ACTORS OF PROTECTION AND THE APPLICATION OF THE INTERNAL PROTECTION ALTERNATIVE

NATIONAL REPORT

SPAIN

European Refugee Fund of the European Commission

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APAIPA National Report: Spain

I. Acknowledgments.

This country report is based on research carried out by Ms Maria Valles.

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II. Glossary.

AP – Actors of Protection

CIAR – Inter-Ministerial Commission for Asylum and Refuge (Comisión Interministerial de Asilo y Refugio)

HNC – High National Court (Audiencia Nacional)

IPA – Internal Protection Alternative

OAR – Office of Asylum and Refuge

III. Background: the national asylum system.

a. Applicable Law.

Article 13(4) of the Spanish Constitution of 1978 guarantees the right to asylum. This right was regulated for the first time in 1984, by Law 5/1984, amended in 1994. In 2009 Spanish asylum legislation was adapted to fully incorporate the Regulations and Directives making up the Common European Asylum System, through Law 12/2009. This law has not yet been complemented by an implementing decree. Article 14 of the asylum law transposed Article 7 of the Qualification Directive literally. Article 8 of the Directive was not transposed. At the time of the research, ECRE was informed that Article 8 will be transposed in the forthcoming implementing decree.

b. Institutional Setup.

All protection claims filed in Spain are processed by the Office of Asylum and Refuge (OAR), an organ of the Ministry of Interior that has general competences on asylum issues. The OAR has one office, in Madrid, and its eligibility officers (asylum officers) perform inadmissibility screening, review international protection claims and prepare reports on them. Each officer is responsible for applications from a particular set of countries of origin.

An Inter-Ministerial Eligibility Commission (CIAR) meets on a monthly basis to review OAR´s reports on individual cases that have passed through the inadmissibility phase and recommends a decision to the Minister of Interior, who takes the final administrative decisions on protection claims. The CIAR is composed of one representative from the

Ministries of the Interior, Foreign Affairs, Justice, Labour and Social Security, Health, Social Services and Equality (Equality Unit), and an observer from UNHCR.

The High National Court hears appeals. The Supreme Court hears further appeals. These courts have neither specialised judges nor specialised chambers on refugee law.

c. The Procedure.

Law 12/2009 established a single system for assessing both refugee status and subsidiary protection. Subsidiary protection is considered only after determining that the applicant is not a refugee. The asylum law establishes two different procedures:

(1) Procedure within territory: for claims issued in Spanish territory. If the applicant is in Madrid the application should be filed at OAR´s office, otherwise it can be filed at authorized police stations or foreign offices. Once admitted, claims can be processed under the accelerated/priority ("*urgent*") procedure or the ordinary procedure. The only difference is the processing time to decide: three months for the accelerated/priority procedure and six months for the ordinary one. The procedural time limits remain similar as well as the guarantees and rights for the applicants. No differences have been found in the application of the IPA between these two procedures.

(2) Border procedure: for claims issued at a border point, which are also applicable to claims filed at a Detention Centre for Foreigners.[1] The time frame is short: 4 days for the main procedure and first decision,[2] 2 days to prepare and present an appeal, and 2 days for the appeal to be decided. The OAR examines the application, and the Interior Ministry renders the initial decision as well as deciding the appeal. In the context of the border procedure, Article 21(2) of the asylum law empowers the Interior Ministry to deny a claim as manifestly unfounded, or because the applicant is from a safe country of origin or subject to exclusion.[3] Some additional procedural guarantees are foreseen, such as free legal assistance, the right to request a re-examination of the decision and the involvement of UNHCR from the lodging of the claim and throughout the procedure.

In the main procedure, unlike the border procedure, the Inter-ministerial Commission for Asylum and Refuge is responsible for proposing to the Ministry of Interior whether to grant or reject an asylum claim. UNHCR provides its opinion on admissibility and takes part in the meetings of the Inter-ministerial Eligibility Commission as an observer, where it presents its views on doctrine and on specific cases.

[1] Centro de detención de extranjeros (CIE).
[2] The Interior Ministry may extend this to up to a total of10 days at the request of UNHCR.
[3] NGOs argue that this permits the Ministry to deny protection claims on the merits through the application of what were formerly admissibility grounds. OAR stakeholders interviewed stated that this provision allows them to consider the IPA when they are analysing a claim lodged at the border or at a detention centre. In four of the six border claims analysed (three from Nigeria and one from Brazil) the IPA is used as a complementary argument to deny the claim. The IPA was not used in any of the applications lodged at detention centres examined (four), but UNHCR and NGOs assert that it is also used in the same way that is used in the procedure within the country. The 2009 law amended the former admissibility asylum procedure. This is now limited to "formal reasons": lack of competency to assess the claim (Dublin cases and when Spain is not responsible to examine the claim according to international conventions) and lack of requirements (first country of asylum, safe third country, reiteration of a previously rejected claim in Spain and claims by a national of an EU member state).

Remedies

Administrative appeals can be lodged before the Ministry of Interior. The HNC hears appeals on the merits. The latter appeal extends to the facts, therefore the court may re-examine evidence submitted at the first instance. The appellant may introduce new evidence. A further appeal (cassation) may be filed before the Supreme Court. Appeals against inadmissibility decisions must be filed before the Administrative Chamber before they may proceed to the HNC. Both the HNC and the Supreme Court have the power to annul the first instance decision and grant international protection.

General figures

During 2012, 2,600 individual first instance decisions were made on asylum applications. Asylum was granted to 230 individuals, 285 were granted subsidiary protection, 10 were granted humanitarian permits, and 2070 were rejected.[4]

With regard to appeals against the denial of international protection (on the merits) through the fast track procedure (applications lodged at a border point or a CIE): 54 claims were lodged in 2012, 77 in 2011 and 10 in 2010. With regard to the nationality of the applicants in 2012, 7 appeals were lodged by applicants from the Sahara, 7 from Colombia, 5 from Nigeria, 3 from Brazil and 3 from Cameroon.

