30: Three types of serious harm in Article 15 QD (recast)**

<b>(a)</b>	the death penalty or execution; or
<b>(b)</b>	torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
<b>(c)</b>	serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

The first and second category ((a) and (b)) are discussed below (see Section 2.4, pp. 102). The present Judicial Analysis does not, however, cover Article 15(c) which is already the subject of another Judicial Analysis within the EASO Professional Development Series for courts and tribunals<sup>670</sup>.

## 2.3 Personal and territorial scope (Article 2(f))

Article 2(f) QD (recast) specifies the applicability of subsidiary protection to a person who is:

[A] **third-country national or a stateless person who does not qualify as a refugee** but in respect of whom substantial grounds have been shown for believing that the person concerned, **if returned to his or her country of origin**, or in the case of a stateless person, **to his or her country of former habitual residence**, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country<sup>671</sup>.

Section 2.3.1 below (pp. 101) discusses the first requirement for subsidiary protection status, which is that the applicant must be a third-country national or stateless person, insofar as this requires additional explanation to that provided in Sections 1.3.1 (pp. 23) and 1.3.2 (pp. 25) concerning refugee status. Section 2.3.2 below (pp. 102) discusses the second requirement ‘if returned to his or her country of origin’ or ‘to his or her country of former habitual residence’. The additional requirement for subsidiary protection status that the person concerned ‘does not qualify as a refugee’ was discussed previously in Section 2.1 (pp. 99).

### 2.3.1 Third-country national or stateless person

Although the notion of subsidiary protection in the QD (recast) is inspired by the jurisprudence of the ECtHR on Article 3 ECHR<sup>672</sup>, it contains the additional requirement that the person concerned must be a third-country national or a stateless person. The protection against *refoulement* under Article 3 ECHR, on the other hand, applies to all individuals facing return<sup>673</sup> and is therefore not limited to third-country nationals or stateless persons. The identification of the country of nationality or statelessness in the context of subsidiary protection status is not different from that identification in the context of the eligibility of refugee status. For how to determine nationality or statelessness, see Sections 1.3.1 (pp. 23) and 1.3.2 (pp. 25).

<sup>670</sup> Art. 15(c) is discussed in: EASO, *Article 15(c) Qualification Directive (2011/95/EU) – A Judicial Analysis*, op. cit., fn. 436.

<sup>671</sup> Emphasis added.

<sup>672</sup> CJEU, *Elgafaji* judgment, op. cit., fn. 45, para. 28.

<sup>673</sup> See, e.g., ECtHR, judgment of 17 July 2008, *NA v the United Kingdom*, application no 25904/07, para. 108, in which the ECtHR examined whether there would be a violation of Art. 3 if a State Party were to expel an **individual** to another State.

### 2.3.2 Territorial scope

Unlike the definition of a ‘refugee’, Article 2(f) QD recast does not explicitly state that a person eligible for subsidiary protection should be outside the country of nationality, or if stateless, the country of former habitual residence. However, in view of the phrasing ‘if returned to his or her country of origin’ or ‘to his or her country of former habitual residence’, an applicant for subsidiary protection is also by definition someone who is outside the country of nationality or habitual residence and is facing return. From the wording ‘if returned to his or her country of origin’ or ‘to his or her country of former habitual residence’, it may be derived that the application of subsidiary protection is limited to situations where the person concerned would face a real risk of suffering serious harm, defined in Article 15 QD, in the country of origin or former habitual residence.

Concerning the scope of Article 15(b), this has been addressed in the judgment of the CJEU in *M’Bodj*. In *M’Bodj* the CJEU recalled that the three types of serious harm laid down in Article 15 QD are the conditions to be fulfilled for subsidiary protection status, where, in line with Article 2(e) QD (now Article 2(f) QD (recast)), ‘substantial grounds have been shown for believing that the applicant concerned faces a real risk of such harm **if returned to the country of origin concerned**’<sup>674</sup>. According to the CJEU, it is apparent from the wording of Article 15(b) of the QD – defining serious harm as the torture or inhuman or degrading treatment or punishment of a third-country national in his/her country of origin – that it is applicable only to this form of treatment of an applicant in his/her country of origin. ‘It follows that the EU legislature envisaged that subsidiary protection should be granted only in those cases in which such treatment occurred in the applicant’s country of origin’<sup>675</sup>.

It should not be forgotten, however, that a person, who does not meet the required condition of a real risk of ill-treatment existing in the country of origin to be granted subsidiary protection, may nevertheless invoke national law, protection of human rights under the ECHR and/or other international instruments<sup>676</sup>.

## 2.4 Serious harm (Article 15)

Article 15 QD (recast) 2011 has been left unaltered since the QD 2004 and provides that:

Serious harm consists of:

- (a) the death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

The present Section analyses this provision looking first at its object, purpose and structure (Section 2.4.1, pp. 102) and then examining the scope of the serious harms, namely Article 15(a) (Section 2.4.2, pp. 105) and Article 15(b) (Section 2.4.3, pp. 106). Article 15(c) is intentionally not covered in any detail in this Judicial Analysis as it is the subject of another Judicial Analysis (Section 2.4.4, pp. 110)<sup>677</sup>.

### 2.4.1 Object, purpose and structure

Article 15 is the key provision on subsidiary protection. Although it defines only the term ‘serious harm’, together with Article 2(f), it describes common conditions under which persons who do not qualify as refugees under the QD (recast) and the Refugee Convention are entitled to a specific type of international protection. Prior to the adoption of the QD in 2004, EU Member States differed widely in respect of those to whom they gave protection outside the Refugee Convention. There was however ad hoc agreement on some categories of persons who were generally recognised to be in need of protection and deserving, if not of all the rights granted to refugees under the Refugee Convention, at least of some rights similar to those of refugees (see Section 2.1 above, pp. 99). The QD codifies into one new status – ‘subsidiary protection status’ – all those categories on which Member States

<sup>674</sup> Emphasis added.

<sup>675</sup> CJEU, *M’Bodj* judgment, op. cit., fn. 45, paras. 30-33. On this issue, see further Section 2.4.3.3 below, pp. 109.

<sup>676</sup> See also EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, op. cit., fn. 3, Section 3.4.1, p. 75.

<sup>677</sup> EASO, *Article 15(c) Qualification Directive (2011/95/EU) – A Judicial Analysis*, op. cit., fn. 436.



could agree. Article 15, thus, contains the basic provision for the qualification criteria for subsidiary protection, that is, the serious harms justifying subsidiary protection<sup>678</sup>.

The definition of serious harm in Article 15 covers **three different situations** which can give rise to subsidiary protection status. Being subsidiary to refugee status (see Section 2.1 above, pp. 99), subsidiary protection is different in its requirements from refugee protection. One evident difference is that ‘serious harm’, as opposed to ‘persecution’ can exist (and so establish subsidiary protection status) independent of any persecutory reasons set out in Article 10 QD (recast), where substantial grounds have been shown for believing that the applicant faces a real risk of such harm if returned to the country of origin<sup>679</sup>.

Whether there are any further differences in practice is not clear. In broad terms ‘persecution’ and ‘serious harm’ denote a certain threshold of severity. Nevertheless it is important to give effect to their specific definitions.

As already noted, Article 15 has adopted the concept of serious harm as a general description of types of treatments further defined in (a) to (c). It follows from the clear wording that **the definition is exhaustive**. Thus, ‘serious harm’ as such does not result in an entitlement to subsidiary protection unless the conditions of Article 15 (a), (b) or (c) are fulfilled. Therefore, a ‘violation of a human right, sufficiently severe to engage the Member State’s international obligations’ as originally suggested by the Commission’s Proposal<sup>680</sup> is not sufficient to establish serious harm unless it can be subsumed under Article 15 (a)-(c).

Moreover, it is noteworthy that Article 15(a)-(c) are **not mutually exclusive**. An applicant may, for example, be able to show he/she comes within both paragraphs (b) and (c). Paragraphs (a), (b) and (c) do not denote a hierarchy but, unless there is a particular reason to do otherwise, it may be convenient for a decision-maker to consider (a)-(c) sequentially.

Article 15 intends to complement, by means of subsidiary protection, the protection of refugees ‘through the identification of persons genuinely in need of international protection’<sup>681</sup>. The CJEU has relied upon this purpose, derived from the recitals of the Directive, to emphasise that the scope of the QD ‘does not extend to persons granted leave to reside in the territories of the Member States for other reasons, that is, on a discretionary basis on compassionate or humanitarian grounds’<sup>682</sup>. It is therefore indispensable to examine in each case whether the requirements of one or more of the three categories of situations described in Article 15(a)-(c) are fulfilled.

#### 2.4.1.1 More favourable standards clause

Under Article 3 QD (recast), the power of Member States to introduce more favourable standards for determining, inter alia, who qualifies as a person eligible for subsidiary protection, extends only insofar as those standards are compatible with the Directive (see the Section on ‘More favourable standards’ in the general introduction, pp. 19)<sup>683</sup>. According to the CJEU in *M’Bodj* of 2014, compatibility requires a situation which has a **connection with the rationale of international protection**<sup>684</sup>. The situation of a third country-national or stateless person suffering from a serious illness where that person’s health will deteriorate as a result of the fact that adequate treatment is not available in his/her country of origin does not ordinarily qualify as a connection with the rationale of international protection<sup>685</sup> (see also below Section 2.4.3, pp. 106).

<sup>678</sup> The QD (recast) does not preclude Member States from applying national law for of protection outside the scope of the Directive.

<sup>679</sup> CJEU, *M’Bodj* judgment, op. cit., fn. 45, para. 30.

<sup>680</sup> See draft Art. 15(b) in European Commission, *QD Proposal*, op. cit., fn. 194. The original Commission’s Proposal related to a well-founded fear of a violation of other human rights and was introduced with the argument that Member States must have regard to their obligations under their human rights instruments. Therefore, Member States would have to consider whether the return of applicants to their country of origin or habitual residence would result in serious unjustified harm on the basis of a violation of a human right and whether they have an extra-territorial obligation to protect (*Ibid.*, p. 26). Against the general concept of violations of human rights, several Member States raised objections on reasons of a lack of specification which violations of human rights exactly would provide an entitlement for subsidiary protection (European Council, Asylum Working Party, Outcome of Proceedings (EU Doc 9038/02), op. cit., fn. 211, p. 2) and possible consequences of an extended scope of application of the provision (European Council, Presidency Note to the Strategic Committee on Immigration, Frontiers and Asylum, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, 20 September 2002, EU Doc 12148/02 ASILE 43, p. 11).

<sup>681</sup> CJEU, *M’Bodj* judgment, op. cit., fn. 45, para. 37; CJEU, *Diakité* judgment, op. cit., fn. 633, para. 33

<sup>682</sup> CJEU, *M’Bodj* judgment, op. cit., fn. 45, para. 37.

<sup>683</sup> CJEU, *B and D* judgment, op. cit., fn. 60, para. 114; CJEU, *M’Bodj* judgment, op. cit., fn. 45, para. 42.

<sup>684</sup> CJEU, *M’Bodj* judgment, op. cit., fn. 45, para. 44.

<sup>685</sup> *Ibid.*, para. 43.

It follows that Article 15(a)-(c) are to be carefully interpreted in light of the object and purpose of the QD (recast) as prescribed by Article 3. The scope of these provisions cannot be extended to encompass situations where protection is granted under national law on humanitarian or compassionate grounds that have to fall outside the Directive.

#### 2.4.1.2 Coherence of relationships between Article 15(a), (b) and (c)

In its *Elgafaji* judgment, the CJEU described the relationship between Article 15(a) and (b) on the one hand and Article 15(c) on the other<sup>686</sup>. The Court noted that Article 15(a) and (b) cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm, whereas Article 15(c) covers a more general risk of harm<sup>687</sup>. Further, the harm defined in Article 15(a) and (b) requires a clear degree of individualisation, whilst collective factors play a significant role in the application of Article 15(c). Nevertheless, Article 15(c) must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15(a) and (b) and must, therefore, be interpreted by close reference to that individualisation<sup>688</sup>.

#### 2.4.1.3 Non-hierarchical character and overlaps between Article 15(a), (b) and (c)

As noted earlier, the granting of subsidiary protection may be **based on more than one of the grounds defined as serious harm in Article 15(a) to (c)**. While subsidiary protection excludes by definition that a person qualifies for refugee status, there is no hierarchy between the different types of harm described in Article 15<sup>689</sup>. In spite of the differences noted previously with regard to the individualisation of a claim, there may be overlapping claims.

Overlaps may occur with regard to Article 15(a) and (b). While it is doubtful whether the death penalty as such according to the system of the ECHR can be generally qualified as inhuman treatment<sup>690</sup>, the imposition of a death penalty may constitute inhuman treatment. Imposition of a death penalty may raise issues of inhuman or degrading treatment when, for instance, a person is exposed to severe stress and fear due to the long time spent on death row in extreme conditions<sup>691</sup> or by the arbitrary nature of the proceedings leading to the imposition of a death penalty<sup>692</sup>.

Overlaps may also occur between Article 15(b) and (c). A situation of generalised violence in a country of destination may be of a sufficiently high level of intensity as to entail that any removal to it would necessarily breach Article 15(b), which in essence corresponds to Article 3 ECHR<sup>693</sup>. Although the ECtHR in its jurisprudence on Article 3 ECHR considers that such an approach would be adopted only 'in the most extreme cases of general violence'<sup>694</sup> and despite the fact the CJEU made clear that not all cases of prohibited removal based upon Article 3 ECHR automatically qualify for subsidiary protection under Article 15(b)<sup>695</sup>, it cannot be excluded that an application for subsidiary protection can be validly based upon both grounds<sup>696</sup>.

<sup>686</sup> CJEU, *Elgafaji* judgment, op. cit., fn. 45, para. 38.

<sup>687</sup> *Ibid.*, paras. 32 and 33.

<sup>688</sup> *Ibid.*, para. 38. See also EASO, *Article 15(c) Qualification Directive (2011/95/EU) – A Judicial Analysis*, op. cit., fn. 436.

<sup>689</sup> See H. Storey, in K. Hailbronner and D. Thym (eds.), op. cit., fn. 75.

<sup>690</sup> The ECtHR has examined the death penalty primarily in connection with the right to life and requirements for limiting this right and/or Protocols Nos 6 and 13: ECtHR, judgment of 12 May 2005, Grand Chamber, *Öcalan v Turkey*, application no 46221/99, para. 166; ECtHR, judgment of 2 March 2010, *Al-Saadoon and Mufdhi v the United Kingdom*, application no 61498/08, paras. 115 and ff. Cf. C. Grabenwarter, *European Convention of Human Rights, Commentary* (Nomos, 2014) Art. 2, paras. 7 and ff.

<sup>691</sup> ECtHR, *Soering v the United Kingdom*, op. cit., fn. 206, para. 99.

<sup>692</sup> ECtHR, judgment of 8 July 2004, Grand Chamber, *Ilaşcu and Others v Moldova and Russia*, application no 48787/99, paras. 429-433.

<sup>693</sup> ECtHR, *NA v the United Kingdom*, op. cit., fn. 673, para. 115. See also, ECtHR, *Sufi and Elmi v the United Kingdom*, op. cit., fn. 49, para. 218. Cf. H. Lambert, 'The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence', URL (2013) 207-234.

<sup>694</sup> ECtHR, *NA v the United Kingdom*, op. cit., fn. 673.

<sup>695</sup> CJEU, *M'Bodj* judgment, op. cit., fn. 45, para. 37.

<sup>696</sup> H. Storey argues that the difference in content has lost its significance, H. Storey, in K. Hailbronner and D. Thym (eds.), op. cit., fn. 689, Art. 15 Directive 2011/95, para. 5.

## 2.4.2 Death penalty or execution (Article 15(a))

### 2.4.2.1 Death penalty

Article 15(a) is based upon obligations of Member States derived from Article 1 of the 6th and 13th Protocols to the ECHR and the jurisprudence of the ECtHR according to which individuals may not be *refouled* to a country in which they would face the death penalty<sup>697</sup>. Protocol No 6, abolishing the death penalty in peace time, is ratified by all EU Member States<sup>698</sup>. Its scope of application was extended by Protocol No 13 which prohibits the death penalty in all circumstances, excluding any derogation even in time of war or national emergency<sup>699</sup>. Whether both Protocols allow the conclusion that the death penalty is no longer permitted under Article 2 ECHR (right to life)<sup>700</sup> need not be decided. But in the context of Article 15(a) **the death penalty is as such and under any circumstances considered as a serious harm entitling an applicant to subsidiary protection status**. This understanding is further enshrined in **Article 19(2) of the EU Charter** which, inter alia, prohibits *refoulement* to face a death penalty.

The death penalty does not need to have already been imposed in the country of origin. The mere existence of a real risk that on return a death penalty may be imposed on an applicant could be considered sufficient to establish a claim under Article 15(a). However, when there is no legal possibility to carry out a death sentence in an applicant's case due to an obligatory commutation of a death penalty into a life sentence, then it would have to be considered whether the applicant would in fact face a real risk of serious harm as defined in Article 15(a).

It is also worth noting that the ECtHR argues that 'the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering'<sup>701</sup>. If the real risk of execution cannot be excluded, the threat of imposition of the death penalty is likely to cause fear and distress comparable to the serious harm described under Article 15(b).

### 2.4.2.2 Execution

The second alternative covers **execution with or without a formal death sentence**. The term 'execution' means intentional killing of a person by the State or non-State actors exercising some kind of authority. The question whether **extrajudicial killings**, that are arbitrary deprivations of life in violation of Article 2 ECHR, are covered or whether Article 15(a) is limited to a death sentence and its execution, as most Member States seem to assume, has not yet been raised before the CJEU. The recognition in Article 6 that there can be non-State actors of serious harm and the fact that the wording of Article 15(a) encompasses the death penalty **or** execution would seem to support a wider interpretation<sup>702</sup>. On the other hand, the systematic context and legislative history requires a distinction between the death penalty proscription as a specific kind of inhuman punishment and the general protection of human life. Thus, it would seem necessary to require at least an element of intentional formalised punishment by State or non-State actors rather than a mere danger of becoming a victim of extrajudicial violence. Article 15(a) therefore is to be distinguished from the risks arising from general violence in an armed conflict.

Although the ECtHR, in the famous *Soering* case, did not as such consider the death penalty as inhuman treatment, the Court found that the way in which the death penalty was applied in the United States ('death row phenomenon') would amount to inhuman treatment<sup>703</sup>. Article 15(a) does not require that the execution is accompanied by particular aggravating circumstances. According to the clear wording, any execution is sufficient

<sup>697</sup> See ECtHR, *Soering v the United Kingdom*, op. cit., fn. 206.

<sup>698</sup> ETS No 114, 28 April 1983 (entry into force: 1 March 1985).

<sup>699</sup> ETS No 187, 3 May 2002 (entry into force: 1 July 2003).

<sup>700</sup> For an abolitionist trend in the practice of Council of Europe Member States, see ECtHR, *Öcalan v Turkey*, op. cit., fn. 690, para. 164; ECtHR, *Al-Saadoon and Mufdhi v the United Kingdom*, op. cit., fn. 690, paras. 115-120. For a critical assessment, see C. Grabenwarter, op. cit., fn. 690, Art. 2, para. 10.

<sup>701</sup> ECtHR, *Al-Saadoon and Mufdhi v the United Kingdom*, op. cit., fn. 690, para. 115.

<sup>702</sup> See in this sense IARLJ, *A Manual for Refugee Law Judges relating to European Council Qualification Directive 2004/83/EC and European Council Procedures Directive 2005/85/EC*, op. cit., fn. 555, p. 33. For the few Member States that recognise extrajudicial executions by non-State actors as falling within the purview of Art. 15(a), see for instance, Council for Alien Law Litigation (Belgium), decision of 14 March 2008, no 8.758, para. 4.4.1.2 ruling that the risk stemming from a vendetta against the applicant's family qualified as serious harm under Art. 15(a) and (b); Supreme Administrative Court (Czech Republic), judgment of 28 July 2009, *LO v Ministry of Interior*, 5 Azs 40/2009-74 (see EDAL English summary); and Supreme Administrative Court (Czech Republic), judgment of 11 February 2009, *AR v Ministry of Interior*, 1 Azs 107/2008-78 (see EDAL English summary).

<sup>703</sup> ECtHR, *Soering v the United Kingdom*, op. cit., fn. 206.

to justify an application of subsidiary protection even if a death sentence is passed for a particularly heinous crime. The wording corresponds to a development described by the ECtHR in its more recent jurisprudence<sup>704</sup>.

### 2.4.3 Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin (Article 15 (b))

Apart from its reference to the applicant's country of origin (see Section 2.4.3.3, pp. 109), Article 15(b) **corresponds in essence to Article 3 ECHR** which forms part of the general principles of EU law and is set out in its own right in Article 19(2) of the EU Charter<sup>705</sup>. According to the established jurisprudence of the CJEU, the case-law of the ECtHR on the interpretation of the ECHR has to be taken into consideration in interpreting the scope of Article 15(b) in the EU legal order<sup>706</sup>. Under Article 52(3) of the EU Charter the meaning and scope of Charter guarantees 'shall be the same as those laid down' by the ECHR<sup>707</sup>. The jurisprudence of the ECtHR provides guidance on the interpretation of the terms 'torture' and 'inhuman or degrading treatment or punishment'. If there is established jurisprudence of the ECtHR on the interpretation of these terms, it may be assumed that they have the same meaning in the EU legal order<sup>708</sup>.

Having said that, the CJEU in *M'Bodj* distinguished its interpretation from the ECtHR's interpretation of Article 3 ECHR based on the slightly different wording of Article 15(b) QD (recast) and the context in which Article 15(b) occurs. In highly exceptional cases the ECtHR has applied Article 3 ECHR to prohibit the removal of a third-country national suffering from a serious illness to a country in which appropriate medical treatment is not available<sup>709</sup>. The CJEU declined to interpret Article 15(b) in the same way. The CJEU noted that the wording of Article 15(b) QD (recast) differs from Article 3 ECHR insofar as it is applicable to torture or inhuman or degrading treatment or punishment of an applicant 'in the country of origin'. It follows that the EU legislature envisaged that subsidiary protection should be granted only in those cases in which such treatment occurred in the applicant's country of origin (see also Section 2.4.3.3 below, pp. 109). Moreover, the Court noted that certain factors specific to the context in which Article 15(b) QD (recast) occurs must, in the same way as the Directive's objectives, also be taken into account for the purpose of interpreting that provision. Accordingly, Article 6 QD (recast) sets out a list of actors of protection, which supports the view that such harm must take the form of conduct on the part of a third party and that it cannot therefore simply be the result of general shortcomings in the health system of the country of origin. Similarly, recital (26) QD (recast) states that risks to which the population of a country or a section of the population is generally exposed do not normally in themselves create an individual threat which would qualify as serious harm. Taking into account this different context, the CJEU concluded that it follows that the risk of deterioration in the health of a third-country national suffering from a serious illness as a result of the absence of appropriate treatment in his/her country of origin is not sufficient, unless that third-country national is intentionally deprived of health care, to warrant that person being granted subsidiary protection on the basis of Article 15(b)<sup>710</sup>. Therefore, whilst Article 3 ECHR might in exceptional circumstances prevent removal of a person to a country in which appropriate treatment is not available, this must not mean that the person qualifies for subsidiary protection status under Article 15(b) (see Section 2.4.3.2 below, pp. 109).

#### 2.4.3.1 Torture or inhuman or degrading treatment or punishment

An act or measure must qualify as torture or inhuman or degrading treatment or punishment to justify a claim under Article 15(b). To qualify as ill-treatment contrary to Article 3 ECHR, it does not matter whether the act or measure is one or the other of these sub-categories (torture, inhuman or degrading treatment or punishment). Thus, for example, merely being able to show degrading treatment can suffice. However, case-law accords the three sub-categories specific meanings which require correct application. The forms of forbidden treatment may be distinguished according to the **intensity and motivation of a violation**.

<sup>704</sup> ECtHR, *Al-Saadoon and Mufdhi v the United Kingdom*, op. cit., fn. 690, para. 115; and ECtHR, *Öcalan v Turkey*, op. cit., fn. 690, para. 164.

<sup>705</sup> CJEU, *Elgafaji* judgment, op. cit., fn. 45, para. 28.

<sup>706</sup> *Ibid.*

<sup>707</sup> See EASO, *An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals – A Judicial Analysis*, op. cit., fn. 3, p. 72.

<sup>708</sup> Art. 52(3) of the EU Charter.

<sup>709</sup> ECtHR, judgment of 27 May 2008, Grand Chamber, *N v the United Kingdom*, application no 26565/05, para. 42.

<sup>710</sup> CJEU, *M'Bodj* judgment, op. cit., fn. 45, paras. 32-36.

### 2.4.3.1.1 Torture

The ECtHR attaches ‘a special stigma to deliberate inhuman treatment causing very serious and cruel suffering’<sup>711</sup>. The ECtHR has also referred to Article 1(1) of the UN [Convention against Torture](#) defining torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions<sup>712</sup>.

An act by which **severe physical or mental pain and suffering is intentionally inflicted** is required to qualify as an aggravated and deliberate form of cruel, inhuman or degrading treatment to which the special stigma of torture is attached. The ECtHR has not defined the precise level of intensity required. The **impact of the treatment or its long-term consequences and the existence of a specific intention** such as extracting a confession are taken into account<sup>713</sup>. All the circumstances of a case are taken into consideration, including the underlying purpose behind the infliction of treatment forbidden under Article 3 ECHR as inhuman or degrading treatment. In the *Gäfgen* judgment the ECtHR was concerned with the threat of torture in order to find the victim of a kidnapper. Although recognising that forewarning of torture may amount to torture, the ECtHR stated that:

[...] the method of interrogation to which the kidnapper was subjected in the circumstances of this case was sufficiently serious to amount to inhuman treatment prohibited by Article 3, but that it did not reach the level of cruelty required to attain the threshold of torture<sup>714</sup>.

Similarly in *Jalloh*, the Court argued that the administration of emetics in order to force a suspect to regurgitate was inhuman treatment but did not attach the special stigma reserved for acts of torture<sup>715</sup>. In the *Ireland v the United Kingdom* case, the ECtHR was similarly reluctant to determine the UK interrogation methods against suspected terrorists as torture but did deem that they amounted to inhuman treatment<sup>716</sup>. Only deliberate intentional inflictions however may qualify as torture while inhuman or degrading treatment may lack intent.

### 2.4.3.1.2 Inhuman or degrading treatment or punishment

The prohibition of inhuman or degrading treatment as defined by the ECtHR covers a wide range of ill-treatments which reach a **certain level of severity**. The ECtHR has considered treatment to be ‘inhuman’ because, inter alia, it was premeditated, was applied for hours at a stretch and caused either bodily injury or intense physical or mental suffering<sup>717</sup>.

A treatment or punishment is defined by the ECtHR as ‘**degrading**’ because it is such as to arouse in the victim feelings of fear, anguish and inferiority capable of humiliating or debasing them<sup>718</sup> or because it affects a person’s personality in a manner incompatible with Article 3<sup>719</sup>. The absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3<sup>720</sup>. It may be sufficient that the victim is humiliated in his/her own eyes, even if not in the eyes of others<sup>721</sup>.

The ECtHR jurisprudence however frequently does not distinguish clearly between torture and inhuman or degrading treatment. The decisive criterion to arrive at the finding of a violation of Article 3 ECHR is that the

<sup>711</sup> ECtHR, judgment of 28 July 1999, Grand Chamber, *Selmouni v France*, application no 25803/94, para. 99; ECtHR, judgment of 18 January 1978, *Ireland v the United Kingdom*, application no 5310/71, para. 167. See also, Administrative Court (Republic of Slovenia), *Mustafa*, op. cit., fn. 526, where the Court interpreted acts of torture in the light of the standards from *Selmouni v France*.

<sup>712</sup> 1465 UNTS 85, 10 December 1984 (entry into force: 26 June 1987).

<sup>713</sup> ECtHR, judgment of 23 May 2001, *Denizci and Others v Cyprus*, applications nos 25316-25321/94 and 27207/95, para. 383.

<sup>714</sup> ECtHR, judgment of 1 June 2010, Grand Chamber, *Gäfgen v Germany*, application no 22978/05, para. 108.

<sup>715</sup> ECtHR, judgment of 11 July 2006, Grand Chamber, *Jalloh v Germany*, application no 54810/00, paras. 103-107.

<sup>716</sup> ECtHR, *Ireland v the United Kingdom*, op. cit., fn. 711, para. 167.

<sup>717</sup> ECtHR, judgment of 26 October 2000, *Kudla v Poland*, application no 30210/96, para. 92; ECtHR, judgment of 15 July 2002, *Kalashnikov v Russia*, application no 47095/99, para. 95; ECtHR, judgment of 21 January 2011, Grand Chamber, *MSS v Belgium and Greece*, application no 30696/09, para. 220.

<sup>718</sup> ECtHR, *Kudla v Poland*, op. cit., fn. 717, para. 92. See also, ECtHR, judgment of 25 April 1978, *Tyrer v the United Kingdom*, application no 5856/72, para. 30.

<sup>719</sup> ECtHR, *Kalashnikov v Russia*, op. cit., fn. 717, para. 95.

<sup>720</sup> *Ibid.*; ECtHR, judgment of 19 April 2001, *Peers v Greece*, application no 28524/95, para. 74.

<sup>721</sup> ECtHR, *MSS v Belgium and Greece*, op. cit., fn. 717, para. 220.

ill-treatment attains a **minimum level of severity**. The assessment of this minimum level of severity is **relative**: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the gender, age and state of health of the victim. Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it, as well as its context, such as an atmosphere of heightened tension and emotions<sup>722</sup>. Such a case-by-case assessment is moreover dictated by the terms of Article 4 QD (recast). In Germany, the *Bayerischer Verwaltungsgerichtshof* (High Administrative Court of Bavaria) held that the threat of a forced marriage, arranged by the woman's parents, can amount to degrading treatment within the meaning of Article 15(b) QD, especially if a young Sunni woman has resisted the decision of her family council in Northern Iraq by fleeing to Europe<sup>723</sup>.

Frequently, **measures depriving a person of his/her liberty** may involve an element of intense physical or mental suffering constituting inhuman or degrading treatment. However, the execution of an administrative decision or detention on remand or short-term detention may not in itself raise an issue under Article 3. Nor can Article 3 ECHR be interpreted as laying down a general obligation to release a detainee on health grounds<sup>724</sup>. Nevertheless the State must ensure that a detained person is accommodated under conditions which are compatible with respect for human dignity and the manner and methods of the implementation of a measure must not subject the person to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention<sup>725</sup>. Drawing on its previous case-law, in its *Babar Ahmad and Other* judgment the ECtHR has suggested an illustrative list of factors that have been decisive for finding a violation of Article 3 ECHR arising out of ill-treatment of prisoners (see Table 31 below)<sup>726</sup>. The Court nevertheless underlined that 'all of these elements depend closely upon the facts of the case and so will not be readily established prospectively in an extradition or expulsion context'<sup>727</sup>.

**Table 31: ECtHR illustrative list of factors decisive for concluding on ill-treatment of prisoners<sup>728</sup>**

1	the presence of premeditation
2	that the measure may have been calculated to break the applicant's resistance or will
3	an intention to debase or humiliate an applicant, or, if there was no such intention, the fact that the measure was implemented in a manner which nonetheless caused feelings of fear, anguish or inferiority
4	the absence of any specific justification for the measure imposed
5	the arbitrary punitive nature of the measure
6	the length of time for which the measure was imposed
7	the fact that there has been a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention

**Prosecution and punishment for ordinary crimes** cannot be characterised as inhuman treatment unless there are **special aggravating circumstances** supporting the assumption that the punishment is grossly **disproportionate**. It is in principle a State's choice to determine the appropriate sentence for a crime and review sentences. A life sentence without any possibility of review and to reduce the prison sentence has been qualified by the ECtHR as grossly disproportionate and thus inhuman<sup>729</sup>.

In all cases, however, the requirement of severity of treatment has to be fulfilled. By analogy to the jurisprudence of the CJEU in *X, Y and Z*<sup>730</sup>, even criminalisation of acts or behaviour which is protected by human rights may not reach the level of a severe ill-treatment. Subject to what is said below in Section 2.4.3.2 (pp. 109), even dire economic and humanitarian conditions are not ordinarily capable of constituting inhuman treatment and therefore do not establish eligibility for subsidiary protection<sup>731</sup>.

<sup>722</sup> ECtHR, judgment of 18 October 2012, *Bureš v the Czech Republic*, application no 37679/08, para. 84; ECtHR, *Gäfgen v Germany*, op. cit., fn. 714, para. 88.

<sup>723</sup> High Administrative Court of Bavaria, judgment of 17 March 2016, application no 13a B 15.30241.

<sup>724</sup> ECtHR, *Kudła v Poland*, op. cit., fn. 717, para. 93.

<sup>725</sup> ECtHR, *Kalashnikov v Russia*, op. cit., fn. 717, para. 95. This was also supported by EWCA (UK), judgment of 5 November 2003, *Batayav v Secretary of State for the Home Department* [2003] EWCA Civ 1489.

<sup>726</sup> ECtHR, judgment of 10 April 2012, *Babar Ahmad and Others v the United Kingdom*, applications nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, para. 178.

<sup>727</sup> *Ibid.*

<sup>728</sup> *Ibid.* (internal references omitted).

<sup>729</sup> ECtHR, judgment of 9 July 2013, Grand Chamber, *Vinter and Others v the United Kingdom*, applications nos 66069/09, 130/10 and 3896/10, paras. 104-121. See also ECtHR, judgment of 4 September 2014, *Trabelsi v Belgium*, application no 140/10, paras. 137-139.

<sup>730</sup> CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 53.

<sup>731</sup> See ECtHR, *Sufi and Elmi v the United Kingdom*, op. cit., fn. 49, para. 282.

### 2.4.3.2 Non-refoulement according to Article 3 ECHR and subsidiary protection under Article 15(b) in cases of unintentional ill-treatment

The application of Article 15(b) requires an **element of intentional ill-treatment**. In spite of the CJEU's reference to the case-law of the ECtHR on the interpretation of Article 3 ECHR and to the obligation to apply the QD (recast) in a manner consistent with Article 19(2) of the EU Charter (*non-refoulement* in case of a serious risk of inhuman or degrading treatment or punishment)<sup>732</sup>, the Court has attached specific importance to the different wording of Article 15(b). It has also drawn a distinction between the scope of application of Article 3 as a prohibition to return a person and the establishment of an application for subsidiary protection in specific situations<sup>733</sup>.

According to the established case-law of the ECtHR, a decision to remove a foreign national suffering from a serious physical or mental illness to a country where the facilities for the treatment of the illness are inferior to those available in that State may constitute a violation of Article 3 ECHR in highly exceptional cases, where the humanitarian grounds against removal are compelling<sup>734</sup>. The highly exceptional cases are characterised by the seriousness and irreparable nature of the harm that may be caused by the removal of third-country nationals to a country<sup>735</sup>.

Yet, as the CJEU stated in its *M'Bodj* judgment:

[T]he fact that a third country national suffering from a serious illness may not, under Article 3 ECHR, as interpreted by the European Court of Human Rights, in highly exceptional cases be removed to a country in which appropriate treatment is not available does not mean that the person should be granted leave to reside in a Member State by way of subsidiary protection<sup>736</sup>.

Distinguishing between *non-refoulement* and subsidiary protection, the CJEU noted that Article 15(b) must be interpreted as meaning that:

[Serious harm] does not cover a situation in which inhuman or degrading treatment, [...] to which an applicant suffering from a serious illness may be subjected if returned to his country of origin, is the result of the fact that appropriate treatment is not available in that country, unless such an applicant is intentionally deprived of health care<sup>737</sup>.

### 2.4.3.3 Inhuman or degrading treatment in the country of origin of an applicant

The risk of serious harm as defined in Article 15(b) must, according to the clear wording of the provision, exist **in the country of origin of an applicant** in order to establish a claim for subsidiary protection (see above Section 2.3, pp. 101). It is not sufficient that the applicant runs a risk of serious harm in the country of previous habitual residence. The country of origin is in principle determined by the nationality of the applicant (Article 2(n) QD (recast))<sup>738</sup>. In case of statelessness, the country of former habitual residence may be considered as the country of origin within the meaning of Article 15(b) (Article 2(n) QD (recast)).

The exclusive reliance in Article 15(b) on the country of origin made in the original QD 2004 and maintained in the QD (recast) has to be seen in the context of the debate about the wide interpretation of the broad scope of application of Article 3 by the ECtHR. The Danish Presidency of the Council expressed concern that if Article 15(b) was to fully mirror the jurisprudence of the ECtHR relating to Article 3 ECHR, cases based purely on compassionate

<sup>732</sup> CJEU, *Elgafaji* judgment, op. cit., fn. 45, para. 28; CJEU, *El Kott and Others* judgment, op. cit., fn. 25, para. 43.

<sup>733</sup> CJEU, *M'Bodj* judgment, op. cit., fn. 45.

<sup>734</sup> ECtHR, *N v the United Kingdom*, op. cit., fn. 709, para. 42; ECtHR, *NA v the United Kingdom*, op. cit., fn. 673; ECtHR, *Sufi and Elmi v the United Kingdom*, op. cit., fn. 49, paras. 217 and ff.

<sup>735</sup> CJEU, *M'Bodj* judgment, op. cit., fn. 45, para. 50.

<sup>736</sup> *Ibid.*, para. 40.

<sup>737</sup> *Ibid.*, para. 41.

<sup>738</sup> For the rules on determining nationality or lack of it see Section 2.3.1 above, pp. 101.

considerations such as the case in *D v the United Kingdom*<sup>739</sup> – also known as the St Kitts case – would have to be included. In the St Kitts case, although the lack of access to a developed health system as well as lack of a social network were not in themselves considered as torture or inhuman or degrading treatment, the exposure to this situation as a result of expulsion, in combination with the disruption of medical treatment D was receiving in the UK, was determined to amount to life-threatening ill treatment contrary to Article 3<sup>740</sup>. Consequently, considering that the Directive was not meant to cover such cases, the Danish Presidency suggested avoiding the inclusion of compassionate grounds cases within the subsidiary protection regime by limiting the scope of Article 15(b) to a real risk of torture or inhuman or degrading treatment or punishment prevailing **in the country of origin**<sup>741</sup>. To overcome this concern, the Chair suggested the insertion of a recital with a wording similar to the one contained in the explanatory memorandum of the Commission’s Proposal (point 2, paragraph 2):

Whereas those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on compassionate or humanitarian grounds, fall outside the scope of this Directive<sup>742</sup>.

This proposal was adopted in a slightly amended version as recital (9) QD (now recital (15) QD (recast)) and clarifies that persons who are allowed to remain for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds fall outside the scope of the Directive (see above the Section on more favourable standards, pp. 19)<sup>743</sup>.

## 2.4.4 Serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict (Article 15(c))

Concerning Article 15(c), reference should be made to *Article 15(c) Qualification Directive (2011/95/EU) – A Judicial Analysis*<sup>744</sup>.

## 2.5 Actors of serious harm (Article 6)

Article 6 QD (recast) 2011 provides a list of actors of serious harm which includes:

- (a) the State;
- (b) parties or organisations controlling the State or a substantial part of the territory of the State;
- (c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

This provision is common to both forms of international protection. The analysis in Section 1.6 (pp. 55) thus equally applies to actors of serious harm for the purpose of granting subsidiary protection. For a detailed analysis of Article 6, please refer therefore to Section 1.6 in Part 1 (pp. 22).

<sup>739</sup> ECtHR, judgment of 2 May 1997, *D v the United Kingdom*, application no 30240/96. The case concerned an AIDS-patient, who the UK wanted to return to St Kitts (his country of origin). In the ruling the Court considered the expulsion as such to the prevailing situation in St Kitts to be an inhuman treatment. The reasoning was that the patient had become dependent on the medical treatment in the UK. Furthermore he could neither receive a similar treatment in St Kitts nor did he have a social network there. See the explanations of the Danish Presidency, in European Council, Presidency Note to the Strategic Committee on Immigration, Frontiers and Asylum, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, op. cit., fn. 680, p. 6.

<sup>740</sup> European Council, Presidency Note to the Strategic Committee on Immigration, Frontiers and Asylum, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, op. cit., fn. 680, p. 4.

<sup>741</sup> *Ibid.*, p. 5.

<sup>742</sup> European Council, Presidency Note to the Permanent Representative Committee, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, 7 October 2002, EU Doc 12534/02 ASILE 49, p. 3.

<sup>743</sup> European Council, Asylum Working Party / SCIFA/Corperer, Outcome of Proceedings (EU Doc 13648/02), op. cit., fn. 133, p. 22.

<sup>744</sup> EASO, *Article 15(c) Qualification Directive (2011/95/EU) – A Judicial Analysis*, op. cit., fn. 436.



### 2.5.1 The State (Article 6(a))

For a detailed analysis of the State as actor of persecution or serious harm, see Section 1.6.1 above (pp. 56).

### 2.5.2 Parties or organisations controlling the State or a substantial part of its territory (Article 6(b))

For a detailed analysis of parties or organisations controlling the State or a substantial part of its territory as actors of persecution or serious harm, see Section 1.6.2 above (pp. 58).

### 2.5.3 Non-State actors (Article 6(c))

For a detailed analysis of non-State actors as actors of persecution or serious harm, see Section 1.6.3 above (pp. 59).

## 2.6 Actors of protection (Article 7)

Article 7 QD (recast) is a **mandatory provision** common to both refugee status and subsidiary protection. The analysis developed in Section 1.7 on actors of protection (pp. 60) is thus also applicable concerning protection against serious harm. For a detailed analysis of Article 7, please refer therefore to Section 1.7 in Part 1 (pp. 60).

### 2.6.1 Actors of protection willing and able to offer protection (Article 7(1) and (3))

For a detailed analysis of Article 7(1) and (3), see Section 1.7.1 above (pp. 61).

#### 2.6.1.1 The State (Article 7(1)(a))

For a detailed analysis of the State as actor of protection, see Section 1.7.1.1 above (pp. 62).

#### 2.6.1.2 Parties or organisations, including international organisations (Article 7(1)(b) and (3))

For a detailed analysis of parties or organisations, including international organisations, as actors of protection, see Section 1.7.1.2 above (pp. 64).

### 2.6.2 Quality of protection (Article 7(2))

Article 7(2) of the QD (recast) defines protection in the country of nationality or of former habitual residence on the basis of **three cumulative requirements**. Accordingly, protection has to be:

- 1) **effective**;
- 2) **non-temporary**; and
- 3) **accessible**.

For a detailed analysis of these three requirements, see Section 1.7.2 above (pp. 66).

## 2.7 Internal protection (Article 8)

Article 8 QD (recast) is a provision applicable when determining **both refugee status and subsidiary protection**. Hence, Member States also have the possibility to determine that an applicant is not in need of subsidiary protection if internal protection exists in a part of the country of origin. The analysis given above in Section 1.8 (pp. 72) is thus equally valid when it comes to internal protection in the context of subsidiary protection. While this Section provides some more insights into the specific context of subsidiary protection whenever relevant, please refer to Section 1.8 in Part 1 (pp. 72) for a more comprehensive analysis.

### 2.7.1 Quality of internal protection (Article 8(1))

In its *Abdulla* judgment the CJEU emphasised that the QD establishes two distinct systems of protection, i.e. refugee status and subsidiary protection status<sup>745</sup>. Consequently, each provision of the QD (recast) referring to persecution or serious harm must be understood as having two sets of applications (i.e. one regarding persecution and the other regarding serious harm). Hence, whilst Article 8(1)(a) refers to well-founded fear of being persecuted or real risk of suffering serious harm, when assessing subsidiary protection, it is only the latter that is relevant. For example, when examining eligibility for subsidiary protection, the UKUT has applied the **same substantive requirements of safety, reasonableness and access** to internal protection using the wording of the subsidiary protection definition:

It is clear from the structure of Article 8 of the Qualification Directive that internal relocation is a necessary element, which is relevant not just to establishing refugee eligibility (under Articles 2 and 9) but also to establishing subsidiary [...] protection eligibility under all three limbs of Article 15 – 15 (a), (b) and (c). So far as concerns internal relocation being a necessary consideration for Article 15(c) purposes, it has been confirmed by the CJEU ruling in *Elgafaji* that an Article 15(c) issue can arise not just in relation to the whole of a country but also part(s) of it (para. 43). If a civilian's home area or region is considered to be in a state of indiscriminate violence at above the Article 15(c) threshold, he will still not be able to establish eligibility for subsidiary (humanitarian) protection unless able to show either a continuing risk of serious harm (the Article 8 (1) 'safety' limb) or circumstances that would make it unreasonable for him to relocate to another area or region (the Article 8 (1) 'reasonableness' limb)<sup>746</sup>.

Similarly, examining eligibility for subsidiary protection the German *Bundesverwaltungsgericht* (Federal Administrative Court) and the Hungarian *Fővárosi Közigazgatási és Munkaügyi Bíróság* (Administrative and Labour Court of Budapest) analysed the concepts of 'localised persecution' and 'non-temporary nature of protection' and concluded that: 'if an armed conflict has not spread to the whole territory an internal protection assessment is possible'<sup>747</sup>; but that 'countries that face armed conflicts usually cannot offer a safe internal protection because moving frontlines may render previously safe areas unsafe'<sup>748</sup>. From this analysis it is clear that decision-makers must pay particular regard (in accordance with Article 8(2)) to what is shown by the up-to-date country of origin information as regards the geographical scope of the violence and whether there is a real risk of it shifting or spreading to an area that is currently safe. According to the Slovenian *Upravno Sodišče* (Administrative Court), the quality of internal protection also requires having regard to an applicant's ability to cater for his/her most basic needs, such as food, hygiene and shelter, his/her vulnerability to ill-treatment and the prospect of his/her situation improving within a reasonable time-frame<sup>749</sup>.

In *Salah Sheekh and Sufi and Elmi*, the ECtHR applied the notion of (what it refers to as) internal flight alternative in the context of armed conflict. Both cases concerned applicants from Somalia. The ECtHR acknowledged that Article 3 ECHR allows States to rely on an internal flight alternative. However, its application should be subject to certain guarantees. In the *Salah Sheekh* judgment, the Court held that the person must be able to travel to the area concerned, gain admittance and settle there<sup>750</sup>. Since the available safe regions (Puntland and Somaliland) did not meet the above criteria and other areas of Somalia were not considered safe for the applicant, the ECtHR

<sup>745</sup> CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 78.

<sup>746</sup> UKUT, *AK (Article 15(c) Afghanistan CG*, op. cit., fn. 177, para. 228.

<sup>747</sup> Federal Administrative Court (Germany), judgment of 31 January 2013, 4AFG03MSB.

<sup>748</sup> Administrative and Labour Court of Budapest (Hungary), 6.k.34.830/2010/19, op. cit., fn. 482.

<sup>749</sup> Administrative Court (Republic of Slovenia), *Rahimi*, op. cit., fn. 351.

<sup>750</sup> ECtHR, *Salah Sheekh v the Netherlands*, op. cit., fn. 349, para. 141.

ruled out the possibility of relying on an internal flight alternative in that case<sup>751</sup>. In *Sufi and Elmi*, the ECtHR found that the applicants would face a risk of ill-treatment in the areas under Al-Shabaab's control, while conditions in internally displaced persons' camps, in the Court's view, reached the Article 3 threshold and, therefore, could not be considered a relocation alternative<sup>752</sup>.

