

# AVIPA

**ACTORS OF PROTECTION AND THE APPLICATION  
OF THE INTERNAL PROTECTION ALTERNATIVE**

**EUROPEAN COMPARATIVE REPORT**



**THE VIEWS EXPRESSED IN THIS PUBLICATION CANNOT IN ANY CIRCUMSTANCES BE REGARDED AS THE OFFICIAL POSITION OF THE EUROPEAN UNION.**

**THIS REPORT AND THE NATIONAL REPORTS ARE BASED ON RESEARCH CARRIED OUT DURING 2013 AND WERE COMPILED IN THE FIRST PART OF 2014.**

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# CONTENTS

<b>ACKNOWLEDGMENTS</b>	<b>3</b>
<b>GLOSSARY OF TERMS</b>	<b>6</b>
<b>EXECUTIVE SUMMARY</b>	<b>7</b>
<b>I. INTRODUCTION.</b>	<b>17</b>
1.1. Background	17
1.2. Purpose and Scope of the Study	17
1.3. Methodology	19
1.3.1. <i>Structure of the Research Team</i>	19
1.3.2. <i>Outline of the Main Research Methodology</i>	19
1.3.3. <i>The Project Questionnaire</i>	20
1.3.4. <i>Case Sampling Methodology</i>	20
1.3.5. <i>Stakeholder Interviews</i>	22
1.3.6. <i>Aggregation and Analysis of the Results</i>	22
1.3.7. <i>Anonymity of Asylum Applicants</i>	23
<b>II. THE INTERNAL PROTECTION ALTERNATIVE AND ACTORS OF PROTECTION IN INTERNATIONAL AND EUROPEAN LAW.</b>	<b>27</b>
2.1. Background: Actors of Protection and the IPA in International and European law	27
2.1.1. <i>Actors of Protection and the IPA under International Law</i>	27
2.1.2. <i>The Qualification Directive and International Refugee Law</i>	29
2.2. Substantive rules of law applying to actors of protection and the IPA	30
2.2.1. <i>Actors of Protection</i>	30
2.2.1.1. What is Protection	30
Elements of Protection	30
How durable must protection be?	31
Formal protection? Best efforts? Actual protection?	31
2.2.1.2. Who can protect	32
2.2.1.3. Actors of protection in the Qualification Directive	33
2.2.2. <i>The Internal Protection Alternative</i>	33
2.2.2.1. The IPA in International Law	33
2.2.2.2. The Framework of the IPA	34
Safety from Persecution	35
Quality of Protection	35
Access to Protection	36
2.2.2.3. Procedural Considerations	36
2.2.2.4. Internal Protection in the Qualification Directive	37
<b>III. ACTORS OF PROTECTION.</b>	<b>41</b>
3.1. The Nature of Protection (Article 7(2))	41
3.1.1. <i>Prevention of Persecution or Serious Harm.</i>	41
3.1.1.1. Reasonable Steps	42
3.1.1.2. Effectiveness of the Legal System in the Country of Origin	42
3.1.2. <i>Durability of Protection</i>	44
3.1.3. <i>Access to Protection</i>	45
3.1.3.1. Personal Circumstances	45
3.1.3.2. Seeking Protection in Country of Origin prior to Flight	46
3.2. Actors of Protection	47
3.2.1. <i>General Criteria: Willingness and Ability to Provide Protection</i>	48
3.2.2. <i>State Actors of Protection</i>	49
3.2.3. <i>Non-State Actors of Protection</i>	49
3.2.3.1. Criteria for a Non-State Actor to be an Actor of Protection	50
3.2.3.2. Types of Non-State Actors of Protection	51
International Organisations	51
Multinational Forces	51
Clans or Tribes	52
Other Parties or Organisations	52
<b>IV. THE INTERNAL PROTECTION ALTERNATIVE</b>	<b>57</b>
4.1. Assessment of the IPA	57
4.1.1. <i>Identifying a Protection Region</i>	57

4.1.2. <i>Safety in the Region</i>	58
4.1.3. <i>“Reasonably expected to stay [settle]”</i>	60
4.1.3.1. General Living Standards in the Protection Region	61
4.1.3.2. The Applicant’s Personal Circumstances	62
4.1.3.3. Applicants with Special Needs	63
4.1.3.4. Duration of Stay in the Protection Region	65
4.1.4. <i>Access: Safe and Legal Travel</i>	65
4.2. Application of the IPA	66
4.2.1. <i>Procedure</i>	67
4.2.1.1. Types of Asylum Procedures where the IPA is applied	67
4.2.1.2. Timing of the IPA Assessment	68
4.2.1.3. Notice and Opportunity to challenge the IPA	69
4.2.2. <i>Policy</i>	70
4.2.2.1. Type of Protection Claim	70
4.2.2.2. Countries and Groups to which the IPA is most often applied	70
4.2.2.3. Exclusions from the use of the IPA	71
4.2.2.4. Application despite Technical Obstacles to Return	71
<b>V. ASSESSMENT OF FACTS AND CIRCUMSTANCES</b>	<b>75</b>
<b>VI. DECISION QUALITY</b>	<b>81</b>
6.1. Country of Origin Information	81
6.1.1. <i>Sources of Country of Origin Information</i>	81
6.1.2. <i>Up-to-Date Country of Origin Information</i>	82
6.1.3. <i>Specific to the Region</i>	82
6.2. Templates, Guidance and Training	83
<b>VII. VULNERABLE GROUPS</b>	<b>87</b>
7.1. Introduction	87
7.2. Provisions for Vulnerable Groups in Relation to the Legal Concepts of AP and IPA	88
7.3. Actors of Protection and Vulnerable Groups	88
7.3.1. <i>Access to Protection</i>	89
7.3.1.1. Particular Obstacles to Access Recognised in Policy	89
7.3.1.2. Youth	91
7.3.1.3. Stigmatised Displaced Population	91
7.3.1.4. Standing or Influence of the Persecutor	91
7.3.1.5. Gender	91
7.3.2. <i>Effectiveness of Protection</i>	92
7.3.3. <i>Non-Temporary Protection</i>	94
7.4. Internal Protection Alternative	94
7.4.1. <i>Safety in the Region of Relocation</i>	95
7.4.2. <i>Securing Human and Social Rights in the Alternative Location</i>	97
7.4.2.1. Victims of Torture, Rape and Other Trauma and persons with Specific Health Needs	98
7.4.2.2. Women	99
7.4.2.3. Children	100
7.4.2.4. LGBTI Claims	102
7.4.3. <i>Safe and Legal Travel</i>	103
7.5. Evidence: Assessment of Facts and Circumstances	103
<b>VIII. CONCLUSION.</b>	<b>109</b>
<b>ANNEXES:</b>	<b>113</b>
I. Recommendations	113
II. Bibliography	116

# GLOSSARY OF TERMS

AP: Actor of Protection

BAMF: German Federal Office of Migration and Refugees (Germany)

CALL: Council for Aliens Law Litigation (Belgium)

Ceseda: Code on the admission and residence of aliens and on the right of asylum (France)

CIAR: CIAR – Inter-Ministerial Commission for Asylum and Refuge (Spain)

CGRS: Office of the Commissioner General for Refugees and Stateless Persons (Belgium)

CNDA: National Court of Asylum (France)

CJEU: Court of Justice of the European Union

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

ECRE: European Council on Refugees and Exiles

EU: European Union

FAC: Federal Administrative Court (Germany)

INS: Immigration and Naturalisation Service (Netherlands)

IPA: Internal Protection Alternative

M.B.: Migration Board (Sweden)

QD 2004: Qualification Directive (2004/83/EC)

QD 2011: Recast Qualification Directive (2011/95/EU)

NGO: Non-governmental Organization

OAR: Spanish Office for Asylum and Refuge (Spain)

OFPRA: French Office for the Protection of Refugees and Stateless Persons (France)

OIN: Office of Immigration and Nationality (Hungary)

UKAIT: Asylum and Immigration Tribunal (UK)

VwGH: Administrative High Court (Verwaltungsgerichtshof) (Austria)

# EXECUTIVE SUMMARY

The concepts of actors of protection and internal protection alternative play a role in refugee status determination in most Member States. These concepts are set out in the Qualification Directive and its recast. This research analyses how these concepts are applied both at the administrative and judicial level in 11 EU Member States: Austria, Belgium, France, Germany, Hungary, Italy, Netherlands, Poland, Spain, Sweden and the United Kingdom. The research highlights that, ten years after the adoption of the Qualification Directive, inconsistencies remain in the application of the concepts of internal protection alternative and actors of protection.

## I. Main Findings

### 1. Actors of Protection

Article 7 of the Qualification Directive indicates which entities can be considered actors of protection, and what constitutes “protection”.

#### 1.1. Nature of protection

The recast Qualification Directive provides that the protection must be “effective and of a non-temporary nature”, and that the applicant should have access to it. All Member States studied assess the effectiveness of protection, but only some assess the durability of protection and whether the applicant can access it.

The **effectiveness of protection** is assessed, to various degrees in all Member States covered in this study. The main, if not only, criteria taken into account for such an assessment is the operation of a legal system for the detection, prosecution and protection of acts of persecution or serious harm. In some countries, the availability of protection for the applicant is sometimes not demonstrated in practice, if the decision maker is satisfied that the act of persecution is prohibited by law in the country of origin.

While many Member States require that protection be of a non-temporary nature, they rarely assess the **durability of protection** in practice. In particular, France, Hungary, Italy, Poland, Spain and Sweden did not assess it in the decisions reviewed in this research. Some Dutch decisions considered that short term protection is sufficient.

Only half of the countries surveyed regularly assess the **ability of the applicant to access protection**.

In all Member States studied except the Netherlands, if the applicant had not approached the national authorities in the country of origin to seek protection previously, it tended to contribute to an adverse credibility finding regarding their testimony as a whole.

#### 1.2. Types of actors of protection

According to the recast Qualification Directive, only States, parties and organisations that control at least a substantial part of the State, and who are willing and able to offer protection, can be considered as actors of protection.

The Member States surveyed considered whether the actor of protection was **willing and able** to provide protection. This assessment was however inconsistent in Italy and was not found in the Spanish decisions reviewed. Cases reviewed from the Netherlands and Poland tended not to perform an in depth assessment on this issue.

The **State** is the main actor of protection. Failed states, States unable to control the territory or States facing widespread corruption, are often not considered as an actor of protection. Examples include Afghanistan, Somalia and Syria.

Decision makers do not usually treat **non-state entities** as stand-alone protection actors. If they were referred to, it was generally as reinforcement for state-provided protection. Of the Member States studied, Italy was the only country that did not refer at all to non-state actors of protection in the research sample of decisions. Little information was found regarding the details of the assessment by which Member States qualify a non-state actor as an actor of protection. A variety of non-state actors were identified during the research: International Organisations, Multinational Forces (e.g. UNMIK, ISAF), clans and other organisations (e.g. NGOs providing shelters for women).

## 2. Internal Protection Alternative

The IPA is a discretionary provision which is set out in Article 8 of the Qualification Directive and its recast. Member States do not have to apply it. All Member States reviewed applied IPA in at least some cases. Italy and Spain have not transposed Article 8 into their national legislation. Courts have drawn different conclusions from this; in Italy the IPA may not be applied, while in Spain, it is left to the asylum authorities to decide whether to use it. In France, there is no practice of application of the IPA at first instance (OFPRA), and the practice is still very limited at the appeal stage (CNDA). Only three Member States (Germany, Hungary and Sweden) assessed the IPA in all cases if a protection need was established.

The IPA is applied to both refugee status and subsidiary protection, including in cases where Article 15c is engaged.

## 2.1 Assessment of the IPA

Under Article 8 of the Qualification Directive, Member States may deny protection if, in a part of the country of origin, there is either no risk of persecution or serious harm, or if protection is available. The applicant must be able to safely and legally travel to and gain admittance to that region and can reasonably be expected to settle there.

Member States generally identify a **protection location**. However, the identification might not always be sufficiently specific (“the applicant can relocate in a larger city”) or might not be made at all (“the applicant can relocate somewhere else in the country”). Member States tend to frequently indicate the same areas of relocation (“Kabul”, “[Northern or Southern] Nigeria”). Some Member States have developed criteria to further qualify the protection region (“more specific than a larger city”, “stable with clear boundaries”, “a substantial part of the country”). Significant consideration is given to the applicant’s former place of residence in order to identify the area of relocation. The main criteria used during such an assessment include the size of the region, the population density and the power of the actor of persecution.

Decision makers in Belgium, Germany, Hungary and Sweden assess whether there is a **risk of persecution or serious harm** in the proposed region of relocation. This is often not done in other Member States, particularly those that do not identify a specific protection location.

Most of the Member States reviewed required verification that the applicant can **reasonably be expected to stay [settle]** in the protection region. In assessing this issue, most Member States took the general and personal circumstances of the applicant into account. No specific analysis of the applicant’s ability to settle was found in cases from Italy, Poland or Spain.

Decision makers in the Member States considered that the living conditions in the relocation region needed to reach a certain “minimum standard”. However, this standard has never been clearly defined in any Member State and there is no agreement as to how this standard should be assessed. A tendency was identified in northern Member States toward considering living standards acceptable if they would not violate Article 3 of the European Convention on Human Rights. References were also made to “undue hardship from a humanitarian perspective” or “general hardship”. Some countries assessed conditions in light of the living standards of the population in the region (France, Netherlands; sometimes in Belgium, Poland). Most Member States took the personal circumstances of the applicant into account when evaluating whether it is reasonable for the applicant to stay in the proposed region, most frequently considering family connections, age and gender.

The amount of time an applicant is expected to be able to stay in the region of relocation for the IPA to be applicable was often not specified. Some countries used the standard of “durable” (at least for the time of the need for protection), or the standard of “permanent residence” (Hungary, Poland). In Germany, in most cases, the possibility of a relatively short stay was considered sufficient, while in cases reviewed from Austria, Spain and Sweden the duration of the stay was seldom considered.

Over half of the countries surveyed verified whether the applicant could **safely and legally travel** to and gain admittance to the protection region, although in some countries (Austria, Germany and the UK) this was not systematically considered. It was not often verified in France and Poland, whilst in Italy and Spain it was never considered. Such an assessment is not possible when the region of relocation was not specifically identified. Little information was provided in the decisions studied regarding the criteria used for this assessment.

## 2.2. Application of the IPA

In a significant proportion of the IPA cases across the Member States studied, the IPA was raised in the form of a secondary argument, that **“even if”** the applicant’s fear of persecution was credible, an IPA would be available. In other instances an alternative argument was to assert that because the applicant had not acted to obtain protection in the country of origin, the fear of persecution was not real.

No Member State studied considered the IPA when deciding whether to admit an applicant to a full determination **procedure**. Only Austria, Belgium and Spain use the IPA in border procedures. About a third of the countries surveyed use the IPA in accelerated procedures.