With regard to appeals lodged through the in country procedure: 593 were lodged in 2012, 714 in 2011, and 814 in 2010. The nationality of the applicants who lodged an appeal in 2012 were Nigerian (106 appeals), followed by Colombia with 75, Guinea with 42 and Cameroon with 32.[5]

d. Representation and Legal aid.

Asylum seekers have a right to free legal assistance throughout the asylum procedure.[6] The Spanish Asylum Act stipulates that legal aid (including the presence of a lawyer at the asylum interview) is mandatory when claims for asylum are made at the border. Asylum seekers who apply for asylum in the country can ask for the assistance of a free legal advisor including non-governmental organisations that specialise in refugee law. Alternatively asylum seekers may also request a lawyer of the competent Bar Association of the province where they lodged their application. In case of an in-country application, the interview can take place in absence of a lawyer. For additional interviews legal advisors/lawyers may be present upon request of the applicant.

IV. Methodology: sample and interviews.

a. Methodology used.

[4] Eurostat http://www.emnbelgium.be/sites/default/files/publications/eurostat_2012.pdf
[5] Official figures according to the OAR included in « Situation of refugees in Spain » CEAR Report 2013 available at http://cear.es/wp-content/uploads/2013/06/InformeCEAR_2013.pdf
[6] See Article 16 (2) and Article 18 (1) (b) of the Spanish Asylum Act.

The research supporting this report was based on the analysis of more than one hundred decisions issued by Spanish authorities between January 2011 and Jan 2013 and on stakeholder interviews. Persons interviewed included senior officials and eligibility officers at the OAR, representatives of UNHCR Spain, and lawyers and supervisors at the NGOs ACCEM, CEAR, and RESCATE.

b. Description of the sample.

Sources

According to OAR, since cases are not scanned it is not possible to search relevant cases for the purpose of the study by keywords. Country of origin was, therefore, the main criteria agreed to select cases. In order to form a fuller picture of national practice, further cases were obtained from UNHCR and CEAR.

(1) First instance cases

(i) The Asylum and Refugee Office (OAR)

Upon request, the authorities at OAR provided access to a sample of their case files, for the project researcher to review confidentially at the OAR office in Madrid. No information was removed from the premises, and no copies were made.

- Size: approximately 60 cases
- Dates: cases decided between June 2011 and March 2013.
- Sample composition:

❖ **1/3 selected on the basis of specific countries of origin:** cases from Afghanistan, Russia and Somalia (to facilitate comparison with case profiles in other Member States), as well as Nigeria and Algeria (as two of the most common countries of origin among asylum seekers in 2012 in Spain).[7]

❖ **1/3 representative of the national asylum case law as a whole:** Nigeria and Ivory Coast are two countries that Spain receives a lot of applicant's from. According to UNHCR and NGOs, IPA has been one of the grounds argued to deny international protection. Colombia and the DRC were also countries that Spain receives a lot of asylum applications from; IPA was applied with respect to asylum seekers coming from both countries even before the transposition of the QD 2004, and thus were also included in the sample.

❖ **1/3 vulnerable applicants:**

(i) Women: all stakeholders interviewed agreed that gender is a factor in the application of the IPA, since gender based persecution often occurs via non-state actors. Illustrative cases concerning women were selected from Nigeria and Algeria.

[7] Syria is also one of the countries with more asylum seekers in Spain, but, according to UNHCR, there should not be issues on IPA, because Syrians are been granted subsidiary protection status.

(ii) LGBT people: IPA is only applied to countries that do not penalise based on sexual orientation. As a result, the IPA is often used more in cases from Latin and Central America. Accordingly the sample included asylum cases concerning LGBT people from Honduras and El Salvador.

(iii) Unaccompanied children: according to UNHCR there are significant numbers of cases in Spain involving unaccompanied children from Afghanistan, most of which are granted subsidiary protection, but some are rejected based on IPA being invoked. Therefore cases concerning unaccompanied children from Afghanistan were added to the sample.

Files were consulted at the OAR office in Madrid, using files selected based on the countries of origin discussed above. Not all the analysed cases were included in the sample, but most were as they helped to identify whether or not the IPA or AP concepts are invoked in particular situations. After approximately 60 cases were reviewed, none of the sample included a decision where asylum was granted. Upon request, OAR then provided access to some cases where the applicant was recognised as a refugee. This was the only time when the selection criterion was not based on the country of origin. In all, 58 cases consulted at OAR´s office were included in the sample.

(ii) UNHCR

Due to its observer status with the Inter-ministerial Eligibility Commission that recommends a decision to the Minister of Interior on international protection claims, UNHCR has access to reports submitted by eligibility officers of the OAR recommending whether or not to grant protection. UNHCR Spain supported the research by providing additional cases for the study from the countries of origin selected for sampling. 43 of the most representative cases from this group were included in the sample; consulting the wider set facilitated the identification of trends in the use of the AP and IPA concepts, particularly with regard to applicants from Nigeria and Afghanistan. As with the cases OAR provided, these cases were consulted at UNHCR's office and no information contained in them was copied or removed from the premises.

(iii) CEAR

Analysis of cases provided by UNHCR and the OAR indicated that the IPA is invoked in border procedures.[8] CEAR, the only NGO that provides legal aid at border points in Spain, confirmed this practice, mostly in cases of people coming from Nigeria (including victims of trafficking) or Central America (cases of gender based violence or victims of gangs (maras)).

(2) Appeal cases

The sample included 31 appeal cases: 22 from the High National Court and 9 Supreme Court cassation appeals. Out of more than 60 appeals reviewed from these two courts, no decisions of the HNC within the past two years addressed the issue of AP or IPA and granted protection.[9] Most of the Supreme Court decisions, relevant for the concepts

[8] See for instance : MoI, 17.02.2012 (NIG102MNSNO), MoI, 19.10.2013 (BRA103FNSTO) and MoI, 05.04.2013 (NIG56MNSNO).