## 2.7.2 Requirement of examination (Article 8(2))

An important peculiarity of the determination of subsidiary protection in the specific context of Article 15(c) QD is what has been referred to as **'the sliding-scale' concept**, i.e. that: 'the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection'<sup>753</sup> (see below Section 2.8, pp. 114). The opposite also applies: exceptionally, the level of violence could reach such a high intensity that a civilian would, solely on account of his/her presence on the territory of the affected country or region, face a real risk of being subject to serious harm<sup>754</sup>.

As is analysed in more detail in *Article 15(c) Qualification Directive (2011/95/EU) – A Judicial Analysis*<sup>755</sup>, the application of the 'sliding scale' concept for the internal protection assessment derives directly from what was held by the CJEU in the *Elgafaji* case (although it did not use this term):

Moreover, it should be added that, in the individual assessment of an application for subsidiary protection, under Article 4(3) of the Directive, the following may be taken into account:

- the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned to the relevant country, as is clear from Article 8(1) of the Directive, and
- the existence, if any, of a serious indication of real risk, such as that referred to in Article 4(4) of the Directive, an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower<sup>756</sup>.

This reasoning may arguably be extended to cases of generalised violence falling under Article 15(b). When examining expulsion under Article 3 ECHR, the ECtHR in the cases *NA v the United Kingdom* and *Sufi and Elmi v the United Kingdom* has emphasised that the assessment of a real risk in situations of generalised violence must be made on the basis of all relevant factors which may increase the risk of ill-treatment. Hence, in *NA*, the ECtHR held, inter alia:

Thus, while account must be taken of the general situation of violence in Sri Lanka at the present time, the Court is satisfied that it would not render illusory the protection offered by Article 3 to require Tamils challenging their removal to Sri Lanka to demonstrate the existence of further special distinguishing features which would place them at real risk of ill-treatment contrary to that Article [...]. [...] the Court emphasises that the assessment of whether there is a real risk must be made on the basis of all relevant factors which may increase the risk of ill-treatment. In its view, due regard should also be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk; but when taken cumulatively and when considered in a situation of general violence and heightened security, the same factors may give rise to a real risk<sup>757</sup>.

In *Sufi and Elmi*, concerning the situation in Somalia in 2011, the ECtHR considered 'the level of violence in Mogadishu is of sufficient intensity to pose a real risk of treatment reaching the Article 3 threshold to anyone in the capital'<sup>758</sup>. It should be noted that more recently the ECtHR has found that the situation in Mogadishu has now changed, so that it does not meet the Article 3 threshold<sup>759</sup>.

<sup>751</sup> *Ibid.*, para. 148.

<sup>752</sup> ECtHR, *Sufi and Elmi v the United Kingdom*, op. cit., fn. 49, paras. 301-304 and 309-312.

<sup>753</sup> CJEU, *Elgafaji* judgment, op. cit., fn. 45, para. 39; CJEU, *Diakité* judgment, op. cit., fn. 633, para. 31.

<sup>754</sup> EASO, *Article 15(c) Qualification Directive (2011/95/EU) – A Judicial Analysis*, op. cit., fn. 436, p. 23.

<sup>755</sup> *Ibid.*

<sup>756</sup> CJEU, *Elgafaji* judgment, op. cit., fn. 45, para. 40.

<sup>757</sup> ECtHR, *NA v the United Kingdom*, op. cit., fn. 673, paras. 128 and 130.

<sup>758</sup> ECtHR, *Sufi and Elmi v the United Kingdom*, op. cit., fn. 49, para. 248.

<sup>759</sup> See ECtHR, *RH v Sweden*, op. cit., fn. 350, para. 68.

## 2.8 Substantial grounds for believing in a real risk

### 2.8.1 Real risk (Article 2(f))

The QD (recast) stipulates the definition of the ‘person eligible for subsidiary protection’ in Article 2(f). In contrast to the QD (recast) refugee definition in Article 2(d) which requires there to be a ‘well-founded fear’ without further specification, Article 2(f) QD (recast) contains a reference to the way in which eligibility is to be demonstrated. More specifically, Article 2(f) QD (recast) requires that ‘substantial grounds have been shown for believing that the person concerned [...] would face a **real risk** of suffering serious harm’ if returned<sup>760</sup>. This wording closely follows the standard of proof developed by the ECtHR.

The requirement that a person eligible for subsidiary protection be at ‘real risk’ of suffering serious harm has so far been addressed by the CJEU only indirectly in *Elgafaji* concerning the interpretation of ‘serious harm’ in the situation of generalised violence defined in Article 15(c) QD<sup>761</sup>. However, the ECtHR jurisprudence sheds some light on this issue. Ever since *Soering v the United Kingdom*, the ECtHR has repeatedly underlined that the specific standard of proof required in *non-refoulement* cases is: ‘**substantial grounds** have been shown for believing that the person in question, if expelled, would face a **real risk** of being subjected to **treatment contrary to Article 3** in the receiving country’<sup>762</sup>. It has also held that:

[i]n order to determine whether there is a risk of ill-treatment, [it is necessary to] examine the **foreseeable consequences** of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances<sup>763</sup>.

This forward-looking assessment of the real risk means that what is important, according to the ECtHR, is not if the applicant is known to have been subject to ill-treatment following his/her return (which could be only a post factum analysis), but whether the decision-maker could have reasonably foreseen that outcome<sup>764</sup>.

Regarding the standard of proof, the applicant needs only to be exposed upon removal to a ‘real risk’ of ill-treatment for there to be a violation of Article 3 ECHR. On the one hand, the ECtHR held in *Vilvarajah and Others v the United Kingdom* that a ‘mere possibility’ of ill-treatment does not meet the threshold of ‘real risk’<sup>765</sup>. On the other hand, it held in *Saadi v Italy* that **the threshold is lower than ‘more likely than not’**<sup>766</sup>. The ECtHR also held that the same threshold applies for all applicants, irrespective of their profile. More specifically, the ECtHR held in *Saadi* that **the same test of ‘real risk’ applies to applicants who are a threat to national security**, meaning that such applicants do not need to satisfy a higher threshold of risk than other applicants<sup>767</sup>. Similarly, the same test of real risk applies irrespective of the source of the risked ill-treatment, including, for example in a situation of armed conflict and/or generalised violence (see below Section 2.8.5, pp. 117).

Although the CJEU has not as yet addressed the issue directly, it would appear that the standard of ‘real risk’ of serious harm does not differ from the standard used for assessment of ‘well-founded fear’ of persecution in the refugee definition (which is ‘reasonable fear’<sup>768</sup>), because it uses the terms ‘real risk’ and ‘well-founded fear’ interchangeably<sup>769</sup>. This would appear to indicate that the same standard of proof applies to assessment of ‘real risk’ and ‘well-founded fear’. This **‘reasonable fear/real risk’ test** means that, while the mere chance or remote possibility of being persecuted or subjected to serious harm is insufficient to establish a well-founded fear

<sup>760</sup> Emphasis added.

<sup>761</sup> See below Section 2.8.5, pp. 117.

<sup>762</sup> See e.g. ECtHR, *Soering v the United Kingdom*, op. cit., fn. 206, para. 91 (emphases added).

<sup>763</sup> ECtHR, *Saadi v Italy*, op. cit., fn. 516, para. 130 (emphasis added). See also ECtHR, judgment of 11 October 2011, *Auad v Bulgaria*, application no 46390/10, para. 99(c).

<sup>764</sup> See ECtHR, judgment of 30 October 1991, *Vilvarajah and Others v the United Kingdom*, applications nos 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 112.

<sup>765</sup> *Ibid.*, para. 111.

<sup>766</sup> ECtHR, *Saadi v Italy*, op. cit., fn. 516, para. 140 (emphasis added).

<sup>767</sup> *Ibid.*, para. 140.

<sup>768</sup> See CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 76; CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, para. 89; and CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 72. For further details, see Section 1.9.1.2, pp. 82.

<sup>769</sup> See CJEU, *Y and Z* judgment, op. cit., fn. 33, paras. 75, 79 and 80. ‘Real risk’ and ‘reasonable chance’ are very similar terms anyway; see IARLJ, *A Manual for Refugee Law Judges Relating to the European Council Qualification Directive 2004/84/EC and European Council Procedures Directive 2005/85/EC*, op. cit., fn. 555, p. 17; and H. Battjes, op. cit., fn. 117, p. 229.

or real risk, the applicant need not show that there is a clear probability that he/she will be persecuted or suffer serious harm (for further details, see Section 1.9.1.2 above, pp. 82).

## 2.8.2 Requirement of current risk (Article 2(f)) and significance of past serious harm (Article 4(4))

The word ‘risk’ reflects the forward-looking emphasis of the QD (recast) definition of a ‘person eligible for subsidiary protection’. According to the ECtHR, whether removal would be in violation of Article 3 ECHR is determined by whether a real risk of ill-treatment is foreseeable at the time of the proceedings before the ECtHR (**‘ex nunc’ assessment**)<sup>770</sup>. This *ex nunc* standard means that for the national decision-maker, the relevant moment for assessing the risk is the moment of the judicial decision. For instance, in *Chahal v the United Kingdom* the ECtHR held that:

Since [the applicant] has not yet been deported, the material point in time must be that of the Court’s consideration of the case. It follows that, although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is **the present conditions which are decisive**<sup>771</sup>.

This standard regarding the point in time for the assessment of the risk was reiterated in *Saadi v Italy*<sup>772</sup>, in *RH v Sweden*<sup>773</sup>, and, more recently, in *FG v Sweden*<sup>774</sup>. It should be noted that by virtue of provisions introduced by the APD (recast) at Article 46(3), there is now a duty on Member States to afford an effective domestic remedy that provides for ‘a full and *ex nunc* examination of both facts and points of law [...], at least in appeals procedures before a court or tribunal of first instance’.

An important element in assessing the current risk of serious harm in the context of Article 15 is whether the applicant has already been subject to serious harm or to direct threats of such harm. According to Article 4(4) QD (recast), which is a mandatory provision, the fact that an applicant has already been subject to serious harm or to direct threats of serious harm, is a serious indication of the applicant’s real risk of suffering serious harm, unless there are good reasons to consider that such serious harm will not be repeated. As Article 4(4) QD (recast) concerns both persecution and serious harm, it is possible to find guidance on this issue in the CJEU’s case-law regarding the significance of past persecution (see above Section 1.9.2, pp. 83). Importantly, past serious harm, as defined by Article 4(4) QD (recast), includes not only acts of serious harm, but also threats of serious harm<sup>775</sup>, and if the applicant had already been subject to persecution or to direct threats of serious harm, then, in accordance with Article 4(4), this would be a serious indication of real risk<sup>776</sup>. The CJEU confirmed this position in the context of subsidiary protection in *Elgafaji* where it considered that the level of indiscriminate violence required for eligibility for subsidiary protection under Article 15(c) QD may be lower where it is established that the applicant has already been subject to serious harm, since, as stipulated in Article 4(4) QD, that may itself be a serious indication of real risk<sup>777</sup>.

Whilst the jurisprudence of the ECtHR has not articulated an approach to past serious harm in precisely the same terms, it is clear that the ECtHR does take into account the fact that an applicant has already experienced inhuman treatment in the country of origin. In several recent judgments, the ECtHR has carefully scrutinised the applicant’s claims regarding past serious harm and has given these allegations, if properly substantiated, significant weight<sup>778</sup>. But, at the same time, the ECtHR has repeatedly stressed that ‘[e]ven though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive’<sup>779</sup>.

<sup>770</sup> See for instance: ECtHR, *Saadi v Italy*, op. cit., fn. 516, para. 133; ECtHR, *FG v Sweden*, op. cit., fn. 561, para. 115.

<sup>771</sup> ECtHR, *Chahal v the United Kingdom*, op. cit., fn. 457, para. 86 (emphasis added).

<sup>772</sup> ECtHR, *Saadi v Italy*, op. cit., fn. 516, para. 133 *in fine*.

<sup>773</sup> ECtHR, *RH v Sweden*, op. cit., fn. 350, para. 59.

<sup>774</sup> ECtHR, *FG v Sweden*, op. cit., fn. 561, in particular paras. 115 and 156-158.

<sup>775</sup> See, mutatis mutandis, CJEU, *Abdulla and Others* judgment, op. cit., fn. 336, paras. 94 and 96-97.

<sup>776</sup> See, mutatis mutandis, CJEU, *Y and Z* judgment, op. cit., fn. 33, para. 75; and CJEU, *X, Y and Z* judgment, op. cit., fn. 20, para. 64.

<sup>777</sup> CJEU, *Elgafaji* judgment, op. cit., fn. 45, para. 40.

<sup>778</sup> See for instance ECtHR, judgment of 17 April 2014, *Ismailov v Russia*, application no 20110/13, paras. 77 and 86-89; ECtHR, judgment of 6 June 2013, *ME c France*, application no 50094/10, paras. 51 and 52; and ECtHR, judgment of 18 April 2013, *Mo M c France*, application no 18372/10, paras. 39-43. But see ECtHR, *FG v Sweden*, op. cit., fn. 561, paras. 131-143.

<sup>779</sup> See also ECtHR, *Salah Sheekh v the Netherlands*, op. cit., fn. 349, para. 136. See also ECtHR, *Sufi and Elmi v the United Kingdom*, op. cit., fn. 49, para. 215.

This serious indication can however be rebutted, in particular if the circumstances in the country of origin have changed significantly and non-temporarily. For the criteria regarding ‘significant and non-temporary’ change of circumstances, see above Section 1.9 (pp. 80).

### 2.8.3 Evidence of risk to persons similarly situated

Even though it is required that the applicants face a real risk that they personally will be subject to serious harm, **considerations of the reality of the risk need not necessarily be based on the applicants’ own experience.** While the CJEU has not had the opportunity to address this issue outside the specific context of Article 15(c) QD (recast)<sup>780</sup>, the Belgian *Conseil d’Etat* (Council of State) has held that where the evidence demonstrates that a group is systematically targeted for ill-treatment, mere membership of such a group can constitute substantial grounds for believing that an applicant, if returned, would face a real risk of suffering serious harms as defined in Article 15(b) QD (recast)<sup>781</sup>.

The Belgian *Conseil d’Etat* (Council of State) explicitly rejected the view of the Belgian authorities that the applicant must establish *further* individual circumstances. It emphasised that *Elgafaji* equates Article 15(b) QD with Article 3 ECHR. It then went on to consider that the ECtHR, in *Saadi v Italy*, held that membership to a group systematically targeted by ill-treatments can give rise to protection under Article 3 ECHR<sup>782</sup>. Therefore the Council of State concluded that the protection of Article 15(b) shall be afforded to applicants belonging to a group systematically targeted even though they do not show further individual characteristics<sup>783</sup>.

### 2.8.4 Issue of discretion

As noted in Section 1.9.4 above (pp. 85), the issue sometimes arises as to whether applicants have a ‘duty of discretion’, i.e. can be expected to conceal activities which may lead to them being ill-treated. In other words, if the applicants may prevent serious harm inflicted upon them by concealing their activities, the issue arises as to whether the risk of being subjected to serious harm is no longer real.

While the CJEU has not had the opportunity to clarify this issue in the context of applications for subsidiary protection, it has rejected the notion of a duty of discretion in its *Y and Z* and *X, Y and Z* judgments<sup>784</sup> that dealt with the definition of a refugee. Other supreme national courts have reached the same conclusion<sup>785</sup>. It is thus highly unlikely that the CJEU would depart from this position if the duty of discretion were to be raised in the context of subsidiary protection.

The ECtHR’s case-law on this issue is inconclusive<sup>786</sup>. In the admissibility decisions in *Z and T v the United Kingdom*<sup>787</sup> (concerning Christians to be returned to Pakistan) and *F v the United Kingdom*<sup>788</sup> (concerning a gay man to be returned to Iran), the ECtHR (when assessing the Article 2 and the Article 3 claims) implicitly suggested that the applicants can or should be expected to conceal the activities which may lead to them being ill-treated and, regarding claims based on Articles 5, 6 and 9 ECHR, that it would be necessary for a claimant to establish at least a real risk of a flagrant violation of the very essence of these rights. However, recent developments have cast doubt on this approach. The recent judgment in *ME v Sweden* does not refer to the ‘flagrant denial’ test in the context of the Article 8 assessment<sup>789</sup> and based its Article 3 reasoning primarily on the short period of discretion

<sup>780</sup> See Section 2.8.5, pp. 117, dealing with assessment of serious harm within the context of generalised violence.

<sup>781</sup> Council of State (Belgium), judgment of 16 February 2012, no 218.075. See also UKIAT, *AM & AM (Armed Conflict: Risk Categories) Somalia CG*, op. cit., fn. 386; and Migration Court of Appeal (Sweden), judgment of 24 February 2011, UM 10061-09.

<sup>782</sup> ECtHR, *Saadi v Italy*, op. cit., fn. 516.

<sup>783</sup> *Ibid.*

<sup>784</sup> See, in particular, CJEU, *Y and Z* judgment, op. cit., fn. 33, paras. 78-80; and CJEU, *X, Y and Z* judgment, op. cit., fn. 20, paras. 67-71. For further details see Section 1.9.4 above, pp. 85.

<sup>785</sup> See for instance Supreme Court (UK), *HJ (Iran) and HT (Cameroun) v Secretary of State for the Home Department*, op. cit., fn. 346, paras. 92-98; and Supreme Court (UK), judgment of 25 July 2012, *RT (Zimbabwe) & Ors v Secretary of State for the Home Department*, op. cit., fn. 292.

<sup>786</sup> See for instance ECtHR, decision of 28 February 2006, *Z and T v the United Kingdom*, application no 27034/05; and ECtHR, decision of 22 June 2004, *F v the United Kingdom*, application no 17341/03; and ECtHR, judgment of 26 June 2014, *ME v Sweden*, application no 71398/12, paras. 86-89. See also L. Bianku, ‘Round-table Discussion with the IARL, the CJEU and the ECtHR on Leading Asylum Cases’, IJRL (2013), p. 393.

<sup>787</sup> ECtHR, *Z and T v the United Kingdom*, op. cit., fn. 786.

<sup>788</sup> ECtHR, *F v the United Kingdom*, op. cit., fn. 786. See also ECtHR, decision of 9 December 2004, *IIN v the Netherlands*, application no 2035/04, which deals with a similar case.

<sup>789</sup> ECtHR, *ME v Sweden*, op. cit., fn. 786, paras. 91-102.

required from the applicant rather on the duty of concealment itself<sup>790</sup>. Moreover, the *ME v Sweden* judgment carried a strong dissenting opinion of Judge Power-Forde and was accepted for referral by the Grand Chamber. Even though the Grand Chamber eventually struck the case out of the list (since Sweden granted the applicant a residence permit), it positively assessed the Swedish Migration Board decision that ‘the deterioration in the security situation in his home country would put him at risk of being persecuted since he lived openly as a homosexual and could be expected to continue doing so on his return’<sup>791</sup>.

### 2.8.5 Assessment of serious harm within the context of generalised violence

Assessment of serious harm within the context of generalised violence raises complex and specific issues that may require consideration under either or both Articles 15(b) and (c) QD (recast). As noted by the Judicial Analysis on Article 15(c), it is also important to emphasise that victims of generalised violence may sometimes qualify for refugee status<sup>792</sup>.

The CJEU addressed real risk of suffering serious harm in the context of generalised violence in *Elgafaji*<sup>793</sup>. In general, it held that ‘the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances’<sup>794</sup>. Nevertheless, it also added that ‘the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection’<sup>795</sup> – as explained earlier this is what is known as the ‘sliding-scale’ concept. The interpretation of Article 15(c) QD (recast) is discussed in more detail in *Article 15(c) Qualification Directive (2011/95/EU) – A Judicial Analysis*<sup>796</sup>.

### 2.8.6 Subsidiary protection needs arising sur place (Article 5)

Individuals who were not beneficiaries of subsidiary protection when they left their country of origin, but who become beneficiaries of subsidiary protection at a later date, are called **beneficiaries of subsidiary protection sur place**. In alignment with the concept of a refugee *sur place*, a person becomes a beneficiary of subsidiary protection *sur place* due to significant changes in his/her country of origin (for example, due to a coup d’état) or because of actions taken by, or impacting, the applicant while already abroad (for example, because of his/her dissident political behaviour). For more details on *sur place* claims, see Section 1.9.6 above (pp. 86).

The concept of beneficiaries of subsidiary protection *sur place* is stipulated in Article 5 QD (recast)<sup>797</sup>. Article 5 concerns both refugee status and subsidiary protection. However, there is one important point of difference. While Article 5(1) and (2) apply to persons seeking refugee status as well as subsidiary protection, Article 5(3) is applicable only to persons seeking refugee status and is thus irrelevant for subsidiary protection applications.

Both Article 5(1) and Article 5(2) are mandatory<sup>798</sup>. Therefore, a Member State that completely denies subsidiary protection *sur place* claims either on Article 5(1) or Article 5(2) ground or both would be in breach of the QD (recast). Finally, it is also important to re-emphasise that Article 5 must be interpreted in conjunction with Article 4(3)(d)<sup>799</sup>.

Article 5(1) QD (recast) concerns applications based on events occurring in the country of origin that are beyond the reach of the applicant, whereas Article 5(2) covers applications based on post-flight activities carried out by the applicant. The CJEU has not had the opportunity to clarify interpretation of Article 5(1) and (2) so far.

<sup>790</sup> See *ibid.*, paras. 86-89.

<sup>791</sup> *Ibid.*, para. 37.

<sup>792</sup> EASO, *Article 15(c) Qualification Directive (2011/95/EU) – A Judicial Analysis*, op. cit., fn. 436. See also Section 1.9.5, pp. 86.

<sup>793</sup> CJEU, *Elgafaji* judgment, op. cit., fn. 45.

<sup>794</sup> *Ibid.*, para. 43, first indent.

<sup>795</sup> *Ibid.*, para. 39.

<sup>796</sup> See EASO, *Article 15(c) Qualification Directive (2011/95/EU) – A Judicial Analysis*, op. cit., fn. 436.

<sup>797</sup> See Section 1.9.6, pp. 86 (dealing with the concept of refugee *sur place*) for the wording of Art. 5 QD (recast).

<sup>798</sup> For further details, see Section 1.9.6, pp. 86, dealing with the concept of refugee *sur place*.

<sup>799</sup> For further details see below.

However, the ECtHR has provided some guidance on *sur place* activities in *SF v Sweden*<sup>800</sup>, *AA v Switzerland*<sup>801</sup>, and especially in *FG v Sweden*<sup>802</sup>. Most recently, the ECtHR Grand Chamber held that in the *sur place* conversion cases the domestic authorities have to ‘assess whether the applicant’s conversion was genuine and had attained a certain level of cogency, seriousness, cohesion and importance [...], before assessing whether the applicant would be at risk of treatment contrary to Articles 2 and 3 of the Convention upon his return to Iran’<sup>803</sup> and concluded that:

[I]f an applicant chooses not to rely on or disclose a specific individual ground for asylum by deliberately refraining from mentioning it, be it religious or political beliefs, sexual orientation or other grounds, the State concerned cannot be expected to discover this ground by itself. However, considering the absolute nature of the rights guaranteed under Articles 2 and 3 of the Convention, and having regard to the position of vulnerability that asylum seekers often find themselves in, if a Contracting State is made aware of facts, relating to a specific individual, that could expose him to a risk of ill-treatment in breach of the said provisions upon returning to the country in question, the obligations incumbent on the States under Articles 2 and 3 of the Convention entail that the authorities carry out an assessment of that risk of their own motion<sup>804</sup>.

### 2.8.6.1 Applications based on events occurring in the country of origin (Article 5(1))

The rules set out in Article 5(1) applicable to applications for refugee status based on events occurring in the country of origin apply *mutatis mutandis* to the rules applicable to the applications for subsidiary protection based on events occurring in the country of origin (see Section 1.9.6.1, pp. 88).

### 2.8.6.2 Applications based on post-flight activities of the applicant (Article 5(2))

The rules set out in Article 5(2) applicable to an application for refugee status based on post-flight activities of the applicant apply *mutatis mutandis* to an application for subsidiary protection based on post-flight activities of the applicant<sup>805</sup> (see Section 1.9.6.2, pp. 89). The only difference is that the ECtHR case-law on *sur place* claims<sup>806</sup> – given the close relationship between Article 15 QD (recast) and Articles 2 and 3 ECHR – operates as particularly persuasive precedent in the context of subsidiary protection.

### 2.8.6.3 Subsequent applications (Article 5(3))

As mentioned in Section 1.9.6.3 (pp. 91), Article 5(3) QD (recast) – which permits Member States to determine that an applicant who files a subsequent application based exclusively on circumstances which the applicant has created by his/her own decision since leaving the country of origin is not normally granted refugee status – does not apply to subsidiary protection<sup>807</sup>.

<sup>800</sup> ECtHR, *SF v Sweden*, op. cit., fn. 558, paras. 62-71.

<sup>801</sup> ECtHR, *AA v Switzerland*, op. cit., fn. 559, paras. 38-43.

<sup>802</sup> ECtHR, *FG v Sweden*, op. cit., fn. 561, paras. 123 and 144.

<sup>803</sup> *Ibid.*, para. 144.

<sup>804</sup> *Ibid.*, para. 127. See also para. 156.

<sup>805</sup> See for instance Council for Alien Law Litigation (Belgium), decision of 26 June 2015, no 148.663 where the asylum claim of an Iraqi Kurdish woman from Kurdish region, who lodged the fourth asylum application, was not deemed credible. However, while being in Belgium, she gave birth to a daughter (father is unknown as the child was the result of a short sexual encounter) and given the situation of the Kurdish women with children born out of wedlock, in combination with the massive influx of internally displaced persons in the Kurdish region, and the fact that that the Iraqi child born out of Iraq are not automatically given Iraqi nationality, subsidiary protection under Art. 15(b) QD (recast) was granted. See also Council for Alien Law Litigation (Belgium), decision of 29 September 2015, no 153.571 where an older Iraqi man, Armenian Christian from the Kurdish Autonomous Region in Iraq, was not granted refugee status as the mere fact of being an Armenian Christian from Kurdish region was not found sufficient. However, the man had a stroke after the first instance decision, as a result of which he could not speak properly anymore and was in wheelchair. Given the socio-economic situation in the the Kurdish Autonomous Region, the massive influx of internally displaced persons and the fact that he belongs to a religious minority in the Kurdish region, subsidiary protection under Art. 15(b) QD (recast) was granted.

<sup>806</sup> See ECtHR, *SF v Sweden*, op. cit., fn. 558; ECtHR, *AA v Switzerland*, op. cit., fn. 559; and ECtHR, *FG v Sweden*, op. cit., fn. 561.

<sup>807</sup> Note that the term ‘subsequent application’ and procedures applying to them are defined in Arts. 33(2)(d) and 40 APD.



## 2.9 Subsidiary protection status

After having analysed the different eligibility requirements for subsidiary protection, this Section focuses more specifically on the notion of subsidiary protection status, including residence permits (Section 2.9.1, pp. 119) and the situation of family members of subsidiary protection beneficiaries not qualifying for subsidiary protection in their own right (Section 2.9.2, pp. 120).

### 2.9.1 Subsidiary protection status (Article 18)

#### 2.9.1.1 Definition of subsidiary protection status

Article 18 QD (recast) establishes the **obligation on Member States to grant subsidiary protection status to a third-country national or a stateless person eligible for subsidiary protection** in accordance with Chapters II and V. The great significance of Article 18 is that it transforms diverse complementary protection provisions under national law into a common legal code<sup>808</sup>.

#### 2.9.1.2 Subsidiary protection status and access to benefits (employment, social welfare, health care and integration facilities)

Persons granted subsidiary protection status benefit from international protection as provided for in Chapter VII QD (recast) ('Content of international protection'). As noted by the European Commission, subsidiary protection was initially considered to be of a temporary nature so that the first QD differentiated between the benefits provided to persons granted refugee status and those granted subsidiary protection status, and allowed Member States the discretion to grant the beneficiaries of subsidiary protection a lower level of rights in certain respects<sup>809</sup>. Practical experience acquired showed that this initial assumption was not accurate. It was thus necessary to remove some of the limitations on the rights of beneficiaries of subsidiary protection, which could no longer be considered as necessary and objectively justified. According to the European Commission, such an approximation of rights was necessary to ensure full respect of the principle of non-discrimination, as interpreted in the case-law of the ECtHR<sup>810</sup> and of the UN *Convention on the Rights of the Child*<sup>811</sup>. However, Member States still have discretion to apply limitations to some benefits for beneficiaries of subsidiary protection as confirmed by recital (39) and relevant articles of the QD (recast)<sup>812</sup>.

Recital (40) QD (recast) provides that:

within the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, healthcare and access to integration facilities requires the prior issue of a residence permit.

Although the CJEU has not yet pronounced on the relationship between subsidiary protection status, residence permits and the rights of beneficiaries, the CJEU held with regard to refugee status that with regard to a refugee whose residence permit is revoked pursuant to Article 24(1) QD (recast), as he/she retains refugee status (at least until that status is ended), he/she remains entitled to the benefits guaranteed by the QD (recast) and Member States have no discretion as to whether to continue to grant or to refuse to that refugee the substantive benefits guaranteed by the Directive<sup>813</sup>.

<sup>808</sup> H. Storey, in K. Hailbronner and D. Thym (eds.), *op. cit.*, fn. 689.

<sup>809</sup> European Commission, *QD (recast) Proposal*, *op. cit.*, fn. 243, p. 8.

<sup>810</sup> In *Niedzwiecki v Germany* and *Okpiz v Germany* the ECtHR held that the differentiation of social benefits based on type of residence permits was discriminatory: ECtHR, judgment of 25 October 2005, *Niedzwiecki v Germany*, application no 58453/00, para. 33; ECtHR, judgment of 25 October 2005, *Okpiz v Germany*, application no 59140/00, para. 34.

<sup>811</sup> European Commission, *QD (recast) Proposal*, *op. cit.*, fn. 243, p. 8.

<sup>812</sup> Arts. 24(2) (residence permits), 25(2) (travel documents) and 29(2) (social welfare) QD (recast).

<sup>813</sup> CJEU, *HT* judgment, *op. cit.*, fn. 614, para. 95.

## 2.9.2 Family members of beneficiaries of subsidiary protection not qualifying for subsidiary protection in their own right (Articles 23 and 2 (j))

In the same way as for refugees, the QD (recast) does not guarantee family members of a beneficiary of subsidiary protection, who do not individually qualify for such protection, the same status. But Article 23(2) QD (recast) ensures that accompanying family members of subsidiary protection beneficiaries who do not individually qualify for international protection receive the benefits referred to in Articles 24 to 35 of Chapter VII QD (recast). The **definition of family members** in Article 2(j) QD (recast) does not differentiate between persons granted refugee status and subsidiary protection (see Section 1.10.2, pp. 96). Similarly to refugees, the benefits apply to family members who are present in the same Member State as the beneficiary of subsidiary protection. Family members who are outside the Member State of the beneficiary of subsidiary protection, unlike for refugees, do not benefit from a right to family reunification under the Family Reunification Directive<sup>814</sup>. The CJEU has not yet pronounced on the status of family members of persons granted subsidiary protection under the QD (recast).

Whereas the QD allows Member States to attach conditions to the enjoyment of benefits insofar as family members of beneficiaries of subsidiary protection are concerned (no such conditions were applicable for family members of persons granted refugee status), the QD (recast) removed this limitation<sup>815</sup>. Article 24(2) QD (recast) has extended the benefit of residence permits to family members of subsidiary protection beneficiaries. They are now entitled to residence permits under the same conditions as the family member who has been granted subsidiary protection status<sup>816</sup>.

<sup>814</sup> Art. 3(2)(c) of the Family Reunification Directive.

<sup>815</sup> UNHCR, *The Case Law of the European Regional Courts*, op. cit., fn. 616, p. 80.

<sup>816</sup> This has filled the silence of the initial QD, which did not prescribe the issuance of residence permits to subsidiary protection family members, in contrast to those of refugees. C. Bauloz and G. Ruiz, 'Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection?', in V. Chetail, P. De Bruycker and F. Maiani (eds.), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill/Nijhoff, 2016), pp. 228-229.



## Appendix A: Decision trees

The decision trees below build on the two-step assessment of applications for international protection developed by the CJEU in its *MM* judgment<sup>817</sup>. As a checklist on evidence and credibility assessment is provided in another Judicial Analysis<sup>818</sup>, these decision trees focus on eligibility for refugee status and subsidiary protection status. Eligibility for these statuses has to be assessed sequentially to ensure that subsidiary protection status is only granted to third-country nationals not qualifying for refugee status<sup>819</sup>. As a result, it envisages that courts or tribunals tackle the issue of eligibility for refugee status and subsidiary protection in the following order:

<b>OUTLINE DECISION TREE</b> (reading from top to bottom)	
<b>Step 1: Establishment of factual circumstances which may constitute evidence that supports the application</b>	
<b>A. Obtaining evidence</b>	→ See <i>Evidence and Credibility Assessment in the Context of the CEAS – A Judicial Analysis</i>
<b>B. Evidence and credibility assessment</b>	→ See <i>Evidence and Credibility Assessment in the Context of the CEAS – A Judicial Analysis</i>
<b>Step 2: Legal appraisal of whether the substantive conditions for the grant of international protection are met</b>	
<b>A. Is the applicant eligible for refugee status under the terms of Article 2(d)?</b>	
	A.1 Is the applicant a third-country national or a stateless person?
	A.2 If the answer to A.1 is yes, does the applicant face a real risk of being persecuted if returned to the home area of his/her country of origin <sup>820</sup> ?
	A.2.1 Does/do the act(s) feared qualify as an act of persecution under one of the two alternatives of Article 9(1)?
	A.2.2 Is there an actor of persecution as defined in Article 6?
	A.2.3 Is there a lack of effective and durable protection against the acts of persecution in the home area of his/her country of origin (Article 7)?
	A.3 If the answer to A.2 is yes, is there a connection between the act(s) of persecution as qualified in Article 9(1) or the absence of protection against such act(s) and one or more of the reasons for persecution identified in Article 10?
	A.4 If the answer to A.3 is yes, and if the Member State applies Article 8, is there internal protection in part of the country of origin in accordance with Article 8?
	A.4.1 Is the applicant safe from persecution or serious harm in part of the country of origin?
	A.4.2 If the answer to A.4.1 is yes, can the applicant safely and legally travel to and gain admittance to the part of the country and be reasonably expected to settle therein?

<sup>817</sup> CJEU, judgment of 22 November 2012, case C-277/11, *MM v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, EU:C:2012:744, para. 64.

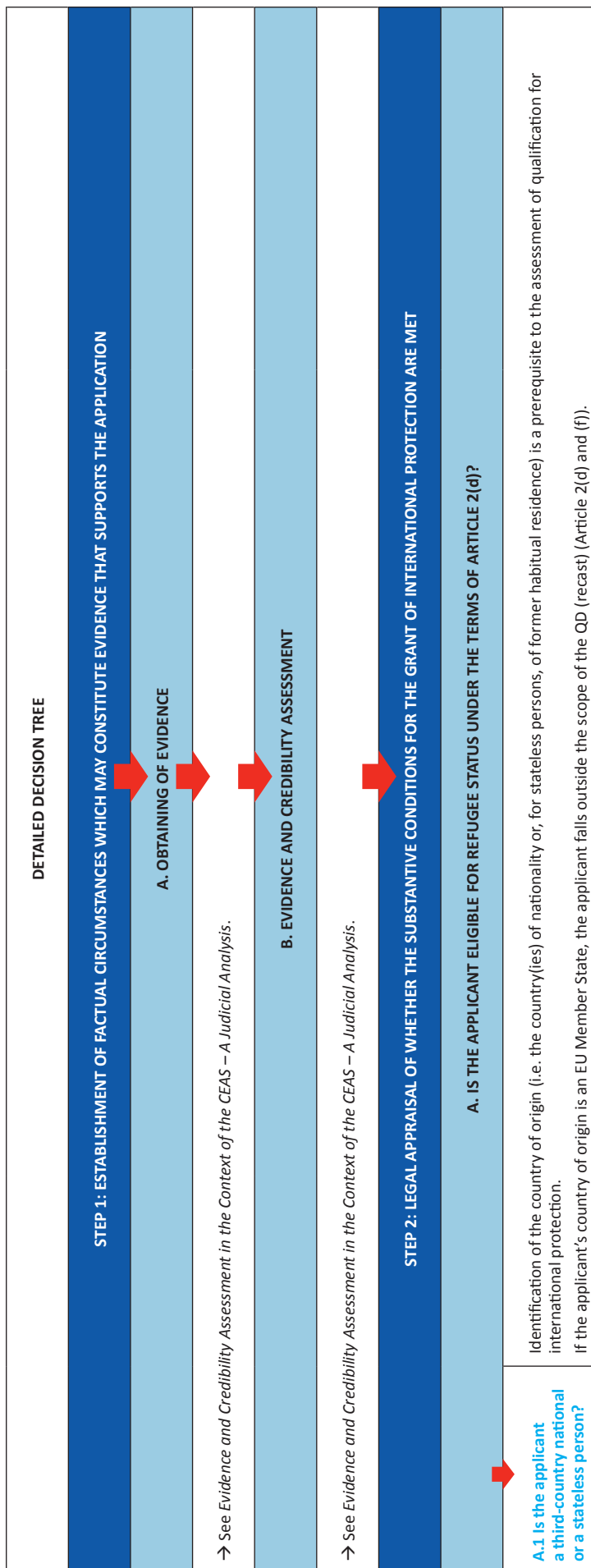
<sup>818</sup> EASO, *Evidence and Credibility Assessment in the Context of the Common European Asylum System (CEAS) – A Judicial Analysis*, forthcoming.




<sup>819</sup> CJEU, judgment of 8 May 2014, case C-604/12, *HN v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, EU:C:2014:302, para. 35.

<sup>820</sup> For the purposes of these decision trees, 'country of origin' means the country(ies) of nationality or, for stateless persons, of former habitual residence.

<b>OUTLINE DECISION TREE</b> (reading from top to bottom)	
	If the answer to A.4 is no, and the exclusion clauses do not apply, the applicant qualifies for refugee status.
<b>B. If the applicant does not qualify for refugee status, is he/she eligible for subsidiary protection under the terms of Article 2(f)?</b>	
	B.1 Is the applicant a third-country national or a stateless person <sup>821</sup> ?
	B.2 If the answer to B.1 is yes, does the applicant face a real risk of serious harm upon return to the home area of his/her country of origin?
	B.2.1 Does the harm qualify as one or more of the serious harms listed exhaustively in Article 15?
	B.2.2 Is there an actor of serious harm as defined in Article 6?
	B.2.3 Is there a lack of effective and durable protection against the serious harm in the home area of his/her country of origin (Article 7)?
	B.3 If the answer to B.2 is yes, and if the Member State applies Article 8, is there internal protection in part of the country of origin in accordance with Article 8?
	B.3.1 Is the applicant safe from persecution or serious harm in part of the country?
	B.3.2 If the answer to B.3.1 is yes, can the applicant safely and legally travel to and gain admittance to the part of the country and be reasonably expected to settle therein?
	If the answer to B.3 is no, and the exclusion clauses do not apply, the applicant qualifies for subsidiary protection.

<sup>821</sup> This question forms an integral part of the definition of a person eligible for subsidiary protection in Article 2(f) but will in practice be already answered when assessing qualification for refugee status (see question A.1).



<p></p>	<p>A.2.1 Does/do the act(s) feared qualify as an act of persecution under one of the two alternatives of Article 9(1)?</p>	<p>A.2.1.1 Is the act sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights (Article 9(1)(a))?</p> <p style="text-align: center;"><b>OR</b></p> <p>A.2.1.2 Is the act an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect the individual in a similar manner as in Article 9(1)(a) (Article 9(1)(b))?</p>	<p>See Table 6 on persecution p. 28. An illustrative list of acts qualifying as persecution is provided in Article 9(2) to guide courts and tribunals of Member States.</p>
<p></p>	<p>A.2.2 Is there an actor of persecution as defined in Article 6?</p>	<p>A.2.2.1 Is the actor of persecution the State?</p> <p style="text-align: center;"><b>OR</b></p> <p>A.2.2.2 Is the actor of persecution parties or organisations controlling the State or a substantial part of its territory?</p> <p style="text-align: center;"><b>OR</b></p> <p>A.2.2.3 Is the actor of persecution a non-State actor?</p>	<p>While the list of actors of persecution or serious harm in Article 6 is illustrative, persecution must take the form of conduct on the part of a third party. Harm arising from the general conditions in a country of origin without any identifiable actor of persecution cannot amount to persecution.</p>
<p></p>	<p>A.2.3 Is there a lack of effective and durable protection against the acts of persecution in the home area of his/her country of origin (Article 7)?</p>	<p>A.2.3.1 Are the State or parties or organisations, including international organisations, controlling the State or a substantial part of its territory willing and able to provide protection against persecution (Article 7(1))?</p> <p>These actors of protection are exhaustively listed in Article 7(1). Parties or organisations, such as international organisation(s) (including multinational forces), have to control the State or a substantial part of the territory of the State to be considered as actors of protection (Article 7(1)(b)).</p> <p>The actor has to be both willing and able to provide protection. Mere willingness without effective ability to provide protection is insufficient.</p> <p>If there exists no actor willing and able to provide protection, courts and tribunals shall proceed with question A.2.3.2 in order to assess the type of protection available to the applicant.</p> <p>A.2.3.2 If so, is the protection provided by this actor effective, non-temporary and accessible to the applicant (Article 7(2))?</p> <p>Effective protection is generally provided when the actor of protection takes reasonable steps to prevent persecution (Article 7(2)). This practical standard first requires an assessment of whether there exists a systemic failure of or insufficiency of state protection. If so, there exists no effective protection in the country. Conversely, if there is no systemic failure of or insufficiency of state protection, it has to be assessed whether protection is provided to the applicant in light of his/her individual circumstances.</p> <p>Protection has to be durable, that is, to preclude a real risk of persecution in the foreseeable future.</p> <p>The accessibility of protection is to be assessed in light of both legal and practical obstacles for the applicant to access protection.</p> <p>If protection against persecution is effective, non-temporary and accessible to the applicant, refugee status shall be denied.</p> <p>If, conversely, no such protection is provided to the applicant, courts and tribunals shall proceed with question A.3.</p>	<p>A.2.3.1 Are the State or parties or organisations, including international organisations, controlling the State or a substantial part of its territory willing and able to provide protection against persecution (Article 7(1))?</p> <p>These actors of protection are exhaustively listed in Article 7(1). Parties or organisations, such as international organisation(s) (including multinational forces), have to control the State or a substantial part of the territory of the State to be considered as actors of protection (Article 7(1)(b)).</p> <p>The actor has to be both willing and able to provide protection. Mere willingness without effective ability to provide protection is insufficient.</p> <p>If there exists no actor willing and able to provide protection, courts and tribunals shall proceed with question A.2.3.2 in order to assess the type of protection available to the applicant.</p> <p>A.2.3.2 If so, is the protection provided by this actor effective, non-temporary and accessible to the applicant (Article 7(2))?</p> <p>Effective protection is generally provided when the actor of protection takes reasonable steps to prevent persecution (Article 7(2)). This practical standard first requires an assessment of whether there exists a systemic failure of or insufficiency of state protection. If so, there exists no effective protection in the country. Conversely, if there is no systemic failure of or insufficiency of state protection, it has to be assessed whether protection is provided to the applicant in light of his/her individual circumstances.</p> <p>Protection has to be durable, that is, to preclude a real risk of persecution in the foreseeable future.</p> <p>The accessibility of protection is to be assessed in light of both legal and practical obstacles for the applicant to access protection.</p> <p>If protection against persecution is effective, non-temporary and accessible to the applicant, refugee status shall be denied.</p> <p>If, conversely, no such protection is provided to the applicant, courts and tribunals shall proceed with question A.3.</p>

<p>→ A.3 If the answer to A.2 is yes, is there a connection between the act(s) of persecution as qualified in Article 9(1) or the absence of protection against such act(s) and one or more of the reasons for persecution identified in Article 10?</p>	<p>A.3.1 Does the applicant face being persecuted for one or more of the following reasons: race, religion, nationality, political opinion or membership of a particular social group?</p> <p>OR</p> <p>A.3.2 Is there an absence of protection against such act(s) or more of these reasons?</p>	<p>Article 10 details the elements that should be taken into consideration by courts or tribunals when assessing the reasons for persecution.</p>
<p>→ A.4 If the answer to A.3 is yes, and if the Member State applies Article 8, is there internal protection in part of the country of origin in accordance with Article 8?</p>	<p>A.4.1 Is the applicant safe from persecution or serious harm in part of the country?</p> <p>→ A.4.2 If the answer to A.4.1 is yes, can the applicant safely and legally travel to and gain admittance to this other part of the country and be reasonably expected to settle therein?</p>	<p>For an alternative part of the country to be safe, it is necessary to ask whether it is one where there is no well-founded fear of persecution or real risk of serious harm for the applicant or whether the applicant has access to effective protection against persecution or serious harm as defined in Article 7.</p> <p>For an alternative part of the country to be accessible, the applicant needs to be able to travel and gain admittance to the area without being prevented from doing so because of a lack of safety or by legal or practical obstacles (e.g. requirement to have a particular type of identity document which he or she cannot obtain, and a safe means and route to reach the region concerned).</p> <p>To be considered reasonable for an applicant to settle in an alternative part of the country, it is necessary to ask if to do so will cause undue hardship.</p> <p>For an applicant to be able to settle there, it is necessary to be satisfied that there is an ability to stay on a non-temporary and non-contingent basis.</p> <p>Assessment is to be made based on precise and up-to-date information from relevant sources and by duly taking into account the applicant's individual circumstances.</p> <p>If conditions A.4.1 and A.4.2 are fulfilled, courts and tribunals can deny refugee status.</p> <p>If one or both conditions A.4.1 and A.4.2 are not fulfilled, courts and tribunals shall grant refugee status.</p>
<p>→</p> <p>Provided that the applicant is <b>not excluded</b> from refugee status by virtue of Article 12 QD (recast) (exclusion clauses):</p> <p><b>1) In case of a Member State not applying Article 8 (non-application of question A.4):</b></p> <ul style="list-style-type: none"> <li>- If questions A.1-A.3 are answered positively, the applicant <b>shall be granted refugee status</b>.</li> <li>- If one or more question(s) among questions A.1-A.3 is or are answered negatively, the applicant <b>shall be denied refugee status but courts or tribunals shall proceed with step B to determine whether the applicant is eligible for subsidiary protection</b>.</li> </ul> <p><b>2) In case of a Member State applying Article 8 (application of question A.4):</b></p> <ul style="list-style-type: none"> <li>→ If questions A.1-A.3 are answered positively and question A.4 negatively (i.e. there is no internal protection in part of the country of origin), the applicant <b>shall be granted refugee status</b>.</li> <li>→ If questions A.1-A.4 are answered positively (i.e. including question A.4 so that there is internal protection in part of the country of origin), the applicant <b>can be denied refugee status</b>.</li> <li>→ Irrespective of the answer to question A.4, if one or more question(s) among questions A.1-A.3 is or are answered negatively, the applicant <b>shall be denied refugee status but courts or tribunals shall proceed with step B to determine whether the applicant is eligible for subsidiary protection</b>.</li> </ul> <p style="text-align: center;"><b>CONCLUSION ON ELIGIBILITY FOR REFUGEE STATUS</b></p>		