While in most Member States the IPA should be considered only after a well-founded fear of persecution is established in part of the country of origin, recent decisions show a tendency to use the IPA before completing the assessment of the well-founded fear or to have the prospect of IPA influencing the conclusion on well-founded fear (except in Belgium and the Netherlands).

The applicant can contest the application of the IPA during the interview in a third of the countries covered, or before the decision is made in the Netherlands and Sweden. In some countries, the applicant was often not aware that the IPA was being applied until the first instance decision was issued, and thus can only contest the application of the IPA upon appeal (Hungary, Italy, Poland, and Spain).

The IPA is generally considered on a case by case basis, but the Member States exhibited tendencies in their **policy** choices regarding the IPA, applying it more or less frequently to specific types of applicants. Most of these classifications were based on an applicant’s countries of origin or their particular vulnerabilities. Some of these policies were similarly applied in some or all of the Member States studied, while others were unique to a particular State.



### 3. Assessment of facts and circumstances

According to Article 4 of the Qualification Directive, both Member States and applicants for international protection have duties relating to the assessment of facts and circumstances when examining a claim. This Article is relevant to the question of actors of protection (Article 7) or the internal protection alternative (Article 8).

In most cases, the responsibility to demonstrate the viability of a protection actor or the IPA is a shared duty. In most of the countries, the State has the responsibility to establish all the relevant facts. By contrast, in Italy and Poland, although nominally the burden of proof may rest with the authority, the applicant must (dis)prove the availability of protection or the elements of the IPA, but the State has a duty to cooperate. Laws in Austria, Germany and the Netherlands add a duty for the applicant to cooperate. In the UK, the applicant must prove the main elements of the case. If the State raises the IPA, it then falls to the applicant to demonstrate why it is not feasible.

In some countries, the IPA is seen as having an “exclusion character” and the burden of proving the elements of the IPA is transferred to the State. In practice, the study revealed several cases where the authority simply asserted that an IPA was available and let the applicant disprove it. An incomplete IPA assessment can in effect require the applicant to show that there is no safe region anywhere in their home country in order to avoid a rejection of the claim.

### 4. Decision quality

The research focused on two aspects of decision quality: the quality of Country of Origin Information (COI) and the existence of guidelines and training for decision makers.

COI in most countries was generally considered to be up to date. When IPA is being considered, decision makers in eight of the countries studied considered COI regarding the proposed region of protection separately from the general COI of the country.

Templates for asylum interviews referred to the IPA in two countries (Spain and Hungary). Some asylum authorities have their own guidelines on how to apply the IPA and AP (Belgium, Germany and the UK). In other countries, decision makers work with leading documents and decisions (Sweden) or country specific guidelines (Netherlands). All Member States use UNHCR Guidelines, mostly eligibility guidelines, albeit not systematically.

Trainings on IPA and AP exist in all countries, usually as part of broader trainings. Many countries use the EASO curriculum module “Inclusion”, which provides training on the interpretation and application of the 1951 Geneva Convention and its relation to the recast EU Qualification Directive.

### 5. Vulnerable groups

The study looked at the application of the concepts of actors of protection and internal protection alternative to vulnerable groups. Consideration of factors affecting vulnerable groups was carried out in most countries but on a case by case basis rather than as a matter of consistent policy. There was a more consistent policy in most Member States with regard to unaccompanied children; generally they would not be expected to relocate internally if they did not have close family in the region of relocation.

#### 5.1. Actors of Protection

There was recognition, albeit in different ways, that particular obstacles exist which affects certain vulnerable groups **accessing protection**.

Commonly Member States had a policy that the **effectiveness of the system for protecting vulnerable groups** would be taken into account, but authorities did not always require evidence that protection had in fact been available to people in the applicant’s position with sufficient regularity to be deemed effective. In Poland and Spain, the effectiveness of the legal system for someone with the applicant’s profile was not considered.

One problematic issue that was identified in the cases analysed for the research in relation to the **durability of protection** was the reliance on shelters for women fleeing domestic violence or trafficking as form of effective protection. The study identified some ambiguity as to whether shelters were relied on to determine the lack of risk or to protect against it, or to establish the reasonableness of the IPA. This was influenced but not governed by whether the shelters were provided by the government or by NGOs.

#### 5.2. Internal Protection Alternative

In some Member States for some vulnerable groups from some countries IPA was not considered to be available. For instance, a Dutch internal instruction states that “there is no relocation alternative in Somalia for particularly vulnerable

groups such as single women, unaccompanied minors and non-Somali minorities'. More narrowly defined exceptions existed in most other Member States.

The study revealed little use of IPA for torture survivors, but more for victims of gender-based violence. Relatively few claims were covered in the study that were based on sexual orientation where IPA was considered or applied.

Little or no consideration was given to the **safety in the region of relocation**. A common exception was the persecutors' capacity to pursue the applicant, although this assessment was usually brief. The **accessibility of the proposed location** was sometimes assessed in cases of vulnerable applicants, especially if this factor could be critical to the application of IPA.

In most countries, the factors which were central to the analysis as to whether the applicant could **reasonably be expected to settle** elsewhere were not issues that would particularly affect vulnerable groups. Where there were no specific guidelines applying IPA to vulnerable groups, there was little to mitigate against the tendency to focus the analysis on the conditions in the protection region largely to issues which reflected the majority culture. However, even when guidelines existed, there was not necessarily an analysis based on the risks of discrimination or on structural factors affecting vulnerable groups.

### 5.3. Assessment of facts and circumstances.

The study revealed that little evidence was available particularly related to access to protection, effectiveness of protection and conditions in the IPA region for women and LGBTI applicants. Regarding the availability of evidence, it was common to cite very brief COI as a basis for a conclusion. More detailed and localised COI was needed to give a more detailed assessment of the risk and reasonableness as to whether an applicant could be relocated to the relevant area. In the few asylum interview extracts analysed in this study, it appeared that the applicant's testimony was not given weight as a contribution to assessing conditions in the IPA location. When assessing the conditions in an IPA location, the COI relied on was often insufficient to determine the safety and reasonableness of the proposed IPA, for example when examining whether a shelter would be available to the particular applicant. People returning to a different part of their home country were sometimes noted to be more similar to Internally Displaced Persons than returning migrants.

## II. Recommendations

The following recommendations on the use of the concepts of internal protection alternative and actors of protection seek to provide specific advice on the proposed courses of action, based on both international standards and the findings of the Study.<sup>1</sup>

### 1. General Recommendations

#### **European Commission:**

- The European Commission should produce interpretative guidelines on the concepts of actors of protection and on the internal protection alternative in the Qualification Directive. These should be compliant with international law, as well as relevant UNHCR guidelines and other relevant material, and should be revised regularly.

#### **Member States:**

- If States make use of the concepts of actors of protection or of internal protection alternative they must do so in full compliance with international law, including international human rights treaties and their interpretation by international human rights monitoring bodies. They must also rigorously follow the guidance provided in the recast Qualification Directive, in particular Articles 4, 7 and 8.
- Where state agents are the actors of, or tolerate, persecution or serious harm, effective protection should be considered to be unavailable.
- The facts relating to a claim should be clearly established before considering protection needs and analysing actors of protection and internal protection alternatives, if such concepts are being used. Any analysis of the availability of protection or the internal protection alternative should be clearly distinguished and separated from the credibility assessment.<sup>2</sup>
- If the internal protection alternative or actors of protection is raised as a possibility, it must be fully assessed and not simply asserted.

### 2. Actors of Protection

#### **Member States:**

- Non-state actors should never be considered as actors of protection. Non-state actors cannot be held accountable under international law and may only be able to provide protection which is temporary and limited in its effectiveness.
- Member States should interpret the criterion that protection must be “non-temporary” to mean that it must be established that the factors, which formed the basis of the refugee’s fear of persecution, have been permanently eradicated, and that there are no further well-founded fears of being exposed to acts of persecution or a risk of serious harm, including by actors other than the original actor of persecution.
- The availability of protection for the applicant must be demonstrated in practice, not merely in principle, it must be available to the particular person concerned or similarly situated persons, not merely in general terms. It should be demonstrated that the particular applicant can be effectively 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, and should be clearly separated and distinct from credibility assessments.
- In evaluating protection needs, Member States should clearly distinguish between assessing a risk of persecution or serious harm, and assessing the availability of protection against that risk.

<sup>1</sup> The UK and Ireland will continue to be bound by Directive 2004/83/EC. To maintain consistent protection standards across Europe and to achieve the overall objectives of a CEAS, ECRE recommends that these Member States opt in to the recast Qualification Directive.

<sup>2</sup> On credibility see UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems : Full Report*, May 2013, available at: <http://www.refworld.org/docid/519b1fb54.html>

### 3. Internal Protection Alternative

#### **Member States:**

- 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, states must give priority to their protection duties under international law and need not consider the IPA at all.
- 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 of origin.
- If the IPA is proposed or applied, the authority conducting the assessment must indicate a specific location within defined boundaries. This location should be easily identifiable by the applicant.
- In order to determine that an applicant can “be expected to settle” in a region, the Member State assessing the applicant must assess all factors and circumstances particular to the applicant in the region of relocation.
- If the applicant falls into a group where social support would normally, in their country of origin, be provided by family, it should only be considered reasonable for the applicant to settle where this support exists in their case or is demonstrably unnecessary.
- The IPA should not be applied where a returnee might find himself in an IDP camp (Sufi and Elmi). The IPA should not be applied to a region that must already meet the needs of a significant number of refugees or displaced persons because it would not only endanger the human and social rights of the applicant, but would also diminish the availability of resources in the region.
- The IPA should not be applied unless it is demonstrated that the applicant will be able to safely and legally traverse each stage of the journey required to travel from the Member State to the identified protection region, including gaining admittance and be legally allowed to settle.

### 4. Procedural aspects

#### a. Assessment of facts and circumstances

#### **Member States:**

- In accordance with Article 4(3) of the Qualification Directive and its recast, particular attention should be paid to the applicant’s statements, which can provide important information on conditions in the country of origin and how they relate to the applicant’s particular circumstances. Member States should exercise their discretion under the recast Asylum Procedures Directive (Article 10(3)) to seek advice, whenever necessary, from experts on for example medical, cultural, religious, child-related or gender issues where appropriate.
- The authority conducting the assessment bears the burden of establishing each element of the internal protection alternative, as indicated in the UNHCR Guidelines on the Internal Flight or Relocation Alternative (paragraph 34). While the applicants may be expected to cooperate in this assessment, they should not bear the burden of proving the IPA is not feasible or that any element required to apply it is missing.
- In accordance with Article 4(3) of the Qualification Directive and its recast, Member States should have particular regard to country of origin information which describes the position, where relevant to the applicant, of women, LGBTI persons and children in the proposed region of relocation.

#### b. Procedural guarantees

#### **Member States:**

- In keeping with the rights under the EU Charter of Fundamental Rights (CFR), including Article 47 and the EU general principle of the right to good administration, all persons should be informed of the reasons for administrative and judicial decisions that affect them. All international protection decisions must be well-reasoned with a clear legal basis, as required by, among others, Article 11(2) of the recast Asylum Procedures Directive.
- If the internal protection alternative 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 Internal Protection Alternative 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 prior to the first instance decision.
- The internal protection alternative should only be applied (if at all) in the context of a full asylum procedure, not for example, in accelerated or border procedures because of the complex nature of the internal protection alternative inquiry and especially the need to assess the individual needs of each applicant against conditions in a particular part of the country of origin.

## c. Country of Origin Information

### **Member States:**

- 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 country of origin information is used to assess the conditions in the region of relocation. The internal protection alternative should not be applied if the COI is unclear or cannot be confidently said to reflect current conditions in the region of relocation.
- Given the particular challenges for both the Member State and the applicant in obtaining case by case evidence of sufficient quality to ensure that relocation is safe for an applicant with special needs, collections of publicly available evidence should be established using anthropological, cultural, religious, and other relevant sources from and about particular groups in the relevant country of origin.
- Recognising the need for localised country information on proposed sites of internal relocation, COI service providers and refugee practitioners should consult publicly available sources from organisations with presence in those areas which meet the quality criteria of reliability and balance. Published academic research may also provide relevant sources of localised country information.



# *INTRODUCTION*





# I. Introduction

## 1.1. Background

The concepts of actors of protection and internal protection alternative have become central to refugee status determination in most EU Member States. Yet, they remain two of the most controversial concepts present in the Qualification Directive.

The concept of **actors of protection** (AP) defines who can provide protection and what level of protection this actor needs to provide. The Qualification Directive was the first supranational instrument to offer a general definition of this concept (Article 7). This definition raises some concerns, in particular with regard to the consideration of non-state actors, such as the United Nations, international organisations, non-governmental organisations and other groups, as suitable actors of protection. As indicated by the European Commission itself, the *“lack of clarity of the concept in the Qualification Directive 2004 allowed for wide divergences and for very broad interpretations which may fall short of the standards set by the Geneva Convention on what constitutes adequate protection”*.<sup>3</sup>

The **internal protection alternative** (IPA) is not a principle of international law nor mentioned in the 1951 Refugee Convention. However, since the practice of denying refugee status on the ground of the existence of an internal protection alternative started in the mid-eighties,<sup>4</sup> ECRE has been concerned about the use of this concept to vindicate an increasingly restrictive global refugee policy. Already in 1998, i.e. before the concept of IPA was incorporated in the Qualification Directive, ECRE and the European Legal Network on Asylum (ELENA) released a research paper on this concept.<sup>5</sup> At the time, the IPA was already used by many countries, but this use was characterised by a lack of common standards, either in case law, guidelines or legislation.

Since the end of the nineties, the concept of IPA has become more developed both in legislation and practice. This concept was introduced, as a discretionary provision, in the Qualification Directive and its use was further clarified by the European Court of Human Rights.<sup>6</sup> Academics and UNHCR also released detailed guidelines on the IPA.<sup>7</sup> Today, the concept of IPA is established in the national jurisprudence of most member states and in their national legislation. However, despite improvements in the standards available, the IPA still give rise to concerns. Indeed, incorrect interpretation or procedural use of this concept can significantly affect people's lives.

The introduction of the Qualification Directive did not address all concerns with regard to the concepts of IPA and AP, and – as described in earlier research by ECRE and UNHCR – did not put an end to the high degree of divergence in State practices with regard to these concepts.<sup>8</sup> The recast Qualification Directive has provided a series of welcome improvements to the concepts of internal protection alternative and actors of protection.<sup>9</sup>

The present research has confirmed the divergence of practices among Member States and revealed a series of good and bad practices. It is hoped that the results of this research will provide useful information and guidance on how the new standards of the recast Qualification Directive should be implemented in practice, and thereby contribute to the development of fairer refugee status determination in Europe.

## 1.2. Purpose and Scope of the Study

The purpose of this research is to provide an in-depth analysis on how the concepts of actors of protection and internal protection alternative are applied both at the administrative and judicial levels in EU Member States.