[9] HNC cases tend to reproduce literaly OAR's eligibility reports without addressing the Actors of Protection nor the IPA concepts, and without referring to relevant Spanish provisions or to the QD.

discussed in this study concerned applicants from Colombia. This reflects the fact that several years ago the most prominent cases in which IPA was raised concerned applicants from Colombia.

V. National Overview.

In Spain, both the AP and IPA concepts tend to be invoked as supplementary rather than main arguments for denying a protection claim. Usually there is not a comprehensive analysis or discussion of the applicable law. According to OAR stakeholders, there are no internal guidelines about how to apply IPA or AP. Consequently, and considering that IPA is not included in any Spanish legal provision, the way of applying the concept varies depending on factors including: the eligibility officer, the country of origin of the applicant, the credibility of the facts, etc.

In the majority of the analysed decisions, IPA is something that could be interpreted as being applied as a secondary argument when the credibility of the applicant is disputed,[10] or when there is not a well-founded fear of persecution. Most of the decisions of High National Court analysed in the sample reproduce the arguments used in the eligibility report. Only one of the decisions of the High National Court reviewed for this study granted international protection. The Supreme Court granted refugee status or subsidiary protection in five of the cases included in the sample.

Applications for international protection by trafficking victims, who are typically citizens of Nigeria or the DRC, are routinely rejected on grounds including the availability of protection in the home country in the IPA region.[11] The OAR generally does not consider that a trafficking victim might be eligible for refugee status or subsidiary protection.[12] In rejecting applications from trafficking victims both at the border and in the normal procedure, authorities argue that other mechanisms are available in Spain to protect against trafficking, or that it is safe for victims to return because "there are official programs and NGOs working for the defence of the rights of these victims".[13] However, in 2013 two applicants who were victims of trafficking were granted refugee status. IPA is sometimes added as a secondary argument, but the risk of re-trafficking is not assessed.

a. Actors of Protection.

[10] This is the main argument used in Spain to deny international protection, see M.T. Gil-Bazo, 'Thou shalt not judge' … Spanish judicial decision-making in asylum and the role of judges in interpreting the law. In: Guy S. Goodwin-Gill & Hélène Lambert, ed. The Limits of Transnational Law. Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union. Cambridge: Cambridge University Press, 2010, pp.107-124.
[11] See for example MoI, 21.01.2013 (NIG17FNPTV); CIAR, April 2013 (NIG60FNSTV); CIAR, November 2012 (DRC67FNSVT); CIAR, January 2012 (NIG90FNPVT).
[12] Interviews with stakeholders from UNHCR, CEAR, OAR. Spanish Ombudsman Annual Report 2012 p. 48. OAR indicated the claim is assessed on a case-by-case basis, and that this assessment may lead to conclude that a victim of trafficking qualifies as a beneficiary for international protection. However, this should be based on an individual analysis and should not be applied as a blanket policy. UNHCR mentions that in general terms the Spanish Authorities still consider that applications by trafficking victims are - in general terms - not eligible for refugee status. However, in 2013, a few victims of trafficking have been recognized as refugees.
[13] CIAR, January 2012 (NIG90FNPVT): "*according to the information provided in this Office, there is no reason for people who have left the country with a trafficking network in returning to Nigeria, to fear any adverse reaction by the Nigerian authorities, as these even provide some assistance and protection in the country, where exist various NGOs that assists victims of trafficking for sexual exploitation.*"

Case analysis shows that first instance decision makers do not invoke Article 14 of the asylum law, which transposed Article 7 of the Qualification Directive. Eligibility officers assess whether the applicant's state provides protection, but without awareness of the concept of agents of protection contained in Article 14 (although they are familiar with the agents of persecution concept).[14]

The only reference to Article 14 in first instance cases analysed for this research appeared in the eligibility reports of cases from Afghanistan. These, however, only referred to the article in an overview of the legal provisions applicable to asylum cases in Spain, without actually analysing or applying the concept. It can be argued, however, that Spanish authorities apply the concept de facto when they assess whether the person can find protection in their state of origin, but in doing so they often refer to Article 13 (which transposed Article 6 of the Qualification Directive, regarding actors of persecution while also referring to protection provided by state agents) instead of Article 14. Subsidiary protection is granted as a blanket policy for cases from certain countries such as Afghanistan and Somalia, so there is not an assessment of the actor of protection in these cases.

i. The Nature of Protection.

1. Prevention of persecution or serious harm.

Spanish authorities sometimes cite general measures taken to prevent persecution or serious harm. One example is the measures taken by Nigeria with regard to the attacks against Christians. Measures cited by the Spanish authorities as sufficient to constitute protection against persecution included the deployment of soldiers and intensified patrolling of police in the city of Kano,[15] as well as new rules prohibiting the use of motorcycles in northern Nigeria to prevent attacks and efforts to initiate a peace dialogue with Boko Haram.[16]

Stakeholders with NGOs and UNHCR report that normally eligibility officers merely refer to laws of the country of origin that prohibit the acts of persecution in question, without analysing whether the laws are effectively enforced. At times this concept of "effectiveness" is mixed with the provision on actors of persecution (Article 13 of the asylum law). For example, in one case an Afghan woman who applied for international protection on the basis that she was at risk of gender based violence, the eligibility officer recommended granting refugee status due to the "lack of capacity of the authorities to provide effective protection to the applicant"[17], citing Article 13.