B. IF THE APPLICANT DOES NOT QUALIFY FOR REFUGEE STATUS, IS HE/SHE ELIGIBLE FOR SUBSIDIARY PROTECTION UNDER THE TERMS OF ARTICLE 2(f)?	
<p><b>B.1 Is the applicant a third-country national or a stateless person?</b></p>	<p>Identification of the country of origin (i.e. the country(ies) of nationality or, for stateless persons, of former habitual residence) is a prerequisite to the assessment of qualification for international protection. If the applicant's country of origin is an EU Member State, the applicant falls outside the scope of the QD (recast) (Article 2(d) and (f)).</p>
<p><b>B.2 Does the applicant face a real risk of serious harm upon return to the home area of his/her country of origin?</b></p>	<p><b>B.2.1.1 Does the applicant face a real risk of suffering the death penalty or execution (Article 15(a))?</b> The mere risk of the death penalty is insufficient if not accompanied with the risk of execution of the death sentence. In some Member States, the real risk of suffering extrajudicial execution by non-State actors also falls within the scope of Article 15(a); otherwise it is covered by Article 15(b).</p> <p><b>B.2.1.2 Does the applicant face a real risk of suffering torture or inhuman or degrading treatment or punishment in his/her country of origin (Article 15(b))?</b> To fall within Article 15(b), the harm risked upon return has to satisfy a minimum threshold of severity so as to constitute at least inhuman or degrading treatment or punishment or at a higher level of severity, torture.</p> <p><b>B.2.1</b> Does the harm qualify as one or more of the serious harms listed exhaustively in Article 15?</p> <p><b>B.2.1.3.1</b> Is the situation in the applicant's home area one in which there is an armed conflict?</p> <p><b>B.2.1.3.2</b> If yes, is it one characterised by indiscriminate violence at such a high level that persons in that area are at real risk of suffering serious harm merely by being civilians? This is a question of general risk.</p> <p><b>B.2.1.3.3</b> Even if the answer to the B.2.1.3.2 is no, can an applicant nonetheless show a real risk of suffering serious harm by virtue of specific harm(s) faced because of personal circumstances combined with the background of (the lesser level) of indiscriminate violence? This is a question of specific risk: the more an applicant can show being specifically affected, the less the level of indiscriminate violence needs to be.</p> <p><b>B.2.2.1</b> Is the actor of serious harm the State? <b>OR</b> <b>B.2.2.2</b> Is the actor of serious harm parties or organisations controlling the State or a substantial part of its territory? <b>OR</b> <b>B.2.2.3</b> Is the actor of serious harm a non-State actor?</p> <p><b>B.2.2</b> Is there an actor of serious harm as defined in Article 6?</p>
	<p>While the list of actors of persecution or serious harm in Article 6 QD (recast) is illustrative, serious harm must take the form of conduct on the part of a third party. Harm arising from the general conditions in a country of origin cannot amount to serious harm giving rise to subsidiary protection.</p>

<p>→ <b>B.2.3.1 Is the State or are organisations, including international organisations, controlling the State or a substantial part of its territory willing and able to provide protection against serious harm (Article 7(1))?</b></p> <p>These actors of protection are exhaustively listed in Article 7(1). Parties or organisations, such as international organisation(s) (including multinational forces), have to control the State or a substantial part of its territory to be considered as actors of protection (Article 7(1)(b)).</p> <p>The actor has to be both willing and able to provide protection. Mere willingness without effective ability to provide protection is insufficient.</p> <p>If there exists no actor willing and able to provide protection, courts and tribunals can proceed with question B.3, if applicable, and shall otherwise conclude on eligibility for subsidiary protection (see ‘Conclusion on eligibility for subsidiary protection’ below).</p> <p>If there exists an actor willing and able to provide protection, courts and tribunals shall proceed with question B.2.3.2 in order to assess the type of protection available to the applicant.</p>	<p>→ <b>B.2.3.2 If so, is the protection provided by this actor effective, non-temporary and accessible to the applicant (Article 7(2))?</b></p> <p>Effective protection is generally provided when the concerned actor takes reasonable steps to prevent persecution (Article 7(2)). This practical standard first requires to assess whether there exists a systemic failure of or insufficiency of state protection. If so, there exists no effective protection in the country. Conversely, if there is no systemic failure of or insufficiency of state protection, it has to be assessed whether protection is provided to the applicant in light of his/her individual circumstances.</p> <p>Non-temporary protection has to be durable, that is, to preclude future risk of persecution in the foreseeable future.</p> <p>The accessibility of protection is to be assessed in light of both legal and practical obstacles for the applicant to access protection.</p> <p>If protection against serious harm is effective, non-temporary and accessible to the applicant, subsidiary protection shall be denied.</p> <p>If, conversely, no such protection is provided to the applicant, courts and tribunals can proceed with question B.3, if applicable, and shall otherwise conclude on eligibility for subsidiary protection (see ‘Conclusion on eligibility for subsidiary protection’ below).</p>	<p>→ <b>B.2.3.1 Is the State or are organisations, including international organisations, controlling the State or a substantial part of its territory willing and able to provide protection against serious harm (Article 7(1))?</b></p> <p>These actors of protection are exhaustively listed in Article 7(1). Parties or organisations, such as international organisation(s) (including multinational forces), have to control the State or a substantial part of its territory to be considered as actors of protection (Article 7(1)(b)).</p> <p>The actor has to be both willing and able to provide protection. Mere willingness without effective ability to provide protection is insufficient.</p> <p>If there exists no actor willing and able to provide protection, courts and tribunals can proceed with question B.3, if applicable, and shall otherwise conclude on eligibility for subsidiary protection (see ‘Conclusion on eligibility for subsidiary protection’ below).</p> <p>If there exists an actor willing and able to provide protection, courts and tribunals shall proceed with question B.2.3.2 in order to assess the type of protection available to the applicant.</p>
<p>→ <b>B.2.3 Is there a lack of effective and durable protection against the serious harm in the home area of his/her country of origin (Article 7)?</b></p>	<p>→ <b>B.3.1 Is the applicant safe from persecution or serious harm in part of the country?</b></p> <p>→ <b>B.3.2 If the answer to B.3.1 is yes, can the applicant safely and legally travel to and gain admittance to the part of the country and be reasonably expected to settle therein?</b></p>	<p>→ <b>B.3 If the answer to B.2 is yes, and if the Member State applies Article 8, is there a lack of internal protection in part of the country of origin in accordance with Article 8?</b></p>
<p>Assessment is to be made based on precise and up-to-date information from relevant sources and by duly taking into account the applicant’s individual circumstances.</p> <p>If conditions B.3.1 and B.3.2 are fulfilled, courts and tribunals can deny subsidiary protection.</p> <p>If one or both conditions B.3.1 and B.3.2 are not fulfilled, courts and tribunals have to grant subsidiary protection.</p> <p>For an alternative part of the country to be accessible, the applicant needs to be able to travel and gain admittance to the area without being prevented from doing so because of a lack of safety or by legal or practical obstacles (e.g. requirement to have a particular type of identity document which he or she cannot obtain, and a safe means and route to reach the region concerned).</p> <p>To be considered reasonable for an applicant to settle in an alternative part of the country, it is necessary to ask if to do so will cause undue hardship.</p> <p>For an applicant to be able to settle there, it is necessary to be satisfied that there is an ability to stay on a non-temporary and non-contingent basis.</p>		
<p style="text-align: center;"><b>CONCLUSION ON ELIGIBILITY FOR SUBSIDIARY PROTECTION</b></p> <p>Provided the applicant is <b>not excluded</b> from subsidiary protection by virtue of Article 17 QD (recast) (exclusion clauses):</p> <p><b>1) In case of a Member State not applying Article 8 (non-application of question B.3):</b></p> <ul style="list-style-type: none"> <li>– If questions B.1 and B.2 are answered positively, the applicant <b>shall be granted subsidiary protection</b>.</li> <li>– If one or more question(s) among questions B.1 and B.2 is or are answered negatively, the applicant <b>shall be denied subsidiary protection</b>.</li> </ul> <p><b>2) In case of a Member State applying Article 8 (application of question B.3):</b></p> <ul style="list-style-type: none"> <li>→ If questions B.1 and B.2 are answered positively, and question B.3 negatively (i.e. there is no internal protection in part of the country of origin), the applicant <b>shall be granted subsidiary protection</b>.</li> <li>→ If questions B.1-B.3 are answered positively (i.e. including question B.3 so that there is internal protection in part of the country of origin), the applicant <b>can be denied subsidiary protection</b>.</li> <li>→ Irrespective of the answer to question B.3, if one or more question(s) among questions B.1 and B.2 is or are answered negatively, the applicant <b>shall be denied subsidiary protection</b>.</li> </ul>		

# Appendix B: Primary sources

## 1. European Union law

### 1.1 EU primary law

Treaty on the Functioning of the European Union (consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009)) [2012] OJ C 326/47.

Treaty on European Union (consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009)) [2012] OJ C 326/13.

Charter of Fundamental Rights of the European Union of 18 December 2000 (as amended on 12 December 2007 (entry into force: 1 December 2009)) [2007] OJ C 303/01.

Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TFEU in [2012] OJ C 326/295.

Protocol No 22 on the position of Denmark, annexed to the TFEU in [2012] OJ C 326/299.

Protocol No 24 on Asylum for National of Member States of the European Union, in [2008] OJ C 115/305.

### 1.2 EU secondary legislation: directives

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12.

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13.

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2005] OJ L 348/98.

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9.

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60.

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180/96.

Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1.

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31.

## 2. International treaties of universal and regional scope

### 2.1 United Nations/League of Nations

Convention on Certain Questions Relating to the Conflict of Nationality Law, 179 UNTS 89, 13 April 1930 (entry into force: 1 July 1937).

Convention Relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entry into force: 22 April 1954).

Convention Relating to the Status of Stateless Persons, 360 UNTS 117, 28 September 1954 (entry into force: 6 June 1960).

International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, 7 March 1966 (entry into force: 4 January 1969).

International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entry into force: 23 March 1976).

Protocol Relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entry into force: 4 October 1967).

Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, 18 December 1979 (entry into force: 3 September 1981).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984 (entry into force: 26 June 1987).

Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989 (entry into force: 2 September 1990).

Rome Statute of the International Criminal Court, 2187 UNTS 3, 17 July 1998 (entry into force: 1 July 2002).

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2173 UNTS 222, 25 May 2000 (entry into force: 12 February 2002).

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2171 UNTS 227, 25 May 2000 (entry into force: 18 January 2002).

United Nations Convention on Transnational Organized Crimes, 2225 UNTS 209, 15 November 2000 (entry into force: 29 September 2003).

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Crime, 2237 UNTS 319, 15 November 2000 (entry into force: 25 December 2003).

Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Crime, 2241 UNTS 507, 15 November 2000 (entry into force: 28 January 2004).

Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, 13 December 2006 (entry into force: 3 May 2008).

### 2.2 International Committee of the Red Cross

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, 12 August 1949 (entry into force: 21 October 1950).

### 2.3 Council of Europe

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, ETS No 005, 4 November 1950 (entry into force: 3 September 1953).

Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than Those Already Including in the Convention and in the First Protocol Thereto, ETS No 046, 16 September 1963 (entry into force: 2 May 1968).

Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, ETS No 114, 28 April 1983 (entry into force: 1 March 1985).

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS No 126, 26 November 1987 (entry into force: 1 February 1989).

European Convention of Nationality, ETS No 166, 6 November 1997 (entry into force: 1 March 2000).

Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in All Circumstances, ETS No 187, 3 May 2002 (entry into force: 1 July 2003).

## 3. Case-law

### 3.1 Court of Justice of the European Union

#### 3.1.1 Judgments

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Judgment of 17 February 2009, case C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, EU:C:2009:94.

Judgment of 2 March 2010, Grand Chamber, joined cases C-175/08, C-176/08, C-178/08 and C-179/08, *Aydin Salahadin Abdulla and Others v Bundesrepublik Deutschland*, EU:C:2010:105.

Judgment of 17 June 2010, Grand Chamber, case C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal*, EU:C:2010:351.

Judgment of 9 November 2010, Grand Chamber, joined cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v B and D*, EU:C:2010:661.

Judgment of 21 December 2011, Grand Chamber, joined cases C-411/10 and C-493/10, *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, EU:C:2011:865.

Judgment of 5 September 2012, Grand Chamber, joined cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y and Z*, EU:C:2012:518.

Judgment of 6 November 2012, case C-245/11, *K v Bundesasylamt*, EU:C:2012:685.

Judgment of 22 November 2012, case C-277/11, *MM v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, EU:C:2012:744.

Judgment of 19 December 2012, case C-364/11, *El Kott and Others v Bevándorlási és Állampolgársági Hivatal*, EU:C:2012:826.

Judgment of 30 May 2013, case C-528/11, *Zuheyr Freyeh Halaf v Darzhavna agentsia za bezhantsite pri Minister-ski savet*, EU:C:2013:342.

Judgment of 6 June 2013, case C-648/11, *MA, BT and DA v Secretary of State for the Home Department*, EU:C:2013:367.

Judgment of 7 November 2013, joined cases C199/12 to C201/12, *Minister voor Immigratie en Asiel v X and Y, and Z v Minister voor Immigratie en Asiel*, EU:C:2013:720.

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Judgment of 8 May 2014, case C-604/12, *HN v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, EU:C:2014:302.

Judgment of 2 December 2014, Grand Chamber, joined cases C-148/13 to C-150/13, *A, B, and C v Staatssecretaris van Veiligheid en Justitie*, EU:C:2014:2406.

Judgment of 18 December 2014, Grand Chamber, case C-542/13, *Mohamed M'Bodj v Etat belge*, EU:C:2014:2452.

Judgment of 18 December 2014, Grand Chamber, case C-562/13, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida*, EU:C:2014:2453.

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Opinion of Advocate General Sharpston of 4 March 2010, case C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal*, EU:C:2010:119.

Opinion of Advocate General Mengozzi of 1 June 2010, joined cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v B and D*, EU:C:2010:302.

Opinion of Advocate General Trstjenjak of 22 September 2011, case C-411/10, *NS v Secretary of State for the Home Department*, EU:C:2011:611.

Opinion of Advocate General Bot of 19 April 2012, joined cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y and Z*, EU:C:2012:224.

Opinion of Advocate General Bot of 26 April 2012, case C-277/11, *M v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, EU:C:2012:253.

Opinion of Advocate General Sharpston of 13 September 2012, case C-364/11, *Mostafa Abed El Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal*, EU:C:2012:569.

Opinion of Advocate General Sharpston of 11 July 2013, joined cases C-199/12 to C-201/12, *Minister voor Immigratie en Asiel v X and Y, and Z v Minister voor Immigratie en Asiel*, EU:C:2013:474.

Opinion of Advocate General Mengozzi of 18 July 2013, case C-285/12, *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides*, EU:C:2013:500.

Opinion of Advocate General Bot of 7 November 2013, case C-604/12, *HN v Minister for Justice, Equality and Law Reform*, EU:C:2013:714.

Opinion of Advocate General Sharpston of 17 July 2014, joined cases C-148/13, C-149/13 and C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, EU:C:2014:2111.

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## 3.2 European Commission and Court of Human Rights

### 3.2.1 Admissibility decisions of the European Court of Human Rights

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Admissibility decision of 28 February 2006, *Z and T v the United Kingdom*, application no 27034/05.

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### 3.2.2 Judgments of the European Court of Human Rights

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Judgment of 22 April 1997, Grand Chamber, *X, Y and Z v the United Kingdom*, application no 21830/93.

Judgment of 29 April 1997, Grand Chamber, *HLR v France*, application no 24573/94.

Judgment of 2 May 1997, *D v the United Kingdom*, application no 30240/96.

Judgment of 25 September 1997, Grand Chamber, *Aydin v Turkey*, application no 23178/94.

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Judgment of 19 April 2001, *Peers v Greece*, application no 28524/95.

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- Judgment of 10 December 2009, *Koktysh v Ukraine*, application no 43707/07.
- Judgment of 19 January 2010, *Muskhadzhiyeva et autres c Belgique*, application no 41442/07.
- Judgment of 2 March 2010, *Al-Saadoon and Mufdhi v the United Kingdom*, application no 61498/08.
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- Judgment of 27 June 2013, *NANS v Sweden*, application no 68411/10.
- Judgment of 27 June 2013, *NMY and Others v Sweden*, application no 72686/10.
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- Judgment of 19 December 2013, *BKA v Sweden*, application no 11161/11.
- Judgment of 7 January 2014, *AA v Switzerland*, application no 58802/12.
- Judgment of 16 January 2014, *FG v Sweden*, application no 43611/11.
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- Judgment of 13 February 2014, *Tali v Estonia*, application no 66393/10.
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## Appendix C: Methodology

### Methodology for the development this Analysis

Although seeking to work as far as possible within the framework of the EASO methodology for the Professional Development Series as a whole, the development of this Analysis as one of the four subjects being dealt with under a contract between EASO and IARLJ-Europe to produce core judicial training materials, required a modified approach. It has already been observed in the Section on Contributors (pp. 3) that the drafting process had two main components: drafting undertaken by a drafting team of experts; and review, guidance and overall supervision of that team's drafting work by an Editorial Team (ET) composed exclusively of judges.

#### Preparatory phase

During the preparatory phase, the ET, in consultation with the drafting team, considered and agreed the scope, structure and content of the Analysis. On this basis, the drafting team prepared:

1. A provisional bibliography of relevant resources and materials available on the subject.
2. An interim compilation of relevant jurisprudence on the subject.
3. A sample of work in progress.
4. A preparatory background report which included a provisional detailed structure for the Analysis and a report on progress.

These materials were shared with the ET which provided both general guidance and more specific feedback in the form of instructions to the drafting team regarding the further development of the Analysis and compilation of jurisprudence.

#### Drafting phase

The drafting team developed a draft of the Analysis and compilation of jurisprudence, in accordance with the EASO Style Guide, using desk-based documentary research and analysis of legislation, case-law, training materials and any other relevant literature, such as books, reports, commentaries, guidelines, and articles from reliable sources. Under the coordination of the team leader, sections of the Analysis and the compilation of jurisprudence were allocated to team members for initial drafting. These initial drafts were then considered by other members of the team with a full exchange of views followed by redrafting in the light of those discussions.

The first draft, completed by the drafting team, was shared with the ET which was charged with reviewing the draft with a view to assisting the drafting team to enhance its quality. Accordingly, the ET provided further instructions to the drafting team concerning the structure, format and content. Pursuant to these instructions, the drafting team made further amendments and submitted a second draft to the ET. This draft was shared with UNHCR which provided its views. These were taken into consideration by the ET in its review and some further amendments were made by the ET, in conjunction with the drafting team, in order to prepare the texts for external consultation. EASO was also consulted and its comments were taken into account by the ET at each stage of drafting.

## External consultation

The draft Judicial Analysis and compilation of jurisprudence was shared by EASO with the EASO network of members of courts and tribunals, UNHCR and members of EASO's Consultative Forum who were invited to review the material and provide feedback with a view to assisting the ET in further enhancing quality. As part of this process comments were sought and received from a judge of the CJEU and a judge of the ECtHR.

Feedback received was taken into consideration by the ET which reached conclusions on the resultant changes that needed to be made. Final revisions were made by the team of experts under the guidance and supervision of the ET.

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## Appendix E: Compilation of jurisprudence

CJEU

court	case name/reference/date	relevance/key words/main points	cases cited
CJEU	<p><i>Meki Elgafaii and Noor Elgafaii v Staatssecretaris van Justitie</i>            case C-465/07            EU:C:2009:94            17/02/2009</p>	<p>Judgment after a reference for a preliminary ruling from the Raad van State – the Netherlands on the relationship of Article 15(c) QD and Article 3 ECHR and interpretation of the terms ‘individual threat’ and ‘indiscriminate violence’ in Article 15(c) QD.            subsidiary protection – Art. 3 ECHR – legal foundation of Art. 15(b) QD – relationship of Art. 15(c) with Art. 15(a) and (b) QD – real risk of serious harm</p> <p><b>Article 3 ECHR as legal foundation of Article 15(b) QD, para. 28:</b> ‘In that regard, while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR. [...]’</p> <p><b>Relationship of Article 15(c) with Article 15(a) and (b) QD, paras. 32, 33 and 38:</b> ‘32. In that regard, it must be noted that the terms ‘death penalty’, ‘execution’ and ‘torture or inhuman or degrading treatment or punishment of an applicant in the country of origin’, used in Article 15(a) and (b) of the Directive, cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm. 33. By contrast, the harm defined in Article 15(c) of the Directive as consisting of a ‘serious and individual threat to [the applicant’s] life or person’ covers a more general risk of harm. [...] 38. The exceptional nature of that situation is also confirmed by the fact that the relevant protection is subsidiary, and by the broad logic of Article 15 of the Directive, as the harm defined in paragraphs (a) and (b) of that article requires a clear degree of individualisation. While it is admittedly true that collective factors play a significant role in the application of Article 15(c) of the Directive, in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict, it is nevertheless the case that that provision must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore, be interpreted by close reference to that individualisation.’</p> <p><b>Definition of real risk under Article 15(c) QD, para. 40:</b> ‘Moreover, it should be added that, in the individual assessment of an application for subsidiary protection, under Article 4(3) of the Directive, the following may be taken into account: [...] – the existence, if any, of a serious indication of real risk, such as that referred to in Article 4(4) of the Directive, an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower.’</p>	<p>ECHR – NA v the United Kingdom application no 25904/07</p>



court	case name/reference/date	relevance/key words/main points	cases cited
<p>CJEU (Grand Chamber)</p>	<p><i>Aydin Salahadin Abdulla and Others v Bundesrepublik Deutschland</i> joined cases C-175/08, C-176/08, C-179/08 and C-179/08 EU:C:2010:105 02/03/2010</p>	<p>Judgment after a reference for a preliminary ruling from Bundesverwaltungsgericht – Germany on cessation of refugee status on the basis of Article 11 QD.</p> <p>protection against persecution – international organisations – durability of protection – past persecution</p> <p><b>Protection against persecution under Article 7(2) QD, paras. 68-71:</b> ‘68. In that way, the circumstances which demonstrate the country of origin’s inability or, conversely, its ability to ensure protection against acts of persecution constitute a crucial element in the assessment which leads to the granting of, or, as the case may be, by means of the opposite conclusion, to the cessation of refugee status. [...] 70. In order to arrive at the conclusion that the refugee’s fear of being persecuted is no longer well founded, the competent authorities, by reference to Article 7(2) of the Directive, must verify, having regard to the refugee’s individual situation, that the actor or actors of protection of the third country in question have taken reasonable steps to prevent the persecution, that they therefore operate, <i>inter alia</i>, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status. 71. That verification means that the competent authorities must assess, in particular, the conditions of operation of, on the one hand, the institutions, authorities and security forces and, on the other, all groups or bodies of the third country which may, by their action or inaction, be responsible for acts of persecution against the recipient of refugee status if he returns to that country. In accordance with Article 4(3) of the Directive, relating to the assessment of facts and circumstances, those authorities may take into account, <i>inter alia</i>, the laws and regulations of the country of origin and the manner in which they are applied, and the extent to which basic human rights are guaranteed in that country.’</p> <p><b>Durability of protection (fundamental change of circumstances), paras. 72-73:</b> ‘72. Furthermore, Article 11(2) of the Directive provides that the change of circumstances recorded by the competent authorities must be ‘of such a significant and non-temporary nature’ that the refugee’s fear of persecution can no longer be regarded as well founded. 73. The change of circumstances will be of a ‘significant and non-temporary’ nature, within the terms of Article 11(2) of the Directive, when the factors which formed the basis of the refugee’s fear of persecution may be regarded as having been permanently eradicated. The assessment of the significant and non-temporary nature of the change of circumstances thus implies that there are no well-founded fears of being exposed to acts of persecution amounting to severe violations of basic human rights within the meaning of Article 9(1) of the Directive.’</p> <p><b>International organisations as actors of protection under Article 7(1) QD, para. 75:</b> ‘As regards the latter point, it must be acknowledged that Article 7(1) of the Directive does not preclude the protection from being guaranteed by international organisations, including protection ensured through the presence of a multinational force in the territory of the third country.’</p> <p><b>Past persecution under Article 4(4) QD, para. 94:</b> ‘That is the situation, first and foremost, at the stage of the examination of an initial application for the granting of refugee status, when the applicant relies on earlier acts or threats of persecution as indications of the validity of his fear that the persecution in question will recur if he returns to his country of origin. The evidential value attached by Article 4(4) of the Directive to such earlier acts or threats will be taken into account by the competent authorities on the condition, stemming from Article 9(3) of the Directive, that those acts and threats are connected with the reason for persecution relied on by the person applying for protection.’</p>	

court	case name/reference/date	relevance/key words/main points	cases cited
<p>CJEU (Grand Chamber)</p>	<p><i>Bundesrepublik Deutschland v B and D</i> joined cases C-57/09 and C-101/09 EU:C:2010:661 09/11/2010</p>	<p>Judgment after a reference for a preliminary ruling from Bundesverwaltungsgericht – Germany on exclusion from refugee status on the basis of Article 12(2)(b) and (c) QD.</p> <p>more favourable standards of qualification for international protection (Art. 3 QD) – exclusion from refugee status</p> <p><b>Whether qualification for refugee status may be extended to applicants excluded from such status under the terms of Article 3 QD, paras. 115-121:</b> ‘115. In view of the purpose underlying the grounds for exclusion laid down in Directive 2004/83, which is to maintain the credibility of the protection system provided for in that directive in accordance with the 1951 Geneva Convention, the reservation in Article 3 of the directive precludes Member States from introducing or retaining provisions granting refugee status under Directive 2004/83 to persons who are excluded from that status pursuant to Article 12(2). 116. However, it is clear from the closing words of Article 2(g) of Directive 2004/83 that the directive does not preclude a person from applying for ‘another kind of protection’ outside the scope of Directive 2004/83. 117. Directive 2004/83, like the 1951 Geneva Convention, is based on the principle that host Member States may, in accordance with their national law, grant national protection which includes rights enabling persons excluded from refugee status under Article 12(2) of the directive to remain in the territory of the Member State concerned. 118. The grant by a Member State of such national protection status, for reasons other than the need for international protection within the meaning of Article 2(a) of Directive 2004/83 – that is to say, on a discretionary and goodwill basis or for humanitarian reasons – does not, as is stated in recital 9, fall within the scope of that directive. 119. That other kind of protection which Member States have discretion to grant must not, however, be confused with refugee status within the meaning of Directive 2004/83, as the Commission, amongst others, has rightly stated. 120. Accordingly, in so far as national rules under a right of asylum is granted to persons excluded from refugee status within the meaning of Directive 2004/83 permit a clear distinction to be drawn between national protection and protection under the directive, they do not infringe the system established by that directive. 121. In the light of those considerations, the answer to the fifth question referred is that Article 3 of Directive 2004/83 must be interpreted as meaning that Member States may grant a right of asylum under their national law to a person who is excluded from refugee status pursuant to Article 12(2) of the directive, provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive.’</p>	

court	case name/reference/date	relevance/key words/main points	cases cited
CJEU (Grand Chamber)	<p><i>Bundesrepublik Deutschland v Y and Z</i>                      joined cases C-71/11 and C-99/11                      EU:C:2012:518                      05/09/2012</p>	<p>Judgment after a reference for a preliminary ruling from the Bundesverwaltungsgericht – Germany on the notion of persecution on the basis of Article 9(1) and 10(1)(b) QD.</p> <p>act of persecution (Art. 9(1) QD) – violation of freedom of religion – severity – well-founded fear of persecution – absence of past persecution (Art. 4(4) QD) – standard of proof – no duty of discretion</p> <p><b>Violation of freedom of religion as an act of persecution and severity of the violation under Article 9(1) QD, paras. 57-62 and 65-66:</b> ‘57. Freedom of religion is one of the foundations of a democratic society and is a basic human right. Interference with the right to religious freedom may be so serious as to be treated in the same way as the cases referred to in Article 15(2) of the ECHR, to which Article 9(1) of the Directive refers, by way of guidance, for the purpose of determining which acts must in particular be regarded as constituting persecution.’ 58. However, that cannot be taken to mean that any interference with the right to religious freedom guaranteed by Article 10(1) of the Charter constitutes an act of persecution requiring the competent authorities to grant refugee status within the meaning of Article 2(d) of the Directive to any person subject to the interference in question. 59. On the contrary, it is apparent from the wording of Article 9(1) of the Directive that there must be a ‘severe violation’ of religious freedom having a significant effect on the person concerned in order for it to be possible for the acts in question to be regarded as acts of persecution. 60. Acts amounting to limitations on the exercise of the basic right to freedom of religion within the meaning of Article 10(1) of the Charter which are provided for by law, without any violation of that right arising, are thus automatically excluded as they are covered by Article 52(1) of the Charter. 61. Nor can acts which undoubtedly infringe the right conferred by Article 10(1) of the Charter, but whose gravity is not equivalent to that of an infringement of the basic human rights from which no derogation can be made by virtue of Article 15(2) of the ECHR, be regarded as constituting persecution within the meaning of Article 9(1) of the Directive and Article 1A of the Geneva Convention. 62. For the purpose of determining, specifically, which acts may be regarded as constituting persecution within the meaning of Article 9(1)(a) of the Directive, it is unnecessary to distinguish acts that interfere with the ‘core areas’ (‘forum internum’) of the basic right to freedom of religion, which do not include religious activities in public (‘forum externum’), from acts which do not affect those purported ‘core areas’. [...] 65. It follows that acts which, on account of their intrinsic severity as well as the severity of their consequences for the person concerned, may be regarded as constituting persecution must be identified, not on the basis of the particular aspect of religious freedom that is being interfered with but on the basis of the nature of the repression inflicted on the individual and its consequences [...]. 66. It is therefore the severity of the measures and sanctions adopted or liable to be adopted against the person concerned which will determine whether a violation of the right guaranteed by Article 10(1) of the Charter constitutes persecution within the meaning of Article 9(1) of the Directive.’</p> <p><b>Definition of a well-founded fear of persecution, para. 70:</b> ‘In assessing such a risk, the competent authorities must take account of a number of factors, both objective and subjective. The subjective circumstance that the observance of a certain religious practice in public, which is subject to the restrictions at issue, is of particular importance to the person concerned in order to preserve his religious identity is a relevant factor to be taken into account in determining the level of risk to which the applicant will be exposed in his country of origin on account of his religion, even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned.’</p> <p><b>Risk of future persecution without past persecution and standard of proof under Article 4(4) QD, paras. 74-76:</b> ‘74. For the purpose of answering that question, it must be observed that it concerns a situation in which, as is the case in the main proceedings, the applicant has not already been subject to persecution or to direct threats of persecution on account of his religion. 75. It is the absence of such a ‘serious indication of the applicant[s] well-founded fear’ within the meaning of Article 4(4) of the Directive which explains the need on the part of the referring court to ascertain the extent to which it may be open to the court, where the applicant cannot claim that his fear is based on the fact that he has already been subject to persecution on account of his religion, to require that on his return to his country of origin he should continue to avoid the real risk of being persecuted. 76. It should be noted in that regard that, in the system provided for by the Directive, when assessing whether, in accordance with Article 2(c) thereof, an applicant has a well-founded fear of being persecuted, the competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subject to acts of persecution.’</p>	

court	case name/reference/date	relevance/key words/main points	cases cited
CJEU	<p><i>El Kott and Others v Bevándorlási és Állampolgársági Hivatal</i> case C-364/11 EU:C:2012:826 19/12/2012</p>	<p><b>No duty of discretion, paras. 78-80:</b> '78. None of those rules states that, in assessing the extent of the risk of actual acts of persecution in a particular situation, it is necessary to take account of the possibility open to the applicant of avoiding the risk of persecution by abstaining from the religious practice in question and, consequently, renouncing the protection which the Directive is intended to afford the applicant by conferring refugee status. 79. It follows that, where it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status, in accordance with Article 13 of the Directive. The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant. 80. In the light of the above considerations, the answer to the third question referred in both cases is that Article 2(c) of the Directive must be interpreted as meaning that the applicant's fear of being persecuted is wellfounded if, in the light of the applicant's personal circumstances, the competent authorities consider that it may reasonably be thought that, upon his return to his country of origin, he will engage in religious practices which will expose him to a real risk of persecution. In assessing an application for refugee status on an individual basis, those authorities cannot reasonably expect the applicant to abstain from those religious practices.'</p> <p>Judgment after a reference for a preliminary ruling from the Fővárosi Bíróság – Hungary on exclusion from refugee status on the basis of Article 12 QD. interpretation of the QD (and QD (recast)) – actor of protection – UNRWA <b>Interpretation of the QD (and QD (recast)), para. 43:</b> 'Directive 2004/83 must, for that reason, be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. As is apparent from recital 10 in the preamble thereto, the directive must also be interpreted in a manner consistent with the rights recognised by the Charter [...].' <b>Exclusion from refugee status because of protection by UNRWA; recognition UNRWA as an actor of protection by analogy, para. 52:</b> 'It is therefore necessary to interpret the first sentence of Article 12(1)(a) of Directive 2004/83 as meaning that the ground for excluding a person from being a refugee laid down in that provision covers not only persons who are currently availing themselves of assistance provided by UNRWA but also those such as the applicants in the main proceedings who in fact availed themselves of such assistance shortly before submitting an application for asylum in a Member State, provided, however, that that assistance has not ceased within the meaning of the second sentence of Article 12(1)(a) of the directive.'</p>	CJEU – C-71/11 and C-90/11 Bundesrepublik Deutschland v Y and Z

court	case name/reference/date	relevance/key words/main points	cases cited
CJEU	<p><i>Minister voor Immigratie en Asiel v X and Y, and Z v Minister voor Immigratie en Asiel</i></p> <p>Joined cases C-199/12, C-200/12 and C-201/12</p> <p>EU:C:2013:720</p> <p>07/11/2013</p>	<p>Judgment after a reference for a preliminary ruling from the Raad van State – Netherlands on membership of a particular social group on ground of sexual orientation on the basis of Articles 9(1) and 10(1)(d) QD.</p> <p>interpretation of the QD (and QD (recast)) – particular social group (Art. 10(1)(d) QD) – sexual orientation – no duty of discretion</p> <p><b>Interpretation of the QD (and QD (recast)), para. 40:</b> ‘The Directive must, for that reason, be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. As is apparent from recital 10 in the preamble thereto, the directive must also be interpreted in a manner consistent with the rights recognised by the Charter [...]’.</p> <p><b>Definition of a particular social group on ground of sexual orientation under Article 10(1)(d) QD, paras. 44-48:</b> ‘44. Article 10(1) of the Directive gives a definition of a particular social group, membership of which may give rise to a genuine fear of persecution. 45. According to that definition, a group is regarded as a ‘particular social group’ where, inter alia, two conditions are met. First, members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. Second, that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society. 46. As far as concerns the first of those conditions, it is common ground that a person’s sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it. That interpretation is supported by the second subparagraph of Article 10(1)(d) of the Directive, from which it appears that, according to the conditions prevailing in the country of origin, a specific social group may be a group whose members have sexual orientation as the shared characteristic. 47. The second condition assumes that, in the country of origin concerned, the group whose members share the same sexual orientation has a distinct identity because it is perceived by the surrounding society as being different. 48. In that connection, it should be acknowledged that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports a finding that those persons form a separate group which is perceived by the surrounding society as being different.’</p> <p><b>Persecution on the basis of sexual orientation, paras. 53-56:</b> ‘53. It is clear from those provisions that, for a violation of fundamental rights to constitute persecution within the meaning of Article 1(A) of the Geneva Convention, it must be sufficiently serious. Therefore, not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness. 54. In that connection, it must be stated at the outset that the fundamental rights specifically linked to the sexual orientation concerned in each of the cases in the main proceedings, such as the right to respect for private and family life, which is protected by Article 8 of the ECHR, to which Article 7 of the Charter corresponds, read together, where necessary, with Article 14 ECHR, on which Article 21(1) of the Charter is based, is not among the fundamental human rights from which no derogation is possible. 55. In those circumstances, the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the Directive. 56. However, the term of imprisonment which accompanies a legislative provision which, like those at issue in the main proceedings, punishes homosexual acts is capable, in itself of constituting an act of persecution within the meaning of Article 9(1) of the Directive, provided that it is actually applied in the country of origin which adopted such legislation.’</p> <p><b>No duty of discretion, paras. 70-71:</b> ‘70. In that connection, it is important to state that requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person’s identity that the persons concerned cannot be required to renounce it. 71. Therefore, an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution.’</p>	<p>CJEU – C-364/11 Mostafa Abed El Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal</p>

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CJEU	<p><i>Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides</i> case C-285/12 EU:C:2014:39 30/01/2014</p>	<p>Judgment after a reference for a preliminary ruling from the Conseil d'Etat – Belgium on the notion of 'internal armed conflict' in Article 15(c) QD. complementarity and objective of subsidiary protection <b>Complementarity and objective of subsidiary protection, para. 33:</b> 'Moreover, it is clear from recitals 5, 6 and 24 to Directive 2004/83 that the minimum requirements for granting subsidiary protection must help to complement and add to the protection of refugees enshrined in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951, through the identification of persons genuinely in need of international protection and through such persons being offered an appropriate status.'</p>	
CJEU	<p><i>HN v Minister for Justice, Equality and Law Reform, Ireland, Attorney General</i> case C-604/12 EU:C:2014:302 08/05/2014</p>	<p>Judgment after a reference for a preliminary ruling from the Supreme Court – Ireland on national procedures for applications of international protection under Articles 2(e) and (f), 15, 18, 20, 28 and 29 QD and APD. complementarity of subsidiary protection <b>Complementarity of subsidiary protection, paras. 32-35:</b> '32. It is clear from the above that the subsidiary protection provided by Directive 2004/83 is complementary and additional to the protection of refugees enshrined in the Geneva Convention. 33. That interpretation is also consistent with the objectives laid down by Article 78(2)(a) and (b) TFEU, which provide that the European Parliament and the Council of the European Union are to adopt measures for a common European asylum system comprising, inter alia, 'a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection'. 34. Furthermore, as the Advocate General observed at points 46 and 49 of his Opinion, given that a person seeking international protection is not necessarily in a position to ascertain the kind of protection applicable to their application and that refugee status offers greater protection than that conferred by subsidiary protection, it is, in principle, for the competent authorities to determine the status that is most appropriate to the applicant's situation. 35. It is apparent from the foregoing considerations that an application for subsidiary protection should not, in principle, be considered before the competent authority has reached the conclusion that the person seeking international protection does not qualify for refugee status.'</p>	

court	case name/reference/date	relevance/key words/main points	cases cited
CJEU (Grand Chamber)	<p><i>Mohamed M'Boj v Etat belge</i> case C-542/13 EU:C:2014:2452 18/12/2014</p>	<p>Judgment after a reference for a preliminary ruling from the Cour constitutionnelle – Belgium on eligibility for subsidiary protection on medical grounds on the basis of Article 15(b) QD.</p> <p>scope of subsidiary protection (Art. 15(b) QD) – medical cases – actors of persecution/serious harm (Art. 6 QD) – more favourable standards (Art. 3 QD)</p> <p><b>Scope of subsidiary protection / exclusion of medical cases from Article 15(b) QD, paras. 31-33, 37-38 and 40-41:</b> '31. The risks faced by a third country national of a deterioration in his state of health which is not the result of that person being intentionally deprived of health care — against which the national legislation at issue in the main proceedings provides protection — are not covered by Article 15(a) and (c) of Directive 2004/83, as harm as defined by those provisions, consists of the death penalty or execution and serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict, respectively. 32. Article 15(b) of Directive 2004/83 defines serious harm as the torture or inhuman or degrading treatment or punishment of a third country national in his country of origin. 33. It is clear from that provision that it is applicable only to the inhuman or degrading treatment of an applicant in his country of origin. It follows that the EU legislature envisaged that subsidiary protection should be granted only in those cases in which such treatment occurred in the applicant's country of origin. [...] 37. That interpretation is also supported by recitals 5, 6, 9 and 24 in the preamble to Directive 2004/83, from which it is apparent that, while the directive is intended to complement and add to, by means of subsidiary protection, the protection of refugees enshrined in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951, through the identification of persons genuinely in need of international protection [...], its scope does not extend to persons granted leave to reside in the territories of the Member States for other reasons, that is, on a discretionary basis on compassionate or humanitarian grounds. 38. The requirement to interpret Article 15(b) of Directive 2004/83 in a manner consistent with Article 19(2) of the Charter [...], to the effect that no person may be returned to a State in which there is a serious risk that that person will be subjected to inhuman and degrading treatment, and having due regard for Article 3 of the ECHR, to which Article 15(b), in essence, corresponds [...], is not such as to call that interpretation into question. [...] 40. None the less, the fact that a third country national suffering from a serious illness may not, under Article 3 ECHR as interpreted by the European Court of Human Rights, in highly exceptional cases, be removed to a country in which appropriate treatment is not available does not mean that that person should be granted leave to reside in a Member State by way of subsidiary protection under Directive 2004/83. 41. In the light of the foregoing, Article 15(b) of Directive 2004/83 must be interpreted as meaning that serious harm, as defined by the directive, does not cover a situation in which inhuman or degrading treatment, such as that referred to by the legislation at issue in the main proceedings, to which an applicant suffering from a serious illness may be subjected if returned to his country of origin, is the result of the fact that appropriate treatment is not available in that country, unless such an applicant is intentionally deprived of health care.'</p> <p><b>Actor of persecution or serious harm under Article 6 QD, para. 35:</b> 'Accordingly, Article 6 of Directive 2004/83 sets out a list of those deemed responsible for inflicting serious harm, which supports the view that such harm must take the form of conduct on the part of a third party and that it cannot therefore simply be the result of general shortcomings in the health system of the country of origin.'</p> <p><b>Scope of Article 3 QD on more favourable standards, paras. 42-44:</b> '42. None the less, Article 3 of Directive 2004/83 allows Member States to introduce or retain more favourable standards for determining, <i>inter alia</i>, who qualifies as a person eligible for subsidiary protection, in so far as those standards are compatible with the directive [...]. 43. The reservation set out in Article 3 of Directive 2004/83 precludes a Member State from introducing or retaining provisions granting the subsidiary protection status provided for in the directive to a third country national suffering from a serious illness on the ground that there is a risk that that person's health will deteriorate as a result of the fact that adequate treatment is not available in his country of origin, as such provisions are incompatible with the directive. 44. In the light of the considerations set out at paragraphs 35 to 37 above, it would be contrary to the general scheme and objectives of Directive 2004/83 to grant refugee status and subsidiary protection status to third country nationals in situations which have no connection with the rationale of international protection.'</p>	<p>CJEU – C-285/12 Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides CJEU – C-364/11 Mostafa Abed El Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal; CJEU – C-465/07 Mekki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie CJEU – C-57/09 and C-101/09 Bundesrepublik Deutschland v B and D ECtHR – N v the United Kingdom application no 26565/05</p>

court	case name/reference/date	relevance/key words/main points	cases cited
<p>CJEU (Grand Chamber)</p>	<p><i>Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abadida</i> case C-562/13 EU:C:2014:2453 18/12/2014</p>	<p>Judgment after a reference for a preliminary ruling from the Cour du travail de Bruxelles – Belgium on suspensive effect of appeals and provision of emergency health care in return procedures under the Returns Directive.</p> <p>scope of subsidiary protection (Art. 15(b) QD) – medical cases</p> <p><b>Scope of subsidiary protection / exclusion of medical cases under Article 15(b) QD, paras. 32-33:</b> '32. It should be noted at the outset that it is apparent from the order for reference that those questions are based on the premise that the applications made under the national legislation at issue in the main proceedings are applications for international protection within the meaning of Directive 2004/83 and therefore fall within the scope of that directive. 33. However, it is clear from paragraphs 27, 41, 45 and 46 of the judgment in <i>M'Bodj</i> [...] that Articles 2(c) and (e), 3 and 15 of Directive 2004/83 are to be interpreted to the effect that applications submitted under that national legislation do not constitute applications for international protection within the meaning of Article 2(g) of that directive. It follows that the situation of a third country national who has made such an application falls outside the scope of that directive, as defined in Article 1 thereof.'</p>	<p>CJEU – C-542/13 Mohamed M'Bodj v Etat belge</p>
<p>CJEU</p>	<p><i>Andre Lawrence Shepherd v Bundesrepublik Deutschland</i> case C-472/13 EU:C:2015:117 26/02/2015</p>	<p>Judgment after a reference for a preliminary ruling from the Bayerisches Verwaltungsgericht München – Germany on eligibility for refugee status and meaning of acts of persecution on the basis of Article 9(2)(b), (c) and (e) QD.</p> <p>act of persecution; refusal to perform military service (Art. 9(2)(e) QD) – severity of discriminatory or disproportionate measures (Art. 9(2)(b) and (c))</p> <p><b>Personal scope of Article 9(2)(e) QD, paras. 33-34:</b> '33. In that context, it must be pointed out that Article 9(2)(e) of Directive 2004/83, in that it refers to the refusal to perform military service in a conflict, where performing military service would include war crimes, is in no way restrictive as regards the persons concerned by such service. It must therefore be acknowledged that the EU legislature, in adopting that provision, did not mean to restrict its scope to certain personnel performing such service on the basis, <i>inter alia</i>, of their rank in the military hierarchy, the circumstances in which they were recruited or even the nature of their tasks. As the Advocate General pointed out in point 32 of her Opinion, that provision covers all military personnel, including, therefore, logistical or support staff. 34. However, given that the objective of Directive 2004/83 [...] is to identify persons who, forced by circumstances, genuinely and legitimately need international protection in the European Union, being a member of the military is a necessary but not sufficient condition for being eligible for the protection provided for in Article 9(2)(e) of that directive.'</p> <p><b>Existence of a conflict required under the terms of Article 9(2)(e) QD, para. 35:</b> 'As regards, in the first place, the conditions for the application of Article 9(2)(e) of Directive 2004/83, it must be pointed out, first, that that provision refers to a conflict situation. It follows that, without such a conflict situation, any refusal to perform military service, irrespective of the motive, could not fall within the ambit of that provision. The circumstances whose significance the Court is asked to assess in order to define that ambit must therefore relate directly to a particular conflict.'</p> <p><b>Risk to be actually involved in war crimes under Article 9(2)(e) QD, paras. 36-39:</b> '36. Secondly, it can be seen from the very wording of Article 9(2)(e) of Directive 2004/83 that it is the military service itself that would involve war crimes. That provision does not refer solely to the situation in which the applicant would be led to commit such crimes personally. 37. It follows that the EU legislature intended the general context in which that service is performed to be taken into account objectively. Accordingly, situations in which the applicant would participate only indirectly in the commission of such crimes, because, <i>inter alia</i>, he is not a member of the combat troops but rather, for example, serves in a unit providing logistical or technical support, are not, as a matter of principle, excluded. Consequently, the fact that the person concerned, because of the merely indirect nature of that participation, could not be prosecuted under criminal law, in particular before the International Criminal Court, cannot preclude protection arising from Article 9(2)(e) of Directive 2004/83. 38. However, although the enjoyment of international protection is not limited to those who could be led to commit acts which constitute war crimes personally, such as combat troops, that protection can be extended only to those other persons whose tasks could, sufficiently directly and reasonably plausibly, lead them to participate in such acts. 39. Thirdly, Article 9(2)(e) of Directive 2004/83 is intended to protect the applicant who opposes military service because he does not wish to run the risk of committing, in the future, acts of the nature of those referred to in Article 12(2) of that directive. The person concerned can therefore invoke only the likelihood of such acts being committed. It follows that Article 9(2)(e) of that directive cannot be interpreted as covering exclusively situations in which it is established that the applicant's unit has already committed war crimes. Nor can it be required that the acts of that unit should already have been penalised by the International Criminal Court, even if the latter had jurisdiction to do so.'</p>	<p>CJEU – C199/12, C-200/2 and C201/12 Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel; CJEU – C-57/09 and C-101/09 Bundesrepublik Deutschland v B and D</p>