<sup>3</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, Brussels, 21.10.2009, COM(2009) 551 final, p.7; See also, European Commission, Staff Working Document accompanying the 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 - Impact Assessment, Brussels, 21.10.2009, SEC(2009) 1373 final, p 11.

<sup>4</sup> For an overview of the conceptual evolution of the concept of IPA see: R. Marx, The criteria for applying the 'Internal Flight Alternative' test in national refugee status determination procedures, IJRL 2002, Vol. 14, no. 2/3, p.179 ff.; J. C. Hathaway and M. Foster, Internal protection/relocation/flight alternative as an aspect of refugee status determination, in Erika Feller et al. (eds.), Refugee Protection in International Law: UNHCR's Global Consultations on International Protection (Cambridge University Press, 2003), pp. 357-417 at p. 361 ff.

<sup>5</sup> ELENA/ECRE, Research Paper on the Application of the Concept of Internal Protection Alternative, 1998 (updated 2000), <http://www.ecre.org/topics/areas-of-work/protection-in-europe/160.html>

<sup>6</sup> See in particular: ECtHR, Salah Sheekh v. The Netherlands, Application no. 1948/04, 11 January 2007.

<sup>7</sup> University of Michigan Law School, International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative, 11 April 1999, available at: <http://www.refworld.org/docid/3dca73274.html> ('Michigan Guidelines on IPA'); UNHCR, Guidelines on International Protection No. 4: «Internal Flight or Relocation Alternative» Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, 23 July 2003, HCR/GIP/03/04, available at: <http://www.refworld.org/docid/3f2791a44.html> ('UNHCR Guidelines on IFA').

<sup>8</sup> See ECRE, The Impact of the EU Qualification Directive on International Protection, October 2008; UNHCR, Asylum in the European Union. A Study of the Implementation of the Qualification Directive, November 2007, available at: <http://www.refworld.org/docid/473050632.html>

<sup>9</sup> See ECRE, Information Note on the Qualification Directive (recast), October 2013, <http://www.ecre.org/topics/areas-of-work/protection-in-europe/92-qualification-directive.html>.

This research aims to highlight current issues in the use of these concepts and existing good practices, as well as provide some assistance in interpreting the new wording of the recast Qualification Directive, such as for instance “effectiveness of protection” or “non-temporary protection”.

**Temporal Scope:**

The research took place between March and October 2013, i.e. before the deadline of transposition of the recast Qualification Directive (21 December 2013). None of the decisions analysed during this research are based on legislation that transposed the recast Qualification Directive. However, the research surveyed the language used in both versions of the Directive, as the wording of the recast Qualification Directive reflects in places pre-existing practices or recent jurisprudence. The report also refers to national legislation that has transposed the recast Qualification Directive.

It must therefore be highlighted that the results of the research, while providing a detailed overview of the use of the concepts of AP and IPA during the research period, might not fully reflect the current practice in some Member States, which might have changed since the transposition of the recast Qualification Directive and as a result of continuing developments in this rapidly changing field of law.<sup>10</sup>

**Geographical Scope:**

The research was carried out in 11 EU Member States: Austria, Belgium, France, Germany, Hungary, Italy, the Netherlands, Poland, Spain, Sweden and the UK. These states were selected in order to present a cross-regional view, and a variety of legal systems and traditions. The sample of countries also aimed to include countries routinely using the concepts of actors of protection and the internal protection alternative, such as Germany, the Netherlands and the UK, and countries that have a much lesser use of these concepts, or at least of one of these concepts, such as France, Italy or Spain. The countries in this sample are also, with the exception of Spain, among the EU Member States receiving the most important numbers of asylum applications.<sup>11</sup>

**Material scope:**

The research looked at the use of the concepts of actors of protection and the internal protection alternative. The questionnaire, which is at the basis of the research, focused on interpretations and practices, based both on international standards and EU standards (Qualification Directive and recast Qualification Directive). While the concept of internal protection alternative is well limited, it was challenging to limit the scope of the broader concept of actors of protection. Indeed, analysing this concept inevitably touches upon the larger concept of “protection”, and hence opens the door to a much wider scope of research, i.e. asylum law in general. As a result, the analysis of actors of protection was very much limited to the wording of the Article 7 of the Qualification and recast Qualification Directive, and examined the types of actors of protection, and three aspects of the nature of protection, as defined in Article 7: the effectiveness of protection, the durability of protection, and the access to protection.

The research also analyses some procedural aspects surrounding the use of the concepts of actors of protection and the internal protection alternative, as well as some selected aspects of the quality of decisions, mainly the type of evidence gathered, and the existence of trainings and guidance for decision makers.

The study was not concerned with access to the process outside the decision-making context, and therefore not with issues such as, for instance, initial accommodation, psychological support or child care.

**Limitations:**

In many of the jurisdictions studied, decisions granting protection are often simply stated, without providing the reasoning on which they are based. Therefore, selecting cases for study that explicitly mentioned either the actor of protection or the IPA concept may have led to a bias towards cases where protection was denied.

The research also showed that in a significant proportion of cases raising them, these concepts were not applied in detail or decisive, but rather were alluded to as a secondary ground for refusing protection, following a determination that the applicant’s fear of persecution was not well-founded.

It was impossible to gather reliable statistical data on the use of the internal protection alternative and actors of protection in the Member States covered by this research, due to the lack of such data being collected, and the difficulty to find relevant decisions in national databases due to the lack of relevant searchable keywords. Therefore, this report does not provide statistical overviews. However, interviews with stakeholders have provided some general impressions on the frequency of the use of such concepts in some countries.

It must be noted that certain Member States may be over-represented in this comparative report in terms of, for instance,

<sup>10</sup> For instance, the research results regarding Poland relate to the normative framework in force as of 31 April 2014, and does not cover the new comprehensive Law on Foreigners came into force the following day.  
<sup>11</sup> See: UNHCR, Asylum Trends 2013 - Levels and Trends in Industrialized Countries, March 2014, p.22. See also below: section 1.3.4 on the description of the sample of decisions.

the number of pages dedicated to describe their practice regarding the use of the concepts of actors of protection and the internal protection alternative. This does not necessarily imply a critique of the practice of these particular Member States per se. Instead, this may reflect the simple fact that some decisions of these Member States were more detailed or informative.

### 1.3. Methodology

The aim of the research component of the APAIPA project was to investigate how the concepts of actors of protection and the internal protection alternative are applied in Austria, Belgium, France, Germany, Hungary, Italy, the Netherlands, Poland, Spain, Sweden and the UK. These states were selected in order to present a cross-regional view, and a variety of legal systems and traditions. Such a diverse legal environment required balancing the priorities of carefully comparing national practices, and presenting as complete a view as possible of each country's approach.

National experts in each country performed most of the research, coordinated by ECRE's project team with the support of the project partners. Substantively, the project began with desk research into legislation, case law, administrative instructions and literature, followed by analysis of selected asylum cases, and interviews with national stakeholders. A questionnaire served to guide the national experts' inquiries. The questionnaire focused on interpretations and practices, based both on international standards and the Qualification Directive. Because, at the time of the research, Member States were transposing the recast Directive, the questionnaire covered terms and concepts found in both the original Directive and the recast. In three selected countries (the Netherlands, Hungary and the United Kingdom) interviews took place with asylum applicants whose cases illustrate issues of actors of protection or the IPA.

The national experts relied primarily on recent asylum cases that reflect the national use of the actors of protection and IPA concepts. Focusing part of each sample on common themes, selected countries of origin and applicants with particular vulnerabilities facilitated cross-country comparisons. The project team analysed the national findings and, in cooperation with the experts and advisory panel, drafted preliminary conclusions and recommendations. These were presented to external experts in Madrid during dedicated experts roundtable on 4th April 2014, revised based on their input, and the report was then finalised.

Each national report contains a separate section providing more details on the methodology used at the national level.

#### 1.3.1. Structure of the Research Team

Research tasks were divided among the ECRE team in Brussels, the project partners at Asylum Aid, the Dutch Council for Refugees and the Hungarian Helsinki Committee, and national experts. ECRE staff led the development of the research methodology and coordinated and analysed the results of the national experts' work, in consultation with the project partners. The partners also served as national experts for Hungary, the Netherlands and the UK. In addition, Asylum Aid carried out research and drafted the section on vulnerable groups.

An advisory panel was consulted during the development of the research plan, in guiding the project and to assess the results. The panel included experts from EU and national institutions, UNHCR, academia and private practice. The panel convened in March to help develop the project plan and methodology, and again eight months later to review the main research results and provide advice on the framework of this report. The panel was consulted during the drafting of key project documents, as well as periodically regarding overall progress and strategy. Individual members were contacted ad hoc for particular expertise or support on key points.

#### 1.3.2. Outline of the Main Research Methodology

The project began in early 2013 with desk research. The team in Brussels surveyed academic literature, case law, NGO and UNHCR reports, guidelines and legislation on the IPA and actors of protection. The case law included relevant CJEU and ECtHR decisions and leading national cases. Materials published in English, French and German were reviewed, with the main focus on those that have become available within approximately the last five years.

While performing the preliminary research, the project team also hired national experts in European and national asylum law in each of the Member States studied. The experts met with the team and partners in Amsterdam in March 2013 to agree on a project plan, and to discuss how to approach selecting national asylum cases to review in support of the research.

Over the next six months, each national expert spent 30 days on desk research, analysis of cases and interviews with stakeholders in their national asylum systems. A detailed questionnaire drafted by the project team and partners supplied the main framework for their inquiries. The desk research consisted of reviewing legislation including pending legislation applying the concepts; administrative instructions or staff guidelines of the determining authorities; academic literature

and reports of national authorities, NGOs, UNHCR and other stakeholders.

Most of the national experts' efforts went into analysing recent asylum cases. As discussed below, the approach in each country to selecting cases was tailored to the availability of relevant cases – for example in some Member States there were few relevant decisions available, while in others challenge was how to select from many decisions. In some but not all countries, it was possible to review case files as well. Each country report briefly presents the particular sampling methodology used.<sup>12</sup> The project team facilitated sharing findings and methods, and supplemented the background information gathered by national experts with information such as supranational case law to facilitate assessing the quality of national proceedings.

After organising the experts' preliminary submissions and indexing them based on characteristics of the applicants or of the proceedings, the project team shared first results with the national experts and the advisory panel. These were discussed, refined, and presented in seminar form to an expert group. The views discussed and suggestions received there led to the final form of the conclusions and recommendations presented in this report. The remainder of the efforts of the research team were devoted to finalising the text and supporting the development of the training and advocacy aspects of the APAIPA project.

### 1.3.3. The Project Questionnaire

Experts' responses to a research questionnaire formed the main basis for this report. The project team and partners prepared the questionnaire, in consultation with the advisory panel. Its purpose was to provide a common framework to compare national interpretations of key concepts used in Articles 7 and 8 of the Qualification Directive and the recast Qualification Directive, and national experiences of applying the IPA in practice. Experts based their answers on desk research and interviews with national stakeholders, within overall guidelines developed with the project team. Experts analysed legislation and policy, but used recent case practice as the main source of information for answering the questionnaire.

Although based on the text of the Qualification Directive, the questionnaire took a thematic approach rather than strictly following its provisions. It aimed to cover all the main operative concepts and terms in Articles 7 and 8 in both the 2004 and 2011 versions of the Directive. The bulk of the questionnaire focused on their application in national asylum determinations, including administrative as well as court procedures. The remainder asked for assessments from a policy point of view, to be answered largely based on published materials or stakeholder interviews.

The first section of the questionnaire focused on the application of the IPA and sought to analyse the scope of its application to different parts of the asylum process, such as procedural questions such as burdens of proof and the opportunity to contest the use of the IPA; policy priorities as to which groups are most often subjected to the IPA; and quality factors such as the appropriate use of evidence and following recognised, neutral practice guidelines. The first part of the questionnaire referenced provisions of the Qualification Directive as appropriate during a thematic review of the IPA. The second part examined Articles 7(1), 7(2) and 8 of the Directive, focusing on the interpretation and use of key operative terms and phrases. The questionnaire finished with a table to record the state of transposition of the Qualification Directive and the recast Qualification Directive.

### 1.3.4. Case Sampling Methodology

During spring and summer 2013, the national experts assessed national asylum decisions that applied the IPA or AP concepts. Given the differences in Member States' asylum determination systems and in the populations claiming protection, it quickly became clear that obtaining significant numbers of comparable cases in all Member States was unlikely. The best method for choosing decisions to review would not be the same in all countries. For example, some countries made much more use of the IPA than others; decisions were more readily available or more thoroughly indexed in some countries; and the degree of factual background and reasoning provided in cases varied considerably.

Accordingly, the overall methodology designed the best feasible sample for each jurisdiction on the basis of a set of priorities and guidelines. In consultation with the project team, each national expert then tailored an approach to the country under study. Therefore, this report does not aspire to provide a perfectly compatible representative sample of decisions for each Member State under examination, but rather an in-depth overview of national usages of the actors of protection and IPA concepts, with a sufficiently similar approach and data set to support making some broad comparisons among Member States.

Cases were selected to be representative of national jurisprudence, rather than unusual results. The sampling also aimed to cover different regions within the Member States studied. The national experts assessed trends and practices regarding the actors of protection and IPA concepts to understand in which types of cases they tend to arise. On this basis they each aimed to review up to 100 cases decided since 2010, half first instance decisions and half appeals.

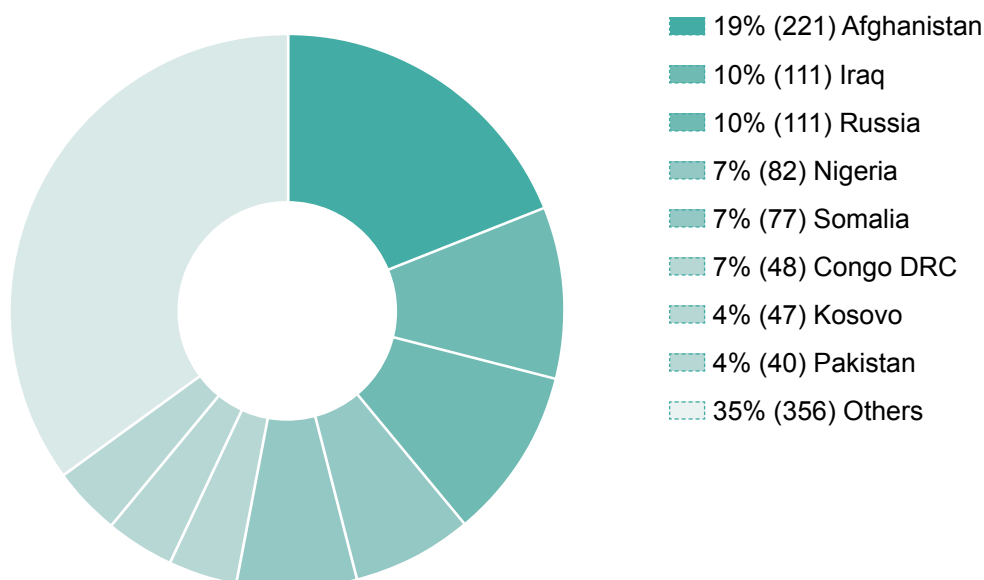
<sup>12</sup> The country reports are available on <http://www.ecre.org>.