Research did not reveal any specific assessment of the effectiveness of protection available to particularly vulnerable applicants, nor of the availability of care arrangements for unaccompanied children. No assessments were observed regarding aspects of protection beyond the simple prevention of harm, such as access to human and social rights, nor of the

[14] Interviews with national eligibility officers.
[15] CIAR, February 2012 (NIG80FNSNO): "*We can conclude from this that there is evidence that the applicant's home country is fighting in an organised and systematic manner against the alleged persecutor agent, as the state is not inactive or tolerating behaviours that are causing fear to the applicant*".
[16] MoI, 19.03.2013 (AFG58FRSNO).
[17] CIAR, May 2013 (NIG88FRSTV).

durability of protection. While there is no formal presumption against the availability of protection when state agents are the source of the risk of persecution, in none of these cases was it argued that the applicant might have access to protection in the country of origin.

Actual access to protection in the country of origin was not assessed in any of the cases reviewed. Accessibility was only referenced in the sense that asylum authorities almost always argued that the applicant should first approach national authorities for protection against non-state actors of persecution, and remain in the country for some time to give those authorities the opportunity to protect. Failure to do so tends to contribute to a finding that the applicant's testimony regarding a risk of persecution is not credible.

ii. Actors of Protection.

Although the 2009 asylum law transposed Article 7 of the Qualification Directive, neither the transposing provision nor the provisions of the Directive appear to be formally used in asylum decisions. There is no explicit interpretation or application of the terms and concepts used in Article 7(1). Nonetheless, reviews of case files and interviews with stakeholders yielded some general observations and patterns in the application of the concept of protection.

1. State actors of protection.

The research did not reveal the use of any uniform criteria to assess under what circumstances a state can be considered an actor of protection. Normally when protection against alleged persecution by non-state actors is denied, the decision will cite a lack of COI or other information indicating that state authorities tolerate or cooperate in the persecution, or that the applicant could not obtain sufficient protection from them.

For example the following paragraph is used to support almost all denials of claims of Nigerian nationals fleeing violence of Boko Haram in the north of the country:

> *"the applicant alleged fear of persecution by the radical Islamic group called Boko Haram, as he is Catholic, without proving that the applicant's country of origin does not fight in an organised and systematic manner against the acts of the agents of persecution . . . because the state is not inactive or tolerates the acts alleged by the applicant as the source of his fear, or that he has avoided the danger through the internal protection alternative"*

Spain sometimes grants subsidiary protection, which carries a five year residence permit under the new asylum law, to all applicants from a country in civil war or other widespread violence. According to stakeholders from state institutions and civil society, Spanish authorities often follow UNHCR country specific recommendations. For example, nationals from the Ivory Coast were granted subsidiary protection until UNHCR updated its guidelines on this country. NGO stakeholders observed that cases before the OAR of nationals of some

countries in conflict tend to be delayed when it is not clear how long the conflict will last, citing as an example the cases of applicants from Mali.[18]

Although most claims of persecution by non-state actors are denied for lack of evidence that states of origin remained passive in the face of the alleged persecution, eligibility officers proposed granting asylum in some cases based on gender related persecution (violence against women in particular) from Algeria, Russia and Afghanistan, citing a "culturally accepted practice" preventing the state from protecting the applicant.[19]

In the cases analysed where the applicant was from Central America (mainly from Honduras, El Salvador or Mexico) based on persecution by gangs (maras) or domestic violence, eligibility officers almost always recommend denying protection. However, in one case of a woman fleeing domestic violence in El Salvador,[20] the CIAR instead followed UNHCR's recommendation and granted subsidiary protection.[21] The CIAR commission referred to the efforts of the authorities to fight gender based violence (two laws and the creation of special units of attention to victims), and the presence of NGOs working for the defence of the rights of the victims, but cited a lack of resources and found that "*so far, Salvadoran authorities' efforts are not being as effective as they should*". Similarly, Spanish authorities grant subsidiary protection to Afghan nationals arguing that the applicant's claims "*are consistent with the available information on the country of origin where the lack of control of the territory by government forces in certain zones makes some regions places where insecurity is palpable*".

2. Non-State Actors of protection.

Except for some exceptions in claims of Nigerian applicants, where NGOs and Christian groups or churches are used as potential agents of protection, Spanish authorities do not consider the possibility of non-state actors of protection. None of the cases reviewed that referred to a non-state actor of protection found that that protector was unable to provide adequate protection. Eligibility reports in the cases reviewed for this study do not formally analyse the factors listed in the law as necessary for a non-state actor to be considered as an actor of protection.

i. Types of non-state Actors of Protection.

Eligibility officers and decision makers rarely refer to specific types of non-state actors of protection. When they do, it is usually to NGOs who provide support or protection to women who are at risk of forced marriage or gender based violence. A few cases argued that the applicant could have found protection from Christian armed groups in Nigeria. None of the

[18] OAR indicated that it is necessary to take sufficient time to assess the evolution of the situation in the country with a view to adopt the decision with the required elements of examination, in order to grant the most appropriate protection according to the specific situation. During the processing of the claim, pending a decision, all applicants are guaranteed with a set of rights, including access to the labour market 6 months after the lodging of the application.

[19] See for example MoI, 21.09.2013 (AFG08MRSLG); MoI, 22.08.2012 (ALG40FRSLG); MoI, 22.08.2012 (RUS47FRSSPTO).

[20] OAR, 29.01.2013 (ELS51FSPTO).

[21] This happen very rarely. It should be noted that the eligibility report, as almost all the cases from Central-American countries invoked IPA and AP concepts.

cases or other sources consulted for this research referred to protection by international organisations, multinational forces,[22] clans or tribes.

OAR consistently states that Nigerian women claiming asylum based on forced marriage or gender based violence could avoid a risk of persecution (if her allegations are true) by moving to Lagos where "there are many NGOs" working for women.[23] This argument is also used in cases of alleged victims of trafficking from Nigeria or DRC and victims of domestic violence in other countries, such as Honduras or El Salvador.