court	case name/reference/date	relevance/key words/main points	cases cited
CJEU	<p style="text-align: center;"> <i>HT v Land Baden-Württemberg</i>                      case C-373/13                      EU:C:2015:413                      24/06/2015                 </p>	<p> <b>Available alternative to refusal of military service, para. 44:</b> 'Thirdly, since the acts of persecution invoked by the applicant for refugee status must, in accordance with those provisions of Directive 2004/83, arise from his refusal to perform military service, that refusal must constitute the only means by which that applicant could avoid participating in the alleged war crimes. In that respect, the assessment that has to be carried out by the national authorities must take into account, in accordance with Article 4(3)(c) of Directive 2004/83, the fact, inter alia, that, in the present case, the applicant not only enlisted voluntarily in the armed forces at a time when they were already involved in the conflict in Iraq but also, after carrying out one tour of duty in that country, re-enlisted in those forces.'                 </p> <p> <b>Sufficient severity of the discriminatory or disproportionate measures under Article 9(2)(b) and (c) QD, paras. 49-50:</b> '49. It is necessary, in those circumstances, to point out, first of all, that the provisions of Article 9(2)(b) and (c) of Directive 2004/83 refer to measures taken by the public authorities whose discriminatory or disproportionate nature must, according to the first paragraph of that article, be sufficiently serious [...] in order to be considered an infringement of fundamental rights constituting persecution within the meaning of Article 1(A) of the Geneva Convention. 50. [...] in assessing whether the prosecution and penalties that might be incurred by the applicant in the main proceedings in his country of origin, because of his refusal to perform military service, are disproportionate, it is necessary to consider whether such acts go beyond what is necessary for the State concerned in order to exercise its legitimate right to maintain an armed force.'                 </p> <p>                     Judgment after a reference for a preliminary ruling from the Verwaltungsgerichtshof Baden-Württemberg – Germany on revocation of residence permits on the basis of Article 24(1) QD.                      revocation of refugee status – <i>non-refoulement</i> </p> <p> <b>Relationship of revocation of refugee status under Article 14(4) QD and the exception to non-refoulement under Article 21(2) QD, paras. 71-74:</b> '71. The refoulement of a refugee, while in principle authorised by the derogating provision Article 21(2) of Directive 2004/83, is only the last resort a Member State may use where no other measure is possible or is sufficient for dealing with the threat that that refugee poses to the security or to the public of that Member State. In the event that a Member State, pursuant to Article 14(4) of that directive, revokes, ends or refuses to renew the refugee status granted to a person, that person is entitled, in accordance with Article 14(6) of that directive, to rights set out inter alia in Articles 32 and 33 of the Geneva Convention. 72. The consequences for the refugee concerned of applying the derogation provided for in Article 21(2) of Directive 2004/83 are potentially very drastic [...] since he might be returned to a country where he is at risk. It is for that reason that that provision subjects the practice of refoulement to rigorous conditions, since, in particular, only a refugee who has been convicted by a final judgment of a 'particularly serious crime' may be regarded as constituting a 'danger to the community of that Member State' within the meaning of that provision. Moreover, even where those conditions are satisfied, refoulement of the refugee concerned constitutes only one option at the discretion of the Member States, the latter being free to opt for other, less rigorous, options. 73. However, Article 24(1) of Directive 2004/83, whose wording is more abstract than that of Article 21(2) of that directive, pertains only to the refusal to issue a residence permit to a refugee and to the revocation of that residence permit, and not to the refoulement of that refugee. That provision therefore concerns only situations where the threat posed by that refugee to the national security, public order or public of the Member State in question cannot justify loss of refugee status, let alone the refoulement of that refugee. That is why implementation of the derogation provided for in Article 24(1) of Directive 2004/83 does not presuppose the existence of a particularly serious crime. 74. The consequences, for the refugee, of revoking his residence permit pursuant to Article 24(1) of Directive 2004/83 are therefore less onerous, in so far as that measure cannot lead to the revocation of his refugee status and, even less, to his refoulement within the meaning of Article 21(2) of that directive.'                 </p>	

court	case name/reference/date	relevance/key words/main points	cases cited
CJEU	<p><i>Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover</i></p> <p>joined cases C-443/14 and 444/14</p> <p>EU:C:2016:127</p> <p>1/03/2016</p>	<p>Judgment after a reference for a preliminary ruling from the Bundesverwaltungsgericht – Germany on the interpretation of Articles 33 and 29 QD (recast).</p> <p>interpretation of the QD (recast) – Refugee Convention – subsidiary protection</p> <p><b>Interpretation of the QD (recast) in light of the Refugee Convention, including for provisions common to refugee status and subsidiary protection, paras. 29-33:</b> ‘29. It must be noted in that regard that it is clear from recitals 4, 23 and 24 of Directive 2011/95 that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the directive for determining who qualifies for refugee status and the content of that status were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria (see, by analogy, judgment in <i>Abed El Karem El Kott and Others</i>, C364/11, EU:C:2012:826, paragraph 42).</p> <p>29. Directive 2011/95 must, for that reason, be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. As is apparent from recital 16 in the preamble thereto, the directive must also be interpreted in a manner consistent with the rights recognised by the Charter of Fundamental Rights of the European Union (see, by analogy, judgment in <i>Abed El Karem El Kott and Others</i>, C364/11, EU:C:2012:826, paragraph 43 and the case-law cited). 30. Furthermore, it follows from recital 3 of Directive 2011/95 that, drawing on the Conclusions of the Tampere European Council, the EU legislature intended to ensure that the European asylum system, to whose definition that directive contributes, is based on the full and inclusive application of the Geneva Convention. 31. In principle, those considerations are, in so far as they pertain to the Geneva Convention, relevant only in relation to the conditions for determining who qualifies for refugee status and the content of that status, since the system laid down by the convention applies only to refugees and not to beneficiaries of subsidiary protection status, which is intended, as is apparent from recitals 6 and 33 of Directive 2011/95, to complement and add to the protection of refugees enshrined in the convention (see, to that effect, judgments in <i>Diakité</i>, C285/12, EU:C:2014:39, paragraph 33, and N., C604/12, EU:C:2014:302, paragraph 31). 32. Nevertheless, recitals 8, 9 and 39 of Directive 2011/95 state that the EU legislature intended, in responding to the call of the Stockholm Programme, to establish a uniform status for all beneficiaries of international protection and that it accordingly chose to afford beneficiaries of subsidiary protection the same rights and benefits as those enjoyed by refugees, with the exception of derogations which are necessary and objectively justified. 33. Thus, Chapter VII of Directive 2011/95, which relates to the content of international protection, is to apply, in accordance with Article 20(2) of the directive, both to refugees and to beneficiaries of subsidiary protection status, unless otherwise indicated.’</p>	<p>CJEU – C-364/11 <i>El Kott and Others v Bevándorlási és Állampolgársági Hivatal</i></p> <p>CJEU – C-285/12 <i>Aboubacar Diakité v Commissaire general aux réfugiés et aux apatrides</i></p> <p>CJEU – C-604/12 <i>HN v Minister for Justice, Equality and Law Reform, Ireland, Attorney General</i></p>

**ECtHR**

court	case name/ reference/date	relevance/key words/main points	cases cited
<p>ECtHR</p>	<p><i>Ireland v the United Kingdom</i> application no 5310/71 18/01/1978</p>	<p>ECtHR judgment on prohibition of ill-treatment under Article 3 ECHR. torture and inhuman degrading treatment – distinction</p> <p><b>Distinction between torture and inhuman or degrading treatment under Article 3 ECHR, para. 167:</b> '[...] In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3 (art. 3), between this notion and that of inhuman or degrading treatment. In the Court's view, this distinction derives principally from a difference in the intensity of the suffering inflicted. The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 (art. 3) of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering. Moreover, this seems to be the thinking lying behind Article 1 in fine of Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on 9 December 1975, which declares: "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment". Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.'</p>	
<p>ECtHR</p>	<p><i>Tyrer v the United Kingdom</i> application no 5856/72 25/04/1978</p>	<p>ECtHR judgment on prohibition of ill-treatment under Article 3 ECHR. degrading treatment or punishment</p> <p><b>Definition of degrading treatment or punishment under Article 3 ECHR, para. 30:</b> 'The Court notes first of all that a person may be humiliated by the mere fact of being criminally convicted. However, what is relevant for the purposes of Article 3 (art. 3) is that he should be humiliated not simply by his conviction but by the execution of the punishment which is imposed on him. In fact, in most if not all cases this may be one of the effects of judicial punishment, involving as it does unwilling subjection to the demands of the penal system. However, as the Court pointed out in its judgment of 18 January 1978 in the case of <i>Ireland v. the United Kingdom</i> [...], the prohibition contained in Article 3 (art. 3) of the Convention is absolute: no provision is made for exceptions and, under Article 15 (2) (art. 15-2) there can be no derogation from Article 3 (art. 3). It would be absurd to hold that judicial punishment generally, by reason of its usual and perhaps almost inevitable element of humiliation, is "degrading" within the meaning of Article 3 (art. 3). Some further criterion must be read into the text. Indeed, Article 3 (art. 3), by expressly prohibiting "inhuman" and "degrading" punishment, implies that there is a distinction between such punishment and punishment in general. In the Court's view, in order for a punishment to be "degrading" and in breach of Article 3 (art. 3), the humiliation or debasement involved must attain a particular level and must in any event be other than that usual element of humiliation referred to in the preceding subparagraph. The assessment is, in the nature of things, relative: it depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution.'</p>	<p>ECtHR – Ireland v the United Kingdom application no 5310/71</p>

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ECtHR	<i>Soering v the United Kingdom</i> application no 14038/88 07/07/1989	<p>ECtHR judgment on <i>non-refoulement</i> under Article 3 ECHR in case of extradition.</p> <p><i>non-refoulement</i> – standard of proof – right to fair trial</p> <p><b>Standard of proof in case of non-refoulement under Article 3 ECHR, para. 91:</b> ‘In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 (art. 3) of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.’</p> <p><b>Non-refoulement in case of risk of violation of the right to fair trial on the basis of Article 6 ECHR, para. 113:</b> ‘The right to a fair trial in criminal proceedings, as embodied in Article 6 (art. 6), holds a prominent place in a democratic society [...]. The Court does not exclude that an issue might exceptionally be raised under Article 6 (art. 6) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk.’</p>	ECtHR – Colozza v Italy application no 9024/80
ECtHR	<i>Vilvarajah and Others v the United Kingdom</i> applications nos 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87 30/10/1991	<p>ECtHR judgment on <i>non-refoulement</i> under Article 3 ECHR.</p> <p><i>non-refoulement</i> – real risk threshold</p> <p><b>Real risk threshold for prohibition of refoulement under Article 3 ECHR, para. 111:</b> ‘[...] Since the situation was still unsettled there existed the possibility that they might be detained and ill-treated as appears to have occurred previously in the cases of some of the applicants [...]. A mere possibility of ill-treatment, however, in such circumstances, is not in itself sufficient to give rise to a breach of Article 3 (art. 3).’</p>	
ECtHR	<i>Chahal v the United Kingdom</i> application no 22414/93 15/11/1996	<p>ECtHR judgment <i>inter alia</i> on <i>non-refoulement</i> under Article 3 ECHR.</p> <p><i>non-refoulement</i> – current risk – internal protection</p> <p><b>Assessment of current risk in case of non-refoulement under Article 3 ECHR, para. 86:</b> ‘It follows from the considerations in paragraph 74 above that, as far as the applicant’s complaint under Article 3 (art. 3) is concerned, the crucial question is whether it has been substantiated that there is a real risk that Mr Chahal, if expelled, would be subjected to treatment prohibited by that Article (art. 3). Since he has not yet been deported, the material point in time must be that of the Court’s consideration of the case. It follows that, although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive.’</p> <p><b>Internal protection in case of non-refoulement under Article 3 ECHR, paras. 104-105:</b> ‘104. Although the Court is of the opinion that Mr Chahal, if returned to India, would be most at risk from the Punjab security forces acting either within or outside State boundaries, it also attaches significance to the fact that attested allegations of serious human rights violations have been levelled at the police elsewhere in India. In this respect, the Court notes that the United Nations’ Special Rapporteur on torture has described the practice of torture upon those in police custody as “endemic” and has complained that inadequate measures are taken to bring those responsible to justice (see paragraph 51 above). The NHRC has also drawn attention to the problems of widespread, often fatal, mistreatment of prisoners and has called for a systematic reform of the police throughout India [...]. 105. Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above [...], it would appear that, despite the efforts of that Government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem [...]. Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety.’</p>	

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ECtHR	<i>Ahmed v Austria</i> application no 25964/94 17/12/1996	ECtHR judgment on <i>non-refoulement</i> under Article 3 ECHR. <i>non-refoulement</i> – risk from non-State actors – state protection – failed State <b>Recognition of non-State actors as source of risk if no state protection in case of non-refoulement under Article 3 ECHR, para. 44:</b> ‘With regard to the present situation in Somalia, the Court bases its assessment on the findings of the Commission, to which, under the Convention, the tasks of establishing and verifying the facts are primarily assigned [...]. In its report of 5 July 1995 the Commission noted that the situation in Somalia had changed hardly at all since 1992. The country was still in a state of civil war and fighting was going on between a number of clans vying with each other for control of the country. There was no indication that the dangers to which the applicant would have been exposed in 1992 had ceased to exist or that any public authority would be able to protect him.’	ECtHR – Cruz Varas and Others v Sweden application no 15576/89
ECtHR (Grand Chamber)	<i>HLR v France</i> application no 24573/94 29/04/1997	ECtHR judgment on <i>non-refoulement</i> under Article 3 ECHR. <i>non-refoulement</i> – risk from non-State actors – state protection <b>Recognition of non-State actors as source of risk if no state protection in case of non-refoulement under Article 3 ECHR, para. 40:</b> ‘Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention (art. 3) may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.’	
ECtHR	<i>D v the United Kingdom</i> application no 30240/96 02/05/1997	ECtHR judgment inter alia on <i>non-refoulement</i> under Article 3 ECHR. <i>non-refoulement</i> – medical cases <b>Exceptional prohibition of refoulement on medical grounds under Article 3 ECHR, para. 54:</b> ‘Against this background the Court emphasises that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison. However, in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of Article 3 (art. 3).’	
ECtHR	<i>Selmouni v France</i> application no 25803/94 28/07/1999	ECtHR judgment inter alia on ill-treatment under Article 3 ECHR in context of police custody. inhuman or degrading treatment – deprivation of liberty <b>Definition of inhuman or degrading treatment in context of deprivation of liberty under Article 3 ECHR, para. 99:</b> ‘The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. The Court therefore finds elements which are sufficiently serious to render such treatment inhuman and degrading [...]. In any event, the Court reiterates that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 [...].’	ECtHR – Ireland v the United Kingdom application no 5310/71 ECtHR – Tomasi v France application 12850/87 ECtHR – Ribitsch v Austria application no 18896/91 ECtHR – Tekin v Turkey application no 22496/93

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ECtHR (Grand Chamber)	<i>Kudla v Poland</i> application no 30210/96 26/10/2000	ECtHR judgment inter alia on ill-treatment under Article 3 ECHR in context of deprivation of liberty, inhuman and degrading treatment – deprivation of liberty <b>Definition of inhuman and degrading treatment under Article 3 ECHR and context of detention on remand, paras. 90-93:</b> ‘90. As the Court has held on many occasions, Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim’s behaviour [...] 91. However, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim [...] 92. The Court has considered treatment to be “inhuman” because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be “degrading” because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. On the other hand, the Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment [...] 93. Measures depriving a person of his liberty may often involve such an element. Yet it cannot be said that the execution of detention on remand in itself raises an issue under Article 3 of the Convention. Nor can that Article be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain a particular kind of medical treatment.’	ECtHR – V v the United Kingdom application no 24888/94 ECtHR – Labita v Italy application no 26772/95 ECtHR – Raminen v Finland application no 20972/92 ECtHR – Tyrer v the United Kingdom application no 5856/72 ECtHR – Soering v the United Kingdom application no 14038/88
ECtHR	<i>Peers v Greece</i> application no 28524/95 19/04/2001	ECtHR judgment inter alia on prohibition of ill-treatment under Article 3 ECHR in context of deprivation of liberty, degrading treatment <b>Definition of degrading treatment under Article 3 ECHR, para. 74:</b> ‘In the light of the foregoing, the Court considers that in the present case there is no evidence that there was a positive intention of humiliating or debasing the applicant. However, the Court notes that, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 [...]’	ECtHR – V v the United Kingdom application no 24888/94
ECtHR	<i>Hilal v the United Kingdom</i> application no 45276/99 06/03/2001	ECtHR judgment inter alia on <i>non-refoulement</i> under Article 3 ECHR. <i>non-refoulement</i> – internal protection <b>Requirements for internal protection in case of non-refoulement under Article 3 ECHR, paras. 67-68:</b> ‘67. The Government relied on the “internal flight” option, arguing that even assuming that the applicant was at risk in Zanzibar, the situation in mainland Tanzania was more secure. The documents provided by the parties indicate that human rights infringements were more prevalent in Zanzibar and that CUF members there suffered more serious persecution [...]. It nonetheless appears that the situation in mainland Tanzania is far from satisfactory and discloses a long-term, endemic situation of human rights problems. Reports refer in general terms to police in Tanzania ill-treating and beating detainees [...] and to members of the Zanzibari CCM visiting the mainland to harass CUF supporters sheltering there [...]. Conditions in the prisons on the mainland are described as inhuman and degrading, with inadequate food and medical treatment leading to life-threatening conditions [...]. The police in mainland Tanzania may be regarded as linked institutionally to the police in Zanzibar as part of the Union and cannot be relied on as a safeguard against arbitrary action (see Chahal, [...]) where the applicant, of Sikh origin, was at particular risk of ill-treatment within the Punjab province but could not be considered as safe elsewhere in India as the police in other areas were also reported to be involved in serious human rights violations). There is also the possibility of extradition between Tanzania and Zanzibar [...]. 68. The Court is not persuaded, therefore, that the “internal flight” option offers a reliable guarantee against the risk of ill-treatment. It concludes that the applicant’s deportation to Tanzania would breach Article 3 as he would face a serious risk of being subjected to torture or inhuman or degrading treatment there.’	ECtHR – Chahal v the United Kingdom application no 22414/93

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ECtHR (Grand Chamber)	<p><i>Cyprus v Turkey</i> application no 25781/94 10/05/2001</p>	<p>ECtHR judgment on violations of ECHR rights in the context of the military operations of Turkey in northern Cyprus. degrading treatment – racial discrimination</p> <p><b>Racial discrimination as a degrading treatment under Article 3 ECHR, para. 306:</b> ‘The Court further recalls that the Commission, in its decision in the above-mentioned East African Asians case, observed, with respect to an allegation of racial discrimination, that a special importance should be attached to discrimination based on race and that publicity to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special affront to human dignity. In the Commission’s opinion, differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question [...]’</p>	ECtHR – Selmouni v France application no 25803/94 ECtHR – Ireland v the United Kingdom application no 5310/71
ECtHR	<p><i>Denizci and Others v Cyprus</i> applications nos 25316-25321/94 and 27207/95 23/05/2001</p>	<p>ECtHR judgment inter alia on ill-treatment under Article 3 ECHR in context of deprivation of liberty.</p> <p>torture and inhuman or degrading treatment or punishment – distinction</p> <p><b>Distinction between torture and inhuman or degrading treatment or punishment under Article 3 ECHR, para. 383:</b> ‘The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment [...]. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 [...]. However, in order to determine whether a particular form of ill-treatment should be characterised as torture, the Court must have regard to the distinction, embodied in the provision, between that notion and that of inhuman or degrading treatment. As the Court has previously found, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering [...]’</p>	ECtHR judgment inter alia on prohibition of ill-treatment under Article 3 ECHR in context of deprivation of liberty. torture or inhuman or degrading treatment – deprivation of liberty
ECtHR	<p><i>Kalashnikov v Russia</i> application no 47095/99 15/07/2002</p>	<p>ECtHR judgment inter alia on prohibition of ill-treatment under Article 3 ECHR in context of deprivation of liberty. torture or inhuman or degrading treatment – deprivation of liberty</p> <p><b>Definition of torture or inhuman or degrading treatment and ill-treatment in context of deprivation of liberty under Article 3 ECHR, para. 95:</b> ‘The Court recalls that, Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim’s behaviour [...]. The Court further recalls that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim [...]. The Court has considered treatment to be “inhuman” because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. It has deemed treatment to be “degrading” because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them [...]. In considering whether a particular form of treatment is “degrading” within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 [...]. However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 [...]. The suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. Yet it cannot be said that detention on remand in itself raises an issue under Article 3 of the Convention. Nor can that Article be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain specific medical treatment. Nevertheless, under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured [...]. When assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant [...]’</p>	ECtHR – Labita v Italy application 26772/95 ECtHR – Ireland v the United Kingdom application no 5310/71 ECtHR – Kudla v Poland application no 30210/96 ECtHR – Raninen v Finland application no 20972/92 ECtHR – Peers v Greece application no 28524/95 ECtHR – Dougoz v Greece application no 40907/98

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<p>ECtHR (Grand Chamber)</p>	<p><i>Ilaşcu and Others v Moldova and Russia</i> application no 48787/99 08/07/2004</p>	<p>ECtHR judgment inter alia on prohibition ill-treatment under Article 3 ECHR. ill-treatment – death penalty</p> <p><b>Death penalty as a potential ill-treatment under Article 3 ECHR, paras 429-433:</b> ‘429. The Court has previously held that, regard being had to developments in the criminal policy of the member States of the Council of Europe and the commonly accepted standards in that sphere, the death penalty might raise an issue under Article 3 of the Convention. Where a death sentence is passed, the personal circumstances of the condemned person, the proportionality to the gravity of the crime committed and the conditions of detention pending execution of the sentence are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 [...] 430. For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable [...]. Nevertheless, in certain circumstances, the imposition of such a sentence might entail treatment going beyond the threshold set by Article 3, when for example a long period of time must be spent on death row in extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty [...]. 431. Furthermore, the anxiety and suffering engendered by such a sentence can only be aggravated by the arbitrary nature of the proceedings which led to it, so that, considering that a human life is at stake, the sentence thus becomes a violation of the Convention. 432. Prohibition of contact with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment. On the other hand, complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason [...]. 433. Moreover, when assessing conditions of detention, account has to be taken of the cumulative effects of these conditions and of specific allegations made by the applicant [...]’.</p>	<p>ECtHR – Soering v the United Kingdom application no 14038/88 ECtHR – Poltoratskiy v Ukraine application no 38812/97 ECtHR – Messina v Italy application no 25498/94 ECtHR – Dougoz v Greece application no 40907/98</p>
<p>ECtHR</p>	<p><i>Krastanov v Bulgaria</i> application no 50222/99 30/09/2004</p>	<p>ECtHR judgment inter alia on prohibition of ill-treatment under Article 3 ECHR in context of deprivation of liberty. ill-treatment – deprivation of liberty – torture and inhuman treatment – distinction</p> <p><b>Ill-treatment in deprivation of liberty and distinction between torture and inhuman treatment under Article 3 ECHR, para. 53:</b> ‘The Court finds that the injuries which the applicant sustained establish the existence of serious physical pain and suffering. Moreover, they had lasting consequences for his health [...]. It is further clear that the acts of violence against the applicant were committed by the police officers in the performance of their duties [...]. However, it does not appear that the pain and suffering were inflicted on the applicant intentionally for the purpose of, for instance, making him confess to a crime or breaking his physical and moral resistance. Also, the injuries were caused during a short period of time, in the course of a police operation for the arrest of suspected offenders, which was apparently accompanied by heightened tension [...]. In these circumstances, the Court concludes that the ill-treatment complained of was sufficiently serious to be considered as inhuman, but that it cannot be qualified as torture.’</p>	<p>ECtHR – Egmez v Cyprus application no 30873/96</p>
<p>ECtHR</p>	<p><i>N v Finland</i> application no 38885/02 26/07/2005</p>	<p>ECtHR judgment inter alia on <i>non-refoulement</i> under Article 3 ECHR. <i>non-refoulement</i> – protection against risk – ability and willingness</p> <p><b>Ability and willingness of State to provide protection against risk of ill-treatment in case of non-refoulement under Article 3 ECHR, para. 164:</b> ‘The current applicant’s case differs from H.L.R. v. France in that the overall evidence before the Court supports his own account of his having worked in the DSP, having formed part of President Mobutu’s inner circle and having taken part in various events during which dissidents seen as a threat to the President were singled out for harassment, detention and possibly execution [...]. In these circumstances there is reason to believe that the applicant’s situation could be worse than that of most other former Mobutu supporters, and that the authorities would not necessarily be able or willing to protect him against the threats referred to.’</p>	<p>ECtHR – HLR v France application no 24573/94</p>



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ECtHR	<p><i>Niedzwiecki v Germany</i> application no 58453/00 25/10/2005</p>	<p>ECtHR judgment on prohibition of discrimination under Article 14 ECHR together with Article 8 ECHR. Discrimination – social benefits – residence permits <b>Discrimination in access to social benefits based on type of residence permit under Article 14 ECHR:</b> ‘33. The Court is not called upon to decide generally to what extent it is justified to make distinctions, in the field of social benefits, between holders of different categories of residence permits. Rather it has to limit itself to the question whether the German law on child benefits as applied in the present case violated the applicant’s rights under the Convention. In this respect the Court notes the decision of the Federal Constitutional Court concerning the same issue which was given after the proceedings which form the subject matter of the present application had been terminated [...]. Like the Federal Constitutional Court, the Court does not discern sufficient reasons justifying the different treatment with regard to child benefits of aliens who were in possession of a stable residence permit on one hand and those who were not, on the other. It follows that there has been a violation of Article 14 in conjunction with Article 8 of the Convention.’</p>	
ECtHR	<p><i>Okpiz v Germany</i> application no 59140/00 25/10/2005</p>	<p>ECtHR judgment on prohibition of discrimination under Article 14 ECHR together with Article 8 ECHR. discrimination – social benefits – residence permits <b>Discrimination in access to social benefits based on type of residence permit under Article 14 ECHR:</b> ‘34. The Court is not called upon to decide generally to what extent it is justified to make distinctions, in the field of social benefits, between holders of different categories of residence permits. Rather it has to limit itself to the question whether the German law on child benefits as applied in the present case violated the applicants’ rights under the Convention. Like the Federal Constitutional Court in the pilot cases [...], the Court does not discern sufficient reasons justifying the different treatment with regard to child benefits of aliens who were in possession of a stable residence permit on one hand and those who were not, on the other. It follows that there has been a violation of Article 14 in conjunction with Article 8 of the Convention.’</p>	
ECtHR (Grand Chamber)	<p><i>Jalloh v Germany</i>, application no 54810/00 11/07/2006</p>	<p>ECtHR judgment inter alia on prohibition of ill-treatment under Article 3 ECHR. torture and inhuman treatment – distinction – special stigma of torture <b>Distinction between torture and inhuman treatment under Article 3 ECHR and special stigma of torture, paras. 103-107:</b> ‘103. In determining whether in the light of these principles the criminal proceedings against the applicant can be considered fair, the Court notes at the outset that the evidence secured through the administration of emetics to the applicant was not obtained “unlawfully” in breach of domestic law. [...] 104. The Court held above that the applicant was subjected to inhuman and degrading treatment contrary to the substantive provisions of Article 3 when emetics were administered to him in order to force him to regurgitate the drugs he had swallowed. The evidence used in the criminal proceedings against the applicant was thus obtained as a direct result of a violation of one of the core rights guaranteed by the Convention. 105. As noted above, the use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. The Court has not found in the instant case that the applicant was subjected to torture. [...] 106. Although the treatment to which the applicant was subjected did not attract the special stigma reserved to acts of torture, it did attain in the circumstances the minimum level of severity covered by the ambit of the Article 3 prohibition. It cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair, irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial. 107. In the present case, the general question whether the use of evidence obtained by an act qualified as inhuman and degrading treatment automatically renders a trial unfair can be left open. The Court notes that, even if it was not the intention of the authorities to inflict pain and suffering on the applicant, the evidence was obtained by a measure which breached one of the core rights guaranteed by the Convention.[...]’</p>	

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<p>ECTHR</p>	<p><i>Mubilanzila Mayeka and Kamiki Mitunga v Belgium</i> application no 13178/03 12/10/2006</p>	<p>ECTHR judgment inter alia on prohibition of ill-treatment under Article 3 ECHR. torture or inhuman or degrading treatment or punishment – children – deprivation of liberty</p> <p><b>Torture or inhuman or degrading treatment or punishment constituted by imprisonment of foreign national children, paras. 55 and 58:</b> ‘55. The second applicant’s position was characterised by her very young age, the fact that she was an illegal immigrant in a foreign land and the fact that she was unaccompanied by her family from whom she had become separated so that she was effectively left to her own devices. She was thus in an extremely vulnerable situation. In view of the absolute nature of the protection afforded by Article 3 of the Convention, it is important to bear in mind that this is the decisive factor and it takes precedence over considerations relating to the second applicant’s status as an illegal immigrant. She therefore indisputably came within the class of highly vulnerable members of society to whom the Belgian State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention. [...] 58. The Court considers that the measures taken by the Belgian authorities – informing the first applicant of the position, giving her a telephone number where she could reach her daughter, appointing a lawyer to assist the second applicant and liaising with the Canadian authorities and the Belgian embassy in Kinshasa – were far from sufficient to fulfil the Belgian State’s obligation to provide care for the second applicant. The State had, moreover, had an array of means at its disposal. The Court is in no doubt that the second applicant’s detention in the conditions described above caused her considerable distress. Nor could the authorities who ordered her detention have failed to be aware of the serious psychological effects it would have on her. In the Court’s view, the second applicant’s detention in such conditions demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment.’</p>	
<p>ECTHR</p>	<p><i>Salah Sheekh v the Netherlands</i> application no 1948/94 11/01/2007</p>	<p>ECTHR judgment inter alia on <i>non-refoulement</i> under Article 3 ECHR.</p> <p><i>non-refoulement</i> – internal protection – risk from non-State actors – protection from non-State actors – clan protection</p> <p><b>Requirements for internal relocation in case of non-refoulement under Article 3 ECHR, paras. 141 and 145:</b> ‘141. In its position paper of January 2004 and its advisory of November 2005, UNHCR states its opposition to the forced return of rejected asylum seekers to areas of Somalia from which they do not originate, emphasising that there is no internal flight alternative available in Somalia [...]. [...] Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual’s claim that a return to his or her country of origin would expose him or her to a real risk of being subjected to treatment proscribed by that provision [...]. However, the Court has previously held that the indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention [...]. It sees no reason to hold differently where the expulsion is, as in the present case, to take place not to an intermediary country but to a particular region of the country of origin. The Court considers that as 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, gain admittance and 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. [...] 145. The question must therefore be examined whether, if the applicant were to end up in areas of Somalia other than Somaliland or Puntland, he would run a real risk of being exposed to treatment contrary to Article 3. In this context, the Court is aware that the Government do not consider areas in Somalia “relatively unsafe” because of any risk that individuals may run there of being subjected to treatment in breach of Article 3 of the Convention, but because of an overall situation which is such that, in the opinion of the Minister of Immigration and Integration, a return to those areas would constitute an exceptionally harsh measure.’</p>	<p>ECTHR – Chahal v the United Kingdom application no 22414/93</p> <p>ECTHR – Hilal v the United Kingdom application no 45276/99</p> <p>ECTHR – Ti v the United Kingdom application no 43844/98</p> <p>ECTHR – HLR v France application no 24573/94</p>

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		<p><b>Risk emanating from nonState actors and existence of protection against such risk in case of non-refoulement under Article 3 ECHR, paras. 137 and 147:</b> ‘137. Ill-treatment must also attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case [...]. Owing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection [...]. [...] 147. While the Netherlands authorities were of the opinion that the problems experienced by the applicant were to be seen as a consequence of the generally unstable situation in which criminal gangs frequently, but arbitrarily, intimidated and threatened people [...], the Court is of the view that that is insufficient to remove the treatment meted out to the applicant from the scope of Article 3. As set out above [...], the existence of the obligation not to expel is not dependent on whether the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country, and Article 3 may thus also apply in situations where the danger emanates from persons or groups of persons who are not public officials [...]. What is relevant in this context is whether the applicant was able to obtain protection against and seek redress for the acts perpetrated against him. The Court considers that this was not the case.’</p> <p><b>Clan protection in the country of origin in case of non-refoulement under Article 3 ECHR, para. 139:</b> ‘[...] The Court has been provided with and has obtained a considerable amount of information relating to the situation in both Somaliland and Puntland, from which it appears that those territories are undoubtedly more stable and peaceful in general than southern and central Somalia. Nevertheless, there is a marked difference between the position of, on the one hand, individuals who originate from those areas and have clan and/or family links there and, on the other hand, individuals who hail from elsewhere in Somalia and do not have such links in Somaliland or Puntland. On the basis of the available information, the Court is prepared to accept that the expulsion to Somaliland or Puntland of a failed asylum seeker belonging to the first group would not generally expose the person concerned to a real risk of being subjected to treatment in violation of Article 3. As far as the second group is concerned, however, the Court is not persuaded that the relevance of clan protection in the “relatively safe” areas has diminished to the extent suggested by the Government. It notes in this respect that as regards the expulsion of a Somali national to a part of the country from where he or she does not originate, UNHCR is of the opinion that “considerations based on the prevailing clan system are of crucial importance” [...]. Clan affiliation has further been described as the most important common element of personal security across all of Somalia [...], and hence not merely in the “relatively unsafe” areas.’</p>	

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<p>ECTHR (Grand Chamber)</p>	<p><i>DH and Others v the Czech Republic</i> application no 57325/00 13/11/2007</p>	<p>ECTHR judgment on discrimination on account of race or ethnic origin under Article 14 ECHR in conjunction with Article 2 Protocol No 1. racial discrimination <b>Definition of racial discrimination, paras. 60-61:</b> '2. ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination (adopted by ECRI on 13 December 2002) 60. The following definitions are used for the purposes of this Recommendation: "9[...] (b) 'direct racial discrimination' shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. (c) 'indirect racial discrimination' shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by or disadvantages... persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.' 61. In the explanatory memorandum to this Recommendation, it is noted (point 8) that the definitions of direct and indirect racial discrimination contained in paragraph 1 (b) and (c) of the Recommendation draw inspiration from those contained in Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and in Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, and on the case-law of the European Court of Human Rights.'</p>	
<p>ECTHR (Grand Chamber)</p>	<p><i>Saadi v Italy</i> application no 7201/06 28/02/2008</p>	<p>ECTHR judgment inter alia on <i>non-refoulement</i> under Article 3 ECHR. <i>non-refoulement</i> – real risk – ex nunc assessment – threshold <b>Notion of real risk in case of non-refoulement under Article 3 ECHR, para. 130:</b> 'In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances [...].' <b>Real risk requiring an ex nunc assessment in case of non-refoulement under Article 3 ECHR, para. 133:</b> 'With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion. However, if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court [...]. This situation typically arises when, as in the present case, deportation or extradition is delayed as a result of an indication by the Court of an interim measure under Rule 39 of the Rules of Court [...]. Accordingly, while it is true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive.' <b>Threshold entailed by the notion of real risk in case of non-refoulement under Article 3 ECHR, para. 140:</b> 'With regard to the second branch of the United Kingdom Government's arguments, to the effect that where an applicant presents a threat to national security stronger evidence must be adduced to prove that there is a risk of ill-treatment [...], the Court observes that such an approach is not compatible with the absolute nature of the protection afforded by Article 3 either. It amounts to asserting that, in the absence of evidence meeting a higher standard, protection of national security justifies accepting more readily a risk of ill-treatment for the individual. The Court therefore sees no reason to modify the relevant standard of proof, as suggested by the third-party interveners, by requiring in cases like the present one that it be proved that subjecting to ill-treatment is "more likely than not". On the contrary, it reaffirms that for a planned forcible expulsion to be in breach of the Convention it is necessary – and sufficient – for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3 [...].'</p>	<p>ECTHR – Vilvarajah and Others v the United Kingdom applications nos 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87 ECTHR – Chahal v the United Kingdom application no 22414/93 ECTHR – Venkadjalasarma v the Netherlands application no 58510/00 ECTHR – Mamatkulov and Askarov applications nos 46827/99 and 46951/99</p>

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ECtHR (Grand Chamber)	<p><i>N v the United Kingdom</i> application no 26565/05 27/05/2008</p>	<p>ECtHR judgment inter alia on <i>non-refoulement</i> under Article 3 ECHR. <i>non-refoulement</i> – medical cases</p> <p><b>Non-refoulement on medical grounds under Article 3 ECHR, paras. 42-45:</b> '42. In summary, the Court observes that since D. v. the United Kingdom it has consistently applied the following principles. Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the D. v. the United Kingdom case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support. 43. The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in D. v. the United Kingdom and applied in its subsequent case-law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country. 44. Although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political [...]. Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights [...]. Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States. 45. Finally, the Court observes that, although the present application, in common with most of those referred to above, is concerned with the expulsion of a person with an HIV and Aids-related condition, the same principles must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost.'</p>	<p>ECtHR – D v the United Kingdom application no 30240/96</p> <p>ECtHR – Airey v Ireland application no 6289/73</p> <p>ECtHR – Soering v the United Kingdom application no 14038/88</p>
ECtHR	<p><i>NA v the United Kingdom</i> application no 25904/07 17/07/2008</p>	<p>ECtHR judgment inter alia on <i>non-refoulement</i> under Article 3 ECHR. <i>non-refoulement</i> – generalised violence – membership of group systematically exposed</p> <p><b>Non-refoulement in case of risk of generalised violence and membership of a group systematically exposed under Article 3 ECHR, paras. 115-116:</b> '115. From the foregoing survey of its case-law, it follows that the Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return. 116. Exceptionally, however, in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court has considered that the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see Saadi v. Italy, cited above, § 132). In those circumstances, the Court will not then insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3. This will be determined in light of the applicant's account and the information on the situation in the country of destination in respect of the group in question (see Salah Sheekh, cited above, § 148). The Court's findings in that case as to the treatment of the Ashraf clan in certain parts of Somalia, and the fact that the applicant's membership of the Ashraf clan was not disputed, were sufficient for the Court to conclude that his expulsion would be in violation of Article 3.'</p>	<p>ECtHR – Saadi v Italy application no 37201/06</p> <p>ECtHR – Salah Sheekh v the Netherlands application no 1948/04</p>

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ECtHR	<p><i>SD c Grèce</i> application no 53541/07 11/06/2009</p>	<p>ECtHR judgment inter alia on prohibition of ill-treatment under Article 3 ECHR due to conditions of detention. degrading treatment</p> <p><b>Illustration of degrading treatment under Article 3 ECHR, paras. 51-53:</b> '51. A supposer même que le requérant ait partagé une pièce relativement propre avec de l'eau chaude pendant son séjour à Soufli, comme l'indique la responsable de la section grecque d'Amnesty International lors de sa visite effectuée le 18 mai 2007, il n'en demeure pas moins qu'il a séjourné deux mois, enfermé dans une baraque préfabriquée, sans possibilité de sortir à l'extérieur, sans possibilité de téléphoner et sans pouvoir disposer de couvertures, de draps propres et de produits d'hygiène suffisants. Ces allégations n'ont pas été contestées par le Gouvernement et sont corroborées par les différents rapports fournis à la Cour. De même, au centre de détention pour étrangers de l'Attique (Petrou Ralli), le requérant a été confiné pendant six jours dans sa cellule, sans possibilité de promenade en plein air. Les conditions de détention dans ce centre, telles que décrites par le CPT dans son rapport suivant sa visite en février 2007, sont, aux yeux de la Cour, inacceptables. 52. S'agissant de la situation personnelle du requérant, la cour observe que celui-ci avait subi des tortures sévères en Turquie, qui lui avaient laissé des séquelles cliniques et psychologiques importantes. Le fait que cet état n'ait été attesté de manière officielle, par le Centre médical de rétablissement des victimes de la torture, qu'après la fin de sa détention, ne change rien à ce constat. 53. Eu égard à ce qui précède, la Cour estime que les conditions de détention du requérant, en tant que réfugié et demandeur d'asile, combinées à la durée excessive de sa détention en de pareilles conditions, s'analysent en un traitement dégradant.'</p>	
ECtHR	<p><i>Al-Saadoon and Mufdhi v the United Kingdom</i> application no 61498/08 02/03/2010</p>	<p>ECtHR judgment inter alia on <i>non-refoulement</i> to risk of death penalty under Articles 2 and 3 ECHR.</p> <p><i>non-refoulement</i> – death penalty</p> <p><b>Prohibition of death penalty in all circumstances under Articles 2 and 3 ECHR, paras. 115 and 120:</b> '115. The Court takes as its starting point the nature of the right not to be subjected to the death penalty. Judicial execution involves the deliberate and premeditated destruction of a human being by the State authorities. Whatever the method of execution, the extinction of life involves some physical pain. In addition, the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering. The fact that the imposition and use of the death penalty negates fundamental human rights has been recognised by the member States of the Council of Europe. In the Preamble to Protocol No. 13 the Contracting States describe themselves as "convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings". [...] 120. It can be seen, therefore, that the Grand Chamber in <i>Öcalan</i> did not exclude that Article 2 had already been amended so as to remove the exception permitting the death penalty. Moreover, as noted above, the position has evolved since then. All but two of the member States have now signed Protocol No. 13 and all but three of the States which have signed it have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2 § 1 continues to act as a bar to its interpreting the words "inhuman or degrading treatment or punishment" in Article 3 as including the death penalty [...].'</p>	<p>ECtHR – <i>Öcalan v Turkey</i> application no 46221/99</p> <p>ECtHR – <i>Soering v the United Kingdom</i> application no 14038/88</p>

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ECtHR (Grand Chamber)	<p><i>Göjgen v Germany</i> application no 22978/05 01/06/2010</p>	<p>ECtHR judgment inter alia on the prohibition of ill-treatment under Article 3 ECHR. ill-treatment – minimum severity – threat of torture – mental suffering</p> <p><b>Minimum severity of ill-treatment under Article 3 ECHR, para. 88:</b> ‘In order for ill-treatment to fall within the scope of Article 3 it must attain a minimum level of severity. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim [...]’. Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it [...]., as well as its context, such as an atmosphere of heightened tension and emotions [...]’.</p> <p><b>Threat of torture as mental suffering which might amount to torture under Article 3 ECHR:</b> ‘108. Having regard to the relevant factors for characterising the treatment to which the applicant was subjected, the Court is satisfied that the real and immediate threats against the applicant for the purpose of extracting information from him attained the minimum level of severity to bring the impugned conduct within the scope of Article 3. It reiterates that according to its own case-law [...], which also refers to the definition of torture in Article 1 of the United Nations Convention against Torture [...], and according to the views taken by other international human rights monitoring bodies [...], a threat of torture can amount to torture, as the nature of torture covers both physical pain and mental suffering. In particular, the fear of physical torture may itself constitute mental torture. However, there appears to be broad agreement, and the Court likewise considers, that the classification of whether a given threat of physical torture amounted to psychological torture or to inhuman or degrading treatment depends upon all the circumstances of a given case, including, notably, the severity of the pressure exerted and the intensity of the mental suffering caused. Contrasting the applicant’s case to those in which torture has been found to be established in its case-law, the Court considers that the method of interrogation to which he was subjected in the circumstances of this case was sufficiently serious to amount to inhuman treatment prohibited by Article 3, but that it did not reach the level of cruelty required to attain the threshold of torture.’</p>	<p>ECtHR – Ireland v the United Kingdom application no 5310/71 ECtHR – Jalloh v Germany application no 54810/00 ECtHR-Aksoy v Turkey application no 21987/93 ECtHR – Egmez v Cyprus application no 30873/96 ECtHR – Krastanov v Bulgaria application no 50222/99 ECtHR – Selmouni v France application no 25803/94</p>
ECtHR (Grand Chamber)	<p><i>MSS v Belgium and Greece</i> application no 30696/09 21/01/2011</p>	<p>ECtHR judgment inter alia on <i>non-refoulement</i> under Articles 2 and 3 ECHR and prohibition of ill-treatment under Article 3. inhuman treatment – <i>non-refoulement</i> – scope of obligations under Art. 3 ECHR</p> <p><b>Definition of inhuman treatment under Article 3 ECHR, para. 220:</b> ‘The Court considers treatment to be “inhuman” when it was “premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering” [...]’.</p> <p><b>Scope of obligations under Article 3 ECHR, para. 249:</b> ‘The Court has already reiterated the general principles found in the case-law on Article 3 of the Convention and applicable in the instant case [...]. It also considers it necessary to point out that Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home [...]. Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living [...]’.</p>	<p>ECtHR – Kudla v Poland application no 30210/96 ECtHR – Chapman v the United Kingdom application no 27238/95 ECtHR – Müslim v Turkey application no 53566/99</p>