This number was not always achieved. As detailed in the national reports (see annexes), practical obstacles to finding reasoned decisions sometimes arose, and in some countries few cases raised questions relating to actors of protection or the IPA.

	Number of first instance decisions audited	Number of second instance decisions audited	Number of 3 <sup>d</sup> instance decisions	Total number of decisions
Austria	50	50	0	100
Belgium	78	85	0	163
France	0	63	1	64
Germany	70	73 <sup>13</sup>	19	162
Hungary	16	21	0	37
Italy	56	40 <sup>14</sup>	4	100
Netherlands	4	60	21	85
Poland	65	97 <sup>15</sup>	0	162
Spain	60	22	9	91
Sweden	52	54	0	106
UK	18	40 <sup>16</sup>	5	63
<b>TOTAL</b>	<b>469</b>	<b>605</b>	<b>59</b>	<b>1133</b>

13 14 15 16



To facilitate comparing national systems, the experts sought to compose about a third of each national sample of cases in which the applicants came from Afghanistan, Iraq or Russia. These three groups represent a significant proportion of asylum applications in most Member States studied,<sup>17</sup> and many asylum applications from the nationals of these countries are rejected.<sup>18</sup> Credibility and availability of internal protection alternative in these countries were often highlighted by legal practitioners as main grounds for rejection of their applications. Moreover, these countries provide an interesting angle to study the concepts of actors of protection and the IPA, due to the presence of international troops, i.e. Iraq and Afghanistan; the weakness or unwillingness of State actors to protect; the nature of persecution, generally from State actors as in the case of the Russian Federation or non-state actors, as in the case of Afghanistan and Iraq, and the important use of IPA for applicants from these countries e.g. to Kabul, to the Kurdistan Region or to “elsewhere in the Russian Federation”.

Another target was for about a third of the cases to concern particularly vulnerable applicants in order to provide a

<sup>13</sup> It includes 55 decisions from the Administrative Court and 18 from the High Administrative Court.

<sup>14</sup> It includes decisions from the Tribunals and the Court of Appeal.

<sup>15</sup> It includes 55 decisions from the Refugee Board and 42 from the Warsaw District Administrative Court.

<sup>16</sup> It includes 10 decisions from the First Tier Tribunal, 21 decisions from the Upper Tribunal and 9 decisions from the Court of Appeal.

<sup>17</sup> In the years 2009, 2010, 2011 and 2012, applicants from Iraq, Afghanistan and/or the Russian federation were among the top three applicants for asylum in the EU Member States covered by this study (except in Spain and Italy). From 2009 to 2012, applicants from these three countries were all among the top 10 applicants in Austria, Belgium, Germany and Sweden. See: UNHCR, Asylum Levels and Trends in Industrialized Countries, 2009 (and 2010, 2011 and 2012): available at <http://www.unhcr.org/4ba7341a9.html>

<sup>18</sup> Eurostat statistics for 2012 indicate that 53% of first instance applications from Afghan nationals, 77% of first instance applications from Russian nationals and 49% of first instance applications from Iraqi nationals were rejected. See: Eurostat, Asylum applicants and first instance decisions on asylum applications: 2012, p. 12 and 13. [http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-QA-13-005/EN/KS-QA-13-005-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-13-005/EN/KS-QA-13-005-EN.PDF)

sufficient sample for a detailed analysis of the use of the concepts of IPA and AP with regard to vulnerable applicants.<sup>19</sup> The remainder of each sample sought to provide an approximate cross-section of the types of cases where the actors of protection and IPA concepts arise in that country. The goal was for at least a third of the cases to involve state protection actors and at least a third non-state protection actors, and that the sample should cover the variety of asylum procedures used in that Member State. Cases were chosen on the basis that they dealt with, or potentially could have dealt with an analysis of actors of protection or the IPA.

Finally, for each point in the questionnaire the national expert sought to identify the main leading or indicative cases that state the applicable national rule. Where access to case files was difficult administratively or technically (e.g. cases are not searchable by keywords) then the national experts focused first on presenting the main rules of law, i.e. leading cases, and at least some indications or examples of what is happening at first instance.

### 1.3.5. Stakeholder Interviews

Following the completion of desk research and case reviews, interviews with stakeholders in the national asylum system helped to clarify preliminary findings. The project team worked in consultation with each national expert to identify gaps and other points needing clarification. On that basis, interview partners were identified, including staff of national agencies, country of origin information experts, judges, lawyers and advocates.<sup>20</sup> In some countries where the number of relevant decisions was too limited to provide a meaningful overview, these interviews together with desk research were the main source of information. The names of interviewees have not been disclosed unless their explicit consent was given.

Questions were agreed between the national experts and the project team, and as far as possible indicated in advance. Interviews were conducted anonymously, unless otherwise noted. Interviews were carried out in person whenever possible.

National UNHCR offices and state authorities were invited to comment on the findings of each national report. Feedback was received from the relevant authority and/or UNHCR in all but one Member State.

In three countries, Hungary, Netherlands and UK, people whose asylum applications raised issues of actors of protection or the IPA were interviewed to highlight research findings and illustrate the impact of the IPA and actors of protection concepts on the asylum experience, their lives and their families.

The interview topics and countries were selected to illustrate the most significant themes running through the research findings. Because of the sensitive and highly personal nature of the refugee experience, the interviewers were very careful to observe a series of practical and ethical guidelines.

Excerpts of these interviews are used to illustrate the findings of the present report.

### 1.3.6. Aggregation and Analysis of the Results

The project team, in consultation with the national experts and the advisory panel, developed the criteria and principles the experts used to evaluate cases. The experts provided a synopsis of each decision, along with standardised basic information to facilitate categorisation and comparative analysis. From each sample, the expert selected for further analysis five decisions that best illustrated the national use of the actors of protection and IPA concepts. These case summaries were made available on the European Database on Asylum Law ([www.asylumlawdatabase.eu](http://www.asylumlawdatabase.eu)). Each expert also provided a short report summarising the overall results.

After reviewing the national experts' responses to the questionnaire, the project team met with them as a group to discuss preliminary findings. The meeting resulted in agreement on an analytical framework through which to present the results, and identification of points where further research was needed. The team responsible for the training aspect of the project joined the discussions in order to identify gaps in understanding and practice that training might help to fill.

Once the main research findings had begun to emerge, draft recommendations were discussed with outside experts in Madrid in April 2014. These experts included decision makers, judges, lawyers, civil society and policy makers.

<sup>19</sup> In ECRE's view, "vulnerable groups' include, but are not limited to, children especially unaccompanied children, disabled people, elderly or persons suffering from serious illnesses, pregnant women, single parents with children, persons suffering from mental health problems, victims of human trafficking and victims of torture, rape or any other form of psychological, physical or sexual violence." <http://www.ecre.org/topics/areas-of-work/introduction/93-vulnerable-groups.html>.

<sup>20</sup> Interviews were carried out with a total of 11 representatives of national authorities, 6 lawyers, 10 NGO representatives, 8 representatives of International organisations and 11 judges.

### *1.3.7. Anonymity of Asylum Applicants*

The research team took careful measures to maintain the anonymity of applicants for international protection at all times. The information contained in decisions was used only for the purpose of this research. No names or personal details which could identify protection applicants are disclosed in this report. To ensure the anonymity of applicants the national experts assigned a coded case number to each decision sampled, for the purpose of referencing. The names and details of the asylum applicants interviewed were used by the project team only for the purposes of establishing contact and scheduling interviews.





***THE INTERNAL PROTECTION  
ALTERNATIVE AND ACTORS OF  
PROTECTION IN INTERNATIONAL  
AND EUROPEAN LAW***



## II: The Internal Protection Alternative and Actors of Protection in International and European Law

This chapter introduces the concepts the Qualification Directive refers to as ‘actor of protection’ (AP) and the ‘internal protection alternative’ (IPA). In applying them, Member States must meet their responsibilities under the 1951 Refugee Convention<sup>21</sup> and international law, as well as the standards set by the Qualification Directive.<sup>22</sup> This chapter first presents the rules of international and EU law that relate to these concepts. Its second section then discusses some issues that can arise in determining whether protection is available against a risk of persecution that would otherwise lead to refugee status,<sup>23</sup> and how the Qualification Directive approaches them. The final section reviews the main controversies surrounding the use of the internal protection alternative, in light of international and EU law.

All EU Member States are parties to the Refugee Convention. That treaty defines a refugee,<sup>24</sup> and enumerates social rights states owe to refugees under their jurisdiction. The 1999 Amsterdam Treaty expanded the competence of the main EU institutions to include asylum policy, among other areas. The October 1999 European Council summit at Tampere called for the creation of a “Common European Asylum System [CEAS], based on the full and inclusive application of” the Convention. Article 78(1) of the Treaty on the Functioning of the European Union requires the EU to develop a common asylum policy that accords with the Refugee Convention “and other relevant treaties”. In 2004 the EU enacted the Qualification Directive, which set minimum standards “to guide the competent national bodies of Member States in the application of” the Refugee Convention.<sup>25</sup> In 2011, the recast Qualification Directive (2011/95/EU) was adopted and lays 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. The recast directive had to be transposed by 21st December 2013. As a component of the CEAS, an important objective of the Directive is to guide Member States in interpreting and applying the Refugee Convention, including as it relates to protection and the IPA.

### 2.1. Background: Actors of protection and the IPA in international and European law

When the relationship of protection between citizen and state fails and the citizen becomes a refugee,<sup>26</sup> the Refugee Convention obliges states party to supply ‘surrogate’ protection on behalf of the international community.<sup>27</sup> One of the innovations of the 2004 Qualification Directive was its attempt to generically describe the types of entities, or actors, able to protect. Under the Directive, if a Member State can identify a suitable alternative protector for a refugee, then it need not grant asylum itself. The IPA predates the Qualification Directive, having entered state practice in the 1980s and 1990s. If a person’s fear of being persecuted extends to only a part of the country of origin, they might be denied international protection on the grounds that they could live safely in another part of the country.

#### 2.1.1. Actors of Protection and the IPA under International Law

Neither actors of protection nor the IPA is a stand-alone principle of international law. Both are rooted in particular interpretations of the Refugee Convention. This subsection presents the justifications supplied for the application of these two concepts, and the rules of international law that constrain how states may apply them.

Article 1A(2) of the Refugee Convention associates protection with states. The Qualification Directive was the first supranational instrument to offer a general definition of an actor of protection. This raises first a threshold question of whether any actor other than a state can provide refugee protection. Second, whether the protector is a state or not, it is necessary to consider the quality of protection required under the Refugee Convention and international law. Other aspects of protection also deserve study, but in view of the limited scope of this report these two were the issues most often raised by decision makers applying the Directive’s concept of actors of protection.

Except for a limited role for UN agencies, the Refugee Convention does not contemplate protection by entities other

<sup>21</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951 (‘Refugee Convention’).

<sup>22</sup> Qualification Directive (2004), Recital (17): the Directive aims “to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of” the 1951 Refugee Convention.

<sup>23</sup> Unless otherwise stated, ‘persecution’ refers to persecution for a Convention reason, and also incorporates the Qualification Directive’s concept of serious harm. Qualification Directive, Article 15. Similarly, in this paper ‘refugee status’ also covers subsidiary protection. Qualification Directive, Article 18.

<sup>24</sup> Refugee Convention, Article 1.

<sup>25</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 (‘Qualification Directive’), Recital (16). Member States remain free to adopt “more favourable” (i.e. more likely to grant protection, or recognising more extensive rights in protected persons) standards, so long as they are compatible with the Directive. Qualification Directive, Article 3.

<sup>26</sup> See Maria O’Sullivan, Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?, *International Journal of Refugee Law* Vol. 24 No. 1, February 2012, pp. 85-110 at pp. 88-91, 102 (drawing on the work of Grahl-Madsen and Shacknove to propose ‘refugeehood’, a severance of a fundamental political relationship, as a conceptual framework through which to understand the protection need).

<sup>27</sup> James C. Hathaway and Michelle Foster, Internal protection/relocation/flight alternative as an aspect of refugee status determination, in Erika Feller et al. (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003), pp. 357-417 at p. 359.

than states. At the time of its drafting only states were considered actors in international law and therefore, arguably, this understanding should inform its interpretation. More practically, ECRE and many other commentators have argued that because by its terms the Refugee Convention only binds states, even if non-state entities could supply equivalent protection they are incapable of providing legal protection and have no duties of cooperation toward UNHCR, as they have no standing under the Convention.<sup>28</sup> An alternative line of reasoning, typified by the UK leading judgment in *Dyli*, holds that the references in Article 1A(2) of the Convention to the applicant's "country" refer to the geographic rather than the legal entity, the state. Therefore as long as the necessary protection is available within those borders, who provides it is irrelevant.<sup>29</sup> Overall state practice is inconsistent, revealing "no coherent line of authority that supports [...] interpretation of 'protection' to encompass non-state actors".<sup>30</sup>

International law defines in some detail the protection that states owe to refugees. First, states party to the Refugee Convention may not return refugees to countries where their life or freedom would be at risk, the duty of non-*refoulement*.<sup>31</sup>

Beyond safety from persecution or serious harm, the exact content of protection necessary to relieve Member States of the duty to themselves protect refugees is debated. Insofar as there is a consensus, courts and commentators agree that at a minimum protection must include safety against the risk of persecution that would otherwise lead to refugee status; no risk of being returned to another country where such a risk exists; and the assurance that such risks are not likely to arise in the future. Some commentators, including ECRE, hold that because a refugee would be entitled to the rights described in the Refugee Convention, meaningful protection in the country of origin must guarantee at least those rights. Many states, UNHCR and other authorities recognise the possibility of denying refugee status to persons who face persecution in part, but not all of their country. As explained in the UNHCR Guidelines on International Protection, the IPA is not a stand-alone principle in refugee law, but rather can arise as part of refugee status determination. Support for the IPA can be found in the object and purpose of the Refugee Convention, in particular the intention to provide surrogate protection to a person who "owing to a well-founded fear of being persecuted [...] is unable or [...] unwilling to avail himself of the protection of [their] country." There is no need for surrogate protection, the logic runs, where a home state can provide protection in another part of that country, nor would protection be needed if the individual did not have a well-founded fear of being persecuted.

The IPA emerged in state practice in the 1980s and 1990s, as attention shifted from political refugees from communist states, who were relatively welcomed, to those fleeing "countries that were politically, racially, and culturally 'different' from Western asylum countries".<sup>32</sup> At the same time the typical source of persecution changed from a monolithic state to include local actors such as rebels or renegade state authorities, whom a country of origin might be able to protect against in a different region.<sup>33</sup> Courts and commentators have accepted that in such circumstances international refugee protection might in principle not be required. The conditions, under which the IPA may be applied, however, remain controversial, both in terms of the characteristics of the region and the circumstances of the individual.