However, there is a judgment from the High National Court,[24] affirming a judgment of the Administrative Court that granted asylum to a Nigerian woman as a victim of gender based violence and forced marriage. The case was decided under the former asylum law, but it shows how the arguments of NGO as potential actors of protection is not new and is being applied regardless of the applicable law. In this judgment the court agreed with a UNHCR report that argued against the consideration of NGOs as actors of protection.

b. The Internal Protection Alternative.

Spanish authorities only use IPA if the credibility of the applicant is disputed or they consider that there is not persecution under the Refugee Convention. In most cases where it is applied, eligibility officers simply allude to the possibility of relocating to another part of the country. If a specific location is proposed, it is usually the capital city, for example Lagos or Kabul. No cases reviewed for this study indicated a protection location based on information provided by the applicant. As a result of the high number of appeals lodged by people from Colombia in the early 21st century in which the IPA was at issue, jurisprudence with regard to IPA continues to be guided largely by decisions in this set of cases.

IPA is assessed in relation to international protection as a whole, including refugee status and subsidiary protection. In all first instance cases examined during this research, OAR eligibility reports used IPA only in the assessment of refugee status. Spanish authorities grant subsidiary protection to applicants from Afghanistan and Somalia, based on the assumption that there are no general conditions of safety in these two countries. The sample includes 16 cases of Afghan asylum seekers, in which the IPA was used as one of the arguments to deny refugee status, but all applicants were granted subsidiary protection. However in two of the appeals analysed, the HNC cited the IPA as one of the arguments to uphold the denial of subsidiary protection.[25]

The IPA was not applied in any of the cases analysed for this study where the actor of persecution was a state actor. One of the interviewees expressed the view that it might be applied in principle if the actor of persecution were a local authority in a large country such as Nigeria.

[22] None of the cases studied referred to the Abdulla judgment of the CJEU.
[23] See for example the following cases of the sample: CIAR, October 2012 (NIG78FNSTO); MoI, 6.11.2012 (NIG12MNSTOSP); CIAR, January 2012 (NIG79FNSTO); CIAR, October 2012 (NIG81FNSTO); CIAR, October 2012 (NIG83FNSTO).
[24] HNC Appeal 478/2010. Of the High National Court decisions issued over the past three years that were reviewed for this study, this was the only one that granted protection.
[25] « In sum, there is no reason to believe that a displacement within the national territory of the state of origin of the applicant and claim for protection by national authorities may grant the same protection that is now planned through the institution of subsidiary protection": HNC, appeal 199/2011 (case MEX116FNSNO) and HNC appeal 200/2011 (MEX117MNSNO).

i. Assessment of the Internal Protection Alternative.

While many of the cases analysed affirm that IPA would be the most "*reasonable*" or "*logical*" option to avoid persecution, taking into account cultural similarities and the distance between the country of origin and Spain, in the majority of the cases there is no substantial assessment of this option. The OAR eligibility reports and asylum administrative decisions analysed in this research refer to this possibility through standard paragraphs.

In the majority of the cases that IPA is invoked the recommendation states: *"The applicant claims persecution against which, according to the content of the file and the information available on his country of origin, he may find effective protection elsewhere in his own country, where he is reasonably expected to move"*.[26]

Other examples include:

> "*it makes little sense that the applicant crosses half a world before trying a displacement to another zone of the country not dominated by the Taliban*";
>
> *"It would in principle be more logical to follow the previous option (IPA) rather than leaving the country of origin to other countries geographically remote with cultural characteristics not related to him, abandoning his family"*; and
>
> "*in this case there has not been internal displacement to another location or area of the same country away from that in which the criminal acts occurred, so there is not a personal situation of persecution and vulnerability requiring international protection*".[27]

1. Safety in the protection region.

The lack of a risk of persecution or serious harm in the protection region is not specifically verified. OAR eligibility reports make general references to the capacity to control the country, such as the ability of the Taliban to persecute people throughout the country. Almost all cases include an argument that *"the Taliban are independent cells located in a particular place and that do not have minimum infrastructure to pursue a private citizen in the country"*, and therefore it is "*not logical*" that the applicant would flee to Spain rather than finding a safe location within Afghanistan. Similarly in cases from Nigeria, it is argued that if the applicant feared persecution they could relocate within the country *"away from where the acts of persecution may have occurred, as the agent of persecution does not dominate completely and effectively the entire national territory"*.

2. Securing human and social rights.

i. General circumstances

OAR eligibility reports often refer to the size of the country and the population density in a region as factors indicating relocation is possible. In proposing an IPA for applicants from Nigeria, OAR eligibility reports always cite the large size of the country. Other factors

[26] See e.g., cases MoI, 9.07.2012 (ELS49FNSSP); MoI, 20.09.2012 (ELS50FNSNO); MoI, 04.07.2012 (COL28MNPNO); MoI, 30.07.2012 (COL29MNPTV).
[27] CIAR, March 2012 (DRC65MNSNO).

considered include situations or history of conflict, such as when Nigerian Christians are expected to relocate to the south of the country. Another consideration is the power of the actor of persecution when eligibility reports propose relocation to a region of the country where that actor does not have control. Living standards or the ability to exercise rights in the proposed region were not referenced in any of the cases reviewed.

ii. Personal circumstances

When evaluating the IPA, OAR eligibility reports usually do not take the personal circumstances or characteristics of the applicant into account. In one case of a Nigerian applicant, the report referred in generic terms to the possibility that, if the applicant's testimony was true, they could avoid the risk of persecution by relocating to another area of the country where they could have relatives.[28]

None of the cases reviewed referred in this context to factors such as language, ethnicity, age, sex, socioeconomic status, health or disabilities. Vulnerability or specific trauma arising out of prior persecution is not considered, because of the practice of only invoking the IPA as a secondary argument when the applicant's credibility is already in question. Children from Afghanistan receive social assistance pursuant to Articles 47 and 48 of the asylum law and are ultimately granted subsidiary protection, but their status as children is not taken into account in applying IPA as one of the arguments used to deny them refugee status.[29]

3. Access.

Access to protection in the IPA region is rarely assessed. In two cases reviewed, the eligibility officer remarked that it would have been reasonable for the applicants, who were both children and whose parents had been killed, to stay in Kabul[30] with an uncle and for the latter applicant in Kinshasa[31] with brothers rather than seeking protection in Spain. No cases mentioned the availability of safe and legal travel to an IPA region.

i. The Application of the IPA.