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ECtHR	<p><i>Sufi and Elmi v the United Kingdom</i>            applications nos 8319/07 and 11449/07            28/06/2011</p>	<p>ECtHR judgment on <i>non-refoulement</i> under Articles 2 and 3 ECHR.</p> <p><i>non-refoulement</i> – risk of generalised violence – no special distinguishing features – intensity of violence – relationship Art. 3 ECHR and Art. 15(c) QD – internal protection requirements</p> <p><b>Non-refoulement in case of risk of generalised violence under Article 3 ECHR; absence of a requirement to show special distinguishing features; intensity of violence; relationship with Article 15(c) QD, paras. 217-219.</b> ‘217. In <i>Vilvarajah v. the United Kingdom</i> the Court appeared to suggest that a mere situation of general instability would only give rise to a breach of Article 3 of the Convention if there was evidence to demonstrate that the applicant’s personal situation was worse than that of the generality of other members of his group [...]. However, in <i>N.A. v. the United Kingdom</i> the Court expressly considered its earlier decision in <i>Vilvarajah v. the United Kingdom</i> and concluded that it should not be interpreted so as to require an applicant to show the existence of special distinguishing features: if he could otherwise show that the general situation of violence in the country of destination was of a sufficient level of intensity to create a real risk that any removal to that country would violate Article 3 of the Convention [...]. To insist in such cases that the applicant show the existence of such special distinguishing features would render the protection offered by Article 3 illusory [...]. Moreover, such a finding would call into question the absolute nature of Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment. 218. Therefore, following <i>NA v. the United Kingdom</i>, the sole question for the Court to consider in an expulsion case is whether, in all the circumstances of the case before it, substantial grounds have been shown for believing that the person concerned, if returned, would face a real risk of being subjected to treatment contrary to Article 3 of the Convention. If the existence of such a risk is established, the applicant’s removal would necessarily breach Article 3, regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the two. However, it is clear that not every situation of general violence will give rise to such a risk. On the contrary, the Court has made it clear that a general situation of violence would only be of sufficient intensity to create such a risk “in the most extreme cases” where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return [...]. 219. Accordingly, in the present case the Court must examine whether substantial grounds have been shown for believing that the applicants, if deported, would face a real risk of being subjected to treatment contrary to Article 3. In doing so, it will first consider the general situation both in Mogadishu, which will be the point of their return, and in the remainder of southern and central Somalia before focusing on the foreseeable consequences of removal for each of the applicants. However, before it can begin its assessment of risk on return, it must address two preliminary issues which have arisen in the present case: first, the relationship between Article 3 of the Convention and article 15(c) of the Qualification Directive, and secondly, the weight to be attached to country reports which primarily rely on information provided by anonymous sources.’</p> <p><b>Requirements for internal protection in case of non-refoulement under Article 3 ECHR, see more specifically paras. 265-267:</b> ‘265. The Court observes that in the present case the Government intends to return both applicants to Mogadishu. However, it cannot limit its consideration of the risk on return to an assessment of the conditions in Mogadishu as the Asylum and Immigration Tribunal found that despite the existence of a real risk of serious harm in the capital, it would be possible for the applicants to relocate to a safer region in southern or central Somalia. 266. In the United Kingdom an application for asylum or for subsidiary protection will fail if the decision-maker considers that it would be reasonable – and not unduly harsh – to expect the applicant to relocate [...]. The Court recalls that Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual’s claim that a return to his country of origin would expose him to a real risk of being subjected to treatment proscribed by that [...]. However, the Court has held that reliance on an internal flight alternative does not affect the responsibility of the expelling Contracting State to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention [...]. Therefore, as a precondition of 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, gain admittance and 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 his ending up in a part of the country of origin where he may be subjected to ill-treatment [...]. 267. Although it is clear that Somali nationals would not be able to gain admittance to Somaliland or Puntland unless they were born there or had strong clan connections to the region [...], the Court is not aware of the existence of any similar obstacles which would prevent a Somali returnee from gaining admittance to another part of southern and central Somalia. However, in view of the humanitarian crisis and the strain that it has placed both on individuals and on the traditional clan structure, in practice the Court does not consider that a returnee could find refuge or support in an area where he has no close family connections [...]. If a returnee either has no such connections or if he could not safely travel to an area where he has such connections, the Court considers it reasonably likely that he would have to seek refuge in an IDP settlement or refugee camp. Therefore, in considering the internal flight alternative, the Court will first consider whether a returnee would be exposed to a risk of ill-treatment either in transit or upon settling in another part of southern and central Somalia before considering whether he would be at risk of ill-treatment in an IDP or refugee camp on account of the humanitarian conditions there.’</p>	<p>ECtHR – <i>Vilvarajah and Others v the United Kingdom</i> applications nos 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87</p> <p>ECtHR – <i>NA v the United Kingdom</i> application no 25904/07</p> <p>ECtHR – <i>Salah Sheekh v the Netherlands</i> application no 1948/04</p> <p>ECtHR – <i>Chahal v the United Kingdom</i> application no 22414/93</p> <p>ECtHR – <i>Hilal v the United Kingdom</i> application no 45276/99</p> <p>ECtHR – <i>Tl v the United Kingdom</i> application no 43844/98</p> <p>UK, House of Lords – <i>Januzi, Hamid, Gaafar and Mohammed v Secretary of State for the Home Department</i> [2006] UKHL 5</p> <p>UK, House of Lords – <i>AH (Sudan) v Secretary of State for the Home Department</i> [2007] UKHL 49</p>



court	case name/ reference/date	relevance/key words/main points	cases cited
ECtHR	<p><i>Awad v Bulgaria</i> application no 46390/10 11/10/2011</p>	<p>ECtHR judgment <i>inter alia</i> on <i>non-refoulement</i> under Article 3 ECHR. <i>non-refoulement</i> – assessment of risk <b>Assessment of risk in case of non-refoulement under Article 3 ECHR, para. 99(c):</b> ‘In Saadi [...] the Court also summarised, with further references, the principles governing the manner of assessing the risk of exposure to treatment contrary to Article 3: [...] (c) To determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his or her personal circumstances.’</p>	ECtHR – Saadi v Italy application no 37201/06
ECtHR	<p><i>Othman (Abu Qatada) v the United Kingdom</i> application no 8139/09 17/01/2012</p>	<p>ECtHR judgment <i>inter alia</i> on <i>non-refoulement</i> under Articles 3 and 6 ECHR. <i>non-refoulement</i> – flagrant denial of justice <b>Flagrant denial of justice as prohibiting refoulement under Article 6 ECHR, paras. 258 and 260:</b> ‘258. It is established in the Court’s case-law that an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country. That principle was first set out in <i>Soering v. the United Kingdom</i> [...] and has been subsequently confirmed by the Court in a number of cases [...]. [...] 260. It is noteworthy that, in the twenty-two years since the <i>Soering</i> judgment, the Court has never found that an expulsion would be in violation of Article 6. This fact, when taken with the examples given in the preceding paragraph, serves to underline the Court’s view that “flagrant denial of justice” is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.’</p>	ECtHR – Soering v the United Kingdom application no 14038/88 ECtHR – Mamatkulov and Askarov v Turkey applications nos 46827/99 and 46951/99 ECtHR – Al-Saadoon and Mufdhi v the United Kingdom application no 61498/08
ECtHR	<p><i>Popov v France</i> applications nos 39472/07 and 39474/07 19/01/2012</p>	<p>ECtHR judgment <i>inter alia</i> on prohibition of ill-treatment under Article 3 ECHR. torture or inhuman or degrading treatment or punishment – children – deprivation of liberty <b>Torture or inhuman or degrading treatment or punishment constituted by imprisonment of foreign national children even if accompanied by their parents, paras. 91 and 102-103:</b> 91. The Court observes that in the present case, as in <i>Muskhadzhiyeva and Others</i>, the applicant children were accompanied by their parents throughout the period of detention. It finds, however, that this fact is not capable of exempting the authorities from their duty to protect children and take appropriate measures as part of their positive obligations under Article 3 of the Convention [...] and that it is important to bear in mind that the child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant [...]. The European Union directive concerning the reception of aliens thus treats minors, whether or not they are accompanied, as a category of vulnerable persons particularly requiring the authorities’ attention [...]. To be sure, children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status. The Court would, moreover, observe that the Convention on the Rights of the Child encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents [...]. [...]102. It can be seen from the foregoing that the conditions in which the children were held, for fifteen days, in an adult environment, faced with a strong police presence, without any activities to keep them occupied, added to the parents’ distress, were manifestly ill-adapted to their age. The two children, a small girl of three and a baby, found themselves in a situation of particular vulnerability, accentuated by the confinement. Those living conditions inevitably created for them a situation of stress and anxiety, with particularly traumatic consequences. 103. Accordingly, in view of the children’s young age, the length of their detention and the conditions of their confinement in a detention centre, the Court is of the view that the authorities failed to take into account the inevitably harmful consequences for the children. It finds that the authorities’ treatment of the children was not compatible with the provisions of the Convention and exceeded the threshold of seriousness for Article 3 of the Convention to be engaged. There has therefore been a violation of that Article in respect of the children.’</p>	ECtHR – Muskhadzhiyeva et autres c Belgique application no 41442/07 ECtHR – Mubianzila Mayeka and Kaniki Mitunga v Belgium application no 13178/03

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<p>ECTHR</p>	<p><i>SF v Sweden</i> application no 52077/10 15/05/2012</p>	<p>ECTHR judgment on <i>non-refoulement</i> under Article 3 ECHR. <i>non-refoulement</i> – sur place activities</p> <p><b>Sur place activities in case of non-refoulement under Article 3 ECHR, paras. 68-69:</b> ‘68. Turning then to the applicants’ sur place activity and incidents after they arrived in Sweden, the Court finds that since 2008 they have continuously participated in political activity of intensifying importance. They have appeared with photographs and names on several internet sites and TV broadcasts, where they have expressed, inter alia, their opinions on human rights issues in Iran and criticism against the Iranian regime. They have taken rather leading roles and the second applicant has been the international spokesperson in a European committee for the support of Kurdish prisoners and human rights in Iran. They have expressed their individual views in many articles published on prominent Kurdish internet sites. The Court concludes that the applicants have been involved in extensive and genuine political and human rights activities of relevance for the determination of the risk on return to Iran. 69. To determine whether these activities would expose the applicants to persecution or serious harm if returned to Iran, the Court has regard to the relevant country information on Iran, as set out above. The information confirms that Iranian authorities effectively monitor internet communications and regime critics both within and outside of Iran. It is noted that a specific intelligence “Cyber Unit” targets regime critics on the internet. Further, according to the information available to the Court, Iranians returning to Iran are screened on arrival. There are a number of factors which indicate that the resources available could be used to identify the applicants and, in this regard, the Court also considers that the applicants’ activities and alleged incidents in Iran are of relevance. The first applicant’s arrest in 2003 as well as his background as a musician and prominent Iranian athlete also increase the risk of his being identified. Additionally, the applicants allegedly left Iran illegally and do not have valid exit documentation.’</p>	<p>ECTHR – Keenan v the United Kingdom application no 27229/95 ECTHR – Rohde v Denmark application no 69332/01 ECTHR – Renolde v France application no 5608/05 ECTHR – Krastanov v Bulgaria application no 50222/99 ECTHR – Wiktoro v Poland application no 14612/02 ECTHR – Herczegfalvy v Austria application no 10533/83</p>
<p>ECTHR</p>	<p><i>Bureš v the Czech Republic</i> application no 37679/08 18/10/2012</p>	<p>ECTHR judgment inter alia on prohibition of ill-treatment under Article 3 in case of mentally ill persons. ill-treatment – special vulnerability – mentally ill persons</p> <p><b>Special vulnerability of mentally ill persons when deprived of liberty and ill-treatments under Article 3 ECHR, paras. 85-87:</b> ‘85. The Court has recognised the special vulnerability of mentally ill persons in its case-law and the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 has, in particular, to take into consideration this vulnerability [...]. 86. In respect of persons deprived of their liberty, recourse to physical force which has not been made strictly necessary by their own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention [...]. In the context of detention in a sobering-up centre, it is up to the Government to justify the use of restraints on a detained person. Regarding the use of restraining belts, the Court accepted that aggressive behaviour on the part of an intoxicated individual may require recourse to the use of restraining belts, provided of course that checks are periodically carried out on the welfare of the immobilised individual. The application of such restraints must, however, be necessary under the circumstances and its length must not be excessive [...]. 87. The position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with. Nevertheless, it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible. The established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist [...].’</p>	<p>ECTHR – Keenan v the United Kingdom application no 27229/95 ECTHR – Rohde v Denmark application no 69332/01 ECTHR – Renolde v France application no 5608/05 ECTHR – Krastanov v Bulgaria application no 50222/99 ECTHR – Wiktoro v Poland application no 14612/02 ECTHR – Herczegfalvy v Austria application no 10533/83</p>

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ECtHR	<p><i>MYH and Others v Sweden</i> application no 50859/10 17/06/2013</p>	<p>ECtHR judgment on <i>non-refoulement</i> under Article 3 ECHR. <i>non-refoulement</i> – internal protection requirements</p> <p><b>Requirements for internal protection in the country of origin in case of non-refoulement under Article 3 ECHR, paras. 62-64 and 66-67:</b> ‘62. The Court reiterates that Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight or relocation alternative in their assessment of an individual’s claim that a return to the country of origin would expose him or her to a real risk of being subjected to treatment proscribed by that provision. However, the Court has held that reliance on such an alternative does not affect the responsibility of the expelling Contracting State to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3. Therefore, as a precondition of relying on an internal flight or relocation alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and 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 his or her ending up in a part of the country of origin where there is a real risk of ill-treatment [...]’. 63. The three northern governorates – Dahuk, Erbil and Sulaymaniyah – forming the Kurdistan Region of Iraq, or KRI, are, according to international sources, a relatively safe area. While there have been incidents of violence and threats, the rights of Christians are generally considered to be respected. As noted by various sources, large numbers of Christians have travelled to the Kurdistan Region and found refuge there. 64. As regards the possibility of entering the KRI, some sources state that the border checks are often inconsistent, varying not only from governorate to governorate but also from checkpoint to checkpoint [...]’. However, the difficulties faced by some at the KRI checkpoints do not seem to be relevant for Christians. This has been noted by, among others, the UNHCR. Rather, members of the Christian group are given preferential treatment as compared to others wishing to enter the Kurdistan Region. [...] 66. Internal relocation inevitably involves certain hardship. Various sources have attested that people who relocate to the Kurdistan Region may face difficulties, for instance, in finding proper jobs and housing there, not the least if they do not speak Kurdish. Nevertheless, the evidence before the Court suggests that there are jobs available and that settlers have access to health care as well as financial and other support from the UNHCR and local authorities. In any event, there is no indication that the general living conditions in the KRI for a Christian settler would be unreasonable or in any way amount to treatment prohibited by Article 3. Nor is there a real risk of his or her ending up in the other parts of Iraq. 67. In conclusion, therefore, the Court considers that relocation to the Kurdistan Region is a viable alternative for a Christian fearing persecution or ill-treatment in other parts of Iraq. The reliance by a Contracting State on such an alternative would thus not, in general, give rise to an issue under Article 3.</p>	<p>ECtHR – Sufi and Elmi v the United Kingdom applications nos 8319/07 and 11449/07</p>
ECtHR	<p><i>DMM v Sweden</i> application no 28379/11 27/06/2013</p>	<p>ECtHR judgment on <i>non-refoulement</i> under Articles 2 and 3 ECHR. <i>non-refoulement</i> – internal protection requirements – clans and tribes</p> <p><b>Requirements for internal protection in the country of origin in case of non-refoulement under Article 3 ECHR and influence of clans or tribes, paras. 54 and 57:</b> ‘54. The Court reiterates that Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight or relocation alternative in their assessment of an individual’s claim that a return to the country of origin would expose him or her to a real risk of being subjected to treatment proscribed by that provision. However, the Court has held that reliance on such an alternative does not affect the responsibility of the expelling Contracting State to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3. Therefore, as a precondition of relying on an internal flight or relocation alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and 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 his or her ending up in a part of the country of origin where there is a real risk of ill-treatment [...]’. 57. More importantly, the Court is not convinced that the material before it supports the applicant’s claim that the woman’s relatives have the means and connections to find him wherever he may be in Iraq. Here, the Court first observes that the available general information suggests that tribes and clans are region-based powers. Thus, in many cases, a person who is persecuted by a family or clan can be safe in another part of the country. In this connection, it is also of importance to note that the influence and power of the tribes and clans in Iraq differ. One factor possibly weighing against the reasonableness of internal relocation is that a person is persecuted by a powerful clan or tribe with influence at governmental level. However, if the clan or tribe in question is not particularly influential, an internal flight alternative might be reasonable in many cases. As regards the family in question in the present case, there is no evidence that it is particularly influential or powerful or that it has connections with the authorities in Iraq. Moreover, the applicant was attacked and threatened by the woman’s brothers. He has not put forward evidence to suggest that more people, for instance relatives living outside of Kirkuk, have been involved in the threats made against him.</p>	<p>ECtHR – Sufi and Elmi v the United Kingdom applications nos 8319/07 and 11449/07</p>

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<p>ECTHR (Grand Chamber)</p>	<p><i>Vinter and Others v the United Kingdom</i> applications nos 66069/09, 130/10 and 3896/10 09/07/2013</p>	<p>ECTHR judgment on prohibition of ill-treatment under Article 3 ECHR. <i>non-refoulement</i> – extradition – life sentence</p> <p><b>Irreducible life sentence as potential violation of Article 3 ECHR, paras. 104, 106-107, 109 and 119-121:</b> '104. It is well-established in the Court's case-law that a State's choice of a specific criminal justice system, including sentence review and release arrangements, is in principle outside the scope of the supervision the Court carries out at the European level, provided that the system does not contravene the principles set forth in the Convention [...] 106. For the same reasons, Contracting States must also remain free to impose life sentences on adult offenders for especially serious crimes such as murder: the imposition of such a sentence on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention [...]. This is particularly so when such a sentence is not mandatory but is imposed by an independent judge after he or she has considered all of the mitigating and aggravating factors which are present in any given case. 107. However, as the Court also found in Kafkaris, the imposition of an irreducible life sentence on an adult may raise an issue under Article 3 [...]. There are two particular but related aspects of this principle that the Court considers necessary to emphasise and to reaffirm. 108. First, a life sentence does not become irreducible by the mere fact that in practice it may be served in full. No issue arises under Article 3 if a life sentence is <i>de jure</i> and <i>de facto</i> reducible [...]. 109. Second, in determining whether a life sentence in a given case can be regarded as irreducible, the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release. Where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3 [...]. 119. For the foregoing reasons, the Court considers that, in the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds. 120. However, the Court would emphasise that, having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing [...], it is not its task to prescribe the form (executive or judicial) which that review should take. For the same reason, it is not for the Court to determine when that review should take place. This being said, the Court would also observe that the comparative and international law materials before it show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter [...]. 121. It follows from this conclusion that, where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention.'</p>	<p>ECTHR – Fakfaris ECTHR – T v the United Kingdom ECTHR – V v the United Kingdom application no 24888/94 ECTHR – Sawoniuk v the United Kingdom application no 63716/00 ECTHR – Maiorano and Others v Italy application no 28634/06 ECTHR – Chorefakis and Chorefakis v Greece application no 46846/08</p>

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ECtHR	<p><i>KAB v Sweden</i> application no 886/11 05/09/2013</p>	<p>ECtHR judgment <i>inter alia</i> on <i>non-refoulement</i> under Articles 2 and 3 ECHR. <i>non-refoulement</i> – internal protection requirements</p> <p><b>Requirements for internal protection in the country of origin in case of non-refoulement under Article 3 ECHR, paras. 80-85:</b> ‘80. Turning to the circumstances of the present case, the Court first notes that the Swedish authorities do not intend to deport the applicant to Mogadishu, but to Somaliland, although it does not appear that any contacts have been made with the Somaliland authorities to establish whether the applicant would be admitted there. As stated above, according to the United Kingdom Operational Guidance Note and the judgment of the Migration Court of Appeal of 24 February 2011 [...], the situation in Somaliland is considered to be generally relatively safe [...]. 81. The Court reiterates that Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative. However, certain guarantees have to be in place. It must be possible for the person to travel to the area in question, gain admittance and settle there. Otherwise an issue may arise under Article 3, 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 [...]. The same considerations apply to the situation in the present case where the applicant will not be sent to the area he originates from but directly to another area within his country of origin, in this case Somaliland [...]. 82. With reference, in particular, to the abovementioned Operational Guidance Note, the Court notes that Somali nationals would not be able to gain admittance to Somaliland unless they were born there or had strong clan connections to the region, that is, in the case of majority clan affiliates, those connected to the Isaaq clan. Moreover, according to the UNHCR Eligibility Guidelines, without clan protection they would be under “a perpetual threat of eviction” [...]. 83. The applicant belongs to the Sheikal clan and there is nothing in the case file to suggest that he is in any way affiliated with the Isaaq clan in Somaliland. The only link the applicant appears to have with the area is that at least one of his children was living there. 84. In the Court’s view, it is not possible to draw any conclusions from the conflicting information submitted by the applicant as to which, if any, of his family members are currently residing in Somaliland. Moreover, even if the applicant does currently have family in Somaliland, the Court is not convinced that that would suffice for him to gain admittance and be able to settle there. [...] In the light of other available country information referred to above, the Court finds that a closer affiliation than that held by the applicant, such as a strong clan connection, is necessary in order for a person, who does not originate from Somaliland, to be able to gain admittance and settle there. 85. It follows that, even if the Swedish authorities were to succeed in removing the applicant to Somaliland, this does not guarantee that he would be allowed in or permitted to stay there. The Government give no information on the point. It therefore appears that there is a real risk that the applicant would have no alternative but to go to other areas of Somalia, such as Mogadishu, his city of origin.’</p>	<p>ECTHR – Salah Sheekh v the Netherlands application no 1948</p>

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ECtHR	<p><i>Bouyid v Belgium</i> application no 23380/09 21/11/2013</p>	<p>ECtHR judgment inter alia on prohibition of ill-treatment under Article 3 ECHR in police station. degrading treatment – minimum of severity – isolated treatment</p> <p><b>Minimum severity for a treatment to fall within Article 3 ECHR, paras. 47-52:</b> '47. However, in order for ill-treatment to fall within the scope of Article 3 it must attain a minimum level of severity. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim [...]. Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it [...]. 48. Accordingly, some forms of violence, although they may be condemned on moral grounds and also in most cases – but not always [...] – under the domestic law of the Contracting States, will not fall within Article 3 of the Convention [...]. 49. In the present case, the applicants alleged that they had each been slapped on the face while they were in the Saint-Josse-ten-Noode police station. [...] The Court, however, finds it pointless to rule on the veracity or otherwise of the applicants' allegations. It takes the view that, even supposing that they were proven, the acts complained of by the applicants would not constitute, in the circumstances of the case, treatment in breach of Article 3 of the Convention. 50. The Court would first point out that police officers who strike individuals while questioning them are at the very least committing a breach of ethics and acting in a manner that is deplorably unprofessional. [...] 51. In the present case, however, even supposing that the slapping took place, in both cases it was an isolated slap inflicted thoughtlessly by a police officer who was exasperated by the applicants' disrespectful or provocative conduct, without seeking to make them confess. Moreover, there was apparently an atmosphere of tension between the members of the applicants' family and police officers in their neighbourhood. In those circumstances, even though one of the applicants was only 17 at the time and whilst it is comprehensible that, if the events really took place as the applicants described, they must have felt deep resentment, the Court cannot ignore the fact that these were one-off occurrences in a situation of nervous tension and without any serious or long-term effect. It takes the view that acts of this type, though unacceptable, cannot be regarded as generating a sufficient degree of humiliation or debasement for a breach of Article 3 of the Convention to be established. In other words, in any event, the above-mentioned threshold of severity has not been reached in the present case, such that no question of a violation of that provision, under either its substantive or its procedural head, arises. 52. The Court thus concludes that in the circumstances of the case there has been no violation of Article 3 of the Convention.'</p>	<p>ECtHR – Ireland v the United Kingdom application no 5310/71 ECtHR – Jalloh v Germany application no 54810/00 ECtHR – El Masri v the Former Yugoslav Republic of Macedonia application no 39630/09 ECtHR – Campbell and Cosans v the United Kingdom applications nos 7511/76 and 7743/76 ECtHR – Costello-Roberts v the United Kingdom application no 13134/87</p>
ECtHR	<p><i>BKA v Sweden</i> application no 11161/11 19/12/2013</p>	<p>ECtHR judgment on <i>non-refoulement</i> under Article 3 ECHR.</p> <p><i>non-refoulement</i> – risk from non-state actors – blood feud</p> <p><b>Non-refoulement in case of risk emanating from non-state actors (e.g. blood feud) under Article 3 ECHR, paras. 34 and 42:</b> '34. The assessment of whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires that the Court assesses the conditions in the receiving country against the standards of Article 3 of the Convention [...]. These standards imply that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case [...]. Owing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection [...]. [...] 42. Turning to the relatives' blood feud against the applicant, the Court notes that the applicant's submissions are unsubstantiated and, as far as the new statements on events in 2012 are concerned, rather speculative. Acknowledging, however, that it may be very difficult to obtain evidence in such matters, the Court accepts the risk assessment made by the Migration Court and therefore concludes that he may face a risk of retaliation and treatment contrary to Article 3 from these relatives upon return to certain parts of Iraq, at least in Baghdad and Diyala where the events have taken place.'</p>	<p>ECtHR – Mamatkulov and Askarov v Turkey applications nos 46827/99 and 26951/99 ECtHR – Hilal v the United Kingdom application no 45276/99 ECtHR – HLR v France application no 24573/94</p>

court	case name/ reference/date	relevance/key words/main points	cases cited
ECtHR	<p>AA v Switzerland application no 58802/12 07/01/2014</p>	<p>ECtHR judgment <i>inter alia</i> on <i>non-refoulement</i> under Article 3 ECHR. <i>non-refoulement</i> – sur place activities</p> <p><b>Sur place activities in case of non-refoulement under Article 3 ECHR, paras. 40-43:</b> '40. With regard to the situation of political opponents of the Sudanese government, the Court nevertheless holds that the situation is very precarious. From the Country reports and the relevant case law above [...], it is evident that suspected members of the SPLM-North, members of other opposition parties, civil society leaders and journalists are frequently harassed, arrested, beaten, tortured and prosecuted by the Sudanese authorities. [...] 41. In the applicant's case, the Court notes that he has been a member of the SLM-Unity in Switzerland for several years. The Government however disputed the genuineness of his activities. In this regard, the Court acknowledges that it is generally very difficult to assess in cases regarding sur place activities whether a person is genuinely interested in the political cause or has only become involved in it in order to create post-flight grounds. In similar cases, the Court has therefore taken into account factors such as whether the applicant was a political activist prior to fleeing his home country, and whether he played an active role in making his asylum case known to the public in the respondent State [...]. In the present case, the Court however also has regard to the fact that the applicant joined the SLM-Unity in Switzerland several years before he launched his second asylum request, at a time when it still might not have been foreseeable for him to apply for asylum in Switzerland a second time. In view of the importance which the Court attaches to Article 3 of the Convention as set out above [...], and the irreversible nature of the damage which results if the risk of torture or ill-treatment materialises, the Court therefore prefers to assess the applicant's claim on the grounds of the political activities he effectively carried out. 42. In this regard, the Court considers that the applicant's political activities have increased in importance over time, as illustrated by his appointment as human rights officer of the SLM-Unity in Switzerland and his participation in international meetings on the human rights situation in Sudan. The Court however agrees with the Government insofar as the applicant's political profile had not been very exposed. He had not, for example, delivered any talks in those conferences, and in the interview broadcast on the TV channel in Eastern Switzerland, he had not mentioned his political activities. The Court therefore considers that if the applicant were to be expelled to a country where the human rights situation of political opponents was less worrying than in Sudan, he would, on account of his political activities, not be exposed to a risk of treatment contrary to Article 3 of the Convention. 43. However, [...] not only leaders and high-profile people, but also those merely suspected of supporting opposition movements are at risk of treatment contrary to Article 3 of the Convention in Sudan. In the case of politically involved Sudanese nationals abroad, in particular those who had been seen to be affiliated with the SLM at the international meetings in Geneva, it has furthermore been established that they had been registered by the Sudanese authorities [...]. In view of the applicant's participation in the international human right meetings, where representatives of the Sudanese government were present and where usually only a few citizens of one country participate so that they are relatively easily identifiable, as well as the applicant's argument with the current Sudanese president's brother, the Court cannot therefore rule out that he, as an individual, attracted the Sudanese government's attention. Having also participated in some of those meetings on behalf of the SLM-Unity Switzerland, the Court believes that the applicant might, at least, be suspected of being affiliated with an opposition movement by the Sudanese government. It therefore finds that there are substantial grounds for believing that he might be known to the Sudanese government and would be at risk of being detained, interrogated and tortured as soon as he arrived at the airport in Sudan. Moreover, he would not have the opportunity to relocate. Accordingly, the Court finds that the implementation of the deportation order against the applicant would give rise to a violation of Article 3 of the Convention.'</p>	<p>ECTHR – SF and Others v Sweden application no 52077/10 ECTHR – N v Finland application no 38885/02</p>

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ECtHR	<p><i>Semikhvostov v Russia</i> application no 2689/12 06/02/2014</p>	<p>ECtHR judgment on prohibition of ill-treatment under Article 3 ECHR because of detention conditions. inhuman treatment – conditions of detention – disabled persons</p> <p><b>Conditions of detention in case of disabled persons as potential inhuman treatment under Article 3 ECHR, paras. 72, 74 and 86:</b> '72. Moreover, the Court has considered that where the authorities decide to place and keep a disabled person in continued detention, they should demonstrate special care in guaranteeing such conditions as correspond to the special needs resulting from his disability [...] 74. The Court has also held that detaining a disabled person in a prison where he could not move around and, in particular, could not leave his cell independently, amounted to degrading treatment [...]. Similarly, the Court has found that leaving a person with a serious physical disability to rely on his cellmates for assistance with using the toilet, bathing and getting dressed or undressed, contributed to its finding that the conditions of detention amounted to degrading treatment [...] 186. In the light of the foregoing considerations and their cumulative effects, the Court holds that the conditions of the applicant's detention in view of his physical disability and, in particular, his inability to have access to various premises in the correctional facility independently, including the canteen and sanitation facilities, and in such a situation the lack of any organised assistance with his mobility around the facility or his daily routine, must have caused him such unnecessary and avoidable mental and physical suffering, diminishing his human dignity, that this amounts to inhuman and degrading treatment. There has, accordingly, been a violation of Article 3 of the Convention.'</p>	<p>ECtHR – Farbutuhs v Latvia application no 4672/02 ECtHR – Jasinskis v Latvia application no 4544/08 ECtHR – ZH v Hungary application no 28937/11 ECtHR – Vincent v France application no 6253/03 ECtHR – Engel v Hungary application no 46857/06</p>
ECtHR	<p><i>Tali v Estonia</i> application no 66393/10 13/02/2014</p>	<p>ECtHR judgment on prohibition of ill-treatment under Article 3 in the context of deprivation of liberty. inhuman and degrading treatment – use of force strictly necessary</p> <p><b>Recourse to physical force not strictly necessary as potential inhuman or degrading treatment in violation of Article 3 ECHR (e.g. use of pepper spray), paras. 75-82:</b> '75. The Court notes at the outset that it is aware of the difficulties the States may encounter in maintaining order and discipline in penal institutions. This is particularly so in cases of unruly behaviour by dangerous prisoners, a situation in which it is important to find a balance between the rights of different detainees or between the rights of the detainees and the safety of the prison officers. 76. In the present case, the Court has had regard to the evidence provided by the Government in respect of the risk posed by the applicant (his convictions for murder, attempted manslaughter, attacks against prison officers and other prisoners, disciplinary punishments and his characterisation in the individual action plans, see paragraph 6 above). [...] 77. The Court observes that the prison officers relied on the use of several immobilisation techniques and special equipment in respect of the applicant. Thus, in addition to physical force and handcuffs they also used pepper spray and a telescopic baton. The Court considers that the applicant's injuries, such as haematomas on his body and blood in his urine [...] indicate that a degree of force was used against the applicant. [...] 78. As regards the legitimacy of the use of pepper spray against the applicant, the Court refers to the concerns expressed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") in respect of the use of such agents in law enforcement. According to the CPT pepper spray is a potentially dangerous substance and should not be used in confined spaces; if exceptionally it needs to be used in open spaces, there should be clearly defined safeguards in place. Pepper spray should never be deployed against a prisoner who has already been brought under control [...]. The Court also notes that although pepper spray is not considered a chemical weapon and its use is authorised for the purpose of law enforcement, it can produce effects such as respiratory problems, nausea, vomiting, irritation of the respiratory tract, irritation of the tear ducts and eyes, spasms, chest pain, dermatitis and allergies. In strong doses it may cause necrosis of the tissue in the respiratory or digestive tract, pulmonary oedema or internal haemorrhaging (haemorrhaging of the adrenal gland) [...]. Having regard to these potentially serious effects of the use of pepper spray in a confined space on the one hand and the alternative equipment at the disposal of the prison guards, such as flak jackets, helmets and shields on the other, the Court finds that the circumstances did not justify the use of pepper spray. [...] 81. [...] In the present case, the Court considers that it has not been convincingly shown that after the end of the confrontation with the prison officers the applicant – who had been locked in a single-occupancy disciplinary cell – posed a threat to himself or others that would have justified applying such a measure. Furthermore, the period for which he was strapped to the restraint bed was by no means negligible and the applicant's prolonged immobilisation must have caused him distress and physical discomfort. 82. In view of the above and considering the cumulative effect of the measures used in respect of the applicant on 4 July 2009, the Court finds that the applicant was subjected to inhuman and degrading treatment in violation of Article 3 of the Convention.'</p>	<p>ECtHR – Izci v Turkey application no 42606/05 ECtHR – Ali Günes v Turkey application no 9829/07 ECtHR – Oya Ataman v Turkey application no 74552/01</p>



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ECHR	<p><i>AAM v Sweden</i> application no 68519/10 03/04/2014</p>	<p>ECHR judgment on <i>non-refoulement</i> under Article 3 ECHR. <i>non-refoulement</i> – internal protection requirements</p> <p><b>Requirements for internal protection in the country of origin in case of non-refoulement under Article 3 ECHR, paras. 68 and 73:</b> ‘68. The Court reiterates that Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight or relocation alternative in their assessment of an individual’s claim that a return to the country of origin would expose him or her to a real risk of being subjected to treatment proscribed by that provision. However, the Court has held that reliance on such an alternative does not affect the responsibility of the expelling Contracting State to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3. Therefore, as a precondition of relying on an internal flight or relocation alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and 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 his or her ending up in a part of the country of origin where there is a real risk of ill-treatment [...] 73. Internal relocation inevitably involves certain hardship. Various sources have attested that people who relocate to the Kurdistan Region may face difficulties, for instance, in finding proper jobs and housing there, not the least if they do not speak Kurdish. Nevertheless, the evidence before the Court suggests that there are jobs available and that settlers have access to health care as well as financial and other support from the UNHCR and local authorities. In any event, there is no indication that the general living conditions in the KRI for an Arab Sunni Muslim settler would be unreasonable or in any way amount to treatment prohibited by Article 3. Nor is there a real risk of his or her ending up in other parts of Iraq.’</p>	<p>ECHR – Sufi and Elmi v the United Kingdom applications nos 8319/07 and 11449/07</p>
ECHR	<p><i>SAS v France</i> application no 43835/11 01/07/2014</p>	<p>ECHR judgment concerning French ban on wearing clothes concealing one’s face under Articles 3, 8, 9, 10 and 11 ECHR, together with Article 14.</p> <p>Limitation to basic human rights – freedom of religion</p> <p><b>Limitation to the freedom of religion under Article 9 ECHR, paras. 124-126 and 157-158 (concerning restrictions to full veils):</b> ‘124. As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion [...] 125. [...] Article 9 does not, however, protect every act motivated or inspired by a religion or belief and does not always guarantee the right to behave in the public sphere in a manner which is dictated by one’s religion or beliefs [...] 126. In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to manifest one’s religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected [...] This follows both from paragraph 2 of Article 9 and from the State’s positive obligations under Article 1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined therein [...] 157. Consequently, having regard in particular to the breadth of the margin of appreciation afforded to the respondent State in the present case, the Court finds that the ban imposed by the Law of 11 October 2010 can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of “living together” as an element of the “protection of the rights and freedoms of others”. 158. The impugned limitation can thus be regarded as “necessary in a democratic society”. This conclusion holds true with respect both to Article 8 of the Convention and to Article 9.’</p>	<p>ECHR – Kokkinakis v Greece application no 14307/88</p> <p>ECHR – Buscarini and Others v San Marino application no 24645/94</p> <p>ECHR - Leyla Şahin v Turkey application no 44774/98</p> <p>ECionHR – Arrowsmith v the United Kingdom application no 7050/75</p> <p>ECHR – Kalaç v Turkey application no 20704/92</p>

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<p>ECtHR</p>	<p><i>Affaire Mugenzi c France</i> application no 52701/09 10/07/2014</p>	<p>ECtHR judgment on right to family reunification under Article 8 ECHR. Refugees – family reunification – evidentiary requirements <b>Family reunification of refugees and evidentiary requirements under Article 8 ECHR, paras. 54 and 56:</b> ‘54. La Cour rappelle que l’unité de la famille est un droit essentiel du réfugié et que le regroupement familial est un élément fondamental pour permettre à des personnes qui ont fui des persécutions de reprendre une vie normale [...]. Elle rappelle également qu’elle a aussi reconnu que l’obtention d’une telle protection internationale constitue une preuve de la vulnérabilité des personnes concernées [...]. Elle note à cet égard que la nécessité pour les réfugiés de bénéficier d’une procédure de regroupement familial plus favorable que celle réservée aux autres étrangers fait l’objet d’un consensus à l’échelle internationale et européenne comme cela ressort du mandat et des activités du HCR ainsi que des normes figurant dans la directive 2003/86/CE de l’Union européenne [...].’ 56. [...] la Cour juge utile de tenir compte des standards qui émanent des instruments internationaux en la matière et d’avoir à l’esprit les recommandations des organisations non gouvernementales (ciaprès « ONG ») spécialisées en droit des étrangers. Ainsi et avant tout, elle observe que la Convention internationale sur les droits de l’enfant préconise que les demandes de regroupement familial soient examinées avec souplesse et humanité. Elle attache de l’importance au fait que le Comité des ministres et le Commissaire du Conseil de l’Europe ont soutenu et précisé cet objectif [...]. S’agissant des moyens de preuve, elle relève dans la directive 2003/86/CE de l’Union européenne [...] et dans divers textes émanant de sources internationales et d’ONG que les autorités nationales sont incitées à prendre en considération « d’autres preuves » de l’existence des liens familiaux si le réfugié n’est pas en mesure de fournir des pièces justificatives officielles. Le HCR, le Conseil de l’Europe et les ONG indiquent de manière concordante l’importance d’élargir ces moyens de preuve [...]. et la Cimade a souhaité que les autorités françaises compétentes prennent en considération les documents tenant lieu d’actes d’état civil délivrés par l’OFPRA, et ceux déjà contrôlés par cet Office [...]. Enfin, il importe de noter que plusieurs rapports dénoncent des pratiques qui font obstacle au regroupement familial, en raison de la longueur excessive et de la complexité de la procédure de délivrance des visas; ils insistent sur la nécessité d’écourter les délais de la procédure en montrant plus de souplesse dans l’exigence des preuves attestant des liens familiaux [...].’</p>	<p>ECtHR – Hirsi Jamaa and Others v Italy application no 27765/09</p>
<p>ECtHR</p>	<p><i>Affaire Tanda-Muzingac France</i> application no 2260/10 10/07/2014</p>	<p>ECtHR judgment on right to family reunification under Article 8 ECHR. Refugees – family reunification – evidentiary requirements <b>Family reunification of refugees and evidentiary requirements under Article 8 ECHR, paras. 75-76:</b> ‘75. La Cour rappelle que l’unité de la famille est un droit essentiel du réfugié et que le regroupement familial est un élément fondamental pour permettre à des personnes qui ont fui des persécutions de reprendre une vie normale (voir le mandat du HCR, paragraphes 44 et 47 ci-dessus). Elle rappelle également qu’elle a aussi reconnu que l’obtention d’une telle protection internationale constitue une preuve de la vulnérabilité des personnes concernées [...]. Elle note à cet égard que la nécessité pour les réfugiés de bénéficier d’une procédure de regroupement familial plus favorable que celle réservée aux autres étrangers fait l’objet d’un consensus à l’échelle internationale et européenne comme cela ressort du mandat et des activités du HCR ainsi que des normes figurant dans la directive 2003/86 CE de l’Union européenne [...]. Dans ce contexte, la Cour considère qu’il était essentiel que les autorités nationales tiennent compte de la vulnérabilité et du parcours personnel particulièrement difficile du requérant, qu’elles prêtent une grande attention à ses arguments pertinents pour l’issue du litige, qu’elles lui fassent connaître les raisons qui s’opposaient à la mise en œuvre du regroupement familial, et enfin qu’elles statuent à bref délai sur les demandes de visa. 76. De ce point de vue, la Cour juge utile de tenir compte des standards qui émanent des instruments internationaux en la matière et d’avoir à l’esprit les recommandations des organisations non gouvernementales (ONG) spécialisées en droit des étrangers. Ainsi et avant tout, elle observe que la Convention internationale sur les droits de l’enfant préconise que les demandes de regroupement familial soient examinées avec souplesse et humanité. Elle attache de l’importance au fait que le Comité des ministres et le Commissaire du Conseil de l’Europe ont soutenu et précisé cet objectif [...]. S’agissant des moyens de preuve, elle relève dans la directive 2003/86/CE de l’Union européenne [...] et dans divers textes émanant de sources internationales et d’ONG que les autorités nationales sont incitées à prendre en considération « d’autres preuves » de l’existence des liens familiaux si le réfugié n’est pas en mesure de fournir des pièces justificatives officielles. Le HCR, le Conseil de l’Europe et les ONG indiquent de manière concordante l’importance d’élargir ces moyens de preuve [...]. et la Cimade a souhaité que les autorités françaises compétentes prennent en considération les documents tenant lieu d’actes d’état civil délivrés par l’OFPRA, et ceux déjà contrôlés par cet Office [...]. Enfin, il importe de noter que plusieurs rapports dénoncent des pratiques qui font obstacle au regroupement familial, en raison de la longueur excessive et de la complexité de la procédure de délivrance des visas; ils insistent sur la nécessité d’écourter les délais de la procédure en montrant plus de souplesse dans l’exigence des preuves attestant des liens familiaux [...].’</p>	<p>ECtHR – Hirsi Jamaa and Others v Italy application no 27765/09</p>

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ECtHR (Grand Chamber)	<p><i>Svinarenko and Slyadnev v Russia</i> applications nos 32541/08 and 43441/08 17/07/2014</p>	<p>ECtHR judgment inter alia on prohibition of ill-treatment under Article 3 ECHR. degrading treatment</p> <p><b>Placing defendants in metal cages when appearing before a court in criminal proceedings while remanded in custody as potential degrading treatment in violation of Article 3 ECHR, paras. 119-120:</b> '119. The Court has examined in recent years several cases concerning the use of metal cages in the courtroom from the standpoint of Article 3. The Court viewed the treatment in question as "stringent" and "humiliating" [...]. It assessed whether such treatment could be justified by security considerations in the circumstances of a particular case, such as the applicant's personality [...], the nature of the offences with which he was charged, though this factor alone was not considered sufficient justification [...], his criminal record [...], his behaviour [...] or other evidence of the risk to safety in the courtroom or the risk of the applicant's absconding [...]. It also took into account such additional factors as the presence of the public and media coverage of the proceedings [...]. 120. It was the unjustified or "excessive" use of such a measure of restraint in particular circumstances which led the Court to conclude, in the above cases, that the placement in a metal cage in the courtroom amounted to degrading treatment. However, in one case the Court found by a majority that there had been no violation of Article 3 [...].'</p>	<p>ECtHR – Ramishvili and Kokhreizidze v Georgia application no 1704/06 ECtHR – Ashot Harutyunyan v Armenia application no 34334/04 ECtHR – Pirusyan v Armenia application no 33376/07 ECtHR – Khodorkovskiy v Russia application no 5829/04 ECtHR – Khodorkovskiy and Lebedev v Russia applications nos 11082/06 and 13772/05 ECtHR – Sarban v Moldova application no 3456/05 ECtHR – Titarenko v Ukraine application no 31720/02</p>
ECtHR	<p><i>Trabelsi v Belgium</i> application no 140/10 04/09/2014</p>	<p>ECtHR judgment inter alia on <i>non-refoulement</i> under Article 3 ECHR in case of extradition.</p> <p><i>non-refoulement</i> – extradition – life sentence</p> <p><b>Extradition to risk of non-reducible life sentence as a violation of Article 3 ECHR, paras. 136-139:</b> '136. The Court now comes to the central issue in the present case, which involves establishing whether, over and above the assurances provided, the provisions of US legislation governing the possibilities for reduction of life sentences and Presidential pardons fulfil the criteria which it has laid down for assessing the reducibility of a life sentence and its conformity with Article 3 of the Convention. 137. No lengthy disquisitions are required to answer this question: the Court needs simply note that while the said provisions point to the existence of a "prospect of release" within the meaning of the Kafkaris judgment – even if doubts might be expressed as to the reality of such a prospect in practice – none of the procedures provided for amounts to a review mechanism requiring the national authorities to ascertain, on the basis of objective, pre-established criteria of which the prisoner had precise cognisance at the time of imposition of the life sentence, whether, while serving his sentence, the prisoner has changed and progressed to such an extent that continued detention can no longer be justified on legitimate penological grounds [...]. 138. Under these conditions, the Court considers that the life sentence liable to be imposed on the applicant cannot be described as reducible for the purposes of Article 3 of the Convention within the meaning of the Vinter and Others judgment. By exposing the applicant to the risk of treatment contrary to this provision the Government engaged the respondent State's responsibility under the Convention. 139. The Court accordingly concludes that the applicant's extradition to the United States of America amounted to a violation of Article 3 of the Convention.'</p>	<p>ECtHR – Kafkaris v Cyprus application no 21906/04 ECtHR – Vinter and Others v the United Kingdom applications nos 66069/09, 130/10 and 3896/10</p>

## National

MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
<p>UK House of Lords</p>	<p><i>R v Secretary of State for the Home Department, ex parte Sivakumaran and Others</i> [1988] 1 AC 958 16/12/1987</p>	<p>Judgment on the interpretation of a 'well-founded fear' of persecution in the refugee definition under Article 1A(2) of the Refugee Convention.</p> <p>refugee definition – well-founded fear</p> <p><b>Definition of a 'well-founded fear' under Article 1A(2) of the Refugee Convention, per Lord Keith of Kinkel:</b> 'In my opinion the requirement that an applicant's fear of persecution should be well founded means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for a convention reason if returned to his own country. In <i>R v Governor of Pentonville Prison, ex p Fernandez</i> [...] this House had to construe s 4(1)(c) of the Fugitive Offenders Act 1967, which requires that a person shall be returned under the Act if it appears: "that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reasons of his race, religion, nationality or political opinions." Lord Diplock said [...]: "My Lords, bearing in mind the relative gravity of the consequences of the court's expectation being falsified either in one way or in the other, I do not think that the test of the applicability of para (c) is that the court must be satisfied that it is more likely than not that the fugitive will be detained or restricted if he is returned. A lesser degree of likelihood is, in my view, sufficient and I would not quarrel with the way in which the test was stated by the magistrate or with the alternative way in which it was expressed by the Divisional Court. "A reasonable chance", "substantial grounds for thinking", "a serious possibility". I see no significant difference between these various ways of describing the degree of likelihood of the detention or restriction of the fugitive on his return which justifies the court in giving effect to the provisions of s 4(1)(c)." I consider that this passage appropriately expresses the degree of likelihood to be satisfied in order that a fear of persecution may be well founded. Counsel for the UN High Commissioner presented a careful and thoughtful argument largely based on the travaux préparatoires of the convention and protocol. The relevant expressions used in these works, such as "good reason" or "reasonable grounds" for fear of persecution, present questions of interpretation similar to those which arise as to the meaning of "well-founded fear" in the convention itself.'</p>	<p>UK, House of Lords – <i>R v Governor of Pentonville Prison, ex parte Fernandez</i> [1971] 2 All ER 691, [1971] 1 WLR 987</p>

MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
UK House of Lords	<p><i>Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, ex parte Shah, R v [1999]</i> UKHL 20 25/03/1999</p>	<p>Judgment on the interpretation of ‘membership of a particular social group’ in the refugee definition under Article 1A(2) of the Refugee Convention. refugee definition – nexus to convention ground – absence of protection against persecution – discrimination – particular social group – women</p> <p><b>Connection of the reason for persecution with the absence of protection against persecution under Article 1A(2) of the Refugee Convention, per Lord Hoffmann:</b> ‘A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? Again, in my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question “Why was he attacked?” would be “because a competitor wanted to drive him out of business.” But another answer, and in my view the right answer in the context of the Convention, would be “he was attacked by a competitor who knew that he would receive no protection because he was a Jew.”’</p> <p><b>Definition of a particular social group under Article 1A(2) of the Refugee Convention based on the concept of discrimination, per Lord Hoffmann:</b> ‘[...] the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect. [...] In choosing to use the general term ‘particular social group’ rather than an enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention.’</p> <p><b>Women as a particular social group under Article 1A(2) of the Refugee Convention, per Lord of Craighead:</b> ‘The unchallenged evidence in this case shows that women are discriminated against in Pakistan. I think that the nature and scale of the discrimination is such that it can properly be said the women in Pakistan are discriminated against by the society in which they live. The reason why the appellants fear persecution is not just because they are women. It is because they are women in a society which discriminates against women.’</p>	
UK Immigration and Asylum Tribunal	<p><i>Agartha Smith v Secretary of State for the Home Department</i> [2000] UKIAT 00TH02130 09/06/2000</p>	<p>Judgment: <i>inter alia</i> on the proper approach to proof of nationality in the context of an application for refugee status under the Refugee Convention. refugee definition – nationality of the applicant</p> <p><b>Determination of the nationality of an applicant for refugee status under Article 1A(2) of the Refugee Convention, para. 55:</b> ‘The Tribunal would summarise its conclusions on the general issues raised by this appeal as follows: a) In most appeals before Special Adjudicators the nationality of the claimant is not in issue, as is noted at paragraph 87 of the 1979 UNHCR Handbook. But where it is doubted Special Adjudicators must address it. Where it clearly is in issue it may be appropriate to deal with it as a preliminary issue, although in some cases it may not be possible to decide it separately from hearing the entirety of the appellant’s evidence. b) In order to comply with Art 1A(2) it is not always necessary to make a positive finding on nationality (or statelessness), but it is always necessary to attempt to do so. In going about this task Special Adjudicators should not treat an asylum hearing as a nationality court. Nor should they rely too strictly on any notion of a hierarchy of sources such as may be apt under classic rules on evidence dealing with questions of foreign law and expert evidence. As is demonstrated by our findings on this appeal, they should also give due weight to texts of a state’s nationality laws read in conjunction with acknowledged general principles governing nationality law. Furthermore they should bear in mind that it is their duty to weigh all items of evidence in the balance, even if they are meagre and would not be enough to satisfy a body charged with responsibility for deciding on a person’s nationality in the light of full particulars furnished by an applicant in accordance with normal civil law procedures. c) Where, notwithstanding application of a flexible approach to establishing the facts, it remains the case that the appellant cannot discharge the burden of proof on him to prove his nationality because, for example, of a lack of even meagre evidence, then it will be in order for Special Adjudicators to record a negative finding as to nationality. Such a finding must not, however, be equated with recognition of any international law status: at international law there is no status of “unknown nationality”. d) However, where a negative finding of nationality cannot be avoided, the task of the Special Adjudicator should not always end there. Except in cases wholly lacking in credibility and substance, he or she should go on and assess the appellant’s claim by reference to his claimed country of persecution. Such a “belt and braces” approach, whilst not strictly required under the Convention, best conforms to its primary purpose of preventing refoulement to those with a well-founded fear of persecution against which the state cannot protect them.’</p>	

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UK House of Lords	<i>Horvath v Secretary of State for the Home Department</i> [2001] AC 489 [2000] UKHL 37 06/07/2000	<p>Judgment on the interpretation of state protection in case of non-state persecution in the refugee definition under Article 1A(2) of the Refugee Convention.</p> <p>refugee definition – protection against persecution – non-State actors of persecution – steps to prevent persecution</p> <p><b>State protection in case of persecution by non-State actors, per Lord Hope of Craighead:</b> 'I would hold therefore that, in the context of an allegation of persecution by non-state agents, the word «persecution» implies a failure by the state to make protection available against the ill-treatment or violence which the person suffers at the hands of his persecutors. In a case where the allegation is of persecution by the state or its own agents the problem does not, of course, arise. There is a clear case for surrogate protection by the international community. But in the case of an allegation of persecution by non-state agents the failure of the state to provide the protection is nevertheless an essential element. It provides the bridge between persecution by the state and persecution by non-state agents which is necessary in the interests of the consistency of the whole scheme. [...] To sum up therefore on this issue, I consider that the obligation to afford refugee status arises only if the person's own state is unable or unwilling to discharge its own duty to protect its own nationals. I think that it follows that, in order to satisfy the fear test in a non-state agent case, the applicant for refugee status must show that the persecution which he fears consist of acts of violence or ill-treatment against which the state is unable or unwilling to provide protection. The applicant may have a well-founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill-treatment for a Convention reason which may be perpetrated against him. But the risk, however severe, and the fear, however well-founded, do not entitle him to the status of a refugee. The Convention has a more limited objective, the limits of which are identified by the list of Convention reasons and by the principle of surrogacy.'</p> <p><b>Reasonable steps to prevent persecution, per Lord Hope of Craighead:</b> 'As regards the third issue, the answer to it also is to be found in the principle of surrogacy. The primary duty to provide the protection lies with the home state. It is its duty to establish and to operate a system of protection against the persecution of its own nationals. If that system is lacking the protection of the international community is available as a substitute. But the application of the surrogacy principle rests upon the assumption that, just as the substitute cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected of the home state. The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard, which takes proper account of the duty which the state owes to all its own nationals. As Ward L.J. said at p. 44G, under reference to Professor Hathaway's observation in his book at p.105, it is axiomatic that we live in an imperfect world. Certain levels of ill-treatment may still occur even if steps to prevent this are taken by the state to which we look for our protection. I consider that the Tribunal in this case applied the right standard when they were considering the evidence.'</p>	UK, Court of Appeal of England and Wales – Horvath v Secretary of State for the Home Department [2000] INLR 15
UK EWCA	<i>Revenko v Secretary of State for the Home Department</i> [2000] EWCA Civ 500 31/07/2000	<p>Judgment on application for refugee status by a stateless person.</p> <p>refugee definition – stateless persons – qualification for refugee status</p> <p><b>Stateless persons being subject to the same conditions to qualify for refugee status, paras. 60 and 68:</b> '60. The text of Article 1A(2) should be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the treaty. That exercise entitles the court given the task of interpretation to have regard to the international instruments already cited and to the resolution adopted in 1951, with respect to the draft protocol relating to the status of stateless persons, at the last session of the conference of plenipotentiaries, which drafted the 1951 Convention. It is clear from Article 1A(2) that stateless persons can be refugees. It is also clear that consideration of the predicament of stateless persons in a comprehensive way was deferred. [...] 67. The paragraph in Article 1A(2) should be read as a whole and does, in my judgment, set out a single test for refugee status. When the words in the first part of the paragraph "is unable or, owing to such fear, is unwilling" were repeated in the second part of the paragraph, it was intended that the entire paragraph should be governed by the need to establish a well-founded fear of persecution on a Convention ground. The existence of a well-founded fear was intended to be a pre-requirement of refugee status. It is significant that both categories, nationals and stateless persons, were dealt with in the same paragraph and indeed in the same sentence. I cannot conclude that by the order of words in the last part of the paragraph, the need for the fear was intended to be excluded in the case of what could be a large category of persons.'</p>	

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<p>UK Immigration and Asylum Tribunal</p>	<p><i>Gomez (Non-state actors: Acero-Garces disapproved) (Colombia)</i> [2000] UKIAT 00007 24/11/2000</p>	<p>Judgment on the interpretation of persecution on ground of political opinion in context of persecution by non-State actors. refugee definition – political opinion – non-State actors of persecution</p> <p><b>Interpretation of the notion of persecution on ground of ‘political opinion’ in the context of persecution by non-State actors under the terms of Article 1A(2) of the Refugee Convention, paras. 30-46:</b> ‘30. The need for the “political opinion” ground to be construed broadly arises in part from the role of the Refugee Convention in the protection of fundamental human rights, which prominently include the rights to freedom of thought and conscience, of opinion and expression and of assembly and association: A.Grahl-Madsen, <i>The Status of Refugees in International Law</i>, 1966 supra n.5 at 227. This entails that even in contexts where the persecutor may be simply another private individual, if his persecutory actions against a claimant are motivated by an intention to stifle his or her beliefs, the opinion being imputed can be seen as political, at least where the state authorities are unable to afford effective protection against such actions. [...] 37. Where thus the persecutor is a non-state actor it becomes the persecutor’s perception of a political opinion held by the victim that matters. 38. However the fact that even state agents who are not overtly political can impute a political opinion does not in our view warrant the conclusion that any opinion imputed by a non-state actor qualifies as a political opinion. As Hill, J noted in a passage already cited from <i>V v Minister for Immigration and Multicultural Affairs</i>, the meaning of political is “... narrower than the usage of the word in connection with the science of politics, where it may extend to almost every aspect of society”. Even in the case of non-state actors therefore one cannot easily see how differences they may have with someone they persecute could be described as political unless they themselves have or express a political ideology or set of political objectives, i.e. views which have a bearing on the major power transactions relating to government taking place in a particular society. That is to say, the Tribunal doubts that the Refugee Convention ground of political opinion was meant to cover power-relationships at all levels of society. [...] Cases where an individual has been accepted as a non-state actor capable of imputing political opinion appear to be ones where that individual is effectively implementing the political views of either the state or some other body with political aims and objectives. [...] 40. As well as the need to adopt a broad definition of the term “political” there is also a need to recognise that the term is a malleable one. In the nature of politics, the boundaries between the political and the non-political shift in historical time and place. In <i>Shah and Islam</i> the point was made by Lord Hoffman that although women in contemporary Pakistan could constitute a particular social group, that did not mean that women anywhere or at any time could. It seems to us that the parameters of time and historical place are even more present in relation to the political opinion ground. That the definition of the adjective “political” must always be to some extent malleable flows from the fact that the nature of the power relationships and transactions that compose what is political vary from society to society. Sometimes political opinion may be located in a particular type of expression or activity, e.g. wearing western clothes in a highly fundamentalist Muslim country with strict social mores; sometimes not. [...] 41. One important consequence of this recognition of the shifting boundaries of the political in different societies is that it will be an error to rely upon any fixed distinctions between the “political” and the “criminal”. As was stated in <i>Jerez-Spring v Canada</i> [1981] 2 F.C. 527[F.C.A.], the “political” nature of a claimant’s actions or opinions must be assessed in the context of his or her country of origin. [...] 45. In consequence of the shifting boundaries of the political in different societies and at different periods <i>neither is it possible to identify any fixed categories of persons or bodies that will qualify as political entities. The assessment of whether there is a political opinion ground in any particular case will depend very much on the individual circumstances. 46. The above approach also explains why in certain circumstances a person who is himself an agent of the state, e.g. a civil servant or policeman, may be at risk of persecution on political opinion grounds if the circumstances are such that non-state actors impute a political opinion opposed to theirs. The decision as to whether a civil servant is at risk of persecution on the grounds of political opinion should never be made by reference to an a priori argument based on a fixed notion that all that can be imputed to a person in such a position is that he is doing his job. It will always be necessary to examine whether or not the normal lines of political and administrative responsibility have become distorted by history and events in that particular country. This perception also explains why refugee law has come to recognise that in certain circumstances “neutrality” can constitute a political opinion. [...]’</i></p>	<p>Australia, Federal Court – <i>V v Minister for Immigration and Multicultural Affairs</i> [1999] FCA 428</p> <p>UK, House of Lords – <i>Shah and Islam</i> [1999] Imm AR 283</p> <p>Canada, Federal Court of Appeal – <i>Jerez-Spring v Canada</i> [1981] 2 FC 527 [FCA]</p> <p>US, Court of Appeal for the Ninth Circuit – <i>Sanga v INS</i>, 103 F.3d 1482 (9<sup>th</sup> Cir 1997)</p>

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UK Court of Appeal of England and Wales	<i>Sepe and Bulbul v Secretary of State for the Home Department</i> [2001] EWCA Civ 681 11/05/2001	<p>Judgment on the interpretation of persecution on ground of political opinion in the case of conscientious objection to military service under Article 1A(2) of the Refugee Convention.</p> <p>refugee definition – political opinion – conscientious objection to military service – partial conscientious objector</p> <p><b>Interpretation of persecution on ground of political opinion in case of (partial) conscientious objectors under the terms of Article 1A(2) of the Refugee Convention, per Lord Justice Laws, paras. 82 and 86:</b> ‘82. If I am right as to absolute conscientious objection, what space can remain for partial objection as a potential avenue to refugee status? Now, I have not so far discussed the question whether conscientious objection may be said to constitute an implied political stance, for the purpose of the categories of Convention reasons in Art. 1A(2). As regards an absolute objector moved by a purely pacifist conviction, I have some difficulty with this idea, supported though it is by Hathaway and Goodwin-Gill. I should have thought that the pacifist’s outlook falls more naturally to be described as a matter of personal morality than a distinct political position, whether express or implied. But it is certainly a matter of <i>belief</i>, and, of course, it is sometimes a matter of religious belief. However if the secular pacifist is not to be treated as expressing an implied political opinion, his position will not fall within any of the Art. 1A(2) categories (“particular social group” would, I think, be unpromising), unlike the religious pacifist; and for that reason he cannot be a candidate for Convention protection - whatever one makes of all I have otherwise said about absolute conscientious objection. In those circumstances, despite the difficulty I feel, the better view may well be that the Convention should be read sufficiently broadly to place secular pacifism and religious pacifism on the same footing for the purposes of Art. 1A(2); and the means of doing so would be to attribute a political quality to secular pacifism. Such a view would, I think, be supported by the reference in the Convention’s recitals to “the widest possible exercise of these fundamental rights and freedoms”, and by authority such as <i>Zoffagharkhani</i> [1993] 3 CF 540, 550. It is certainly supported in this court by Hutchison LJ in <i>Adan</i> [1997] 1 WLR 1107, 1127E-F, and by the reasoning of the Federal Court of Australia in <i>V v Minister of Immigration</i> [1999] FCA 428, paragraph 33, relied on by Mr Macdonald in reply. [...] 86. If, contrary to my own conclusions, the present state of the law may require the grant of refugee status to a partial, political objector as such, it is by no means clear to me that a distinction should be made between base and decent political opinion. We cannot understand, let alone practise, the difficult ethics of pluralist democracy without accepting that the right of free thought applies to all thought: stupid, wise, repulsive or benign. There are, of course, proper limits to its practice or exercise. If a person’s acts bring him within Art. 1F, that is the end of any asylum claim he may advance. But refusing the draft plainly does not attract 1F, whatever the man’s beliefs. And he may have done nothing to further those beliefs, other than profess them.’</p>	Canada, Court of Appeal – <i>Zoffagharkhani v Canada</i> [1993] 3 CF 540 UK, House of Lords – <i>R v Secretary of State for the Home Department, ex parte Adan</i> [1997] 1 WLR 1107 Australia, Federal Court – <i>V v Minister for Immigration and Multicultural Affairs</i> [1999] FCA 428
UK House of Lords	<i>R v Secretary of State for the Home Department, ex p Sivakumar</i> [2003] UKHL 14 20/03/2003	<p>Judgment on the interpretation of the definition of refugee under Article 1A(2) of the Refugee Convention.</p> <p>refugee definition – combination of reasons for persecution</p> <p><b>Combination of reasons for persecution under Article 1A(2) of the Refugee Convention, per Lord Rodger of Earlsferry, para. 40:</b> ‘As has long been recognised, persecutors may act for more than one reason. Dyson LJ was drawing attention to this when he said, at paragraph 22 of his judgment in the Court of Appeal [2001] EWCA Civ 1196; [2002] INLR 310, 317, that, just because someone had been persecuted for suspected involvement in violent terrorism, it did not follow that he had not been persecuted for his political opinion. In other words, he might have been persecuted for both reasons. In the next paragraph Dyson LJ identified the task of the person considering a claim for asylum as being “to assess carefully the real reason for the persecution”. His Lordship was there concerned to make the point that in many cases it is necessary to look below the surface and identify the true reason for any ill-treatment. Of course, there may turn out to be more than one “real reason”. The evidence may show, for instance, that an applicant was ill-treated both because he belonged to a particular ethnic group and because he was suspected of taking part in terrorist crimes that were the work of members of that ethnic group. Not only is it often hard to draw the line between legitimate government counter-terrorist activity and racial and political persecution [...], but indeed members of security forces may act for both legitimate and illegitimate reasons. In such a case the appropriate inference may be that, if the applicant returned home, he would be ill-treated for a combination of Convention and non-Convention reasons. If so, the person considering the claim for asylum will properly conclude that the applicant has a well-founded fear of persecution for that combination of reasons.’</p>	UK, Court of Appeal of England and Wales – <i>Sivakumar v Secretary of State for the Home Department</i> [2001] EWCA Civ 1196; [2002] INLR 310 Australia, Full Court – <i>Paramanathan v Minister for Immigration and Multicultural Affairs</i> (1998) 160 ALR 24



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UK Court of Appeal of England and Wales	<p><i>Bagdanavicius &amp; Anor, R (on the application of) v Secretary of State for the Home Department</i> [2003] EWCA Civ 1605 11/11/2003</p>	<p>Judgment <i>inter alia</i> on the interpretation of 'well-founded fear of persecution' and 'sufficiency of state protection' for qualifying for refugee status.</p> <p>refugee definition – protection against persecution – prevention – applicant's individual circumstances</p> <p><b>Protection against persecution (prevention) and importance of applicant's individual circumstances, para. 55:</b> '[...] 4) Sufficiency of state protection, whether from state agents or non-state actors, means a willingness and ability on the part of the receiving state to provide through its legal system a reasonable level of protection from ill-treatment of which the claimant for asylum has a well-founded fear; Osman, Horvath, Dhima. 5) The effectiveness of the system provided is to be judged normally by its systemic ability to deter and/or to prevent the form of persecution of which there is a risk, not just punishment of it after the event; Horvath; Banomova. McPherson and Kinuthia. 6) Notwithstanding systemic sufficiency of state protection in the receiving state, a claimant may still have a well-founded fear of persecution if he can show that its authorities know or ought to know of circumstances particular to his case giving rise to his fear, but are unlikely to provide the additional protection his particular circumstances reasonably require; Osman.'</p>	ECHR – Osman v the United Kingdom application no 23452/94 UK, House of Lords – Horvath v Secretary of State for the Home Department [2001] AC 489 UK, Administrative Court – R(Dhima) v IAT [2002] Imm AR 394 UK, Court of Appeal of England and Wales – Banomova v Secretary of State for the Home Department [2001] EWCA Civ 807 UK, Court of Appeal of England and Wales – McPherson v Secretary of State for the Home Department [2002] INLR 139 UK, Court of Appeal of England and Wales – Kinuthia v Secretary of State for the Home Department [2002] INLR 133
FR Constitutional Council	2003-485-DC 04/12/2003	<p>Decision on the compatibility of modifications of the French asylum act of 25 July 1952 (loi n° 52-893) with Articles 1, 2, 4, 5, 6 and 10 of the French Constitution.</p> <p>refugee definition – internal protection – substantial part of the country of origin</p> <p><b>Requirements for internal protection including access to a substantial part of the country of origin, para. 17:</b> 'Considérant, enfin, qu'aux termes mêmes de la loi, l'Office français de protection des réfugiés et apatrides instruit la demande en tenant compte des conditions générales prévalant dans la partie concernée du territoire d'origine et de la situation personnelle du demandeur; qu'il devra également tenir compte de l'auteur des persécutions, selon qu'il relève ou non des autorités de l'Etat; que le bien-fondé de chaque demande sera examiné individuellement au regard de ces éléments concrets, appréciés à la date à laquelle l'Office statue; qu'il appartiendra à l'Office, sous le contrôle de la Commission des recours des réfugiés, de ne refuser l'asile pour le motif énoncé au troisième alinéa du III du nouvel article 2 de la loi du 25 juillet 1952 qu'après s'être assuré que l'intéressé peut, en toute sûreté, accéder à une partie substantielle de son pays d'origine, s'y établir et y mener une existence normale[.]'</p>	

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UK House of Lords	<i>In re B Regina v Special Adjudicator, ex parte Hoxha</i> [2005] UKHL 19 10/03/2005	Judgment <i>inter alia</i> on compelling reasons not to return home after fundamental change of circumstances. refugee definition – particular social group – trafficking victims <b>Trafficking victims as a particular social group, per Baroness Hale of Richmond, para. 37:</b> ‘if what they fear is capable of amounting to persecution, is it for a Convention reason? It is certainly capable of being so. In <i>R v Immigration Appeal Tribunal and another, Ex p Shah</i> [...] this House held that women in Pakistan constituted a particular social group, because they shared the common immutable characteristic of gender and were discriminated against as a group in matters of fundamental human rights, from which the State gave them no adequate protection. The fact of current persecution alone is not enough to constitute a social group: a group which is defined by nothing other than that its members are currently being persecuted would not qualify. But women who have been victims of sexual violence in the past are linked by an immutable characteristic which is at once independent of and the cause of their current ill-treatment. They are certainly capable of constituting a particular social group under the Convention.’	UK, House of Lords – <i>R v Immigration Appeal Tribunal and another, Ex p Shah</i> [1999] 2 AC 629
FR Refugee Appeals Board	<i>Mlle A</i> , 487336 29/07/2005	Judgment on qualification for refugee status. refugee definition – non-State actors of persecution – absence of protection against persecution <b>Non-State actors of persecution and absence of protection against persecution:</b> ‘Considérant qu’il résulte de l’instruction que la requérante a été victime de persécutions liées à son appartenance ethnique et peut craindre avec raison d’en subir de nouvelles pour ce motif; que ces agissements sont essentiellement le fait de membres du clan Darod, lesquels contrôlent aujourd’hui la région de Gedo et font partie des clans, sous clans, et factions qui continuent à lutter pour créer ou étendre des zones d’influence à l’intérieur du territoire national; Considérant que le gouvernement somalien dit Gouvernement fédéral de transition mis en place en octobre 2004 et qui siège au Kenya, n’est actuellement pas en mesure d’exercer de manière effective un pouvoir organisé au sein du territoire somalien et dans ces conditions d’offrir une protection aux 66 membres du clan reer hamar; qu’aucune autre autorité telle que définie par les dispositions susvisées de l’article L 713-2 du code de l’entrée et du séjour des étrangers et du droit d’asile, n’est susceptible d’offrir une protection aux membres de cette communauté; que dès lors, Mlle A. peut être regardée comme craignant avec raison d’être persécutée en cas de retour dans son pays d’origine, au sens des stipulations de l’article 1 <sup>er</sup> A2 de la convention de Genève [...]’.	
CZ Supreme Administrative Court	<i>SN v Ministry of Interior</i> , 6 Azs 235/2004-57 21/12/2005	Judgment on interpretation of political opinion as a reason for persecution. refugee definition – reason for persecution – political opinion <b>Interpretation of ‘political opinion’ as a reason for persecution, per EDAL English summary of the case:</b> ‘The membership of a political party is one, but not the only opportunity to participate in public life and express political views. The very fact that the applicant was not a member, but only a supporter of the opposition party, does not lead to the conclusion that he did not express his political views sufficiently. It is all the more so if in this country the mere participation in demonstrations, organised by opposition parties, usually leads to persecution by representatives of state power. Therefore, one of the conditions is, that the applicant has some political opinion, he is able to present it adequately, and credibly describe the injustice caused for this reason.’	

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UK House of Lords	<p><i>Januzi v Secretary of State for the Home Department</i> [2006] UKHL 5 15/02/2006</p>	<p>Judgment on reasonableness of internal protection for qualifying for refugee status. internal protection – undue hardship</p> <p><b>Interpretation of absence of undue hardship as a requirement for internal relocation; absence of requirement of the country's compliance with international human rights in the place of relocation, per Lord Bingham of Cornhill, paras. 15-21:</b> '15. There are, in my opinion, a number of reasons why the broad approach of the Court of Appeal in <i>E</i> must be preferred to the Hathaway/New Zealand rule. First, there is nothing in any article of the Convention from which that rule may be any process of interpretation be derived. The Convention is addressed to the rights in the country of asylum of those recognised as refugees. It is not explicitly directed to defining the rights in the country of their nationality of claimants for asylum who may be able to relocate within that country in a place where they will have no well-founded fear of persecution. 16. Secondly, acceptance of that rule cannot properly be implied into the Convention. It is of course true, as the appellants emphasise, that the preamble to the Convention invokes the Charter of the United Nations and the Universal Declaration of Human Rights, and seeks to assure refugees the widest possible exercise of the fundamental rights and freedoms affirmed in those documents. But the thrust of the Convention is to ensure the fair and equal treatment of refugees in countries of asylum, so as to provide effective protection against persecution for Convention reasons. It was not directed (persecution apart) to the level of rights prevailing in the country of nationality. [...] 17. Thirdly, this rule is not expressed in Council Directive 2004/83/EC of 29 April 2004 (OJ L 304.12) on «minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted». This is an important instrument, because it is binding on member states of the European Union who could not, consistently with their obligations under the Convention, have bound themselves to observe a standard lower than it required. Article 8 provides in paragraphs 1 and 2: [...] This imposes a standard significantly lower than the rule would require. 18. Fourthly, as appears from the sources cited above, the rule is not, currently, supported by such uniformity of international practice based on legal obligation and such consensus of professional and academic opinion as would be necessary to establish a rule of customary international law: <i>Roma Rights</i> case [...], para 23. 19. Fifthly, adoption of the rule would give the Convention an effect which is not only unintended but also anomalous in its consequences. Suppose a person is subject to persecution for Convention reasons in the country of his nationality. It is a poor country. Standards of social provision are low. There is a high level of deprivation and want. Respect for human rights is scant. He escapes to a rich country where, if recognised as a refugee, he would enjoy all the rights guaranteed to refugees in that country. He could, with no fear of persecution, live elsewhere in his country of nationality, but would there suffer all the drawbacks of living in a poor and backward country. It would be strange if the accident of persecution were to entitle him to escape, not only from that persecution, but also from the deprivation to which his home country is subject. It would, of course, be different if the lack of respect for human rights posed threats to his life or exposed him to the risk of inhuman or degrading treatment or as they rest on that ground. It is, however, important, given the immense significance of the decisions they have to make, that decision-makers should have some guidance on the approach to reasonableness and undue harshness in this context. Valuable guidance is found in the UNHCR <i>Guidelines on International Protection</i> of 23 July 2003. In paragraph 7 II(a) the reasonableness analysis is approached by asking "Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?" and the comment is made: "if not, it would not be reasonable to expect the person to move there". [...] 21. [...] The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so. [...].'</p>	UK, Court of Appeal of England and Wales – <i>E</i> and another v Secretary of State for the Home Department [2003] EWCA Civ 1032, [2004] QB 531 UK, House of Lords – <i>R</i> (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport and Another (United Nations High Commissioner for Refugees intervening) [2004] UKHL 55, [2005] 2 AC 1

MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
DE Federal Administrative Court	BVerwG 1 C 15.05 18/07/2006	<p>Judgment on qualification for refugee status.  refugee definition – non-State actors of persecution</p> <p><b>Definition of non-State actors of persecution, para. 23:</b> ‘Danach ist, wie das Berufungsgericht zutreffend erkannt und untersucht hat, auch die Verfolgung der Christen im Irak durch fundamentalistische Muslime und andere private Dritte in den Blick zu nehmen und im Rahmen der stets erforderlichen Gesamtschau aller asylrelevanten Bedrohungen zu würdigen. Entgegen der Auffassung der Beklagten und der von ihr angeführten Stimmen in Rechtsprechung und Literatur erfasst § 60 Abs. 1 Satz 4 Buchst. c AufenthG dabei schon seinem Wortlaut nach alle nicht staatlichen Akteure ohne weitere Einschränkung, namentlich also auch Einzelpersonen, sofern von ihnen Verfolgungshandlungen im Sinne des Satzes 1 ausgehen.’</p>	

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UK House of Lords	<p><i>Secretary of State for the Home Department v K; Farnah v Secretary of State for the Home Department</i> [2006] UKHL 46</p> <p>18/10/2006</p>	<p>Judgment on the interpretation of a 'particular social group' for qualifying for refugee status.</p> <p>refugee definition – particular social group – gender (Art. 10(1)(d) QD)</p> <p><b>Interpretation of a particular social group as defined in Article 10(1)(d) QD, per Lord Bingham of Cornhill, para. 16:</b> 'EU Council Directive 2004/83/EC of 29 April 2004, effective as of 10 October 2006, is directed to the setting of minimum standards among member states for the qualification and status of third country nationals or stateless persons as refugees, or as persons who otherwise need international protection, and setting minimum standards for the content of the protection granted. The recitals recognise the need for minimum standards and common criteria in the recognition of refugees, and for a common concept of "membership of a particular social group as a persecution ground". The Directive expressly permits member states to apply standards more favourable to the applicant than the minimum laid down. Article 10 provides [...]: [...] Read literally, this provision is in no way inconsistent with the trend of international authority. When assessing a claim based on membership of a particular social group national authorities should certainly take the matters listed into account. I do not doubt that a group should be considered to form a particular social group where, in particular, the criteria in sub-paragraphs (i) and (ii) are both satisfied. Sub-paragraph (iii) is not wholly clear to me, but appears in part to address a different aspect. If, however, this article were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority. In its published <i>Comments</i> on this Directive (January 2005) the UNHCR adheres to its view that the criteria in sub-paragraphs (i) and (ii) should be treated as alternatives, providing for recognition of a particular social group where either criterion is met and not requiring that both be met. [...].'</p> <p><b>Connection of the act of persecution with a well-founded fear of persecution under Article 1A(2) of the Refugee Convention, per Lord Bingham of Cornhill, para. 17:</b> 'The text of article 1A(2) of the Convention makes plain that a person is entitled to claim recognition as a refugee only where the persecutory treatment of which the claimant has a well-founded fear is causally linked with the Convention ground on which the claimant relies. The ground on which the claimant relies need not be the only or even the primary reason for the apprehended persecution. It is enough that the ground relied on is an effective reason. The persecutory treatment need not be motivated by enmity, malignity or animus on the part of the persecutor, whose professed or apparent motives may or may not be the real reason for the persecution. What matters is the real reason. In deciding whether the causal link is established, a simple "but for" test of causation is inappropriate: the Convention calls for a more sophisticated approach, appropriate to the context and taking account of all the facts and circumstances relevant to the particular case.'</p> <p><b>Women in Sierra Leone as a particular social group within the terms of Article 1A(2) of the Refugee Convention, per Lord Bingham of Cornhill, para. 31:</b> 'Departing from the submission made below, but with the support of the UNHCR, Miss Webber for the second appellant submitted that "women in Sierra Leone" was the particular social group of which the second appellant was a member. This is a submission to be appraised in the context of Sierra Leonean society as revealed by the undisputed evidence, and without resort to extraneous generalisation. On that evidence, I think it clear that women in Sierra Leone are a group of persons sharing a common characteristic which, without a fundamental change in social mores is unchangeable, namely a position of social inferiority as compared with men. They are perceived by society as inferior. That is true of all women, those who accept or willingly embrace their inferior position and those who do not. To define the group in this way is not to define it by reference to the persecution complained of: it is a characteristic which would exist even if FGM were not practised, although FGM is an extreme and very cruel expression of male dominance. It is nothing to the point that FGM in Sierra Leone is carried out by women: such was usually the case in Cameroon (GZ, above) and sometimes in Nigeria (ART N97/19046, above), but this did not defeat the applicant's asylum claim. [...] There is a common characteristic of intactness. There is a perception of these women by society as a distinct group. And it is not a group defined by persecution: it would be a recognisable group even if FGM were entirely voluntary, not performed by force or as a result of social pressure.'</p> <p><b>Interpretation of a particular social group, per Baroness Hale of Richmond, para. 110:</b> 'it cannot make any difference that it is practised by women upon women and girls. Those who have already been persecuted are often expected to perpetuate the persecution of succeeding generations [...].'</p>	

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UK Immigration and Asylum Tribunal	<p><i>AB (Protection – criminal gangs – internal relocation) Jamaica CG [2007] UKAIT 00018</i> 22/02/2007</p>	<p>Judgment on sufficiency of protection against persecution for qualifying for refugee status. refugee definition – protection against persecution (Art. 7 QD)</p> <p><b>Definition of sufficiency of protection against persecution under the UK Regulations SI 2006/2525 and, by extension, Article 7 QD, para. 143:</b> ‘First, in asylum-related appeals, statements about sufficiency of protection are not statements about whether protection can be universally provided – i.e. to all citizens without exception. As the wording of regulation 4 of the Protection Regulations (and Article 7 of the Qualification Directive) denotes, they are about the system of protection and whether under that system protection can “generally” be provided. Second, the test of protection is a practical one. For there to be effective protection it is not necessary that there be an absolute guarantee of protection; effective protection does not mean the elimination of all risk. Third, the test is one which focuses on whether protection within the state is factually available: protection can be generally afforded without any restriction on the type or form of protection or its sources, save for the requirement of an effective legal system. Whilst, as the wording of regulation 4 underlines, for there to be an ability to protect there is a requirement that there must be an effective legal system, there is not a requirement that serious crime levels most [sic] be kept within a specified level. With record-high crime levels being a frequent feature of many leading democratic states, it would be surprising if the ability of the authorities to protect in such states were seen to be disproved simply by reference to soaring crime figures. Further, although requiring deterrence (the detection, prosecution and punishment of acts constituting persecution or serious harm) the test does not confine protection afforded by the legal system to the system of criminal law: That is important because, as Sedley and Arden LJ observe, civil laws (e.g. non-molestation injunctions) can play a part in the overall system of protection. Each of these observations is important to bear in mind in the Jamaican context. Fourth, as noted by Auld LJ at paragraph 6 of <i>Bagdanavicius</i>: “Notwithstanding systemic sufficiency of state protection in the receiving state, a claimant may still have a well-founded fear of persecution if he can show that the authorities know or ought to know circumstances particular to his case giving rise to his fear, but are unlikely to provide the additional protection his particular circumstances reasonably require; <i>Osman</i>.”’</p>	<p>UK, House of Lords – Regina v Secretary of State for the Home Department, ex parte Bagdanavicius and another [2005] UKHL 38 ECtHR – Osman v the United Kingdom application no 23452/94</p>
CZ Supreme Administrative Court	<p><i>TA v Ministry of Interior, 4 Azs 146/2006-100</i> 28/02/2007</p>	<p>Judgment on protection against persecution/serious harm in case of non-state actors of persecution/serious harm. protection against persecution/serious harm</p> <p><b>Extent to which applicants have to seek protection against persecution/serious harm, per EDAL English summary of the case:</b> ‘The Supreme Administrative Court also ruled that where country of origin reports prove that the minority to which the applicant belongs, is a target of discrimination and persecution from the authorities and the police, the fact that the applicant did not asked the authorities for protection in his or her country of origin and failed to exhaust all legal means, cannot be a reason for not granting asylum.’</p>	
UK Immigration and Asylum Tribunal	<p><i>IM (Sufficiency of protection) Malawi [2007] UKAIT 00071</i> 31/07/2007</p>	<p>Judgment on interpretation of protection against persecution for qualifying for refugee status. refugee definition – protection against persecution/serious harm (Art. 7 QD)</p> <p><b>Interpretation of protection against persecution under UK Protection Regulations and Article 7 QD, paras. 49-50:</b> ‘49. This wording is substantially the same as the text of Article 7 of the Directive save that the wording of reg 4(2) omits the phrase “inter alia” immediately before “by operating” (Article 7(2) states that “Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, <i>inter alia</i>, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection”). 50. The one feature of reg 4 which we consider the facts of this case highlight is that the wording of reg 4(2) reinforces the same point which we take to have been made by post-<i>Horvath</i> case law. The wording of this subparagraph is unmistakably defensible: “[p]rotection shall be regarded as generally provided ...” (emphasis added). It is not stated that the taking of “reasonable steps to prevent the persecution ... by operating an effective legal system ...” will amount to provision of adequate protection in every case, although it is said that it will in the generality of cases. If there be any doubt that post-<i>Horvath</i> case law sets out the correct legal test for protection, then what we can now say is that that doubt has been dispelled by reg 4(2) whose wording closely mirrors that of the test set out in <i>Horvath</i> as we have construed it. Since 9 October 2006 it is reg 4, of course, which now contains the law which we have to apply.’</p>	<p>UK, House of Lords – Horvath v Secretary of State for the Home Department [2001] AC 489 [2000] UKHL 37</p>

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UK Court of Appeal of England and Wales	<p><i>EB (Ethiopia) v Secretary of State for the Home Department</i> [2007] EWCA Civ 809 31/07/2007</p>	<p>Judgment on interpretation of persecution for qualifying for refugee status.                      refugee definition – persecution – discriminatory deprivation of nationality</p> <p><b>Discriminatory deprivation of nationality as persecution under Article 1A(2) of the Refugee Convention per Lord Justice Pill, para. 54, and per Lord Justice Jacob, para. 75:</b> ‘54. It is necessary to consider the circumstances in which the statelessness has occurred. I am not prepared to hold that a deprivation of nationality, whether <i>de facto</i> or <i>de jure</i>, in itself necessarily gives rise to refugee status. Neither does a voluntary departure, unconnected with persecution, followed by refusal to allow re-entry necessarily give rise to refugee status; though it may be a breach of international law. An analysis is required of the circumstances including the loss of rights involved in the particular case and the causes and consequences of them. I am not pre-judging possible future findings of fact in the present case but where persecution of the type now alleged has led to the departure from the state of habitual residence, which then either refuses to permit re-entry, or permits it only in circumstances where the former conditions will continue, it is possible for refugee status to be established. On the first premise, the persecution is in the loss and continued loss of civil rights and, on the second, the fear of such continued treatment on return. [...] 75. Once a claimant for refugee status has established that their country of origin has taken away their nationality on the grounds of race, they in my view have established a prima facie case for such status. It is true that the decision maker must ask: would they have a well founded fear of persecution if they were returned today? But in the absence of contrary evidence, someone who has been deprived of nationality because of race would, if returned, be in a near-impossible position – unable to vote, to leave the country or even unable to work. They may well be treated as pariahs precisely because they had their nationality taken away. They have “lost the right to have rights.” (Chief Justice Warren’s vivid words) And they have already been put in the position that their home state will not let them in – they cannot even go home.’</p>	
UK EWCA	<p><i>JV (Tanzania) v Secretary of State for the Home Department</i> [2007] EWCA Civ 1532 07/11/2007</p>	<p>Judgment on qualification for refugee status.                      refugee status – act of persecution – denial of nationality</p> <p><b>Recognition of denial of nationality as an act of persecution, para. 10:</b> ‘As regards the contention that a denial of citizenship may amount to persecution, it is clear from <i>Lazarevic</i> (and is plain on principle) that it could only do so if the denial is actuated for a Convention reason: political affiliation or of course any of the other matters specified in Article 18 (2) of the Refugee Convention. A primary question in this case, were one looking at it as judge of fact, would be: why did the Tanzanian authorities deny the appellant’s claim to Tanzanian citizenship? The respondent Secretary of State has in counsel’s skeleton argument referred to a welter of correspondence, all of which was before the AIT. It is unnecessary to go into it letter by letter. It is enough to say that it is wholly clear to my mind that the appellant’s claim was denied because of the authority’s interpretation of the legislation and not for any other, certainly not for any capricious or discriminatory reason. They had encouraged the appellant to apply for citizenship by naturalisation. They had granted citizenship by descent to four of the appellant’s siblings. They had recognised both of his parents as citizens. Both the British High Commission and the LHRC seem to have considered that an application for citizenship by naturalisation would be (or would have been) appropriate. Against that background it is no exaggeration to say that an attempt to mount a perversity challenge faces a very tough climb indeed. And although I do not think <i>Mr Hodgetts</i> quite accepts this, there is on the face of the papers no challenge to the finding by the AIT at paragraph 37 that there was an error of interpretation here and no wilful denial of nationality. [...]’</p>	UK, EWCA – Boban <i>Lazarevic v Secretary of State for the Home Department</i> [1997] EWCA Civ 1007

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UK House of Lords	<i>Secretary of State for the Home Department v AH (Sudan) and Others</i> [2007] UKHL 49 14/11/2007	<p>Judgment on risk of persecution and interpretation of internal protection. internal protection – undue hardship</p> <p><b>Definition of internal protection and undue hardship in the country of origin, paras. 3 and 5:</b> ‘3. The decision of the House in <i>Januzi</i> [2006] 2 AC 426 was also directed to the problem of internal relocation of claimants for asylum who had a well-founded fear of persecution in one part of their home state but who, it was said, could reasonably and without undue harshness be returned to and relocated in another part of that state. The common issue in the appeals (see para 1) was whether, in judging reasonableness and undue harshness in this context, account should be taken of any disparity between the civil, political and socio-economic rights which a claimant would enjoy under the leading international human rights conventions and covenants and those which he would enjoy at the place of relocation. The clear conclusion of the House was that, excepting breaches of fundamental rights such as are protected by articles 2 and 3 of the European Convention on Human Rights, it should not: paras 20, 23, 45-46, 61, 67, 70. [...] 5. [...] Although specifically directed to a secondary issue in the case, these observations are plainly of general application. It is not easy to see how the rule could be more simply or clearly expressed. It is, or should be, evident that the enquiry must be directed to the situation of the particular applicant, whose age, gender, experience, health, skills and family ties may all be very relevant. There is no warrant for excluding, or giving priority to, consideration of the applicant’s way of life in the place of persecution. There is no warrant for excluding, or giving priority to, consideration of conditions generally prevailing in the home country. I do not underestimate the difficulty of making decisions in some cases. But the difficulty lies in applying the test, not in expressing it. The humanitarian object of the Refugee Convention is to secure a reasonable measure of protection for those with a well-founded fear of persecution in their home country or some part of it; it is not to procure a general levelling-up of living standards around the world, desirable though of course that is.’</p>	UK, House of Lords – <i>Januzi v Secretary of State for the Home Department</i> , [2006] UKHL 5
DE Administrative Court of Augsburg	Au 6 S 08.30005 10/01/2008	<p>Judgment on credibility of an applicant for refugee status. actor of protection – international organisations – UNMIK – KFOR</p> <p><b>International organisations (UNMIK and KFOR) as actors of protection, para. 56:</b> ‘Bei der Blutrache handelt es sich nicht um eine politische oder sonst nach § 60 Abs. 1 AufenthG relevante Gruppenverfolgung, weil sich der Antragsteller - selbst wenn die Blutrache in seinem Fall tatsächlich drohen würde - zum einen an die grundsätzlich schutzfähigen und schutzwilligen Sicherheitsorgane im Kosovo von UNMIK und KFOR wenden könnte, zum anderen aber der Drohung durch einen Wohnsitzwechsel in einen anderen Teil Serbiens ausweichen könnte. [...] In solch einem Fall kann vielleicht noch von einer “Gruppe” gesprochen werden, aber nicht mehr von einer “Gruppenverfolgung.” Schließlich hat er auch im restlichen Serbien - selbst nach einer etwaigen Unabhängigkeitserklärung des Kosovo - als serbischer Staatsangehöriger mit Schulausbildung und Berufspraxis eine sichere inländische Fluchtalternative. Das gilt auch in Hinblick auf die nun in § 60 AufenthG eingearbeiteten Art. 8, 9 und 10 RL 2004/83/EG. Schließlich sind UNMIK und KFOR grundsätzlich schutzbereite und schutzwillige Akteure i. S. v. § 60 Abs. 1 S. 4 AufenthG i. V. m. Art. 7 RL 2004/83/EG. Ein völlig lückenloser Schutz ist schon praktisch nicht möglich und rechtlich nicht zu fordern.’</p>	
CZ Supreme Administrative Court	<i>EM v Ministry of Interior</i> , 4 Azs 99/2007-93 24/01/2008	<p>Judgment on internal protection. internal protection – individual circumstances</p> <p><b>Importance of individual circumstances of the applicant for internal protection, per EDAL English summary of the case:</b> ‘Concerning the existence of an internal protection alternative, the SAC stated that it is necessary to deal with the issue of whether the applicant can access such protection and whether that protection is effective. Furthermore, the Court stated that the two previous decisions did not take into account the fact that the applicant was a single woman.’</p>	



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DE Federal Administrative Court	BVerwG 10 C 33.07, BVerwG:2008: 070208810C33.07.0 07/02/2008	<p>Judgment on withdrawal of refugee status following a fundamental change of circumstances in the country of origin in the terms of Articles 11 and 14 QD and Article 1C of the Refugee Convention.</p> <p>significance of past persecution/serious harm – change of circumstances</p> <p><b>Significance of past persecution and change of circumstances since departure, paras. 40 and 41</b>, available in English at <a href="http://www.bverwg.de">www.bverwg.de</a>: '[40] bb) There is furthermore a need for clarification as to whether the easier standard of proof under Article 4 (4) of the Directive applies in such a situation – in other words, in cases in which there is no internal connection between the circumstances under which the individual was recognised as a refugee, and the alleged danger inherent in return. This is the substance of Question 3 b. Under Article 4 (4) of the Directive, the fact that an applicant has already been subject to persecution or other serious harm, or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated. [41] In this Court's opinion, the restrictive wording 'such persecution' – in German, 'solcher Verfolgung' – which is also found in the English ('such persecution') and French ('cette persécution') versions, indicates that the easier standard of proof does not apply in all cases of experienced or directly threatened persecution, but rather presupposes an internal connection between an experienced or directly threatened persecution and the circumstance that could lead to a repeat of persecution in the event of a return. Further arguing for this position is the fact that the justification for the presumption that persecution is still threatened or will be threatened again, with the associated reversal of the burden of proof, ultimately does not lie in the fact that the individual has already been persecuted, but rather in that under the same circumstances, persecution already experienced or directly threatened indicates the risk of a renewed persecution. This presumption ceases when the circumstances under which the refugee was recognised have ceased. In these cases, the previous persecution has no indicative effect at the factual level with regard to new, different risks of persecution which are associated with other reasons, and possibly also inflicted by other persecutors (for example, persecution by private individuals in the course of religious disputes, instead of a former state persecution because of behaviour critical of the regime), and which has no connection with the previous persecution. [...] The Commission's later draft initially provided, in Article 7 c, only that in assessing the applicant's fear of persecution or other serious, unjustified harm, the Member States should also take into account whether the applicant had already been persecuted, or had suffered other serious unjustified harm, or had been directly threatened with persecution or with other serious harm, since this is a serious indication of an objective possibility that the applicant could be persecuted further or suffer such harm in the future. However, the reservation that this does not apply when conditions have radically and relevantly changed since then in the applicant's country of origin, or in his relations with his country of origin, was reflected in the Commission's reasons (see p. 16). On the evidence of the minutes of the deliberations on 25 September 2002 (Doc. 12199/02, p. 9) this reservation was added later in Article 7 (4) ('The fact that... is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious and unjustified harm, unless a radical change of conditions has taken place since then in the applicant's country of origin or in his relations with his country of origin'), but on the evidence of the minutes of 12 November 2002 (Doc. 14083/02, p. 9) the wording was amended again, and the present wording was adopted instead. It is not clear from the materials why this happened. However, from the course of the deliberations it may be assumed that the word 'such' was not added by chance, but rather quite intentionally, and thus a connection was to be established with a specific persecution, whether experienced or directly threatened.'</p>	
BE Council for Alien Law Litigation	8.758 14/03/2008	<p>Judgment on application for international protection for risk stemming from a blood feud.</p> <p>subsidiary protection – serious harm (Art. 15(a) and (b)) – blood feud</p> <p><b>Risk from blood feud (vendetta) qualifying as a serious harm under Article 15(a) and (b) QD, para. 4.4.1.2:</b> 'En l'espèce, le Conseil a exposé les raisons pour lesquelles il ne peut exclure qu'en cas de retour dans son pays, la vie ou l'intégrité physique de la partie requérante serait menacée par la vendetta qui pèse contre sa famille [...]. Il constate par conséquent qu'il existe de sérieux motifs de croire que si elle était renvoyée dans son pays d'origine, elle encourrait un risque réel de subir des atteintes graves au sens de l'article 48/4, §2, a) et b) de la loi du 15 décembre 1980.'</p>	