For the IPA to apply, at the very least the area must offer protection in the sense of safety from persecution or serious harm. Beyond that, the quality of life that must be available there is subject to debate. One view is that if the IPA is implied in the Refugee Convention, then the text of the Convention should be a primary source of guidance to interpret key terms such as 'protection'. Since the Convention describes a set of substantive rights that constitute international refugee protection, the protection provided by an IPA must enable access to a similar set of rights. Other standards proposed include for example that it should be 'reasonable' to expect the person to relocate to the indicated region, or that they should not experience 'undue hardship' there.

National judiciaries have developed a variety of approaches to the IPA, but no supranational court has yet addressed it with reference to the Refugee Convention or the Qualification Directive. The European Court of Human Rights has ruled in a number of cases concerning the relationship between the IPA and Article 3 of the European Convention on Human Rights. Because the protections of the Refugee Convention and Article 3 of the ECHR are not coextensive, this jurisprudence although binding on EU Member States is by its nature an incomplete description of the IPA as regards refugees. Nonetheless, some of the principles established by the ECtHR also apply to asylum determination as both the Qualification Directive and Article 3 of the ECHR require Member States to verify that persons they expel are not

<sup>28</sup> 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. 7. See also, e.g., University of Michigan Law School, International Refugee Law: The Michigan Guidelines on Protection Elsewhere, 12 November 2006, § 2 ("the Convention does not contemplate the devolution of protection responsibilities to a non-state entity"); Hemme Battjes, European Asylum Law and International Law (Martinus Nijhoff, 2006), pp. 253-54 (because the Refugee Convention specifically refers to protection by a country, in its terms "only states can offer protection . . . the overly wide definition of agents of protection in Article 7 is at odds with international law, and with Article 2(c) and (e) QD too").

<sup>29</sup> UK Immigration Appeal Tribunal, *Dyli v Secretary of State for the Home Department* [2000], § 13.

<sup>30</sup> Maria O'Sullivan, Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?, *International Journal of Refugee Law* Vol. 24 No. 1, February 2012, pp. 85-110 at p. 101 (noting court decisions ranging from describing "the nature of the body providing the protection under the Convention [as] 'irrelevant'", to limiting non-state actors of protection to those with particular types of UN mandates, to recognising only entities empowered to "act 'like a state'", to denying entirely the legitimacy of non-state actors of protection).

<sup>31</sup> Refugee Convention, Article 33(1).

<sup>32</sup> James C. Hathaway and Michelle Foster, Internal protection/relocation/flight alternative as an aspect of refugee status determination, in Erika Feller et al. (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003), pp. 357-417 at pp. 359-60.

<sup>33</sup> James C. Hathaway and Michelle Foster, Internal protection/relocation/flight alternative as an aspect of refugee status determination, in Erika Feller et al. (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003), pp. 357-417 at p. 360.

consequently subjected to torture or inhuman or degrading treatment. According to the Court, the IPA requires at least that the person “must be able to travel to the area concerned, to gain admittance and be able to settle there”.<sup>34</sup>

## 2.1.2. The Qualification Directive and International Refugee Law<sup>35</sup>

The Refugee Convention requires Member States to grant asylum to refugees,<sup>36</sup> and defines a subsidiary protection status for people who are not refugees yet risk serious harm in their home countries. The Directive enumerates the social rights owed to both these types of beneficiaries of international protection.

Commentators have questioned whether the standards set by the Qualification Directive 2004/83/EC fully reflect Member States’ international obligations.<sup>37</sup> This criticism extends to the Directive’s interpretation of the AP and IPA concepts. For example, ECRE and others have argued that the Directive should not countenance non-state actors of protection because they have limited ability to enforce the rule of law, and are not bound by international human rights treaties.<sup>38</sup> The Directive does not require Member States to assess the risk of persecution or harm prior to considering the IPA, which “might prompt decision-makers to “short-cut” a proper determination of whether an applicant has a well-founded fear”.<sup>39</sup> In accordance with Article 37 of the Directive and the direction of the European Council,<sup>40</sup> the European Commission in 2009 submitted a proposal for an amended (‘recast’) Qualification Directive.<sup>41</sup> According to the Commission, the standards of the original Directive were “vague and ambiguous”, leading to insufficiencies in compatibility with refugee and human rights law, as well as in harmonisation and quality and efficiency of asylum decision making.<sup>42</sup> Definitions of ‘actors of protection’ and ‘internal protection’ did not provide sufficient criteria “for assessing the level and effectiveness of protection required [ . . . ] thus allowing MS to reject claims and return applicants to their country of origin despite the lack of effective protection”.<sup>43</sup> The Council of the EU and the European Parliament agreed on a final text in 2011,<sup>44</sup> which Member States were required to transpose by the end of 2013.<sup>45</sup> Denmark, Ireland and the UK opted out of the recast Directive.<sup>46</sup> Ireland and the UK remain bound by the 2004 Directive.<sup>47</sup>

The recast left many key provisions unchanged, but made several clarifications aimed at safeguarding the right to international protection, and enhanced access to socioeconomic rights for protection beneficiaries and their families.<sup>48</sup> It also raised the level of socioeconomic rights for beneficiaries of subsidiary protection to equal that of refugees, except in the duration of the residence permit Member States must grant. The main amendments concerning the refugee definition clarified that a link to a Refugee Convention ground for persecution can lie in the reason for the absence of protection against persecution, and required Member States to take gender identity into account in defining a ‘particular social group’. The recast clarified that to recognise actors of protection, their protection must be effective and non-temporary, and modified the text concerning the internal protection alternative to more closely reflect the case law of the European Court of Human Rights.<sup>49</sup>

<sup>34</sup> ECtHR, *Salah Sheekh v. The Netherlands*, Application no. 1948/04, 11 January 2007. See also ECtHR, *Sufi and Elmi v. United Kingdom*, Applications nos. 8319/07 and 11449/07, 28 June 2011, and ECtHR, *A. A. M. v. Sweden*, Application no. 68519/10, 3 April 2014.

<sup>35</sup> For the purposes of the AP and API concepts, the Qualification Directive draws no distinction between refugees and beneficiaries of subsidiary protection. This report will generally use ‘refugee’ to apply to both. The reader should however keep in mind that international refugee law applies only to refugees.

<sup>36</sup> Qualification Directive, Article 13.

<sup>37</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edition) (Oxford University Press, 2007), pp. 60-61 (see in particular footnotes 49 and 56); see also Hemme Battjes, *European Asylum Law and International Law* (Martinus Nijhoff, 2006), pp. 260-261.

<sup>38</sup> ECRE, Information Note on the Council Directive 2004/83/EC 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, p. 7. See also Jane McAdam, *The Qualification Directive: An Overview*, in Karin Zwaan (ed.), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers, 2007) (‘Zwaan’), pp. 7-29 at p. 13; Madeline Garlick, ‘UNHCR and The Implementation of 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’, in Zwaan, pp. 59-69 at p. 65 (International organisations may not realistically be able to provide protection as limited resources and lack of legal authority leave them unable to ‘control’ territory and ‘protect’ people in the same way a state can).

<sup>39</sup> ECRE, Information Note on the Council Directive 2004/83/EC 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, p. 8.

<sup>40</sup> European Council, *The Hague programme: strengthening freedom, security and justice in the European Union* (2005) OJ C 53/1 (‘Hague programme’), III.1.3.

<sup>41</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast)*, 21 October 2009, COM(2009) 554 final.

<sup>42</sup> European Commission, *Commission Staff Working Document Accompanying the 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 (Impact Assessment)*, 21 October 2009, SEC(2009) 1373 final (‘Impact Assessment’), p. 10.

<sup>43</sup> Impact Assessment, p. 12.

<sup>44</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) OJ L 337/9 (‘recast Qualification Directive’).

<sup>45</sup> Recast Qualification Directive, Recitals (50), (51).

<sup>46</sup> Recast Qualification Directive, Article 39(1).

<sup>47</sup> See Steve Peers, *Statewatch analysis: The revised directive on Refugee and Subsidiary Protection Status*, July 2011, pp. 2-3 (the Council repealed the 2004 Qualification Directive “only as regards those Member States participating in the revised measure”).

<sup>48</sup> 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, pp. 3-4.

<sup>49</sup> 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, pp. 6-8.



However the new language does not resolve all concerns about compliance with international standards.<sup>50</sup>

## 2.2. Substantive rules of law applying to actors of protection and the IPA

Under the Qualification Directive, any consideration of the IPA must take actors of protection into account, but questions regarding actors of protection are not limited to the internal protection context. The remainder of the chapter discusses the main rules of international law that constrain the way Member States may implement the Qualification Directive's rules regarding actors of protection and the IPA, and the way those rules are presented in the Directive.

### 2.2.1. Actors of Protection

Under the Qualification Directive, actors of protection analysis can take place in several contexts. Article 7 defines "actors of protection," and is explicitly mentioned in Articles 6 and 8 discussing respectively actors of persecution and the IPA. It may be relevant to (a) whether an applicant has a "well-founded fear of persecution" (Article 2(d)); (b) the availability of an IPA (Article 8); (c) first country of asylum questions,<sup>51</sup> and (d) cessation of refugee status (Article 11).<sup>52</sup> The rest of this section discusses the nature of protection, and the types of entities that can provide it.

#### 2.2.1.1. What is Protection

The word 'protection' is central to the refugee definition: a person is a refugee if, *inter alia*, they fear persecution and are unable or unwilling to avail of the protection of their home country.<sup>53</sup> This raises the questions of what 'protection' means, and who can provide it. The 'what' requires consideration of the elements of protection – assuring safety and guaranteeing political, social and economic rights – as well as of how long protection will remain available and what assurance the decision maker must have that it will be provided. The main debates over 'who' concern whether, and which, non-state actors can provide protection.

#### Elements of Protection

Whether protection is assessed with reference to the home country (or part of it), the country where asylum is requested, or a third country, its content is similar.<sup>54</sup> Guaranteeing the absence of a threat to life or freedom is "the first essential step".<sup>55</sup> Because without protection the person would be a refugee, that protection must at a minimum respect the rights of refugees specified in Articles 2-34 of the Refugee Convention.<sup>56</sup> When a state denies protection on the grounds that it can be found elsewhere, the latter protection must also meet the state's obligations under international human rights and international humanitarian law.<sup>57</sup> A claimant cannot be asked to relocate to an area where although protected against the original persecutor they would still be exposed to a risk of serious harm.<sup>58</sup>

<sup>50</sup> 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, pp. 3-4, 7, 9-11. Regarding the IPA, see also Jonah Eaton, The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive, *International Journal of Refugee Law* Vol. 24 No. 4, December 2012, pp. 765-92 at p. 786.

<sup>51</sup> Michelle Foster described "protection elsewhere" as "the practice of sending a refugee applicant who has reached the territory of a state party to a third country. Under this practice, the state party neither allows the refugee to stay nor returns her to the country of origin; rather, the refugee is transferred to a third country in which it is said she will find protection". Michelle Foster, Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State, *Michigan Journal of International Law* Vol. 28 No. 2, Winter 2007, pp. 223-86 at p. 224. The EU asylum *acquis* recognises protection elsewhere through "country of first asylum", "safe third country" and "European safe third country" provisions, referring respectively to non-EU countries that had previously recognised the applicant as a refugee or extended equivalent protection, and to non-EU countries outside and within Europe the applicant passed through where, it is supposed, they could have applied for asylum. 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), OJ 2013 L180/60, Articles 35, 38, 39.

<sup>52</sup> CJEU, Joined cases C-175/08, C-176/08, C-178/08 and C-179/08 Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi & Dier Jamal v Bundesrepublik Deutschland, Judgment of the Court of Justice of the European Union (Grand Chamber), 2 March 2010.

<sup>53</sup> Refugee Convention, Article 1A(2).

<sup>54</sup> See Stephen H. Legomsky, Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection, *International Journal of Refugee Law* Vol. 15 No. 4, February 2003, pp. 567-677 at pp. 570-71.

<sup>55</sup> ECRE, The Way Forward: Guarding Refugee Protection Standards in Regions of Origin, December 2005, p. 6 (referring to the principle of non-refoulement). See also UNHCR, Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers, February 2003, § 15(a); UNHCR Guidelines on IFA, § 6; Summary Conclusions: internal protection/relocation/flight alternative, expert roundtable, San Remo, September 2001, in Erika Feller et al. (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003), pp. 418-419, § 4.

<sup>56</sup> University of Michigan Law School, *International Refugee Law: The Michigan Guidelines on Protection Elsewhere*, 12 November 2006, §8.

<sup>57</sup> *Ibid.*, § 11.

<sup>58</sup> UNHCR, Guidelines on International Protection: "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, § 20 (serious harm includes "a serious risk to life, safety, liberty or health, or one of serious discrimination . . . [taking] into account serious harm generally covered under complementary forms of protection"); Michigan Guidelines on the IPA, § 17 (the IPA cannot be applied if "a distinct risk of even generalized serious harm exists"). Even if the harm is not connected to one of the reasons for persecution specified in the Refugee Convention, it would be a consequence of the original threat of persecution. UNHCR Guidelines on IFA, § 20. If the harm rises to the severity of persecution, then a refugee claim is established with respect to the new region (§ 18). Even absent persecution, the non-refoulement rule of Article 33(1) of the Refugee Convention prohibits return to a threat against life or freedom, as that threat would be a consequence of the person's original flight from persecution (§ 19).