1. Procedure.

i. In which procedure is the IPA applied?

IPA is not being used under any circumstances in some countries where Spain considers that there is an "armed conflict", such as Syria or Somalia.[32] All applicants that can prove that they are a national of Syria or Somalia will be granted subsidiary protection because there is a "generalised internal armed conflict". When eligibility for refugee status is

[28] CIAR, April 2013 (NIG60FNSTV)
[29] See for example: CIAR, September 2012 (AFG97MSPUM) and MoI, 18.12.2012 (AFG03MSPUM).
[30] MoI, 5.10.12 (AFG07MSPUM).
[31] CIAR, May 2013 (DRC64MNSUM).
[32] Spanish law does not contain a definition of armed conflict. This concept is referred in the analysis of the claims of applicants from countries such as Afghanistan, Somalia, Colombia or Syria.

assessed in these cases, IPA is not an issue; the arguments used to deny it are lack of credibility or lack of an individualised and concrete risk of persecution.

In the case of Afghanistan, although it is argued that the situation has improved since the fall of the Taliban regime; applicants are still granted subsidiary protection. However, IPA is used consistently as a complementary argument to deny refugee status when the claim is based on persecution by the Taliban. Spanish decision makers affirm that Taliban groups do not have the capacity to control all of the country, so the persecution can be solved by internally relocating the applicant.[33]

The practice with Colombia is also different. Spanish authorities and Courts affirm that there is not a general internal conflict in the whole territory of the country. Consequently, when the applicant is persecuted by non-state actors, IPA is almost always used as a complementary argument to deny international protection. In the case of Colombia subsidiary protection is not granted. While in the past Spanish authorities often referred to UNHCR guidelines of Colombian nationals issued in 2002, they no longer use the updated UNHCR country guidelines when assessing international protection needs from asylum seekers from Colombia issued in May 2010.

ii. At what point in the procedure is the IPA applied?

When it is used, the IPA is usually applied during the main assessment of the protection claim, as part of the analysis as to whether a risk of persecution exists. According to the eligibility officers and confirmed by cases analysed in the sample, IPA is only considered when there are other arguments to deny the claim, so there is not a comprehensive analysis of the IPA on a case by case basis. The IPA argument is normally referred to in the decisions as standard paragraphs, without specific consideration to the individual case. In none of the cases studied was a risk of persecution first established, and then an IPA analysis applied.[34] The availability of a fast-track procedure for claims made at the borders or from a detention centre (Foreigner Internment Centres – CIEs) leaves open the possibility that the Interior Ministry could deny claims using IPA before admitting the applicant to the full assessment procedure.

iii. Procedural safeguards

Generally the applicant is not informed that the IPA is under consideration until the first instance procedure is complete and the decision is rendered. The applicant and his/her legal representative can access the file after the first instance decision. The file includes the eligibility report prepared by the case worker where considerations on the use of the IPA are to be included. Case files reviewed for this study only contained records of the initial interview carried out during the filing of the claim.[35] When applications are lodged at

[33] CIAR, March 2012 (AFG99MSPNO): *"Internal displacement is consistent with the COI since it is true that after the fall of the Taliban regime and the change of circumstances in Afghanistan after the military intervention of the Western coalition, with a displacement to another area of the country there is for one Afghan may have well-founded fear of persecution by a guerrilla group located at a specific place and that does not have minimum infrastructure to persecute an anonymous citizen all over the country."*

[34] According to OAR stakeholders, currently the IPA is never applied when an applicant has demonstrated a credible need for protection,

[35] Under the asylum law (art. 17 (4) Asylum Law) the assessment of protection claims should include an individual interview.

locations other than the OAR office in Madrid, this interview is performed by the police officers who record the applications. In most of the cases reviewed, eligibility officers do not conduct additional interviews during their assessment.

Increasingly during the last year, if the IPA has been one of the arguments used to deny an application, the authorities include a paragraph to that effect in the decision. This paragraph used to be a standard one,[36] but still informs the applicant, making it possible to contest the point during an appeal. This is not the case if the applicant is granted subsidiary protection instead of refugee status. In these cases, the applicant would have to consult the eligibility report in the file at the OAR office in Madrid to know whether the IPA had been raised.

2. Policy.

i. Frequency of application.

There are no public guidelines to regulate the practice of national officers dealing with international protection claims. According to Spanish authorities in charge of international protection claims[37], there are no internal guidelines on the use of IPA, so, and given that there is not provision in Spanish Asylum law which refers to it, it seems that the eligibility officers can decide whether or not they invoke the IPA. Stakeholders' interviews provided a similar impression.

ii. IPA as blanket policy?

According to interviews with stakeholders, the OAR consistently uses the IPA as a secondary argument in cases of non-state actors and cases of persecution on gender grounds, and with regard to certain countries of origin, such as Nigeria, Honduras, El Salvador, Mexico, RDC, Colombia and Afghanistan.

The sample confirms these statements with some exceptions. The sample contains cases of gender related persecution where the elegibility officer affirms that "there is a culture of tolerance for violence against women in the country" so the IPA is not even mentioned. Particularly illustrative in this regard are one case from Russia and other from Algeria.[38] However, IPA is being invoked in cases where women flee domestic violence and forced marriage in countries like Honduras, Guatemala, Mexico or Nigeria.