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FR National Court of Asylum Law	<i>Mlle N</i> , 574495 02/04/2008	Judgment on application for refugee status because of female genital mutilations and forced marriage. protection against persecution – inability of the State <b>Inability of the State to provide protection against persecution:</b> ‘Considérant (...) qu’il résulte de l’instruction qu’eu égard aux normes et lois coutumières relatives à l’excision et au mariage forcé en vigueur dans l’Etat de Rivières au Nigeria, et nonobstant l’interdiction légale de ces pratiques par l’Etat Fédéral, mais également par l’Etat de Rivières depuis 2001 pour l’excision, les femmes qui en sont victimes dans les zones rurales ne peuvent se réclamer de la protection des autorités de cet Etat, et que leur attitude est perçue comme transgressive par les membres de leur communauté; qu’elles constituent dans ces conditions un groupe social au sens de l’article 1er, A, 2 de la convention de Genève; que par suite Mlle N., peut avec raison craindre personnellement des persécutions du fait de son appartenance à ce groupe[.]’	UK, Court of Appeal – Danian v Secretary of State for the Home Department [2000] Imm AR 96
UK Court of Appeal of England and Wales	<i>YB (Eritrea)</i> [2008] EWCA Civ 360 15/04/2008	Judgment on application for refugee status based on sur place activities. subsequent application for international protection (Art. 5(3) QD) – sur place activities <b>Interpretation of subsequent application under Article 5(3) QD and sur place activities per Lord Justice Sedley, paras. 13 and 14:</b> ‘13. A relevant difference is thus recognised between activities in this country which, while not necessary, are legitimately pursued by a political dissident against his or her own government and may expose him or her to a risk of ill-treatment on return, and activities which are pursued with the motive not of expressing dissent but of creating or aggravating such a risk. But the difference, while relevant, is not critical, because all three formulations recognise that opportunistic activity sur place is not an automatic bar to asylum. The difficulty is in knowing when the bar can eventually come down. To postulate, as in Danian, that the consequence of a finding that the claimant’s activity in the UK has been entirely opportunistic is that “his credibility is likely to be low” is, with respect, to beg the question: credibility about what? He has ex hypothesi already been believed about his activity and (probably) disbelieved about his motive. Whether his consequent fear of persecution or ill-treatment is well-founded is then an objective question. And if it is well-founded, then to disbelieve him when he says it is a fear he now entertains may verge on the perverse. 14. The Directive does not directly confront this problem by, for example, simply shutting out purely opportunistic claims. Its sole permitted purpose is to set common minimum standards for the implementation of the Geneva Convention, and it could probably not have adopted such a rule consistently with the governing definition of a refugee in art. 1A of the Convention. But by art 5(3), perhaps oddly, it does allow ‘subsequent’ – that is, presumably, repeat - applications to be excluded if these are based on activity sur place, whether opportunistic or not.’	UK, House of Lords – AH (Sudan) v Secretary of State for the Home Department [2007] 3 WLR 832 UK, House of Lords – Januzi v Secretary of State for the Home Department [2006] 2 AC 426
PL Supreme Administrative Court	OSK 237/07 08/05/2008	Judgment on application for refugee status on the basis of domestic violence. refugee definition – persecution – domestic violence – protection against persecution – quality of protection <b>Domestic violence as a potential act of persecution under Article 1A(2) of the Refugee Convention and Article 9 QD, per EDAL English summary of the case:</b> ‘Violence, beating, and bullying constitute persecution within the meaning of the Convention relating to the Status of Refugees (the Refugee Convention) and the Qualification Directive.’ <b>Protection against persecution and quality of protection, per EDAL English summary of the case:</b> ‘The applicant was not obliged to exhaust all available means of protection provided by the state. It should be determined whether, in the given circumstances, she would have obtained help from the state had she requested it. A first important factor is whether the legal system in the country in question envisages the provision of such protection (i.e. whether suitable procedures are in place), but a second important factor is whether the applicant has access to such protection (i.e. whether there is a genuine opportunity to seek it).’	UK, House of Lords – AH (Sudan) v Secretary of State for the Home Department [2007] 3 WLR 832 UK, House of Lords – Januzi v Secretary of State for the Home Department [2006] 2 AC 426
UK Court of Appeal of England and Wales	<i>AA (Uganda) v Secretary of State for the Home Department</i> [2008] EWCA Civ 579 22/05/2008	Judgment on interpretation of ‘unduly harsh’ for the purpose of internal protection. internal protection – unduly harsh – individual circumstances – special vulnerability <b>Interpretation of the requirement for internal protection not be unduly harsh in light of applicant’s special vulnerability, paras. 22 and 23:</b> ‘22. Even if the foregoing is wrong, and it was open to the AIT to hold that it would not be unduly harsh to return young women generally to Kampala, it is still necessary to consider whether AA has characteristics that would render remission unduly harsh in her particular case. [...] 23. The two particular characteristics of AA that were relied on as making her particularly vulnerable were, first, that AA has no formal qualifications; and second that she was traumatised and suffering from anxiety and depression. It will be recalled from the extracts set out in §9 above that Dr Nelson relied on both of those matters as showing that AA would be even more vulnerable than the general run of unaccompanied young women in Kampala.’	UK, House of Lords – AH (Sudan) v Secretary of State for the Home Department [2007] 3 WLR 832 UK, House of Lords – Januzi v Secretary of State for the Home Department [2006] 2 AC 426

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<p>DE Federal Administrative Court</p>	<p>BVerwG 10 C 11.07, BVerwG:2008: 290508/10C11.07.0 29/05/2008</p>	<p>Judgment on internal protection. internal protection – temporary unavailability of safe areas – burden of proof <b>Application of internal protection in case of temporary unavailable safe areas, para. 20:</b> 'Bereits entschieden ist ebenfalls, dass des asylrechtlichen Schutzes nicht bedarf, wer bei einer Rückkehr in den Heimatstaat die sicheren Landesteile zwar nicht vom Inland, aber unmittelbar vom Ausland aus zu erreichen vermag. Asylrechtlich unbeachtlich ist in einem solchen Fall die nur vorübergehende Nichterreichbarkeit der sicheren Gebiete, etwa infolge unterbrochener Verkehrsverbindungen oder typischerweise behebbare Schwierigkeiten bei der Beschaffung von Reisepapieren und Transitvisa. Die Anerkennung als Asylberechtigter nach Art.16a GG ist erst gerechtfertigt, wenn feststeht, dass dem Betroffenen die Rückkehr in eine sichere Region des Heimatstaates, die auch sonst alle Anforderungen an eine inländische Fluchtalternative erfüllt, dauerhaft nicht zumutbar möglich ist [...]'. <b>Burden of proof in internal protection cases, para. 22:</b> 'Damit sich die innerstaatliche Zufluchtsmöglichkeit nicht nur als theoretische Option, sondern als dem Asylbewerber praktisch eröffnete Möglichkeit internen Schutzes darstellt, bedarf es verlässlicher Tatsachenfeststellungen zur Prognose tatsächlicher Erreichbarkeit als auch zur Bewertung einer realistisch eröffneten Reisemöglichkeit. Nur im Falle einer weitgehend gesicherten Prognose sowie einer die konkreten persönlichen Umstände des Betroffenen angemessen berücksichtigenden Zumutbarkeitsbewertung ist es mit Blick auf die Subsidiarität des Asylrechts gerechtfertigt, dem Antragsteller den Schutz des Art.16a GG in Deutschland zu versagen.'</p>	<p>Germany, Federal Administrative Court – BVerwG 9 C 16.00</p>
<p>CZ Supreme Administrative Court</p>	<p><i>SN v Ministry of Interior</i>, 5 Azs 66/2008-70 30/09/2008</p>	<p>Judgment on application for refugee status due to persecution by non-State actors inter alia on religious ground. refugee definition – reasons for persecution <b>Reasons for persecution not mutually exclusive, per EDAL English summary of the case:</b> 'The SAC accepted that the illegal police procedure might not have been driven solely by the applicant's religious beliefs. However, the actors of persecution are often lead by more than one motive. The plurality of motives of the authorities did not mean that the applicant did not meet the grounds of persecution and that he should be disqualified from refugee status. There is no need that race, religion, nationality, membership of a particular social group, political opinion or gender should be the only and exclusive grounds as to why the applicant is persecuted. It is enough if one of them is the decisive ground to cause serious harm or to refuse protection. In this case the causal nexus between persecution and grounds of persecution had been fulfilled.'</p>	
<p>CZ Supreme Administrative Court</p>	<p><i>Sich v Ministry of Interior</i>, 1 Azs 86/2008-101 18/12/2008</p>	<p>Judgment on application for refugee status on religious ground. non-State actors of persecution (Art. 6 QD) – effectiveness and accessibility of protection against persecution (Art. 7 QD) <b>Non-state actors of persecution under Article 6 QD and protection against persecution under Article 7 QD, per EDAL English summary of the case:</b> 'In addition, the SAC challenged the reasoning of the Regional Administrative Court, namely, the fact that the applicant was obliged to prove direct persecution by state authorities or persecution supported by state authorities. The SAC held that Art 6 of the Qualification Directive stated that if non-state agents are actors of persecution, it is sufficient if the state authorities are unable to give protection to the applicant from such persecution. The SAC also noted that according to Art 7 of the Directive the legal system in the country of origin, in order to offer protection, has to be effective and accessible.'</p>	
<p>SE Migration Court of Appeal</p>	<p>MIG 2009:4 (UM 4118-07) 14/01/2009</p>	<p>Judgment on internal protection. internal protection – burden of proof – specific area of the country of origin <b>Burden of proof in assessing internal protection, per EDAL English summary of the case:</b> 'The Migration Court of Appeal stated that even if it is the applicant who primarily holds the burden of proof for the adduced need for protection, the burden of proof normally is transferred to the Migration Board as regards the existence of internal protection.' <b>Identification of a specific area for the purpose of internal protection, per EDAL English summary of the case:</b> 'The Migration Court of Appeal however stated that the Migration Board, as a minimum, is obliged to identify a specific area (a reference to "larger cities" is not sufficient) and also to show that internal protection in this individual case (to the identified area) is a both a reasonable and plausible alternative. In its reasoning, the Court took as a starting point statements by the UNHCR, previous case law and the Qualification Directive (not incorporated into Swedish legislation at this point in time). The Court emphasised that weight should be given to the individual's gender, age and health, as should the possibilities of making a living. It was not considered possible to refer to internal protection if those returning will face serious hardship from a humanitarian perspective.'</p>	

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UK Immigration and Asylum Tribunal	AM & AM ( <i>armed conflict: risk categories</i> ) Somalia CG [2008] UKAIT 00091 27/01/2009	Judgment on application for international protection (refugee status, subsidiary protection and <i>non-refoulement</i> under Article 3 ECHR). actors of protection – clans <b>Clans as potential actors of protection against persecution/serious harm, para. 164:</b> ‘We do not doubt that recent events have altered the character and dynamics of clan and sub-clan activities in Somalia to a significant degree. We accept that as compared with the early 1990s clan protection is no longer as effective as it was. We are sure that Matt Bryden is right and that “[p]olitics and clan no longer converge to the same degree” (Nairobi evidence). We also accept that conflict over scarce resources have complicated the situation and made it unpredictable. But we cannot agree with Mr Toal that the clan or sub-clan has somehow ceased to be the primary entity to which individuals turn for protection.’	
BE Council for Alien Law Litigation	22.175 28/01/2009	Judgment <i>inter alia</i> on internal protection. protection against persecution/serious harm – internal protection – state actor of persecution/serious harm <b>Presumption that protection against persecution/serious harm or internal protection inexistent in case of state actor of persecution/serious harm, para. 3.3:</b> ‘Concernant le second motif de la décision attaquée, le Conseil constate d’emblée que la motivation de la décision attaquée est sur ce point inadéquate. En effet, ce motif de la décision attaquée renvoie implicitement à la notion d’alternative de protection interne, ou encore à la protection à l’intérieur du pays, visée à l’article 48/5, §3 de la loi, qui trouve, en principe, à s’appliquer lorsque la menace provient d’un agent non étatique [...]. Dès lors que la menace de persécution que prétend redouter le requérant provient d’un acteur étatique, il appartenait à tout le moins à la partie adverse d’exposer dans sa motivation pourquoi elle estimait que l’article 48/5, §3 de la loi trouvait néanmoins à s’appliquer au présent cas d’espèce.’	
CZ Supreme Administrative Court	AR v Ministry of Interior, 1 Azs 107/2008-78 11/02/2009	Judgment on application for subsidiary protection as manifestly unfounded if made to delay enforcement of a previous removal decision. subsidiary protection – serious harm (Art. 15(a)) – execution <b>Interpretation of Article 15(a) QD as covering extrajudicial executions, per EDAL English summary of the case:</b> ‘The Supreme Administrative Court stated that where the Asylum Act considers that one is in danger of serious harm that consists of the death penalty and the enforcement of death penalty, in accordance with Art 15 (a) of the Qualification Directive, serious harm consists not only of the death penalty, but also of execution. The Supreme Administrative Court defined execution as a broader concept than enforcement of the death penalty, because an execution does not have to be based on a formal decision resulting from legal proceedings.’	
ES Supreme Court	6894/2005 16/02/2009	Judgment on application for refugee status. protection against persecution/serious harm – inability of the State <b>Inability of the State to provide protection against persecution/serious harm in the terms of Articles 6 and 7 QD, p. 10:</b> ‘En esa misma Sentencia fecha 2 de enero de 2009 hemos expresado que en el artículo 6 c) de la mentada Directiva europea 83/2004, de 29 de abril, se extiende la protección cuando la persecución proviene de «los agentes no estatales, si puede demostrarse que los agentes mencionados en las letras a) y b) (Estado y partidos u organizaciones que controlan el Estado o una parte importante de su territorio), incluidas las organizaciones internacionales, no pueden o no quieren proporcionar protección contra la persecución o los daños graves definida en el artículo 7 ». En este caso, los solicitantes de asilo, como se deduce del transcrito informe del ACNUR, pueden encuadrarse en dos de los grupos de riesgo existentes en Colombia, a saber, el de los perseguidos por la guerrilla y por los paramilitares, que actuaban sin control alguno, mientras que ni uno ni otro grupo de riesgo recibían protección eficaz del Estado.’	

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<p>DE Federal Administrative Court</p>	<p>BVerwG 10 C 50.07, BVerwG:2009: 260209U10C50.07.0 26/02/2009</p>	<p>Judgment on application for refugee status on ground of deprivation of citizenship.</p> <p>refugee definition – serious violation of basic human rights (Art. 9(1) QD) – deprivation of citizenship – habitual residence of stateless persons (Art. 2(c) and (e) QD)</p> <p><b>Deprivation of citizenship as a potential serious violation of basic human rights amounting to persecution within the meaning of Article 9(1) QD, paras. 18-19</b>, available in English at <a href="http://www.bverwg.de">www.bverwg.de</a>: '18. A state measure of persecution need not consist solely of interference with life, limb and liberty. Violations of other rights to protection and freedom may also qualify as characterising elements of persecution, depending on the circumstances of the case. In terms of the intensity of interference, persecution must also fundamentally be seen in a state's withdrawing the material rights of citizenship from a citizen, thus excluding him from the general system of peace within the national unit [...]. This also applies taking account of Article 9 (1) a of Directive 2004/83/EC of 29 April 2004 (known as the 'Qualification Directive'), whose application is ordered under Section 60 (1) sentence 5 of the Residence Act. Accordingly, persecution relevant to asylum includes acts which are sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15 (2) of the ECHR. While it is true that deprivation of citizenship does not violate a right that persists even in public emergencies within the meaning of the ECHR, this is also not necessary, since Article 9 (1) a of the Directive mentions it only as a non-limiting example. But it does violate Article 15 of the Universal Declaration of Human Rights of 10 December 1948 [...], which reads as follows: Article 15 (1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality. 19. In the view of this Court, the critical factor in regard to the severity of the violation of rights caused by deprivation of citizenship, within the meaning of Article 9 (1) a of the Directive, is that the state deprives the individual in question of his or her fundamental status as a citizen, and thus necessarily denies residency protection, thereby rendering the person stateless and unprotected – in other words: it excludes him or her from the state's system of protection and peace. The case law of other European states likewise views deprivation of citizenship, when linked with characteristics relevant to asylum, as an act of persecution [...].'</p> <p><b>Interpretation of 'habitual residence' of a stateless person in the definition of a refugee/person eligible for subsidiary protection respectively under Article 2(c) and (e) QD, paras. 31-33</b>, available in English at <a href="http://www.bverwg.de">www.bverwg.de</a>: '31. Contrary to the opinion of the court below, habitual residence within the meaning of these provisions does not presuppose that the stateless person's residency must be lawful. Rather, it is sufficient if the stateless person actually focused his life in that country, and therefore did not merely remain there transiently, while the competent authorities initiated no measures to end his residency. 32. In its decision of 23 February 1993 - Federal Administrative Court 1 C 45.90 [...] on the interpretation of Article 2 of the Act Implementing the Convention on the Reduction of Statelessness of 29 June 1977 [...], the Federal Administrative Court has already pointed out that a distinction must be made between the duration of a stateless person's residence and the lawfulness of his or her residence. Under Article 1 (2) b of the Convention on the Reduction of Statelessness, a state may make a grant of nationality to a stateless person contingent on the individual's having 'habitually resided' in the territory of the state for a period of five to ten years. Article 2 No. 2 of the German Act Implementing the Convention on the Reduction of Statelessness of 29 June 1977 requires 'lasting residence' in Germany for at least five years. The Federal Administrative Court ruled that the term 'lasting residence' in the Act Implementing the Convention on the Reduction of Statelessness represents substantially the same meaning as the term 'habitual residence' in the Convention Relating to the Status of Stateless Persons and the Geneva Convention Relating to the Status of Refugees (the 'Geneva Convention on Refugees'). In the German version of the Convention for the Reduction of Statelessness, the binding (along with other languages) English and French wording of the treaty – 'has habitually resided' and 'ait résidé habituellement' – is translated as 'dauernden Aufenthalt gehabt' ('has had a lasting residence'). By contrast, in the Geneva Convention, the wording in the original text, 'habitual residence/résidence habituelle', which is based on the same root words, is accurately translated as 'gewöhnlicher Aufenthalt' (see Article 14 sentence 1, Article 16 (2), Convention Relating to the Status of Stateless Persons; Article 1A No. 2, second half of the sentence, Geneva Convention on Refugees). Under these circumstances it can be assumed that 'lasting residence' within the meaning of Article 2 of the Act Implementing the Convention on the Reduction of Statelessness means substantially the same as the term 'habitual residence' used in refugee law [...]. Such a lasting residence does not require formal consent from the aliens authority. This consent is in principle necessary only in order to establish a lawful residence. Lawfulness must be distinguished from the duration of residence. For a lasting residence, it is sufficient if, irrespectively of its legal options, the aliens authority refrains from terminating the stateless person's residence, for example because it considers such a termination unreasonable or unfeasible (decision of 23 February 1993, op. cit., 125). 33.</p>	<p>Germany, Federal Administrative Court – BVerwG 9 C 3.95 Germany, Federal Administrative Court – BVerwG 1 C 45.09 Germany, Federal Administrative Court – BVerwG 1 C 45.90 UK, Court of Appeal of England and Wales – EB (Ethiopia) v Secretary of State for the Home Department [2007] EWCA Civ 809 Canada, Federal Court – Maarouf v. Canada [1994] 1 FC 723</p>

MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
DE Federal Administrative Court	BVerwG 10 C 51.07, ECLI:DE:BVerwG:2009: 050309U10C51.07.0 05/03/2009	<p>In foreign case law as well, the concept of habitual residence within the meaning of the Geneva Convention on Refugees is interpreted to mean that de facto residence is sufficient if it is characterised by a certain duration. For example, the Federal Court of Canada based its decision of 13 December 1993 [...] on the assumption that more than a transient residence is necessary. Rather, the stateless person must have found a residence with the prospect of a certain duration ('with a view to a continuing residence of some duration'). He must furthermore have spent a substantial period of de facto residence in the country concerned ('a significant period of de facto residence'). The court refers to Hathaway's opinion that a year's residence can be considered a meaningful defining standard. The residence is not required to be lawful.'</p> <p>Judgment inter alia on interpretation of persecution for qualifying for refugee status.</p> <p>refugee definition – act of persecution – violation of basic human rights – severity</p> <p><b>Article 9(1) QD not limited to non-derogable rights as long as the violation of the right is severe, para. 11</b>, available in English at <a href="http://www.bverwg.de">www.bverwg.de</a>: '[...] if an interference with this right is not covered by Article 3 ECHR, persecution must be assumed if the violation of a right is severe within the meaning of Article 9 (1) a of the Directive. The referral in that Article to the rights listed in Article 15 (2) of the ECHR is not limiting, as can be deduced from the wording 'in particular' in Article 9 (1) a of the Directive. [...]'</p> <p><b>Automatic presumption of severity of the act of persecution in case of non-derogable rights, para. 11</b>, available in English at <a href="http://www.bverwg.de">www.bverwg.de</a>: 'In the event of interference with physical integrity or physical freedom, significant persecution is to be assumed automatically, provided the interference is covered by Article 3 of the ECHR.'</p>	
FR National Court of Asylum Law	M K, 616907 06/04/2009	<p>Judgment on application for refugee status on ground of sexual orientation.</p> <p>protection against persecution – inability and unwillingness of the State</p> <p><b>Inability and unwillingness of the State to provide protection against persecution:</b> 'Considérant qu'il ressort de l'instruction que si la législation kosovienne, à travers la « Loi contre la discrimination », adoptée en 2004 par l'Assemblée du Kosovo, interdit toute discrimination fondée sur l'orientation sexuelle, dans les faits les personnes assumant publiquement leur homosexualité et le manifestant dans leur comportement extérieur sont régulièrement victimes de harcèlement et de discriminations, sans pouvoir se prévaloir de la protection des autorités qui leur affirment souvent à tort que l'homosexualité est illégale.'</p>	
CZ Supreme Administrative Court	AR v <i>Ministry of the Interior</i> , 5 Azs 7/2009-98 22/05/2009	<p>Judgment on application for refugee status on religious ground.</p> <p>actor of persecution – state actors acting ultra vires</p> <p><b>State actors of persecution acting ultra vires, per EDAL English summary of the case:</b> 'It is necessary to clearly distinguish between such possible repressive actions on the part of security authorities or other state bodies that represent obvious excesses beyond the sphere of provisions permitted by law and which, at the same time, may either individually or on a cumulative basis together with other provisions target a particular person and reach the intensity of persecution, and the legal requirement to register a religious group and its enforcement using instruments permitted by the law and reasonable means. The Ministry did not collect sufficient information about the country of origin in order to make it possible to conclude whether this was an isolated police excess or a widespread practice tolerated by governing bodies. The Ministry therefore should focus on verifying these alleged threats in further proceedings. This detailed survey and examination cannot be avoided by merely stating that the Applicant first had the opportunity to seek protection from persecution (or exhaust the available means of protection) in the country of origin. It is necessary to examine instances of persecution by the State (or actors of persecution supported by the State) in a different way from cases of persecution caused merely by non-governmental actors of persecution. In the first case, it is important to carefully examine whether bodies of the aforementioned instances or other providers of protection are able and willing to provide effective protection according to Article 7(2) of the Qualification Directive. If not, it is not possible to request that the Applicant turn to such bodies.'</p>	

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CZ Supreme Administrative Court	LO v Ministry of Interior, 5 Azs 40/2009 22/07/2009	Judgment on internal protection. subsidiary protection (Art. 15(a)) – execution <b>Interpretation the term ‘execution’ under Article 15(a) QD as covering extrajudicial executions, per EDAL English summary of the case:</b> ‘The provisions of § 14(a)(2) of the Asylum Act, must be interpreted in accordance with Art 15(a) of the Qualification Directive (2004/83/EC). Art 15(a) provides that serious harm consists of “the death penalty or execution.” The term “execution”, however, has a wider scope than “capital punishment” because the execution may take place without a trial and without any formal imposition of a death sentence, and execution can be imposed by non-State actors.’	
FR National Court of Asylum Law	M P, 643384 27/11/2009	Judgment on application for refugee status due to deprivation of nationality. refugee definition – act of persecution – deprivation of nationality <b>Deprivation of nationality as an act of persecution under Article 1A(2) of the Refugee Convention:</b> ‘Considérant [...] qu’il est constant que les pratiques employées par les autorités bhoutanaises notamment après l’instauration par le décret royal du 16 janvier 1989 de « Driglam Namza » signifiant « La voie de l’harmonie consciente », ont conduit à exclure de la nationalité bhoutanaise certains ressortissants de ce pays, membres d’une minorité, dont fait partie le requérant; qu’ainsi, celui-ci doit être regardé comme étant ressortissant du Royaume du Bhoutan, seul pays envers lequel les craintes doivent être examinées; que lesdites pratiques des autorités bhoutanaises peuvent être considérées comme des persécutions dès lors qu’elles ont pour origine l’un des motifs énumérés à l’article 1er, A, 2 de la convention de Genève; que par ailleurs, en dépit des négociations internationales engagées, les autorités bhoutanaises persistent à refuser le retour de ceux qui, déçus de leur nationalité, ont été contraints de quitter le Bhoutan au début des années 1990[...].’	
IE High Court	ASO v Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform [2009] IEHC 607 09/12/2009	Judgment on existence of protection in the country of origin in case of an application for refugee status. protection against persecution/serious harm – quality of protection <b>Quality of protection against persecution/serious harm, para. 12:</b> ‘The court accepts the argument made by counsel for the applicant that this does not constitute a finding that state protection is available in these circumstances in Nigeria. It is a reference to the existence of a hierarchical complaint structure against the failure of local police officers to pursue the investigation of reported crimes. As the well settled-case law in this regard makes clear, whether or not State protection is available does not depend upon the existence of a police complaints procedure but upon a determination that there exists in the country of origin as a matter of current practice, an effective system for the detection, investigation, prosecution and conviction of crimes of the kind which form the subject matter of the complaint. [...]’	
UK Upper Tribunal	AM and BM (Trafficked women) Albania CG [2010] UKUT 80 (IAC) 18/02/2010	Judgment on application for refugee status due to human trafficking. protection against persecution – applicant’s individual circumstances – inability and unwillingness of the State <b>Protection against persecution to be determined on an individual basis; inability and unwillingness of the State to provide protection, para. 182:</b> ‘[...] We consider that the levels of corruption in Albania and societal attitudes towards women, particularly those that are thought of as “kurva”, are such that it is not possible to reach a clear conclusion that there is in all cases for a victim of trafficking a sufficiency of protection from her former traffickers. We conclude that, for each individual it is necessary to make an assessment taking into account the particular factors of that individual. These would include her age, her social, economic and educational background, the network of support which she might have, whether or not she has an illegitimate child and the way in which she has been trafficked in the past. If the victim is at real risk of persecution from her family or her “husband” then there is little evidence that the State would intervene, particularly in the north of the country.’	

MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
ES Supreme Court	429/2007 24/02/2010	<p>Judgment on application for refugee status on political ground. refugee definition – imputed political opinion – perception of persecutor</p> <p><b>Imputed political opinion and perception of persecutor, p. 4:</b> Lo relevante es la percepción que tenga quien persigue respecto de la persona del perseguido y las actividades que le atribuye de carácter político, así como la apreciación del demandante, que alberga un temor fundado de persecución por las opiniones políticas que le imputan las autoridades marroquíes, recogidas en los periódicos de Marruecos, que pueden llegar a verlo como una amenaza, y, por consiguiente, lo decisivo en este caso es la perspectiva del perseguidor en la medida que percibe al demandante en la instancia como un opositor, es decir por ser probable que el perseguidor actúe contra el percibido como opositor, supuesto en que la víctima potencial debe ser protegida, razones todas por las que la sentencia recurrida no ha incurrido en las interpretaciones indebidas que denuncia el Abogado del Estado en el único motivo de casación que esgrime contra ella,</p>	
UK Upper Tribunal	<i>AZ (Trafficked women) Thailand</i> CG [2010] UKUT 118 (IAC) 08/04/2010	<p>Judgment on application for international protection in context of human trafficking. refugee definition – particular social group – trafficking victims – sexual exploitation</p> <p><b>Victims of human trafficking for sexual exploitation as particular social group under Article 10(1)(d) QD, para. 140:</b> ‘We do find, however, that the appellant falls into a narrower social group; that of ‘young females who have been victims of trafficking for sexual exploitation’. We do not seek to define a specific age group but the appellant as a woman in her early twenties when she was trafficked can clearly be described as young. We adopt the words of Baroness Hale in <i>Hoxha</i> and find that “women who have been victims of sexual violence in the past are linked by an immutable characteristic which is at once independent of and the cause of their current ill-treatment...are certainly capable of constituting a particular social group under the Convention” [...].’</p>	UK, House of Lords – <i>In re B Regina v Special Adjudicator</i> , ex parte <i>Hoxha</i> [2005] UKHL 19
FR National Court of Asylum Law	<i>M K</i> , 090004366 14/04/2010	<p>Judgment on application for refugee status on ground of sexual orientation. protection against persecution – unwillingness of the State</p> <p><b>Unwillingness of the State to provide protection against persecution:</b> ‘Considérant qu’il ressort de l’instruction que si la législation kossovienne, à travers la « Loi contre la discrimination », adoptée en 2004 par l’Assemblée du Kosovo, interdit toute discrimination fondée sur l’orientation sexuelle, dans les faits les personnes assumant publiquement leur homosexualité et le manifestant dans leur comportement extérieur sont régulièrement victimes de harcèlement et de discriminations, sans pouvoir se prévaloir de la protection des autorités qui leur affirmant souvent à tort que l’homosexualité est illégale[.]’</p>	
FR Council of State	<i>OFPRA c M A</i> , 323669 14/06/2010	<p>Judgment quashing previous decision granting refugee status for lack of reason for persecution. refugee definition – political opinion</p> <p><b>Political opinion under Article 10(1) QD:</b> ‘Considérant, en second lieu, qu’au regard des mêmes stipulations [Art. 10(1)(d) QD], les opinions politiques susceptibles d’ouvrir droit à la protection ne peuvent être regardées comme résultant d’un engagement au sein d’une institution de l’Etat que lorsque celle-ci subordonne l’accès des personnes à un emploi en son sein à une adhésion à de telles opinions, ou agit sur leur seul fondement, ou combat exclusivement tous ceux qui s’y opposent[.]’</p>	
BE Council for Alien Law Litigation	45.095 18/06/2010	<p>Judgment on application for international protection. Article 23 QD – family unity</p> <p><b>Application of Article 23 QD, para. 4.6:</b> ‘Le principe de l’unité familiale invoqué par la partie requérante ne saurait en aucun cas entraîner une dérogation à l’application de la règle énoncée ci-dessus, qui découle du texte de la loi et de celui de l’article 1er, section A, §2 de la Convention de Genève. L’octroi d’une protection dérivée à un membre de la famille d’un réfugié en application de ce principe ne peut, en effet, s’effectuer si le statut personnel de la personne y fait obstacle, notamment parce qu’elle posséderait une autre nationalité. La partie requérante invoque en vain à cet égard l’article 23 de la directive 2004/83/CE du Conseil de l’UE qui énonce que: «Les États membres veillent à ce que les membres de la famille du bénéficiaire du statut de réfugié ou du statut conféré par la protection subsidiaire qui, individuellement, ne remplissent pas les conditions nécessaires pour obtenir ce statut puissent prétendre aux avantages visés aux articles 24 à 34, conformément aux procédures nationales et dans la mesure où cela est compatible avec le statut juridique personnel du membre de la famille.» Outre que cette disposition, qui n’est pas d’application directe, ne crée aucun droit dans le chef du membre de la famille d’un bénéficiaire du statut de réfugié ou du statut conféré par la protection subsidiaire à bénéficier de ce même statut, elle rappelle aux Etats membres la nécessité de tenir compte du statut juridique personnel du membre de la famille. [...]’</p>	



MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
BE Council for Alien Law Litigation	45.742 30/06/2010	<p>Judgment on application for refugee status.</p> <p>Article 7(1)(b) QD (recast) – actors of protection – non-governmental organisations</p> <p><b>Non-governmental organisations as actors of protection only if control the State or a substantial part of its territory, para. 5.8 and 5.8.1:</b> ‘5.8. Dans un troisième temps, le Conseil examine la possibilité de protection effective des autorités albanaises. Dans la mesure où la requérante craint un agent de persécution non étatique, à savoir son ex-mari, il convient de s’interroger sur la possibilité pour elle d’avoir accès à la protection de ses autorités. En effet, conformément à l’article 48/5, §1er de la loi du 15 décembre 1980, une persécution au sens de l’article 48/3 de la loi du 15 décembre 1980 peut émaner ou être causée par des acteurs non étatiques, s’il peut être démontré que ni l’Etat, ni des partis ou organisations qui contrôlent l’Etat ou une partie importante de son territoire, y compris les organisations internationales, ne peuvent ou ne veulent accorder une protection contre les persécutions. Le § 2 de la même disposition précise qu’une protection au sens de l’article 48/3 de la loi du 15 décembre 1980, est accordée lorsque les acteurs visés à l’alinéa 1er prennent des mesures raisonnables pour empêcher les persécutions, entre autres lorsqu’ils disposent d’un système judiciaire effectif permettant de déceler, de poursuivre et de sanctionner les actes constitutifs de persécution et lorsque le demandeur a accès à cette protection. 5.8.1. D’une part, la partie requérante fait à juste titre valoir que les ONG ne rentrent pas dans le champ d’application de l’article 48/5, §2 de la loi du 15 décembre 1980. Elles ne peuvent être considérées comme des acteurs de protection, à moins qu’elles ne contrôlent l’Etat ou une partie importante de son territoire, ce qui n’est pas le cas en l’espèce.’</p>	
UK Supreme Court	HJ (Iran) and HT (Cameroun) v Secretary of State for the Home Department [2010] UKSC 31 07/07/2010	<p>Judgment on application for refugee status based on sexual orientation.</p> <p>refugee definition – well-founded fear of persecution – standard of proof – sexual orientation – no duty of discretion</p> <p><b>Standard of proof of well-founded fear of persecution, para. 89:</b> ‘Moreover the inquiry is by no means wholly subjective. The need for the claimant’s fear to be well-founded introduces a very important objective element. Different jurisdictions have taken different approaches to evaluating what Professor James C Hathaway has called “the threshold of concern” (Hathaway, The Law of Refugee Status (1991) pp 75-80). When that work was published the test approved by the House of Lords in <i>R v Secretary of State for the Home Department Ex p Sivakumaran</i> (and conjoined appeals) [1988] AC 958 was that there should be “a reasonable degree of likelihood” (Lord Keith at p 994) or “real and substantial danger” (Lord Templeman at p 996) or a “real and substantial risk” (Lord Goff at p 1000) of persecution for a Convention reason. This remains the test. [...] “Risk” is in my view the best word because (as explained in the next paragraph) it factors in both the probability of harm and its severity.’</p> <p><b>No duty of discretion in context of a refugee application based on sexual orientation, paras. 92, 94 and 96:</b> ‘92. The notion that a gay man could (and so, some might say, should) avoid trouble by adopting a “discreet” lifestyle (or leading an entirely celibate life) is not limited to the context of asylum law. It is the way in which hundreds of thousands of gay men lived in England before the enactment of the Sexual Offences Act 1967. But it has assumed particular importance in asylum law since gays and lesbians have become generally recognised as a particular social group for Convention purposes. [...]93. This approach has been brought to an end, for the purposes of Australian asylum law, by the majority decision of the High Court of Australia in <i>Appellants S395/2002 v Minister for Immigration and Multicultural Affairs</i> (2003) 216 CLR 473. [...] 94. I find the joint judgment of Gummow and Haynes J illuminating and compelling. Lord Hope and Lord Rodger have quoted parts of paras 81 and 82 but I think it helpful to set out the whole section (paras 78-83) which appears under the heading “Discretion” and “being discreet”: “[...] If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. And to say to an applicant that he or she should be ‘discreet’ about such matters is simply to use gentler terms to convey the same meaning. The question to be considered in assessing whether the applicant’s fear of persecution is well founded is what may happen if the applicant returns to the country of nationality, it is not, could the applicant live in that country without attracting adverse consequences. [...]” [...] 96. [...] The essential question in these cases is whether the claimant has a well-founded fear of persecution as a gay man if returned to his own country, even if his fear (possibly in conjunction with other reasons such as his family’s feelings) would lead him to modify his behaviour so as to reduce the risk.’</p>	UK, House of Lords – <i>R v Secretary of State for the Home Department</i> , ex parte Sivakumaran and Others [1988] 1 AC 958 Australia, High Court – <i>Appellant S395/2002 v Minister for Immigration and Multicultural Affairs</i> (2003) 216 CLR 473

MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
PL Refugee Board	RdU-439-1/S/10 08/09/2010	<p>Decision on refugee status in case of human trafficking. non-State actor of persecution – absence of protection</p> <p><b>Definition of non-State actors of persecution, per EDAL English summary of the case:</b> ‘The Board also emphasised that although physical persons acting on their own behalf do not constitute typical perpetrators of persecution, they may be regarded as actors of persecution within the meaning of the Convention in cases where public authorities are unable or unwilling to protect an individual against their activities.’</p>	ECtHR – D v the United Kingdom application no 30240/96
UK House of Lords	<i>Regina v Secretary of State for the Home Department ex parte Bagdanavicius and another</i> [2005] UKHL 38 11/10/2010	<p>Judgment <i>inter alia</i> on <i>non-refoulement</i> under Article 3 ECHR in case of risk emanating from non-State actors and sufficiency of state protection. <i>non-refoulement</i> – risk from non-State actors</p> <p><b>Risk emanating from non-State actors, per Lord Brown of Eaton-under-Heywood, para. 24:</b> ‘The plain fact is that the argument throughout has been bedevilled by a failure to grasp the distinction in non-state agent cases between on the one hand the risk of serious harm and on the other hand the risk of treatment contrary to article 3. In cases where the risk “emanates from intentionally inflicted acts of the public authorities in the receiving country” (the language of para 49 of D v United Kingdom 24 EHR 423, 447) one can use those terms interchangeably: the intentionally inflicted acts would without more constitute the proscribed treatment. Where, however, the risk emanates from non-state bodies, that is not so: any harm inflicted by non-state agents will not constitute article 3 ill-treatment unless in addition the state has failed to provide reasonable protection. If someone is beaten up and seriously injured by a criminal gang, the member state will not be in breach of article 3 unless it has failed in its positive duty to provide reasonable protection against such criminal acts. This provides the answer to Mr Nicol’s reliance on the UK’s obligation under article 3 being a negative obligation and thus absolute. The argument begs the vital question as to what particular risk engages the obligation. Is it the risk merely of harm or is it the risk of proscribed treatment? In my judgment it is the latter. [...] Non-state agents do not subject people to torture or the other proscribed forms of ill-treatment, however violently they treat them: what, however, would transform such violent treatment into article 3 ill-treatment would be the state’s failure to provide reasonable protection against it.’</p>	ECtHR – D v the United Kingdom application no 30240/96
BE Council for Alien Law Litigation	49.821 20/10/2010	<p>Judgment on application for refugee status. actors of protection – non-governmental organisations – inability of the State</p> <p><b>Non-governmental organisations as potential actors of protection if controlling the State or a substantial part of its territory, para. 4.8.2:</b> ‘D’une part, le Conseil rappelle que les ONG ne rentrent pas dans le champ d’application de l’article 48/5, §2 de la loi du 15 décembre 1980. Elles ne peuvent être considérées comme des acteurs de protection, à moins qu’elles ne contrôlent l’Etat ou une partie importante de son territoire, ce qui n’est pas le cas en l’espèce.’</p> <p><b>Inability of the State to provide protection because of corruption, para. 4.8.3:</b> ‘D’autre part, il y a lieu de s’interroger sur la question de savoir si la partie requérante peut démontrer que l’Etat macédonien ne peut ou ne veut lui accorder une protection contre les persécutions alléguées. [...] Le Conseil constate également que les documents produits par la partie défenderesse sur l’effectivité de la protection des autorités macédoniennes sont plus nuancés que ce que suggère la motivation de la décision entreprise. La lecture de ces documents révèle que si la Macédoine a entrepris de réels efforts de lutte contre les réseaux de traite d’êtres humains, ce phénomène demeure bien présent et que dans certains cas, la protection des autorités peut se révéler insuffisante ou inexistante, principalement du fait de la corruption des agents étatiques, qui entrave largement les efforts des autorités macédoniennes [...]. Ce document fait également état d’opérations menées à l’égard de policiers ou d’agents de douane suspects de faciliter la vie de réseaux de traite des êtres humains.’</p>	ECtHR – D v the United Kingdom application no 30240/96

MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
UK Upper Tribunal	AW (Sufficiency of protection) Pakistan [2011] UKUT 31 (IAC) 22/11/2010	<p>Judgment on application for international protection.</p> <p>sufficiency of protection against persecution/serious harm – applicant’s individual circumstances</p> <p><b>Sufficiency of protection against persecution/serious harm in the country of origin under Article 7 QD as a practical test, para. 22:</b> ‘The starting point in considering whether there is a sufficiency of protection must be regulation 4 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (implementing Article 7 of the Qualification Directive 2004/83/EC) which we take to mirror the principles set out by the House of Lords in Horvath [...] where it was held that whether protection was sufficient was a “practical standard which takes proper account of the duty which the state owes its nationals...” and that “the sufficiency of state protection is not measured by the existence of a real risk of an abusive right but by the availability of a system for the protection of a citizen and a reasonable willingness of the state to operate it”.’</p> <p><b>Importance of the applicant’s individual circumstances when assessing sufficiency of protection in the country of origin, paras. 24, 34 and 35:</b> ‘24. Thus, while it will always be relevant to ask whether or not there is in general a sufficiency of protection in a country, the critical question will nevertheless remain in an asylum case as set out in the sixth proposition by Auld LJ and in an Article 3 case as set out in the fifteenth proposition. Thus under either head a judge must look, notwithstanding a general sufficiency of protection in a country, to the individual circumstances of the appellant and ask himself the above questions. [...] 34. The starting point in assessing whether the appellant would be given sufficient protection if returned to Pakistan is to consider whether there is systemic insufficiency of state protection. In relation to Pakistan, having regard to the case of AH and also to the case of KA and Others [...], it cannot be said that such a general insufficiency of state protection has been established. Neither party submitted that there was, nor do we find, that the background evidence before us demonstrates such as insufficiency. 35. However, as we have outlined above, that is not an end of the matter, regard must be had to the individual circumstances of the appellant with a view to addressing the questions as outlined in the sixth and fifteenth propositions of Auld LJ in Bagdanavicius [2005] EWCA 1605.’</p>	UK, House of Lords – Horvath v Secretary of State for the Home Department [2001] 1 AC 489 UK, Asylum and Immigration Tribunal – AH (Sufficiency of Protection – Sunni Extremists) Pakistan CG [2002] UKIAT 05862 UK, Upper Tribunal – KA and Others (Domestic Violence – Risk on Return) Pakistan CG [2010] UKUT 216 (IAC) UK, Court of Appeal of England and Wales – R (Bagdanavicius) v Secretary of State for the Home Department [2005] EWCA 1605
DE Federal Administrative Court	BVerwG 10 C 19.09, ECLI:DE:BVerwG:2010:091210B10C19.09 10/12/2010	<p>Judgment on interpretation of persecution in context of a violation of freedom of religion (core aspects v practice of faith in public).</p> <p>refugee definition – act of persecution (Art. 9(1)(a) QD) – basic human rights – freedom of religion</p> <p><b>Violation of religious freedom as a potential severe violation of basic human rights constituting persecution under Article 9(1)(a) QD, para. 20,</b> available in English at <a href="http://www.bverwg.de">www.bverwg.de</a>: ‘This Court is of the opinion that interference with religious freedom may constitute a severe violation of human rights within the meaning of Article 9(1)(a) of Directive 2004/83/EC. To be sure, this provision is in particular intended to cover violations of human rights from which there is no possibility of derogation under Article 15(2) of the ECHR. Freedom of religion does not count among these. However, the referral in Article 9(1)(a) of Directive 2004/83/EC to the rights listed in Article 15(2) of the ECHR is not exhaustive, as the phrase ‘in particular’ indicates. In its case law, the European Court of Human Rights (ECtHR) has repeatedly emphasised the fundamental significance of religious freedom to a democratic society (see, for example, judgment of 5 April 2007 – 18147/02, <i>Scientology v. Russia</i> – Marginal [...]). It is also evident from the diverse protection of this right on the national, European Union, and international levels that freedom of religion is of central human rights importance. For example, freedom of religion is guaranteed as a human right not only by numerous national constitutions (see, in Germany, Article 4(1) and (2) of the Basic Law), but also under Article 10(1) of the Charter of Fundamental Rights of the European Union (EU Charter of Human Rights), Article 18 of the United Nations Universal Declaration of Human Rights of 1948, and Article 18 of the International Covenant on Civil and Political Rights of 1966. For that reason, even before Directive 2004/83/EC took effect, this Court’s settled case law has held that violations of religious freedom – at least if they concern a core aspect that is essential to an individual’s religious identity – justify the assumption of a persecution that is relevant in asylum law [...]. It has also so held in regard to Article 9(1)(a) of the Directive [...]. This Court has furthermore held, in its case law on protection from deportation in cases of a violation of the ECHR (now Section 60(5) of the Residence Act), that a severe violation of religious freedom may be grounds for a prohibition of deportation under Article 9 of the ECHR [...].’</p>	ECtHR – Church of Scientology Moscow v Russia application no 18147/02 Germany, Federal Administrative Court – BVerwG 1 C 9.03 Germany, Federal Administrative Court – BVerwG 10 C 51.07 Germany, Federal Administrative Court – BVerwG 9 C 34.99

MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
UK Upper Tribunal	SA ( <i>political activist – internal relocation</i> ) Pakistan [2011] UKUT 30 (IAC) 26/01/2011	<p>Judgment inter alia on existence of internal protection. internal protection (Art. 8 QD) – no duty of discretion</p> <p><b>Absence of a requirement of discretion for assessing internal protection under Article 8 QD, para. 15:</b> 'In our judgement also, the only way the appellant could achieve safety by relocation was if he effectively decided to live in hiding or in political exile. In UK asylum law, requiring a political activist to live away from his home area in order to avoid persecution at the hands of his political opponents has never been considered as a proper application of the internal relocation principle: see e.g. Nolan J in R v Immigration Appeal Tribunal, ex p. Jonah [..]. And [since October 2006] such a requirement cannot be considered to be consistent with para 3390 of the Immigration Rules (Article 8 of the Qualification Directive). Indeed, the pitfalls of requiring a person to act contrary to his normal behaviour in order to avoid persecution have been further emphasised by the Supreme Court in HJ([Iran] [2010] UKSC 31.'</p>	UK, High Court – R v Immigration Appeal Tribunal, ex parte Jonah [1985] Imm AR 7
UK Upper Tribunal	BA ( <i>Demonstrators in Britain – risk on return</i> ) Iran CG [2011] UKUT 36 (IAC) 01/02/2011	<p>Judgment inter alia on application for refugee status based on post-flight activities of the applicant.</p> <p>post-flight activities of an applicant</p> <p><b>Factors to be considered in applications based on post-flight activities of an applicant, para. 64:</b> 'Against that backdrop of an announced intention to proceed against dissident Iranians abroad, we need to make a judgment about the risk on return for an Iranian, having regard to his <i>sur place</i> activities. In this type of case the factors that bear on that judgment can be conveniently placed under four main heads: (i) the type of <i>sur place</i> activity involved; (ii) the risk that a person will be identified as engaging in it; (iii) the factors triggering inquiry on return of the person and; (iv) in the absence of a universal check on all entering the country, the factors that would lead to identification at the airport on return or after entry. For each factor there is a spectrum of risk. The factors are not exhaustive and may overlap.'</p>	

MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
<p>UK Upper Tribunal</p>	<p><i>KK and others (Nationality: North Korea) Korea CG</i> [2011] UKUT 92 (IAC) 21/02/2011</p>	<p>Judgment on application for refugee status in case of dual nationality. personal scope of international protection – third-country national – determination of nationality <b>Determination of nationality for qualification for refugee status, paras. 79-82:</b> ‘79. At the beginning of this determination we drew attention to three possible scenarios in the interpretation of the multiple nationality provisions in Article 1A(2) of the Refugee Convention. A person may have the nationality in question; or he may not have it but be entitled to have it; or he may be a potential beneficiary of a discretion to grant him the nationality in question. The appellants fall within the first category in relation to South Korea, and it is therefore not strictly necessary to consider the others. In the light of the submissions we heard, however, it is right to give our views briefly. We have little doubt that, where a person’s acquisition of nationality depends on the exercise of a discretion by the State whose nationality he seeks to acquire, he cannot be regarded without more as for the purposes of the Refugee Convention having the nationality in question. 80. If support for that view is required, it can be found in the Israel Law of Return Cases, <i>MZXL, NAGV and Katkova</i>. The Law of Return, passed by the Knesset in 1950, gave all Jews a right to emigrate to Israel, but does not make even those Jews who seek to settle in Israel nationals of Israel by that very act: there are provisions initially for the grant of visas and then for the determination of whether nationality is to be granted. The finding of <i>McKeown J</i> in <i>Katkova</i> was that “the Law of Return confers a wide discretion on the Israeli Minister of the Interior to reject applications for citizenship”. As a result, courts have found (though not in every case, as discussion in <i>Katkova</i> makes clear) that a person who may be able to obtain nationality of Israel under the Law of Return is not to be regarded as being a national of Israel. Similarly, we can see no general basis for treating persons as nationals of a state of which they are not presently nationals, and of which they have presently no entitlement to nationality. 81. On the other hand, there may be cases where the acquisition of a nationality not yet obtained is a matter not of discretion but of entitlement and of mere formality. Russian nationality was capable of being acquired by right by the claimants in <i>Bouianova v MEI</i> (1993) 67 FTR 74 and <i>Zdanov v MEI</i> (1994) 81 FTR 246. These were Canadian cases where the claimants were individuals who claimed to be stateless but, as <i>Rothstein J</i> said in <i>Bouianova</i> at [76] (as cited by <i>McKeown J</i> in <i>Katkova</i>): “In my view, the applicant, by simply making a request and submitting her passport to be stamped, becomes a citizen of Russia. On the evidence before me, there is no discretion by the Russian officials to refuse her Russian citizenship. I do not think the necessity of making an application, which in these circumstances is nothing more than a mere formality, means that a person does not have a country of nationality just because they choose not to make such an application.” 82. In summary, for the purposes of the Refugee Convention, where a person already has a nationality (even if he has no documents to that effect) that is the end of the matter: he is a national of the country concerned. If he is entitled to nationality, subject only to his making an application for it, he is also to be regarded as a national of the country concerned. But if he is not a national and may be refused nationality, he is not to be treated as being a national of the country concerned. Subject to questions as to the “effectiveness” of nationality, the same principle applies to entitlement to a second nationality as to entitlement to a first’.</p>	
<p>DE Federal Administrative Court</p>	<p>BVerwG 10 C 3.10, BVerwG:2011: 240211U10C3.10.0 24/02/2011</p>	<p>Judgment on revocation of refugee status (cessation). fundamental change of circumstances – non-temporary – durable protection against persecution/serious harm <b>Definition of non-temporary nature of fundamental change of circumstances under Article 11 QD (cessation clause) and, by extension, of durable protection against persecution/serious harm under Article 7 QD, para. 20,</b> available in English at <a href="http://www.bverwg.de">www.bverwg.de</a>; ‘c) In application of the requirements that proceed from Article 11 of Directive 2004/83/EC and the case law of the European Court of Justice, the court below was ultimately correct in holding that the threat of persecution on the basis of which the Complainants’ refugee status was granted had ceased to exist. The Complainants were recognised as refugees by the Federal Office in its decision of 26 February 2002 because at that time the Federal Office held that the Iraqi authorities viewed a mere application for asylum in another country as political opposition. This fact, on which the Complainants’ fear of persecution by the state was based, has permanently ceased to exist, according to the findings of the court below. According to those findings, the fall from power of the dictator Saddam Hussein and his regime is irreversible. A return of the Baath regime is viewed as out of the question. Neither the new Iraqi government nor other actors attach measures for persecution to applying for asylum in another country [...]. Since it is therefore clear that the Complainants no longer need to fear persecution from any side in Iraq because of their application for asylum, this also embraces the finding that a state actor of protection within the meaning of Article 7 of Directive 2004/83/EC is present, in the form of the new Iraqi government, which has eliminated the former state sanctions and abuses relating to applications for asylum, and has therefore taken sufficient appropriate steps to permanently prevent the persecution on which the recognition of refugee status was based.’</p>	

MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
SE Migration Court of Appeal	UM 3363-10 and 3367-10 09/03/2011	<p>Judgment on honour-related violence and absence of protection in case of application for subsidiary protection. protection against persecution/serious harm – applicant's individual circumstances</p> <p><b>Importance of taking into account the applicant's individual circumstances for assessing effective protection against serious harm in the country of origin, per EDAL English summary of the case:</b> 'The question was then if local authorities in the country of origin could offer the applicants effective protection. The Migration Court of Appeal recognised that COI provides evidence that such protection certainly is available (in particular for women) but that it is a delicate situation. It is therefore, the Court concluded, not possible to say in general that the protection offered is effective. An individual assessment must always take place. In the present case the Court thus found that, taking into account the girl's father's position in society, the limited knowledge available concerning the protection available for young girls against their parents, the limited access to protection for men subject to honour-related violence, as well as the fact that both applicants were minors, it was not reasonable to require the applicants to have sought protection from the local authorities. Internal protection was not considered applicable.'</p>	
SE Migration Court of Appeal	UM 7851-10 21/04/2011	<p>Judgment on application for refugee status on gender-related ground. non-State actors of persecution/serious harm – relatives</p> <p><b>Relatives as non-State actors of persecution, per EDAL English summary of the case:</b> 'Since the applicant had shown it probable that she would on return to Kismayo be vulnerable to abuse from male relatives, in collaboration with Al Shabaab, because as a woman had not followed the norms that prevailed, and since the applicant's possibilities of obtaining effective protection in this area were virtually nonexistent, she had the right to protection as a refugee on the basis of her gender. However, this presumed that she could not obtain protection in any other part of Somalia.'</p>	
BE Council for Alien Law Litigation	62.867 09/06/2011	<p>Judgment <i>inter alia</i> on effective protection and internal relocation for qualifying for refugee status. actors of protection – non-governmental organisations – effective protection against persecution – insufficiency of mere criminalisation</p> <p><b>Non-governmental organisations as potential actors of protection if controlling the State or a substantial part of its territory, para. 4.8.2:</b> 'A titre liminaire, le Conseil rejoint la partie requérante et rappelle que les ONG ne rentrent pas dans le champ d'application de l'article 48/5, §2 de la loi du 15 décembre 1980. Elles ne peuvent être considérées comme des acteurs de protection, à moins qu'elles ne contrôlent l'Etat ou une partie importante de son territoire, ce qui n'est pas le cas en l'espèce. Dès lors, l'argumentation de la partie défenderesse au sujet de l'association de droits de l'homme TIMIDRIA n'est pas suffisante pour fonder la décision attaquée à ce sujet.'</p> <p><b>Criminalisation of certain conducts without effective application insufficient to amount to effective protection against persecution in the country of origin, paras. 4.8.3-4.8.5:</b> '4.8.3. La question principale à trancher, en l'espèce, tient donc à ceci: la partie requérante peut-elle démontrer que l'Etat nigérien ne peut ou ne veut lui accorder une protection contre les persécutions? La requérante affirme qu'elle a fait des démarches auprès des autorités locales de police, en vain, et auprès d'une association islamique qui l'aurait chassée et lui aurait dit « ma sentence doit être la mort. Le marabout a dit que c'est à cause des gens comme nous que la pluie ne vient pas dans notre pays » [...]. La partie défenderesse semble passer outre ces démarches effectuées et insiste sur l'importance de l'association des droits de l'homme TIMIDRIA qui lutte contre l'esclavage. La partie requérante quant à elle, en termes de requête, insiste sur l'ineffectivité des dispositions légales interdisant l'esclavage, sur l'absence d'aide apportée à la requérante par ses autorités et sur l'inaction des autorités administratives et judiciaires à l'égard des victimes de l'esclavage. Elle joint au dossier administratif des rapports d'organisations internationales qui vont en ce sens. 4.8.4. Il ressort des informations objectives déposées au dossier administratif, tant par la partie requérante que par la partie défenderesse, que l'application effective de la disposition pénale incriminant l'esclavage apparaît peu aisée et que les craintes de représailles des maîtres sont parfois si fortes que peu de plaintes sont déposées [...] 4.8.5. En l'occurrence, la partie requérante démontre que, dans son cas particulier, le système judiciaire nigérien a échoué à poursuivre et à sanctionner les actes constitutifs de persécution dont elle a été victime. Le Conseil estime, en conséquence, que la requérante n'a pas eu accès à une protection effective au sens de l'article 48/5, § 2, alinéa 2, de la loi du 15 décembre 1980.'</p>	

MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
DE Administrative Court of Augsburg	Au 6 K 30092 16/06/2011	<p>Judgment on persecution on gender-related ground for qualifying for refugee status.</p> <p>refugee definition – reason for persecution – particular social group (Art. 10(1)(d) QD) – women – non-State actors of persecution/serious harm – inability and unwillingness of the State to provide protection against persecution</p> <p><b>Women transgressing social mores as a particular social group within the terms of Article 10(1)(d) QD, p. 5:</b> ‘Die der Klägerin drohende Verfolgungshandlung knüpft an den Verfolgungsgrund der Geschlechtszugehörigkeit und die Zugehörigkeit zu einer bestimmten sozialen Gruppe – ledigste Frauen aus Familien, deren traditionelles Selbstverständnis auch eine Zwangsverheiratung gebietet – an (Art. 10 Abs. 1 Buchstabe d RL 2004/83/EG), durch die ihr Leben, zumindest aber ihre körperliche Unversehrtheit und Freiheit aktuell bedroht ist.’</p> <p><b>Individuals as non-State actors of persecution, p. 6:</b> ‘Die Klägerin in Afghanistan drohende Verfolgung geht aus von nichtstaatlichen Akteuren im Sinne des § 60 Abs. 1 Satz 4 Buchstabe c AufenthG. Zu diesen nichtstaatlichen Akteuren zählen auch Einzelpersonen und damit auch der Vater der Klägerin.’</p> <p><b>Inability and unwillingness of the State to provide protection against persecution in the country of origin, p. 6:</b> ‘Ein ausreichender Schutz der Klägerin vor der ihr drohenden Zwangsverheiratung ist nicht gewährleistet. Der afghanische Staat wäre nicht in der Lage und willens, die Klägerin vor der Verfolgung zu schützen [...]’.</p>	Germany, Administrative Court of Köln – Az 14 K 7186/09 A
BE Council for Alien Law Litigation	64.233 30/06/2011	<p>Judgment on internal protection for qualifying for refugee status.</p> <p>internal protection – applicant’s individual circumstances – special vulnerability</p> <p><b>Special vulnerability of the applicant as an individual circumstance to be taken into consideration when assessing internal protection, para. 5.4.2:</b> ‘[...] Compte tenu de ces conditions générales et de la situation personnelle de la partie requérante, qui souffre, selon les termes mêmes du rapport du conseiller expert auprès du Commissariat général, d’une importante psychopathologie et d’une souffrance psychique - confirmée par le rapport médical d’évolution daté du 9 mars 2011, versé par la partie requérante au dossier de la procédure -, le Conseil estime qu’il ne peut être raisonnablement attendu de celle-ci qu’elle reste dans d’autres parties de la Géorgie. L’article 48/5, §3 ne trouve dès lors pas à s’appliquer au cas d’espèce.’</p>	
ES Supreme Court	1789/2009 ECLI:ES:TS:2011:4013 15/06/2011	<p>Judgment on application for refugee status.</p> <p>refugee status – reasons for persecution – Article 10(1)(d) QD (recast) – membership of a particular social group - gender</p> <p><b>Recognition of women as a particular social group on the basis of gender, pp. 5 and 6:</b> ‘Asimismo, estimamos que la decisión de la Sala de instancia es acorde con la doctrina jurisprudencial de esta Sala de lo Contencioso-Administrativo del Tribunal Supremo, que ha estimado en las sentencias de 15 de febrero de 2007 (RC 9036/2003) y de 11 de mayo de 2009 (RC 3155/2006), que en aquellos supuestos en que se acredite la existencia de «indicios suficientes», según las circunstancias de cada caso, de que una mujer sufre persecución por su pertenencia al género femenino, que le ha supuesto la imposición de prácticas contrarias a la dignidad humana, como el matrimonio forzoso o la mutilación de un órgano genital, y que el régimen legal del país de origen no ofrece una protección jurídica eficaz, procede la concesión del derecho de asilo a la luz de lo dispuesto en los artículos 3 y 8 de la Ley 5/1984, de 26 de marzo, reguladora del derecho de asilo y de la condición de refugiado. [...] En este contexto normativo, la reforma de la Ley española de asilo, introducida por la Ley Orgánica 3/2007, permite identificar como sujetos protegibles a aquellas personas pertenecientes al género femenino que sufren violaciones de sus derechos humanos inderogables, y concretamente, a aquellas que padecen una grave discriminación en su país de origen, derivada del reconocimiento de un estatuto legal de subordinación, contrario al principio de igualdad de mujeres y hombres, y que no gozan de protección jurídica eficaz frente a actos graves de violencia sexual o de violencia doméstica, atentatorios contra la dignidad y la integridad física y moral.’</p>	ES, Supreme Court – 9036/2003 ES, Supreme Court – 3155/2006
PL Metropolitan Court	KH v Office of Immigration and Nationality, 6.K. 34.440/2010/20 05/10/2011	<p>Judgment on particular social group and absence of effective protection in the country of origin for qualifying for refugee status.</p> <p>protection against persecution/serious harm – effectiveness – prevention</p> <p><b>Protection in the country of origin effective if also preventing future persecution, per EDAL English summary of the case:</b> ‘The court found that state protection could only be considered effective if there were mechanisms to prevent acts of persecution (or seriously discriminatory acts) from occurring [sic] and not only to prosecute the perpetrators of past incidents.’</p>	

MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
<p>CZ Supreme Administrative Court</p>	<p><i>DK v Ministry of Interior</i>, 6 Azs 22/2011 27/10/2011</p>	<p>Judgment on internal protection and effective protection for qualifying for international protection. actors of protection – non-governmental organisations <b>Non-governmental organisations as actors of protection against persecution/serious harm if controlling the State or a substantial part of its territory, per EDAL English summary of the case:</b> ‘For the purposes of assessing the ability and willingness to prevent persecution or serious harm from non-State actors, possible protection provided by the state, parties or organisations which control the state or a substantial part of its territory, must be examined. Effective protection cannot be provided by non-governmental organisations which do not control the state or a substantial part of its territory.’</p>	
<p>UK Upper Tribunal</p>	<p><i>AMM and Others (conflict; humanitarian crisis; returnees; FGM) Somalia CG</i> [2011] UKUT 445 (IAC) 25/11/2011</p>	<p>Judgment on application for international protection. internal protection – burden of proof <b>Burden of proof in assessing internal protection, para. 225:</b> ‘We do not consider that the case law relied upon by the appellants comes close to establishing that the respondent bears the legal burden of proving that there is a part of the country of nationality of an appellant, who has established a well-founded fear in one area thereof, to which the appellant could reasonably be expected to go and live. The person who claims international protection bears the legal burden of proving that he or she is entitled to it. What that burden entails will, however, very much depend upon the circumstances of the particular case. In practice, the issue of an internal relocation alternative needs to be raised by the Secretary of State, either in the letter of refusal or (subject to issues of procedural fairness) during the appellate proceedings. In many cases, the respondent will point to evidence regarding the general conditions in the proposed place of relocation. It will then be for the appellant to make good an assertion that, notwithstanding those conditions, it would not be reasonable to relocate there. Those reasons may often be ones about which only the appellant could know; for example, whether there are people living in the area of proposed relocation who might identify the appellant to those in his home area whom he fears. The Secretary of State clearly cannot be expected to lead evidence on such an issue.’</p>	
<p>DE Administrative Court of Stuttgart</p>	<p>A 11 K 2066/11 30/12/2011</p>	<p>Judgment on application for refugee status. actors of protection – local actors <b>Local actors (i.e., town registration office) as potential actors of protection if able and willing to offer effective protection against persecution/serious harm, p. 10:</b> ‘Einen ausreichenden Schutz vor den erlittenen Eingriffen im Iran hat der Kläger nicht erhalten. Zwar hat der Kläger dargelegt und auch durch Vorlage von Urkunden nachgewiesen, dass die Registerbehörde der Stadt Mashhad in den von seinem Vater eingeleiteten und durchgeführten gerichtlichen Verfahren verpflichtet wurde, ihm und seinen Familienangehörigen Personalpapiere auszustellen. Er hat jedoch außerdem glaubhaft dargelegt, dass die Registerbehörde trotz Vollstreckungsanträgen durch den von seinem Vater beauftragten Rechtsanwalt der gerichtlichen Verpflichtung nicht nachgekommen ist. Bei dieser Sachlage kann von einer wirksamen Schutzgewährleistung im Sinne des Art. 7 Abs. 2 RL 2004/83/EG nicht ausgegangen werden.’</p>	
<p>FR National Court of Asylum Law</p>	<p><i>M et Mme M</i>, 09002796 and 09002797 C 06/02/2012</p>	<p>Judgment on application for refugee status on religious ground. protection against persecution/serious harm – inability of the State – armed conflict <b>Inability of the State to provide protection in time of armed conflict:</b> ‘Considérant [...] que, dans ces circonstances, il n’est pas concevable de penser que les intéressés puissent utilement se prévaloir de la protection des autorités de leur pays, en dépit des efforts des autorités locales pour restaurer l’ordre public et ce, notamment depuis le départ des forces américaines, tel qu’il résulte de l’analyse du 27 décembre 2011 du service des nouvelles et analyses humanitaires du Bureau de la coordination des affaires humanitaires des Nations unies [...]’.</p>	



MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
FR National Court of Asylum Law	MD, 11026661 13/02/2012	<p>Judgment on application for refugee status on ground of political opinion. actors of persecution/serious harm – de facto state actors</p> <p><b>Parties or organisations controlling a substantial part of the State's territory as de facto state actors:</b> 'Considérant que les pièces du dossier et des déclarations précises et personnalisées du requérant ont permis d'établir que ce dernier est né dans le camp de réfugiés de Smara, situé en territoire algérien près de Tindouf, et qu'il y a toujours vécu; qu'il produit à cet égard une carte d'identité délivrée par la RASD auto-proclamée; qu'il ressort par ailleurs de l'instruction que les camps de réfugiés sahraouis sont installés à l'Ouest du grand Sud algérien depuis 1976, sur une concession du morceau de territoire accordée par les autorités algériennes, sur laquelle le siège de la République Arabe Saharaoui Démocratique (RASD) auto-proclamée est installée, au début de l'exil des Sahraouis ; que la RASD a été soutenue par l'Algérie aussitôt après son auto-proclamation en 1976 [...] ; que les camps sont gérés par les autorités sahraouies désignées par les réfugiés et y exercent les pouvoirs administratifs, de police, judiciaires, militaires et politiques avec le plein accord des autorités algériennes; que ces autorités de fait exercent un pouvoir exclusif sur ce territoire; qu'en l'espèce, le requérant ne détient ni la nationalité marocaine, ni la nationalité algérienne; qu'il convient donc de déterminer son lieu de résidence habituelle; qu'il ressort de l'instruction qu'il a exclusivement résidé sur le territoire placé sous le contrôle des autorités de la RASD auto-proclamée; qu'il découle de ce qui précède que M. D., d'origine sahraoui, peut être regardé comme un résident de la RASD, autorité de fait ; que par conséquent, les craintes qu'il exprime doivent être examinées au regard de la RASD[.]'</p>	
SI Administrative Court	I U 42/2012 14/02/2012	<p>Judgment on application for refugee status by a child applicant. refugee definition – particular social group – children</p> <p><b>Children as potential members of a particular social group, per EDAL English summary of the case:</b> 'A child in Afghanistan can be a member of a particular social group. In Afghanistan being a youth without any contact with the parents is an essential characteristic of one's identity, thus these individuals should not be forced to denounce their identity, as it is impossible to denounce this identity in its entirety. Apart from this, it is also clear, without any shadow of a doubt, that the aforementioned group has a special identity in Afghanistan, for the Taliban perceive them as such and use them for their military and political purposes, while criminal groups use them for other illegal intentions such as the white slave trade, sexual violence, drug trade and other crime. The Plaintiff could thus be persecuted because he belongs to a vulnerable group of children with or without parents.'</p>	
BE Council of State	218.075 16/02/2012	<p>Judgment on interpretation of real risk of serious harm (individualisation) for qualifying for subsidiary protection. real risk – evidence for persons similarly situated</p> <p><b>Evidence of real risk of serious harm to persons similarly situated:</b> [...] en considérant que le requérant « ne fait valoir aucun moyen, argument ou motif personnel susceptible d'établir un tel risque dans son chef », le Conseil du contentieux des étrangers donne une interprétation qui n'est pas compatible avec l'article 48/4, § 2, b), de la loi du 15 décembre 1980; que cet article transpose l'article 15, b), de la directive 2004/83/CE précitée qui dispose : « Les atteintes graves sont : a) [...] b) la torture ou des traitements inhumains ou dégradants infligés à un demandeur dans son pays d'origine, ou c) [...] » ; que se prononçant sur la portée de cette disposition, la Cour de justice de l'Union européenne a rappelé que les notions de « torture ou de traitement ou sanctions inhumains ou dégradants du demandeur dans son pays d'origine » devaient s'interpréter suivant la jurisprudence de la Cour européenne des droits de l'homme à propos de l'article 3 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales; qu'elle considère à cet égard (arrêt Saadi c. Italie du 28 février 2008), que la personne qui invoque la violation de l'article 3 de la Convention, doit démontrer que tant la situation générale dans le pays d'origine que les circonstances propres à son cas témoignent du risque de traitements inhumains et dégradants en cas de retour dans le pays d'origine, sauf à démontrer son appartenance à un groupe systématiquement exposé à une pratique de mauvais traitements; qu'il appartient, dans ce dernier cas, à la personne intéressée de démontrer qu'il y a des motifs sérieux et avérés de croire à l'existence de la pratique en question et à son appartenance au groupe visé; qu'il s'ensuit que dès le moment où le Conseil du contentieux des étrangers n'a, en l'espèce, pas dénié la qualité de demandeur d'asile débouté de nationalité XXX au requérant et que ce dernier alléguait des risques de mauvais traitements pour les personnes confrontées à une telle situation, le juge ne pouvait exiger de la part de ce dernier la présentation d'un « moyen, argument ou motif personnel susceptible d'établir un tel risque dans son chef », sans avoir considéré, au préalable, que la catégorie des demandeurs d'asile débouté du XXX n'était pas exposée à une pratique de mauvais traitements[.]'</p>	<p>CJEU – C-465/07 Meiki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie ECtHR – Saadi v Italy application no 37201/06</p>

MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
IE High Court	<p><i>JTM v Minister for Justice and Equality, Ireland and the Attorney General</i> [2012] IEHC 99 01/03/2012</p>	<p>Judgment <i>inter alia</i> on interpretation of Article 6 QD (actors of serious harm) for qualifying for subsidiary protection. actors of serious harm (Art. 6 QD) – non-exhaustive list</p> <p><b>Interpretation of the scope of Article 6 QD as providing a non-exhaustive list of actors of serious harm/persecution, paras. 32-34 and 46:</b> '32. The court is not of the view that either in the Directive [i.e. Article 6 QD] or in the Regulations is "serious harm" to be defined in a way that "serious harm" must only have been carried out by actors of serious harm. 33. Whether or not a particular act was carried out by a "actor of serious harm" is of relevance under the Directive and also to an Irish decision maker (because otherwise the definition would be superfluous) but it does not necessarily operate of itself to exclude from consideration for subsidiary protection, somebody who's harm was inflicted by someone other than an actor of serious harm. If the Directive or the Regulations had meant to say that it would have done so. 34. The court is of the view that the meaning of the definitions is clear, serious harm means what it says, it is not to be confined only to harm carried out by actors of serious harm. [...] 46. It is not for the court to speculate upon the Minister's ultimate decision. It is for the Minister to decide whether the applicant is qualified for subsidiary protection. When the Minister is coming to that conclusion, he ought not to exclude from his considerations the fact that the applicant has suffered "serious harm" because of the fact that "serious harm" was not inflicted by an actor of serious harm. Whether or not harm was inflicted by an actor of serious harm or may well be relevant when considering the question of the eligibility for subsidiary protection but the fact that the harm suffered by the applicant was not perpetrated by an actor of serious harm does not make the harm less "serious" or does not exclude it from the definition of "serious harm" as set out in the Regulations.'</p>	
UK Upper Tribunal	<p><i>AK (Article 15(c)) Afghanistan v Secretary of State for the Home Department, CG</i> [2012] UKUT 00163 (IAC) 18/05/2012</p>	<p>Judgment on qualification for subsidiary protection on the basis of Article 15(c) QD. internal protection – assessment in context of subsidiary protection under Art. 15(c)</p> <p><b>Assessment of internal protection in context of eligibility for subsidiary protection on the basis of Article 15(c), para. 228:</b> It is clear from the structure of Article 8 of the Qualification Directive that internal relocation is a necessary element which is relevant not just to establishing refugee eligibility (under Articles 2 and 9) but also to establishing subsidiary (humanitarian) protection eligibility under all three limbs of Article 15 – 15(a), (b) and 15(c). So far as concerns internal relocation being a necessary consideration for Article 15(c) purposes, it has been confirmed by the Court of Justice of the European Union (CJEU) ruling in <i>Elgafaji</i> that an Article 15(c) issue can arise not just in relation to the whole of a country but also part(s) of it: see para 43. If a civilian's home area or region is considered to be in a state of indiscriminate violence at above the Article 15(c) threshold, he will still not be able to establish eligibility for subsidiary (humanitarian) protection unless able to show either a continuing risk of serious harm (the Article 8(1) "safety" limb) or circumstances that would make it unreasonable for him to relocate to another area or region (the Article 8(1) "reasonableness" limb).</p>	<p>CJEU – C-465/07 <i>Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie</i></p>

MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
IE High Court	<p><i>WA v Minister for Justice and Equality, Ireland and the Attorney General</i> [2012] IEHC 251 25/06/2012</p>	<p>Judgment on qualification for subsidiary protection. Arts. 6 and 7 QD – non-State actors of persecution or serious harm – State actor of protection <b>Complementarity of Article 6 QD (actors of persecution/serious harm) and Article 7 QD (actors of protection), para. 36:</b> ‘In the view of the Court, it is in the light of that background and objective that it is necessary to consider the purpose and effect of the definition of “actors of persecution or serious harm” as it appears in s.2 (1) of the 2006 Regulations giving effect to Article 6 of the Directive. It is a mistake, in the view of the Court, to focus upon that definition in isolation because it fails to be read and applied in conjunction with the definition of “serious harm” itself and the definitions of “person eligible for subsidiary protection” and “protection against persecution or serious harm” in Regulation 2(1) based upon Article 7 – “actors of protection” – in the Directive.’ <b>Non-State actors as actors of persecution or serious harm under Article 6 QD, para. 40:</b> ‘The statement in the Determination that “serious harm” can only be carried out by “actors of serious harm” within the meaning of Regulation 2(1) is correct because, in practical terms, if the claim to a risk of serious harm is based upon a cause or source other than the State of nationality itself and its forces and agencies or parties or organisations controlling that State or a substantial part of its territory, national protection is taken to be available and international protection is therefore unnecessary provided it is shown that the “State actors” take reasonable steps to prevent the serious harm in question when perpetrated by “Non-State actors”. Thus “non-State actors” can become “actors of serious harm” only where it is [...] shown that the State of nationality is unable or unwilling to prevent the harm perpetrated by the non-State actors.’ <b>The State as the traditional actor of protection against persecution/serious harm, para. 34:</b> ‘The commitment of the Contracting States to the Refugee Convention of 1951 and of the Member States of the European Union as addressees of the Qualifications Directive, to provide international protection to refugees and to individual who qualify for its complement form of subsidiary protection within the European Union, is predicated upon the premise that in international law it is a primary duty of every sovereign state by its institutions and through its security forces and agencies to protect its own nationals both from external attack and from internal violence and harm. The international community refrains from intervening in the internal relationship between a State and its own nationals and will do so only where an individual claimant is outside the country of nationality by reasons of the threat to him or her there of persecution or serious harm and because the government and agencies of the country in question are unwilling or unable to afford protection domestically to their own nationals in those conditions. International protection is accorded only where national protection in the country of origin is not. [...]’.</p>	
UK Supreme Court	<p><i>RT (Zimbabwe) &amp; Ors v Secretary of State for the Home Department</i> [2012] UKSC 38 25/07/2012</p>	<p>Judgment on imputed political belief for qualifying for refugee status. refugee definition – reasons for persecution – human dignity <b>Importance of human dignity to identify the reason(s) for persecution, para. 39:</b> ‘The right to dignity underpins the protections afforded by the Refugee Convention: see <i>Canada (Attorney General) v Ward</i> [1993] 2 SCR 689, approving Professor Hathaway, <i>Law of Refugee Status</i> (1991), p. 108: “The dominant view, however, is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard.”’</p>	
FR Council of State	<p><i>M B</i>, 349824 27/07/2012</p>	<p>Judgment on qualification for refugee status on ground of sexual orientation. protection against persecution/serious harm – unwillingness of the State <b>Unwillingness of the State to provide protection when persecution is tolerated or condoned by the State, para. 3:</b> ‘Considérant [...] que la circonstance que l’appartenance au groupe social ne fasse l’objet d’aucune disposition pénale répressive spécifique est sans incidence sur l’appréciation de la réalité des persécutions à raison de cette appartenance qui peut, en l’absence de toute disposition pénale spécifique, reposer soit sur des dispositions de droit commun abusivement appliquées au groupe social considéré, soit sur des comportements émanant des autorités, encouragés ou favorisés par ces autorités ou même simplement tolérés par elles[.]’</p>	

MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
CZ Supreme Administrative Court	<i>HR v Ministry of the Interior</i> , 5 Azs 2/2012-49 02/08/2012	Judgment on exclusion from refugee status and definition of particular social group. refugee definition – particular social group <b>Definition of a particular social group, per EDAL English summary of the case:</b> 'It may therefore be concluded that the applicant's position can be classified as belonging to a particular social group. This group can be "quite easily defined, as these are the persons who, before the fall of Saddam Hussein's regime, were involved in the Iraqi army and in other armed bodies, or are those who participated in exercising power. This is why they are perceived by the rest of the population to be supporters or representatives of the former regime, especially when they also follow the Sunni religion. This is a group of persons that may be quite accurately identified as they have identical or similar status and these persons could be exposed, according to the mentioned recommendation of the UNHCR, to the risk of persecution by armed groups and attacks, something that the Iraqi government is not able to prevent at the moment.'"	
PL Regional Administrative Court in Warsaw	V SA/Wa 2459/11 05/02/2013	Judgment on absence protection against persecution for qualifying for refugee status. protection against persecution/serious harm – no requirement of exhaustion of domestic remedies <b>Absence of protection against persecution not requiring exhaustion of domestic remedies, per EDAL English summary of the case:</b> 'Furthermore, the Court found that the authorities had wrongly interpreted article 1A(2) of the Geneva Convention as regards evaluating the Applicant's failure to ask the relevant authorities in her own country for protection against the actions of non-state actors of persecution. One cannot accept the position that an applicant must in every case show that he or she has exhausted all available forms of protection in his or her country of origin. The condition of absence of state protection must not in every case be understood to mean an absolute obligation to exhaust all domestic procedures. The fact that the police, as the Applicant had shown, have no basis upon which to launch an investigation would suggest that the Applicant did apply to the state authorities for protection but that no protection was granted.'	
DE Federal Administrative Court	BVerwG 10 C 23.12, BVerwG:2013: 200213U10C2312.0 20/02/2013	Judgment on public practice of religious faith as persecution for qualifying for refugee status. refugee definition – act of persecution (Art. 9(1)(a) QD (recast)) – public practice of religious faith – severe violation of freedom of religion <b>Prohibition of public practice of religious faith as severe violation of freedom of religion amounting to persecution under Article 9(1)(a) QD (recast), para. 30,</b> available in English at <a href="http://www.bverwg.de">www.bverwg.de</a> : 'Consistently with the requirements of Federal law, the court below holds that the prohibition of the public practice of a religion is in itself already suitable grounds for a severe violation of the right of freedom of religion within the meaning of Article 9 (1) (a) of Directive 2011/95/EU [...]. The court holds – consistently with the judgment of the ECJ of 5 September 2012 – that the scope of protection of religious freedom protected by Article 9 (1) of the Directive also includes the practice of religion in public, including the right to propagate the faith through proselytisation, and to persuade others to accept it [...]. In a replicable manner, it views the prohibitions of the Pakistan Penal Code aimed at the Ahmadis as an act of persecution within the meaning of Article 9 (1) (a) of the Directive, if the individual believer is impeded from practising his faith in such a severe manner that the minimum standard of human rights is thereby violated [...]. By the nature of the matter, this refers to the severe violation of basic human rights as required under Article 9 (1) (a) of the Directive. Such severe violations of human rights may, in the correct opinion of the court below, also be constituted by substantial restrictions or prohibitions on the public exercise of a faith if that exercise is 'of fundamental importance', according to the understanding of the given religion or – not necessarily entirely identically – the understanding of the individual believer [...].'	

MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
PL Supreme Administrative Court in Warsaw	II OSK 126/07 12/03/2013	<p>Judgment on family as a particular social group for qualifying for refugee status.                      refugee definition – particular social group – members of a family</p> <p><b>Members of a family as a potential particular social group within the meaning of Article 1A(2) of the Refugee Convention, per EDAL English summary of the case:</b> ‘In the examined case the authorities wrongly assumed, therefore, that the fact that the Applicant’s brother-in-law had been accorded refugee status could not affect the decision to accord refugee status to the Applicant. They found that the persecution did not directly relate to the Applicant. It should be noted that the Geneva Convention links the recognition of refugee status with a well-founded fear of persecution for the reasons cited therein. One such reason is membership of a particular social group. To recognise that the Applicant is a member of a group at risk of persecution means, therefore, that the persecution has an individual character. If, therefore, there are grounds for believing that being a family member of a recognised refugee meets the condition of membership of a particular social group, then it is only by demonstrating the absence of a well-founded fear of persecution for this reason that refusal of the application can be justified.’</p>	Austria, Constitutional Court – U677/12
AT Constitutional Court	U1674/12 12/03/2013	<p>Judgment on qualification for subsidiary protection.                      internal protection – assessment</p> <p><b>Risk assessment for determination of internal protection to be based on the actual destination of the applicant, para. 2.1:</b>                      ‘Für die zur Prüfung der Notwendigkeit subsidiären Schutzes erforderliche Gefahrenprognose ist bei einem nicht landesweiten bewaffneten Konflikt (vgl. §8 Abs1 AsylG 2005) auf den tatsächlichen Zielort des Beschwerdeführers bei einer Rückkehr abzustellen. Kommt die Herkunftsregion des Beschwerdeführers als Zielort wegen der dem Beschwerdeführer dort drohenden Gefahr nicht in Betracht, kann er nur unter Berücksichtigung der dortigen allgemeinen Gegebenheiten und seiner persönlichen Umstände auf eine andere Region des Landes verwiesen werden (vgl. §11 Abs2 AsylG 2005, zB VfGH 11.10.2012, U677/12).’</p>	Austria, Constitutional Court – U677/12
CZ Supreme Administrative Court	AS v Ministry of the Interior, Azs 56/2012-8 15/05/2013	<p>Judgment on qualification for international protection in context of criminal extradition.                      non-State actors of persecution/serious harm – protection against persecution/serious harm</p> <p><b>Obligation to examine the existence of protection against persecution in case of non-State actors of persecution, per EDAL English summary of the case:</b> ‘The Court also mentioned that if the Applicant claimed his fear of serious harm resulted from the actions of private persons, so-called non-state actors of persecution, it is necessary to examine the effectiveness of protection against such actions by the Russian authorities.’</p>	
FR National Court of Asylum Law	M R, 13000622 C 15/07/2013	<p>Judgment on qualification for refugee status.                      protection against persecution/serious harm – application to have sought protection</p> <p><b>Need for the applicant to have sought the protection from his country against persecution:</b> ‘Considérant [...] que, par ailleurs, il ne saurait utilement se prévaloir de l’absence de protection des autorités dès lors qu’il ne les a pas sollicitées; qu’il s’ensuit que M. R. ne peut, dès lors, soutenir qu’il serait exposé, en cas de retour, à des persécutions, pour un motif religieux, au sens des stipulations précitées de l’article 1<sup>er</sup> A 2 de la Convention de Genève[.]’</p>	
FR Council of State	350661 25/07/2013	<p>Judgment on notion of particular social group for qualifying for refugee status.                      refugee definition – particular social group – distinct identity</p> <p><b>Distinct identity of a social group within the meaning of the Refugee Convention, para. 5:</b> ‘Considérant qu’en jugeant que les femmes victimes de réseaux de trafic d’êtres humains et ayant activement cherché à échapper à leur emprise constituaient un groupe social sans rechercher si, au-delà des réseaux de proxénétisme les menaçant, la société environnante ou les institutions les percevaient comme ayant une identité propre, constitutive d’un groupe social au sens de la convention, la Cour nationale du droit d’asile a commis une erreur de droit [...]’</p>	

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CZ Supreme Administrative Court	<i>J/v Minister of the Interior</i> , 4 Azs 24/2013-34 20/09/2013	Judgment on qualification for refugee status. internal protection – legal and factual availability <b>Legal and factual availability of internal protection, as per EDAL English summary of the case:</b> ‘As for the possibility of internal relocation, the Court pointed out with reference to its previous jurisprudence that internal relocation should be preferred before leaving the country and its availability is therefore logically to be examined within the asylum procedure. It must, however, be examined whether it is available from a legal and factual point of view with regard to the particular situation of the Applicant.’	
UK Upper Tribunal	<i>MS (Coptic Christians: Egypt) CG</i> [2013] UKUT 611 (IAC) 03/12/2013	Judgment on qualification for international protection. effective protection against persecution/serious harm – state of emergency – ECHR non-derogable rights <b>Effective protection against persecution/serious harm in case of state of emergency, para. 151:</b> ‘In relation to a country which is in a state of emergency affecting the life of the nation and which takes measures strictly required by the exigencies of the situation, its ability to afford adequacy of protection under Directive 2004/83/EC (the Qualification Directive) is to be assessed by reference to its general securing of non-derogable rights as set out in the ECHR.’	
DE Federal Administrative Court	BVerwG 1 C 4.13, BVerwG:2014:130214U1C4.13.0 13/02/2014	Judgment on reimbursement of social benefits granted to applicant's sister. right of residence (Art. 24 QD (recast)) – declaratory nature of refugee recognition – non-retroactive application <b>Despite the declaratory nature of refugee recognition, the right of residence (Article 24 QD (recast) on residence permits) is not retroactive upon qualification for international protection under the QD (recast), para. 15:</b> ‘Aus Art. 24 Abs.1 der Richtlinie 2011/95/EU, demzufolge die Mitgliedstaaten so bald wie möglich nach Zuerkennung des internationalen Schutzes Personen, denen der Flüchtlingsstatus zuerkannt worden ist, einen Aufenthaltstitel ausstellen, ergibt sich, dass das Aufenthaltsrecht für den anerkannten Flüchtling unionsrechtlich an die Zuerkennung des Flüchtlingsstatus anknüpft, die sich ungeachtet der deklaratorischen Natur der Anerkennung gerade keine umfassende Rückwirkung beimisst. Im Übrigen wirken sich weder die Regelungen der Genfer Flüchtlingskonvention noch der Richtlinie 2011/95/EU auf das Rechtsverhältnis zwischen dem Kläger als Garantgeber und der Beklagten aus. Auch insoweit besteht offenkundig keine Notwendigkeit, den Gerichtshof der Europäischen Union gemäß Art. 267 AEUV anzurufen.’	

MS/court	Case name/ reference/date	relevance/key words/ main points	cases cited
UK Upper Tribunal	NA and VA ( <i>Protection: Article 7(2) Qualification Directive</i> ) India [2015] UKUT 00432 (IAC) 29/05/2015	<p>Judgment on application for international protection.</p> <p>Article 7(2) QD (recast) – actors of protection – quality of protection</p> <p><b>Interpretation of Article 7(2) QD (recast), paras. 13-17:</b> ‘13. We consider that the distance separating the parties on the “inter alia issue” is slight. In our judgement, the effect of the inclusion of the phrase “<i>inter alia</i>” in regulation 7(2) is to lay emphasis on the word “<i>generally</i>”. This word, an unpretentious member of the English language, denotes, uncontroversially, <i>normally</i> or <i>in the generality of cases</i>. Thus it contemplates that the specific measures which follow might not, in an individual case, be sufficient to constitute “<i>protection</i>”. It follows that the operation of an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm and (our emphasis) access thereto by the applicant may not, in a given case, amount to protection. [...] 14. Thus the central theme of the language of Article 7(2), which was doubtless chosen with care and intent following the usual process of representations, negotiations and deliberations among Member States, is that it is non-prescriptive in nature. The word “<i>generally</i>” and the phrase “<i>inter alia</i>”, in tandem, have certain other effects. First, they clearly confer choice, or discretion, on the state concerned. Article 7(2) does not compel a state to devise any particular measures of protection. Second, Article 7(2) prescribes neither minima nor maxima. Thus it is conceivable that, in certain states, practical and effective protection could be provided by measures and arrangements which, viewed through the lens of an advanced first world country, do not equate to an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm and access thereto by the individual. For example, a measure of pure deterrence or prevention based on fear of clan or family reprisals might have to be reckoned in a given context. This is consistent with the intrinsically individual nature of each case and the fact sensitive context to which the judicial inquiry will be directed. 15. There is a further effect of the language used which is also worthy of comment. Article 7(2) speaks of “<i>the actors mentioned in paragraph 1</i>”. These are not confined to state agencies. In principle, it seems unlikely that in many countries of the world the measures following the words “<i>inter alia</i>” will be devised or provided by “<i>parties</i>” or “<i>organisations</i>” of the kind envisaged. As a result, measures which may appear unfamiliar, unconventional or unorthodox in developed states may, in principle, constitute, or contribute to, effective protection against persecution. This is illustrated in the recent decision of the Upper Tribunal in MOI and Others (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) where, in considering the issue of sufficiency of protection, the Tribunal identified what it described as an “<i>apparatus of protection</i>” for civilians, composed of assorted elements: the armed forces, the police force, the district police composed mainly of dominant clan members, the “<i>nuclear family</i>”, armed private guards and a functioning central government [...]. This is consistent with the UNHCR Handbook, at [65]. Thus, to instance another illustration, the availability of women’s shelters in Pakistan guarded by armed bodyguards should be considered in assessing the overall system of protection. 16. The further feature of Article 7(2) of the Qualification Directive worth highlighting in the present context is the standard of “<i>reasonable steps</i>”. This imports the familiar concepts of margin of appreciation and proportionality [...]. Moreover, it forges a direct link between this measure of EU law and the ECHR, specifically Article 2 of the latter and the “<i>Osman</i>” principle (<i>infra</i>). 17. The “<i>reasonable steps</i>” required to provide effective protection could, in principle, embrace a broad array of measures. Thus, while in the present case the emphasis is on the need for an efficacious witness protection model, other measures may be required, depending on the individual context: for example, home security; enhanced police protection; simple warnings and security advice to the person concerned; the grant of a firearms licence; or, <i>in extremis</i>, what has come to be known in the United Kingdom as a comprehensive “<i>relocation</i>” package, which may involve a change of identity, accompanied by appropriate financial and logistical support. In law, context is everything: per Lord Steyn in R (Daly) v Secretary of State for the Home Department [...]. Furthermore, we would highlight the related principle that the claimant must provide clear and convincing evidence of the inability of his home state to provide efficacious protection to its citizen. This stems from the underlying rationale of international protection as a surrogate, coming into operation as a last resort: see Canada (Attorney General) v Ward [...].’</p>	UK, Upper Tribunal – MOI and Others (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) UK, House of Lords – R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532 Canada, Supreme Court – Canada (Attorney General) v Ward [1993] 2 SCR 689









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