The term ‘effective protection’ is often used to indicate a level of protection sufficient to obviate a need for international protection. It entered use before being defined,<sup>59</sup> but a reasonably clear minimum definition has begun to emerge. Protection requires respect for the civil, political, economic and social rights of the claimant.<sup>60</sup> Mere absence of a threat to life, or of torture or inhuman and degrading treatment is not sufficient.<sup>61</sup> It is critical that the would-be protector “takes account of any special vulnerabilities of the person concerned”,<sup>62</sup> in keeping with applicable human rights instruments.<sup>63</sup> Although the point is not universally agreed, commentators have expressed the view that protection actors must also guarantee some level of economic opportunity beyond mere subsistence.<sup>64</sup> Finally, there must be no real risk the third state would send the person to another state where they might either not receive adequate protection or be sent on to yet another state where such protection is lacking (chain *refoulement*).<sup>65</sup> This includes return to living conditions so poor as to cause the claimant to choose to instead return to a risk of persecution or serious harm.<sup>66</sup>

### How durable must protection be?

Refugee protection must include a “prospect of timely access to” one of the three ‘durable solutions’: voluntary return to the home country, integration in the asylum country, or resettlement to a third country.<sup>67</sup> It may be difficult to predict whether refugees will be able to access durable solutions,<sup>68</sup> making an actor of protection inquiry particularly risky in a ‘protection elsewhere’ scenario. ECRE has argued that even if a protector can safeguard a refugee’s rights, and enable them to become self-reliant, if a durable solution is not available in a reasonable time then protection is not effective.<sup>69</sup> Conditions that require refugees to seek international protection “are far more likely to persist for years than they are to be resolved in a matter of weeks or months”.<sup>70</sup> It is not reasonable to return people to situations of protracted temporary protection, or “where resettlement is the only durable solution”.<sup>71</sup> Even when a programme is in place “actual resettlement is not always guaranteed”.<sup>72</sup>

### Formal protection? Best efforts? Actual protection?

A crucial indicator of the quality of protection offered is whether or not the protector complies with the Refugee Convention and other international human rights instruments.<sup>73</sup> Formal ratification is not strictly necessary, according to UNHCR, if “the third State has developed a practice akin to the” Convention.<sup>74</sup> ECRE noted however that although “it is possible for non-party countries to be in compliance [...] based on appropriate national legislation or practice”, acceding to the Convention enables UNHCR to perform its essential role of helping “to ensure ongoing compliance”.<sup>75</sup> Actual practice “is key to the assessment of the effectiveness of protection”.<sup>76</sup> Establishing its nature requires “a good faith empirical assessment by the state which proposes to effect the transfer”, to “inform itself of all facts and decisions relevant to the availability of protection in the receiving state”.<sup>77</sup>

59 Catherine Phuong, The concept of ‘effective protection’ in the context of irregular secondary movements and protection in regions of origin, Global Migration Perspectives No. 26, Global Commission on International Migration, April 2005, p. 2. However, “the word ‘effective’ should be redundant to the extent that protection should always be effective. Protection that is not effective is simply not protection”. Ibid., p. 3.

60 ECRE, The Way Forward: Guarding Refugee Protection Standards in Regions of Origin, December 2005, p. 6.

61 Ibid., p. 19 (“Such rights are of course critical and should have prominence, but civil and political rights are minimum standards - they are not aspirational or open to selective application. Other civil and political rights include the right to family unity, rights to liberty and freedom of movement, and rights of conscience or belief.”) (footnotes omitted).

62 UNHCR, Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers, February 2003, § 15(h).

63 ECRE, The Way Forward: Guarding Refugee Protection Standards in Regions of Origin, December 2005, p. 6.

64 UNHCR, Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers, February 2003, § 15(g) (what is required is “access to means of subsistence sufficient to maintain an adequate standard of living”. Once the person is recognised as a refugee the third state must take steps “to enable the progressive achievement of self-reliance, pending the realisation of durable solutions”).

65 Ibid., §15(c); University of Michigan Law School, International Refugee Law: The Michigan Guidelines on Protection Elsewhere, 12 November 2006, § 6 (citing Article 33 of the Refugee Convention).

66 UNHCR Guidelines on IFA, § 21.

67 ECRE, The Way Forward: Guarding Refugee Protection Standards in Regions of Origin, December 2005, p. 22.

68 Catherine Phuong, The concept of ‘effective protection’ in the context of irregular secondary movements and protection in regions of origin, Global Migration Perspectives No. 26, Global Commission on International Migration, April 2005, p. 12.

69 ECRE, The Way Forward: Guarding Refugee Protection Standards in Regions of Origin, December 2005, p. 22. See also UNHCR, Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers, February 2003, § 15(i) (to be effective, protection for refugees must “remain available until a durable solution can be found”).

70 ECRE, The Way Forward: Guarding Refugee Protection Standards in Regions of Origin, December 2005, p. 22.

71 Ibid., p. 22 (citing UNHCR, Protracted Refugee Situations, Standing Committee 30th meeting, EC/54/SC/CRP.14, 10 June 2004, § 5, which defines a situation that persists for five years as ‘protracted’).

72 ECRE, The Way Forward: Guarding Refugee Protection Standards in Regions of Origin, December 2005, p. 23.

73 Ibid., p. 7 (accession “can be an important indicator of a state’s political will to do this and can help UN bodies exercise their supervisory functions”).

74 UNHCR, Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers, February 2003, § 15(e).

75 ECRE, The Way Forward: Guarding Refugee Protection Standards in Regions of Origin, December 2005, p. 23 (referencing Article 35 of the Refugee Convention).

76 UNHCR, Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers, February 2003, § 15(e).

77 University of Michigan Law School, International Refugee Law: The Michigan Guidelines on Protection Elsewhere, 12 November 2006, § 3.

### 2.2.1.2. Who can protect

In the framework of the Refugee Convention and international law generally, protection against persecution is normally discussed as coming from states. Increasingly since the turn of the 21<sup>st</sup> century, states evaluating refugee claims have also considered the possibility that protection could be provided by non-state actors.<sup>78</sup> This section reviews the types of entities that courts have most often considered as possible protection actors, and the elements they have taken into account in deciding whether particular actors can indeed provide protection.

#### States

The willingness and ability of authorities in the country of origin to provide protection is a crucial consideration when an asylum claim is grounded in persecution by non-state actors or renegade agents of the state. This assessment takes into account the availability of police protection and a legal system for deterring and punishing crimes. Courts have found it is insufficient merely to look at formal legal requirements. Decision makers must investigate the actual prospects of protection, in light of the particular situation and characteristics of the applicant. When state agents are the source of a risk of persecution, key considerations include whether they are acting based on their official roles or in a private capacity, and the existence and effectiveness of supervisory authorities to protect against them and remedy the effects of their acts.

#### Statutory UN bodies

In practice, UNHCR aids in the protection of a significant proportion of the world's refugees. UNHCR has a mandate to, for example, advocate on behalf of refugees, assist states and organisations in meeting refugees' needs, and gather and disseminate information about state practices.<sup>79</sup> However UNHCR cannot provide protection in the sense of the Refugee Convention, as it is not empowered to demand of states the administrative and civic resources necessary to fulfil refugees' rights under the Convention. The Convention recognises protection by "organs or agencies of the United Nations other than" UNHCR,<sup>80</sup> in the form of the UN Relief and Works Agency for Palestine (UNRWA)'s responsibility for Palestinian refugees.<sup>81</sup>

#### International Organisations and Forces

According to the UNHCR Guidelines, it is inappropriate to deny refugee status "solely on the assumption that the threatened individual could be protected by" an international organisation.<sup>82</sup> Lacking the attributes of states under international law, the "exercise of a certain administrative authority and control over territory by" such organisations cannot generally equate to state protection.<sup>83</sup> The Constitutional Council of France stated that UN missions that exercise administrative and coercive powers under Chapter VII of the UN Charter could be considered protection actors, subject to showing that the mission in question can actually provide effective protection.<sup>84</sup> Protection by UN missions has also arisen in the UK, where the Immigration Appeals Tribunal reasoned that "protection of the [home] country" in Article 1A of the Refugee Convention referred to protection within the state's borders rather than necessarily by its authorities,<sup>85</sup> and therefore accepted that "UNMIK and KFOR [are] capable of amounting to the protection of his own country for a resident of Kosovo [...] That is a matter of fact, to be decided on the evidence".<sup>86</sup>

#### Clans or Tribes

Under the UNHCR Guidelines, clans and tribes, unless they are the recognised authority in a region, cannot provide effective and durable protection, which requires "an organised and stable authority exercising full control over the territory and population in question".<sup>87</sup> Considering whether clans can provide protection in light of their reliance on armed militias, the UK Immigration Appeals Tribunal (Asylum and Immigration Tribunal) maintained that such cases should turn on "the factual question, *'Is protection afforded?'*" not the legal question of *'is there an entity or are there entities qualified to afford protection?'*"<sup>88</sup> The Federal Court of Canada also referred to the *de facto* protective role of clans in Somalia particularly

78 For an overview of these developments, see Eeva Nykänen, *Fragmented State Power and Forced Migration: A Study on Non-State Actors in Refugee Law*, Matinus Nijhof Publishers, Leiden, 2012; Maria O'Sullivan, *Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?*, *International Journal of Refugee Law* Vol. 24 No. 1, February 2012, pp. 85-110 at pp. 86-87.

79 UNHCR Statute, Article 8.

80 Refugee Convention, Article 1D.

81 CJEU, Case C-31/09 *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal*, Judgment of the Court of Justice of the European Union (Grand Chamber), 17 June 2010, § 44.

82 UNHCR Guidelines on IFA, § 16. UNHCR's 2007 study of the Qualification Directive found that while some EU states studied had considered the possibility of international organisations as actors of protection, upon analysis the organisations, including multinational forces, had been deemed incapable of actually providing the necessary protection. UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, November 2007, pp. 48-49.

83 UNHCR Guidelines on IFA, § 16.

84 See ECRE/ELENA, *The Impact of the EU Qualification Directive on International Protection*, October 2008, p. 95.

85 UK Immigration Appeal Tribunal, *Dyli v Secretary of State for the Home Department* [2000], § 12.

86 UK Immigration Appeal Tribunal, *Dyli v Secretary of State for the Home Department* [2000], § 14.

87 UNHCR, *Guidelines on International Protection: "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, § 17.

88 UK Immigration Appeal Tribunal, *DM (Majority Clan Entities Can Protect) Somalia* [2005] UKAIT 00150, § 22.



in providing for social welfare.<sup>89</sup> However there remains little precedent for state action to return refugees to situations where they must depend on a clan, tribe or other non-state actor to provide the protection their home state fails to supply.

### 2.2.1.3. Actors of protection in the Qualification Directive

To discharge a Member State's responsibility under the recast Qualification Directive, an actor must offer protection that is "effective" and "non-temporary", which is "generally" the case if it takes "reasonable steps to prevent [...] harm, inter alia, by operating an effective legal system", and the applicant must have access to the protection.<sup>90</sup> Valid protectors are states and "parties or organisations, including international organisations, controlling the State or a substantial part of [its] territory".<sup>91</sup> The 2011 recast made clear that this list is exhaustive, and required that those actors be "willing and able to provide protection" as defined in the Directive (as well as adding "effective" and "non-temporary"). According to the CJEU, while the decision maker must verify the existence of authorities that actually take reasonable steps to protect against would-be persecutors, "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".<sup>92</sup> This requires "the operation of an effective legal system for the detection prosecution and punishment" of persecutory acts.<sup>93</sup>

Although Article 7 of the Directive is only referenced in the contexts of non-state actors of persecution (Article 6) and the IPA (Article 8),<sup>94</sup> it defines actors of protection in general terms. The text at first appears to conflict with the prevailing international understanding of protection. In international law, effective protection consists of more than the operation of an effective legal system to deter and redress persecution, but the Directive's use of the flexible terms "generally" and "inter alia" allows Member States to account for this. Similarly, although the reference to "reasonable steps" is "troublesome", requiring that the applicant be able to access the protection seems to imply that effective protection must actually be available.<sup>95</sup> The term "non-temporary" captures durability. It thus remains possible for Member States to interpret the Directive's minimum standards so as not to violate their international obligations. Whether non-state actors can provide protection sufficient to satisfy the requirements of the Refugee Convention remains questionable. If it is possible in principle, then the language of the Qualification Directive is broad enough to allow nearly any type of entity to act as a protector, so long as it controls "a substantial part" of a state and provides durable, effective protection.<sup>96</sup>

## 2.2.2. The Internal Protection Alternative

This section describes the IPA as it has developed in international law. It draws on the UNHCR Guidelines and two sets of conclusions of expert colloquia. The Guidelines aim to be prescriptive as well as descriptive, pursuant to the UNHCR Statute and Article 35 of the Refugee Convention.<sup>97</sup> The 2001 San Remo roundtable conclusions present a baseline understanding shared among a group of national authorities and experts from countries that together represent a majority of the world's population. The 1999 Michigan guidelines provide a more detailed view on the IPA, as understood by a group of prominent international legal scholars. Leading court cases illustrate judicial rules for the application of the IPA.

### 2.2.2.1. The IPA in International Law

The IPA is not a stand-alone principle in refugee law and the Refugee Convention does not explicitly mention it. States are not bound to apply it.<sup>98</sup> The ECtHR has accepted that in principle a person at risk of treatment in violation of Article 3 ECHR in one part of their home country but not in another might lawfully be returned to the latter area.<sup>99</sup> UNHCR cautiously acknowledges that the IPA can "arise as part of the refugee status determination process".<sup>100</sup> According to the Michigan guidelines, "internal protection analysis can be carried out in full conformity with the requirements of the Refugee Convention" if focused on currently accessible, "meaningful protection".<sup>101</sup> The San Remo conclusions concur that depending "on the particular factual circumstances", the IPA "can sometimes be a relevant consideration" in

<sup>89</sup> Federal Court of Canada, *Elmi v Minister of Citizenship and Immigration*, 12 March 1999, § 8 (quoting with approval the reasoning of the Immigration and Refugee Board, but remanding the case for reconsideration in light of the applicant's youth) (cited in Maria O'Sullivan, *Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?*, *International Journal of Refugee Law* Vol. 24 No. 1, February 2012, pp. 85-110 at p. 101 n80).

<sup>90</sup> Qualification Directive (2011), Article 7(2).

<sup>91</sup> Qualification Directive (2011), Article 7(1).

<sup>92</sup> CJEU, *Joined cases C-175/08, C-176/08, C-178/08 and C-179/08 Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi & Dier Jamal v Bundesrepublik Deutschland*, Judgment of the Court of Justice of the European Union (Grand Chamber), 2 March 2010, §§ 70-71, 75.

<sup>93</sup> CJEU, *Joined cases C-175/08, C-176/08, C-178/08 and C-179/08 Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi & Dier Jamal v Bundesrepublik Deutschland*, Judgment of the Court of Justice of the European Union (Grand Chamber), 2 March 2010, § 76.

<sup>94</sup> Persecution by non-state actors can lead to asylum, so long as no Article 7 actor of protection is willing and able to provide protection. Qualification Directive (2011), Article 6(1). The IPA depends on either the absence of a risk of harm or the presence of an Article 7 protection actor in the IPA region. Article 8(1).

<sup>95</sup> Hemme Battjes, *European Asylum Law and International Law* (Martinus Nijhoff, 2006), p. 247.

<sup>96</sup> Non-state actors of protection should "control a region or a larger area within the [state]". Qualification Directive (2011), Recital (26).

<sup>97</sup> UNHCR Guidelines on the IFA.

<sup>98</sup> Michigan Guidelines on the IPA, § 7 (states party to the Refugee Convention "remain entitled to recognize the refugee status of persons who fear persecution in only one part of their country of origin").

<sup>99</sup> ECtHR, *Salah Sheekh v. the Netherlands*, Application No. 1948/04, 11 January 2007, § 139.

<sup>100</sup> UNHCR Guidelines on the IFA, § 2.