In one of the cases reviewed, the eligibility officer suggested the granting of refugee status to a man from Afghanistan who alleged persecution for being part of one specific group "bacha hazi".[39] The eligibility report affirms in this case that the applicant could not find protection in his country for being an "*accepted cultural practice*". However other cases in the sample consistently showed how the OAR is consistently applying IPA as secondary argument for not granting refugee status to children who have lost their parents as a result of the general

[36] "The applicant claims persecution against which, according to the contents of the file and the information available on his country of origin, the applicant may find effective protection elsewhere in his own country, where he is reasonably expected to move".
[37] Head of unit, focal point at OAR for this study assigned by the Spanish Director of Asylum and Refugee at the Ministry of Interior
[38] MoI, 12.02.2013 (RUS47FRSSPTO) ; MoI, 22.08.2012 (ALG40FRSLG)
[39] MoI, 21.09.2013 (AFG08MRSLG).

violence or, who has leaved their country fleeing forced recruitment.[40] However, it must be indicated that these children are always granted subsidiary protection.

iii. Scope of application of the IPA

The IPA is most likely to be applied to applicants from Nigeria, Colombia, Honduras, Mexico, El Salvador, Guatemala, DRC and Afghanistan. It is not formally excluded for any group of applicants, but it is not invoked in any of the cases reviewed that concerned LGBT. The sample also includes cases where the women were victims of domestic violence and where IPA is not considered and the applicants are granted with subsidiary protection[41] because the authorities of certain countries (Honduras and El Salvador) do not have the capacity to provide effective protection in the terms of Article 6 of the Qualification Directive (transposed as Article 13 of Law 12/2009).

iv. Application if technical obstacles to return

This possibly is not raised in any of the cases analysed. Spain did not transpose Article 8(3) of the Qualification Directive, and decision makers at administrative level very rarely refer directly to provisions of EU law.

c. Assessment of facts and circumstances.

When the IPA is raised, the applicant is asked to demonstrate that their state of origin does not provide appropriate protection.[42] The applicant bears the burden of proving (1) they tried to avoid persecution through internal relocation or (2) the conditions are not safe in other parts of the country. Almost all of the analysed cases where IPA has been raised contained phrases such as "*there is no evidence that the applicant has solved the persecution through an alternative of internal flight by moving to another location within the same country*".[43]

In a landmark 2009 case on the assessment of evidence in asylum claims in general and regarding IPA in particular, the Supreme Court overruled the administrative decision and the court judgment that upheld it, and ultimately granted the applicant refugee status. The court stated that asking the applicant to prove the absence of an IPA improperly reverses the burden of proof, which is not in accordance with prior Supreme Court jurisprudence and contravenes international law.[44] However the cases analysed for this study, including those of the National High Court and the Supreme Court, indicate that this ruling is not consistently followed. There appears to be no consistent practice on the analysis of IPA in general and the burden of proof in particular, but in the majority of the cases the courts confirm the arguments of the OAR eligibility reports. In many appeals reviewed that concerned the application of IPA, the courts refer instead to a 2002 Supreme Court judgment which cites

[40] See for example MoI, 18.12.2012 (AFG03MSPUM); CIAR, May 2013 (AFG62MSPUM).
[41] CIAR, July 2012 (HON59FRSTO) and OAR, 29.01.2013 (ELS51FSPTO).
[42] Protection by non-state actors does not arise in this context, as this is only ever raised in the form of a statement in the eligibility report, rather than being indicated to the applicant as a possibility.
[43] Confirmed in interviews with OAR stakeholders.
[44] Supreme Court, 2 January 2009, 4251/2005 (for the lower court to assert "*that there is no evidence that the applicant might not obtain effective protection in another part of the territory, [reverses] the burden of proof [which requires the state to show] that asylum applicant could obtain protection by internal displacement. . . . [T]he reference to the possibility of internal flight requires that the person alleging it, in this case the instructor of the administrative file, provide the necessary data evidencing the existence of it and, therefore, that this alternative is likely to grant real and effective protection*").

"*the Common Position of the European Union on March 4, 1996, defined by the European Council on the basis of Article K3 of the Treaty on European Union on the harmonised application of the definition of refugee*" and requires the applicant "*to submit those elements needed to assess the veracity of the facts and circumstances alleged*".[45]

The asylum law states that "*sufficient evidence*" ("indicios suficientes") of persecution or serious harm is enough to require international protection.[46] This is confirmed in jurisprudence, which consistently states that evidence (*indicios*), not "*full proof*" is necessary. Courts refer to the general standard of proof for asylum cases, without applying specific standards for the IPA. The Supreme Court has referenced Article 4(5) of the Directive, but despite this and the rule requiring sufficient evidence rather than full proof, in most of the judgments analysed the courts appear to require a higher standard of proof.[47]

When the applicant relocated within the country of origin prior to leaving the country without coming to harm,[48] or when the applicant relocated with their family and the family remained in the new location apparently without experiencing persecution,[49] the eligibility officer will usually use this fact to justify applying the IPA. However, since IPA is usually applied using standardised phrasing without referring to the specific case, the IPA may be applied regardless of whether the applicant refers to a previous relocation in the asylum claim.

d. Quality of decision.

i. Country of Origin Information (COI).