<sup>101</sup> Michigan Guidelines on the IPA, § 5.

assessing an asylum claim.<sup>102</sup> ECRE has acknowledged that, despite the lack of a clear Convention basis, by 1998 the IPA had become “established in the national jurisprudence of state parties”.<sup>103</sup>

States diverge in how they justify the application of the IPA in international law. The Refugee Convention defines a refugee as someone who “owing to well-founded fear of being persecuted . . . is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”.<sup>104</sup> One line of reasoning holds that if the applicant can find protection somewhere within the home country, then there is no well-founded fear of being persecuted.<sup>105</sup> Another locates the IPA in the ability to protect: if there is a well-founded fear, the appropriate inquiry is into the availability of protection against it.<sup>106</sup> If the well-founded fear clause is used to support the IPA, then it might be raised within the main inquiry into the risk of persecution. If on the other hand the protection clause is invoked, then the IPA is appropriately raised only after establishing the existence of a fear of persecution. Many commentators including ECRE prefer the latter approach, as it encourages a more structured and careful approach to the IPA than would necessarily be the case if the IPA were applied before assessing the risk it is to protect against.<sup>107</sup>

The 1979 UNHCR Handbook contains an implied description of the IPA: “a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so”.<sup>108</sup> The implication that a person can “be excluded from refugee status” for not having sought internal protection, if to seek it would have been “reasonable”, carries a “punitive connotation” that is “difficult to reconcile with the explicit and closely circumscribed exclusion provisions contained in the 1951 Convention”.<sup>109</sup> UNHCR has continued to refine its views on the IPA,<sup>110</sup> for example in the 2003 Guidelines,<sup>111</sup> and some jurisprudence has developed in this area. The resulting framework requires at a minimum that an IPA protect against persecution, whether from the source originally feared or another, and take into account the rights and living standards available in the proposed relocation area, and that the person concerned can actually access protection there.<sup>112</sup>

### 2.2.2.2. The Framework of the IPA

Under prevailing state practice, in order for the IPA to apply, the person must be able to access the location, live there without risking persecution or serious harm, and enjoy basic human and social rights.<sup>113</sup> The original persecutor must not be present, and “there must be reason to believe” its reach will not extend there in the future.<sup>114</sup> The claimant should have access to at least the rights guaranteed under international refugee and human rights law, and should not have to “suppress their political or religious views or other protected characteristics to avoid persecution [...]. The relocation alternative must be more than a “safe haven” away from the area of origin”.<sup>115</sup> The degree to which basic human rights must be secured there remains controversial.<sup>116</sup>

<sup>102</sup> Summary Conclusions: internal protection/relocation/flight alternative, expert roundtable, San Remo, September 2001, in Erika Feller et al. (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003), pp. 418-419, § 1. (‘San Remo Summary Conclusions on IPA’).

<sup>103</sup> ELENA, Research Paper on the Application of the Concept of Internal Protection Alternative, November 1998 (updated autumn 2000), p. 65.

<sup>104</sup> Refugee Convention, Article 1A(2).

<sup>105</sup> UK House of Lords, *Januzi v Secretary of State for the Home Department Immigration; Hamid v Secretary of State for the Home Department* and other appeals [2006] UKHL 5, § 7 (opinion of Lord Bingham) (“if a person [could] move to a place of relocation within his own country where he would have no well-founded fear of persecution, where the protection of his country would be available to him and where he could reasonably be expected to relocate, it can properly be said that he is not outside the country of his nationality owing to a well-founded fear of being persecuted for a Convention reason”).

<sup>106</sup> *Ibid.*, § 66 (opinion of Lord Hope) (concurring in Lord Bingham’s opinion and declining to adopt this approach).

<sup>107</sup> For further discussion of the relative merits of these two approaches, see James C. Hathaway and Michelle Foster, *Internal protection/relocation/flight alternative as an aspect of refugee status determination*, in Erika Feller et al. (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003), pp. 357-417 at pp. 365-81.

<sup>108</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1979, § 91.

<sup>109</sup> James C. Hathaway and Michelle Foster, *Internal protection/relocation/flight alternative as an aspect of refugee status determination*, in Erika Feller et al. (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003), pp. 357-417 at pp. 361-62.

<sup>110</sup> Andreas Zimmermann and Claudia Mahler, Article 1 A, para. 2 1951 Convention, in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011), pp. 281-466 at § 612.

<sup>111</sup> UNHCR, *Guidelines on International Protection: “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.

<sup>112</sup> See e.g., Andreas Zimmermann and Claudia Mahler, Article 1 A, para. 2 1951 Convention, in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011), pp. 281-466 at §§ 628-662; Jonah Eaton, *The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive*, *International Journal of Refugee Law* Vol. 24 No. 4, December 2012, pp. 765-92 at p. 771 (an IPA must offer “a meaningful mitigation of the initial danger of persecution, as well as some quality of life that both mitigates against the danger of indirect refoulement and does not result in some new, independent danger of serious harm or death”).

<sup>113</sup> See e.g., Reinhard Marx, *The Criteria of applying the “Internal Flight Alternative” Test in National Refugee Status Determination Procedures*, *International Journal of Refugee Law* Vol. 14 No. 2/3, April 2002, pp. 179-218 at p. 184 et seq.

<sup>114</sup> UNHCR Guidelines on the IFA, § 18; Michigan Guidelines on the IPA, § 15.

<sup>115</sup> UNHCR Guidelines on the IFA, § 19.

<sup>116</sup> Reinhard Marx, *The Criteria of applying the “Internal Flight Alternative” Test in National Refugee Status Determination Procedures*, *International Journal of Refugee Law* Vol. 14 No. 2/3, April 2002, pp. 179-218 at p. 185. See also, Ninette Kelley, *Internal Flight/Relocation/Protection Alternative: is it Reasonable?*, *International Journal of Refugee Law* Vol. 14, 2002, p. 4 – 44; Penelope Matthew, *The Shifting Boundaries and Content of Protection: The Internal Protection Alternative Revisited*, in Satvinder S. Juss (ed.), *The Ashgate Research Companion to Migration Law, Theory and Policy*, 2013, p. 189-206; and Hugo Storey, *The Internal Flight Alternative Test: The Jurisprudence Re-examined*, *International Journal of Refugee Law* Vol. 10 No.3, 1998, p. 499-532.

According to the UNHCR Guidelines, after establishing that there is a well-founded fear of persecution in part of the country, decision makers may consider whether the IPA is relevant and reasonable.<sup>117</sup> The IPA may be “relevant” when the state is willing and able to protect against persecution and the claimant can gain access to the region, and “reasonable” if they can “in the context of the country concerned, lead a relatively normal life without facing undue hardship”.<sup>118</sup> The Michigan guidelines pose a three-part test of “meaningful internal protection”: protection against the persecution which (presumptive) refugee status is based on; absence of other risks of persecution; and local conditions which “at least meet the Refugee Convention’s minimalist conceptualization of “protection””.<sup>119</sup> According to the San Remo conclusions, “the level of respect for human rights [...] the asylum seeker’s personal circumstances, and/or conditions in the country at large (including risks to life, limb, or freedom)” are relevant.<sup>120</sup>

### Safety from Persecution

Because a state is presumed to be entitled to act throughout its territory, the IPA is “not normally a relevant consideration” if there is a risk of being persecuted by a state actor.<sup>121</sup> There should be “a strong presumption against” the IPA when the government created or sponsored the creation of that risk.<sup>122</sup> This also applies to a risk of persecution “from local or regional bodies”.<sup>123</sup> Only where it is clear that the power of the state authority or agent is geographically limited or “where the State itself only has control over certain parts of the country” can the IPA be considered in cases of state supported persecution.<sup>124</sup>

An IPA is more likely if the risk of persecution comes from a non-state actor.<sup>125</sup> In such a case, according to the UNHCR Guidelines, “the main inquiries should include an assessment of the motivation of the persecutor, [its ability] to pursue the claimant in the proposed area, and the protection available to the claimant in that area from State authorities”.<sup>126</sup> This requires that the state have control over the territory, and functioning laws and authorities by which the claimant can obtain protection.<sup>127</sup> If the state could not or would not protect the claimant in the original area of persecution, a presumption can arise that “it may also not be able or willing to extend protection in other areas”.<sup>128</sup>

### Quality of Protection

The UNHCR Guidelines incorporate human rights standards in an all-circumstances test of “what is reasonable, both subjectively and objectively, given the individual claimant and the conditions in the proposed [IPA]”.<sup>129</sup> This requires “respect for basic human rights standards, including in particular non-derogable rights”.<sup>130</sup> Factors considered in deciding whether the claimant could “lead a relatively normal life without facing undue hardship” include “the applicant’s personal circumstances, the existence of past persecution, safety and security, respect for human rights, and possibility for economic survival”.<sup>131</sup> The Michigan guidelines consider that since denial of refugee status is at stake, it is logical to measure protection in the region “by reference to the scope of the protection which refugee law guarantees”,<sup>132</sup> i.e. the substantive rights guaranteed in the Refugee Convention.<sup>133</sup> A reasonableness test can then be used as an additional safeguard.<sup>134</sup>

### General circumstances

General circumstances include physical safety and economic conditions. The claimant must be durably “free from danger and risk of injury”, which is rarely possible if there is an armed conflict in the country, due to “shifting armed fronts”.<sup>135</sup> If “an armed group and/or State-like entity” controls the area, a “careful examination must be made of the durability of the situation there and the ability of the controlling entity to provide protection and stability”.<sup>136</sup> Here it is critical to make use of high-quality and recent country of origin information (COI). However, it may not be possible for even the best sources

117 UNHCR Guidelines on the IFA, § 7.  
 118 UNHCR Guidelines on the IFA, § 7.  
 119 University of Michigan Law School, International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative, 11 April 1999, § 13.  
 120 San Remo Summary Conclusions on IPA, § 5.  
 121 San Remo Summary Conclusions on IPA, § 2. See also UNHCR, Guidelines on International Protection: “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, § 13. See James C. Hathaway and Michelle Foster, Internal protection/relocation/flight alternative as an aspect of refugee status determination, in Erika Feller et al. (eds.), Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection (Cambridge University Press, 2003), pp. 357-417 at pp. 395-97 (“the presumption against IPA in such circumstances may logically be defined as verging on irrefutable”).  
 122 University of Michigan Law School, International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative, 11 April 1999, § 16.  
 123 UNHCR Guidelines on the IFA, § 14.  
 124 UNHCR Guidelines on the IFA, § 13 (footnote omitted).  
 125 San Remo Summary Conclusions on IPA, § 2.  
 126 UNHCR Guidelines on the IFA, § 15.  
 127 UNHCR Guidelines on the IFA, § 15.  
 128 UNHCR Guidelines on the IFA, § 15.  
 129 UNHCR Guidelines on the IFA, §§ 22-23.  
 130 UNHCR Guidelines on the IFA, § 28.  
 131 UNHCR Guidelines on the IFA, § 24.  
 132 University of Michigan Law School, International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative, 11 April 1999, § 20.  
 133 Refugee Convention, Articles 2-34.  
 134 University of Michigan Law School, International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative, 11 April 1999, §§ 23-24.  
 135 UNHCR Guidelines on the IFA, § 27.  
 136 UNHCR Guidelines on the IFA, § 27.

of COI to account for sudden changes in volatile countries or regions.<sup>137</sup>

Economic conditions should enable the applicant to earn a living and access accommodation and medical care, and to lead “a relatively normal life [...] in the context of the country concerned”.<sup>138</sup> The applicant must be able to access communal resources rather than treated as an outsider, and should not have to relocate to a place “such as the slums of an urban area, where they would be required to live in conditions of severe hardship”.<sup>139</sup>

### *Personal circumstances*

Whether relocation would be ‘reasonable’ also depends on the individual. Per the UNHCR Guidelines, relevant factors might include “age, sex, health, disability, family situation and relationships, social or other vulnerabilities, ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, educational, professional and work background and opportunities, and any past persecution and its psychological effects”.<sup>140</sup> Even if no single factor makes the location unreasonable, elements can combine to deprive the applicant of the necessary “material and psychological well-being” there.<sup>141</sup> Psychological trauma arising from past persecution is particularly important; in some jurisdictions the fact of past persecution alone renders the IPA untenable.<sup>142</sup> Social isolation due to “lack of ethnic or other cultural ties” or of family or other close links can also play a role.<sup>143</sup> This inquiry must be carried out with particular care if the applicant is a child, in keeping with the overriding principle of the best interest of the child.

### *Access to Protection*

The relocation area should be “practically, safely, and legally accessible”.<sup>144</sup> Access is unsafe if it requires “pass[age] through the original area of persecution” or use of airports “especially in cases where the State is the persecutor or where the persecutor is a non-state group in control of the airport”.<sup>145</sup> It is essential that the claimant “have the legal right to travel [to the proposed area], to enter, and to remain. Uncertain legal status can create pressure to move to unsafe areas, or to the area of original persecution”.<sup>146</sup> The San Remo conclusions advise decision makers to consider “barriers to access, such as risks that may accrue in the process of travel or entry; and any legal barriers to travel, enter, or remain in the proposed IPA”.<sup>147</sup>

#### *2.2.2.3. Procedural Considerations*

Application of the IPA has procedural implications. Most fundamentally, it requires an individuated inquiry:<sup>148</sup> a state may not deny asylum based on general characteristics of a region or membership in a category of persons. The inquiry is forward-looking, to determine whether the claimant can live in the proposed area into the future, not whether they could have sought protection there before leaving the home country.<sup>149</sup> While the UNHCR Guidelines treat the IPA as part of a single, holistic inquiry into refugee status,<sup>150</sup> the Michigan guidelines consider it an exceptional measure, for possible use once a well-founded fear of being persecuted in a part of the home country is established.<sup>151</sup>

The state bears the burden of proving that a suitable IPA exists.<sup>152</sup> The UNHCR Guidelines consider this an implication of the general rule that it falls to the party making an assertion to prove it.<sup>153</sup> The Michigan guidelines reason that placing the burden of proving a viable IPA on the state is a necessary consequence of considering the IPA only after the applicant has demonstrated a well-founded fear of persecution in at least part of the country.<sup>154</sup>

As a matter of basic fairness, a would-be asylum state must give the applicant “clear and adequate notice that an [IPA] is under consideration”,<sup>155</sup> and disclose its factual basis. This is needed to ensure that the assessment of the IPA adheres

<sup>137</sup> UNHCR Guidelines on the IFA, § 37.

<sup>138</sup> UNHCR Guidelines on the IFA, § 29.

<sup>139</sup> UNHCR Guidelines on the IFA, § 30.

<sup>140</sup> UNHCR Guidelines on the IFA, § 25.

<sup>141</sup> UNHCR Guidelines on the IFA, § 25.

<sup>142</sup> UNHCR Guidelines on the IFA, § 26.

<sup>143</sup> UNHCR Guidelines on the IFA, § 25.