1. Sources and timeliness of COI.

The sources of country of origin information used tend to vary from one eligibility officer to another. Article 45 of the asylum law, concerning cessation and revocation of asylum, requires "*that the competent authority is able to obtain precise and updated information from different sources, for example from UNHCR, about the general situation of the affected people in the states of origin*". However as the asylum law does not transpose Article 8 of the Qualification Directive, there is no provision applying this rule in the context of the IPA. In practice, the most recent reports of the UK Border Agency and the US State Department, and Amnesty International human rights reports are frequently cited. In cases reviewed for this study, the case recommendations for applicants from Afghanistan and Algeria used

[45] See e.g., High National Court, April 2013, rec 61/2012.
[46] Article 26 of Law 12/2009.
[47] Supreme Court, 2 January 2009, Appeal 4251/2005.
[48] Two examples:(1) case of an Nigerian applicant the eligibility report says, as reproduced by the HNC (NIG105MNSNO): "*As stated in the interview the applicant was helped during his flight by armed groups of Christians, as he was away from the city where he lived and where the terrorist attacks took place, and he had no further problem, he might have stay there and have refuge*" ;(2)case of an applicant from Honduras the eligibility report reproduced by HNC (HON114FNSSP) "*to avoid the risk it would be enough to quit the work job or through an internal displacement, as indeed he did with their daughters, without facing any problems in his new location until leaving the country* "
[49] Two examples (1) DRC64MNSUM the brothers of the applicant (unaccompanied child) remain « safely in Kinshasa to the date (2) COL74MNSNO, the family moved to other part of Colombia from Barranquilla and they remain « safely » there

reports of other organisations, such as Human Rights Watch and EASO. Normally only general COI of the country is used, rather than reports specific to a proposed IPA region.

Contesting COI is usually only possible on appeal, and only if the eligibility report states the arguments on COI and if it indicates the sources used for this particular case. Practice varies. Reports for applicants from Nigeria almost always cite the COI reports used but this is not the case regarding other countries, for example, El Salvador.[50] At times asylum officers only state that they are relying on information the OAR has on the country of origin without citing specific sources.[51] The applicant may introduce additional COI during an appeal.

ii. Templates, Guidance and Trainings for case workers and decision makers.

UNHCR Spain pointed out that there is a lack of guidelines in the Spanish asylum system generally, including regarding actors of protection and the IPA. A standard form is provided for use in claims for international protection in Spain (it is not public, but easily accessible for lawyers and NGOs). It has a section for the "*grounds in which he or she supports his or her application*" without any specific questions. It does not contain any reference to IPA. There is, however, a non-public document with guidelines for the completion of an international protection claim.[52] These include 13 questions to guide the officials receiving the application. One of these refers to IPA: *Did you consider moving to another village or city to resolve the situation in which you were?* There are also two related to actors of protection: *Did you ask the national authorities for help? Did you file a complaint?* According to lawyers from CEAR, one of the NGOs that provides legal assistance during asylum applications, sometimes questions on IPA are posed, sometimes not.

In some cases, decision makers take UNHCR guidelines into account. Cases reviewed did not contain a reference to the UNHCR Handbook or the Guidelines on the IPA. When UNHCR guidelines are used, they are country specific situation guidelines, particularly those concerning Colombia (but just the ones issued in 2002, not those launched in 2010) and Ivory Coast, and Somalia for the purpose of possibly granting subsidiary protection. There are also references to UNHCR guidelines on gender related persecution in claims based on sexual orientation. Despite the increased number of applications from people from Central America (Honduras, El Salvador, Mexico) fleeing gang violence, no reference was made to UNHCR guidelines on refugee claims related to victims of organised crime. Courts only cite UNHCR reports or guidelines when they are included in the file or referenced in the eligibility officer's report.

VI. National Recommendations.

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

[50] See e.g., MoI, 9.07.2012 (ELS49FNSSP) and MoI, 20.12.2011 (ELS52FNSNO).
[51] See e.g., CIAR, May 2013 (NIG88FRSTV).
[52] A copy of the guidelines was included in one of the files analysed at the OAR office.

- If the OAR makes use if the concept of Actors of Protection, it must do so with careful regards to international law and must rigorously follow the guidance provided in Article 7 of the recast Qualification Directive and Article 14 of the Asylum Law. In particular, it should be demonstrated that the applicant can effectively be protected by a specific actor of protection and will have access to protection and that the protection is not temporary.

- Applicants are not required in law, and should not be required in practice, to exhaust all possibilities to find protection in the country of origin prior to their flight. The assessment of protection needs is forward looking, taking into consideration the applicant's prospects in case of return to the country of origin.

- The Spanish eligibility authorities need not to consider the IPA at all because the IPA is a discretionary provision under the Qualification Directive and is neither a principle of international law nor mentioned in the 1951 Refugee Convention nor in Spanish legislation.[53] If they make use of the concept of IPA, they must do so with careful regards to international law, and must rigorously follow the guidance provided in the recast Qualification Directive. In particular, it should be demonstrated that the applicant can be expected to settle in an identified part of the country of origin, where he/she has no fear of persecution and where he/she can safely and legally travel and gain admittance to. Such an assessment requires taking the personal circumstances of the applicant into account as well as the general circumstances prevailing in that part of the country.

- Because of the complex nature of the IPA inquiry and especially the need to assess the individual needs of each applicant against conditions in a particular part of the country of origin, the IPA should only be applied (if at all) in the context of a full asylum procedure, not in border procedures.

- If the IPA is considered, it should only occur once a well-founded fear of persecution or a real risk of serious harm has been established in at least one part of the country. The facts relating to a claim should be clearly established before considering protection needs and analysing internal protection alternatives. Any analysis of the IPA should be clearly distinguished and separated from credibility assessment. As indicated by the Supreme Court, the authority conducting the assessment bears the burden of establishing each element of the IPA. While the applicants may be expected to cooperate in this assessment, they should not bear the burden of proving that the IPA is not feasible or that any element required to apply it is missing. If the IPA may be applicable to the applicant, he/she must be provided with information explaining the concept and its significance, either in written form or through their legal representative, or both. If the IPA is to be considered, the applicant must be promptly made aware of this possibility and given the opportunity to present evidence and arguments against it before the first decision on his/her claim has been taken.

- According to Article 8(2) Recast Qualification Directive, Member States must ensure that precise and up-to-date information is obtained. Member States must ensure that additional region-specific COI is used to assess the conditions in the region of

[53] At the time of publication of this report.

relocation. The IPA should not be applied if the COI is unclear or cannot be confidently said to reflect current conditions in the region of relocation.

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