<sup>144</sup> UNHCR Guidelines on the IFA, § 10. The San Remo conclusions and Michigan guidelines contain nearly identical language, although the latter omits “legally”. San Remo Summary Conclusions on IPA, § 3; Michigan Guidelines on the IPA, § 16 (IPA is only permissible if “the putative asylum state is in fact able safely and practically to return the asylum-seeker to the site”).

<sup>145</sup> UNHCR Guidelines on the IFA, § 11.

<sup>146</sup> UNHCR Guidelines on the IFA, § 12.

<sup>147</sup> San Remo Summary Conclusions on IPA, § 3.

<sup>148</sup> San Remo Summary Conclusions on IPA, § 2.

<sup>149</sup> University of Michigan Law School, *International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative*, 11 April 1999, § 8 (“whatever the circumstances at the time of departure from the home state”, IPA analysis is only useful “if directed to the identification of a present possibility of meaningful protection within the boundaries of the home state”). See also UNHCR, *Guidelines on International Protection: “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, § 8.

<sup>150</sup> UNHCR Guidelines on the IFA, § 3 (refugee status determination is “one holistic test of interrelated elements” whose relationships and importance will depend on the circumstances of the case).

<sup>151</sup> Michigan Guidelines on the IPA, § 5.

<sup>152</sup> UNHCR Guidelines on the IFA, § 33-34; Michigan Guidelines on the IPA, § 14.

<sup>153</sup> UNHCR Guidelines on the IFA, § 33.

<sup>154</sup> Michigan Guidelines on the IPA, § 14.

<sup>155</sup> San Remo Summary Conclusions on IPA, § 7.



to international standards.<sup>156</sup> The applicant must be able to respond to any information presented to justify the IPA, “and to present other relevant information to the decision-maker”.<sup>157</sup>

The IPA should only be considered, if at all, in main asylum procedures, not during admissibility or other preliminary proceedings, nor in accelerated procedures. This is due to the complex nature of the IPA inquiry,<sup>158</sup> and specifically the need for “full knowledge of the risks in other regions of the state of origin”.<sup>159</sup>

### 2.2.2.4. Internal Protection in the Qualification Directive

The Qualification Directive permits Member States to refuse protection to a person who would not be at risk of persecution or serious harm in part of their home country.<sup>160</sup> The 2011 recast introduced the restriction that the IPA is only available if the person “can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there”,<sup>161</sup> enhancing the original “reasonably be expected to stay” requirement,<sup>162</sup> but still short of the ECtHR rule that they must “be able to settle there”.<sup>163</sup> The recast does not provide guidance on how to interpret “reasonably”.<sup>164</sup> Member States must “at the time of taking the decision [...] have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant” when assessing the risk of persecution or serious harm there.<sup>165</sup> The recast added that Member States must use up-to-date country of origin information from sources such as UNHCR and EASO when assessing whether a region is safe enough for the applicant to return and settle and explicitly tied this inquiry to Article 4 of the Directive governing the assessment of facts and circumstances.<sup>166</sup> Article 8(3) QD 2004, which had purported to allow the IPA even if “technical obstacles” prevented actual return, was repealed. According to a new Recital (27), there should be a presumption the IPA is unavailable whenever the applicant fears persecution from the state or its agents, and the availability of care or custodial arrangements in their best interests “should form part of the assessment as to whether” effective protection is available to unaccompanied children.

<sup>156</sup> University of Michigan Law School, International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative, 11 April 1999, § 26.  
<sup>157</sup> University of Michigan Law School, International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative, 11 April 1999, § 26.  
<sup>158</sup> San Remo Summary Conclusions on IPA, § 6; UNHCR, Guidelines on International Protection: “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, § 36.  
<sup>159</sup> University of Michigan Law School, International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative, 11 April 1999, § 25.  
<sup>160</sup> Qualification Directive (2011), Article 8(1)(a). The recast added that Member States could refuse protection if the applicant “has access to protection against persecution or serious harm as defined in Article 7” in a part of their home country. Qualification Directive (2011), Article 8(1)(b).  
<sup>161</sup> Qualification Directive (2011), Article 8(1).  
<sup>162</sup> Qualification Directive (2004), Article 8(1).  
<sup>163</sup> ECtHR, Salah Sheekh v. The Netherlands, Application no. 1948/04, 11 January 2007, § 141.  
<sup>164</sup> Relevant factors could include “considerations of personal circumstances, past persecution, safety and security, respect for human rights and economic survival”. Helene Lambert, The EU Asylum Qualification Directive, its Impact on the Jurisprudence of the United Kingdom and International Law, International Journal and Comparative Law Quarterly Vol. 55, January 2006, pp. 162-192 at p. 167.  
<sup>165</sup> Qualification Directive, Article 8(2).  
<sup>166</sup> Qualification Directive (2011), Article 8(2). The recast applies these rules only to the inquiry into the risk of persecution or serious harm in the area, rather than to the entirety of Article 8(1) as the original Directive did, but as Article 4 is a general provision of the Directive they nonetheless apply to all of Article 8(1).





# *ACTORS OF PROTECTION*





### III: Actors of Protection

The Qualification Directive defines protection with reference to the concept of an actor of protection. The first subsection discusses the research findings concerning the quality of protection such an actor must offer in order for an administrative authority to determine that an applicant does not require protection in the Member State concerned. The second subsection assesses the types and characteristics of actors of protection that arise in Member States' application of the Directive.

It must be noted that the assessment of actors of protection rarely differs based on whether refugee status or subsidiary protection is at issue in any of the Member States studied. In **Spain** and **Sweden**, protection by the country of origin was often not considered in subsidiary protection cases – principally in relation to Somalia and Afghanistan.<sup>167</sup>

#### 3.1. The Nature of Protection (Article 7(2))

##### Article 7(2) Qualification Directive 2011/95/EU

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>168</sup>

This subsection presents the ways in which the Member States included in this study apply the concept of protection, and the durability and accessibility of that protection. Under Article 7(2) of the Qualification Directive protection must entail “reasonable steps to prevent” persecution or serious harm, must be “effective and of a non-temporary nature”, and “the applicant [must have] access to such protection”. The “effective” and “non-temporary” criteria were added in the 2011 recast, reflecting the longstanding position of UNHCR,<sup>169</sup> and bringing Article 7 almost into line with the wording of Article 11 of the 2011 Qualification Directive, concerning cessation, which refers to the “significant and non-temporary nature” of any change in circumstances.<sup>170</sup>

Most Member States assess the main elements of protection, i.e. effectiveness of protection, durability of protection and access to protection, to at least some degree when examining the protection needs of applicants. **Poland** and **Spain** seem to be exceptions. The research findings from **Poland** demonstrated that the analysis of actors of protection is rare in refugee status determination. Decisions reviewed did not include a separate discussion of what entities can be considered actors of protection. The authorities usually moved straight to the analysis of the effectiveness of protection. In the decisions analysed, the assessment of access to protection and of the durability of protection was cursory or missing. If an analysis of the nature of protection arose, it was almost always when the authority, having dismissed the other elements of the claim, asserted that even if the applicant was “threatened by wrongful conduct” upon return, protection would be available in their former place of residence. In **Spain**, case analysis shows that decision makers assess whether the applicant’s state provides protection, but without reference to the concept of actors of protection contained in the law that transposed Article 7 of the Qualification Directive. The effectiveness of protection was not always rigorously examined, and access to protection was not assessed in any of the cases reviewed. The case law of the **French** National Asylum Court (Cour Nationale du Droit d’Asile - CNDA) takes into account, sometimes only implicitly, elements such as the measures taken to prevent persecution, the effectiveness of the judicial system and access to protection. In the **Netherlands**, analysis of the possibility of protection is reserved until after a fear of persecution is shown and accepted by the authorities.<sup>171</sup> In **Germany**, the question of protection is always related to the well-founded fear question, often without clearly distinguishing between the risk of persecution and the potential for protection. This makes it difficult to know if courts are applying the actors of protection analysis.

##### 3.1.1. Prevention of Persecution or Serious Harm

According to Article 7(2) of the Qualification Directive, effective and non-temporary protection “is generally provided

<sup>167</sup> In **Sweden**, this was the case in the majority of the analysed decisions that dealt with Somalia and Afghanistan where the Migration Board has deemed that in certain areas there is a situation of “internal armed conflict”. In **Spain** this is because it is a frequent policy that all applicants from a country in civil war or experiencing other widespread violence are granted subsidiary protection, often based on UNHCR country guidelines.

<sup>168</sup> See also Art. 7(2) Qualification Directive 2004/83/EC: “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.”

<sup>169</sup> See for instance, in the context of the IPA: UNHCR, Guidelines on International Protection: “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, paragraph 17.

<sup>170</sup> See further CJEU, CJEU, Joined cases C-175/08, C-176/08, C-178/08 and C-179/08 Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi & Dier Jamal v Bundesrepublik Deutschland, Judgment of the Court of Justice of the European Union (Grand Chamber), 2 March 2010. § 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.”

<sup>171</sup> **NL**: Aliens Circular 2000 (30/09/2013, currently in force), paragraph C2/6.1, Aliens Circular 2000 (in force until April 2013), paragraph C4/2.2.1 (both referencing Article 3.37c of the Aliens Instructions, transposing Article 7 of the Qualification Directive).

when” appropriate actors take “reasonable steps to prevent the persecution or serious harm, *inter alia*, by operating an effective legal system”. The research survey investigated how the Member States apply “reasonable steps”, and how they judge the effectiveness of legal systems.

The term “generally provided”, as laid out in the Article 7(2), is not interpreted specifically in **France**, **Spain** or **Sweden**. Neither **Italian** nor **Polish** legislation transposes “generally”. In **Sweden** it was transposed as “normally”. A 2005 **UK** case interpreted “generally provided” to indicate that the “reasonable steps” listed in Article 7(2) of the Directive were indicative rather than an exhaustive list.<sup>172</sup> In **Germany**, the term is incorporated into the assessment of state protection. It is first assessed whether a state would exercise effective control in the area, and is able to protect or persecute. If it is found that protection is generally provided, the result often depends on whether the examining authority in the country of refuge believes the person has already been subject to persecution or serious harm, or threats thereof.

### 3.1.1.1. Reasonable Steps

National legislation in all Member States examined, with the exception of **France**, require that actors of protection take “reasonable steps” to prevent persecution or serious harm.<sup>173</sup> In **France**, the same rule is found in a precedent setting decision of the CNDA,<sup>174</sup> but there is little information regarding how the term is interpreted in practice. Research revealed no specific criteria for demonstrating reasonable steps in **Germany**, **Hungary**, or **Italy**. In **Belgium**, it is not interpreted according to fixed rules or criteria, but assessed on a case-by-case basis. The assessment includes considering whether laws prohibiting persecutory acts are actually applied in practice.<sup>175</sup> Two decisions in **Italy** for example referred to the efforts of the Nigerian government, including amnesties as well as military action, to suppress militant activity as reasonable steps.<sup>176</sup> In the **Netherlands**, when the threat stems from local authorities anti-corruption enforcement is often cited.<sup>177</sup> In **Germany**, the requirement of reasonable steps appears to be relatively easily satisfied, with greater emphasis placed on questions of effectiveness and the applicable standard of proof. Decision makers examine first the legal framework of the country, especially in cases of gender-related persecution or persecution by non-state agents, then whether the applicant has access to protection. In **Spain** the language “reasonable steps” was not used, but the asylum authorities considered for example actions such as the deployment of soldiers and intensified patrolling of police in the city of Kano,<sup>178</sup> 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,<sup>179</sup> as sufficient to protect Christians. Courts in the **UK** apply a broader ‘sufficiency of protection’ test, which considers whether the legal system in the country can protect the applicant in practice, with respect to their individual circumstances.

### 3.1.1.2. Effectiveness of the Legal System in the Country of Origin

It must first be noted that Member States do not require protection to be absolute. The **UK** and **Germany** follow the **UK Horvath case**,<sup>180</sup> for the rule that a legal system cannot guarantee absolute protection, but should generally protect through detection and prosecution of crimes.<sup>181</sup> **Austria**, **Belgium**, **France**, **Hungary**, **the Netherlands**, **Poland** and **Sweden** appear to use a similar standard.

#### Excerpt of judgment:

**UK House of Lords, Horvath v. Secretary of State for the Home Department, 6 July 2000.**<sup>182</sup>

Lord Hope of Craighead held that:

“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.”

The research indicated that, when assessing the effectiveness of protection, the main, if not only, criteria used by Member States is the existence of an effective legal system for the detection, prosecution and punishment of acts constituting

<sup>172</sup> **UK**: UKAIT, DM Somalia, 27.07.2005.

<sup>173</sup> **FR**: France did not transpose Article 7(2) of the 2004 Directive. A new bill should be adopted in 2014 to transpose Article 7 (2) of the recast Qualification Directive 2011/95/EU.

<sup>174</sup> **FR**: CNDA, 16.02.2007 (C155MRS).

<sup>175</sup> **BE**: CGRS internal guidelines on actors of protection, 27 August 2013, p. 3.

<sup>176</sup> **IT**: Territorial Commission (Bologna), 29.06.2011 (NIG21FNS); Tribunal of Roma, 5.02.2010 (NIG66MNS).

<sup>177</sup> **NL**: For example: Dutch Council of State, 21/03/2013, no 201105922/1/V2 (Kazakhstan).

<sup>178</sup> **ES**: 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”.

<sup>179</sup> **ES**: Ministry of Interior, 19.03.2013 (AFG58FRSNO).

<sup>180</sup> **UK**: UKHL, Horvath v. Secretary of State for the Home Department, 6.07.2000.

<sup>181</sup> **Germany** looks at whether there is “sufficient certainty” that the person will not be subject to persecution upon return. This standard has also been described that there needs to be a “predominant probability for such a risk”.

<sup>182</sup> **UK**: UKHL, Horvath v. Secretary of State for the Home Department, 6.07.2000.

persecution or serious harm in the country of origin.<sup>183</sup> **France** did not transpose Article 7(2) of the 2004 Qualification Directive, but case law generally takes into account the effectiveness of the legal system albeit sometimes only implicitly.<sup>184</sup> In the **Netherlands**, an effective legal system is not absolutely required. According to the Council of State, “*the fact that the level of effectiveness is not established does not mean that in fact no protection can be provided*”.<sup>185</sup> In **Austria** sometimes the existence of a legal system is cited as evidencing state protection, but its effectiveness is not assessed. In **Hungary** and **Poland**, the determining authorities lack the resources to investigate the effectiveness of a legal system, and tend to issue similar decisions from case to case, based on general country of origin information. However most decisions in **Poland** that granted protection based on persecution by non-state agents cited an ineffective legal system in the country of origin as a key factor. Decisions in **Poland** almost always considered that the existence of a law enforcement agency and a procedure for reporting wrongful acts demonstrated effectiveness. No explicit assessment of the effectiveness of protection was found in **Spain**, but some decisions reversed the recommendations of asylum officers not to grant protection, particularly in gender related cases from Central America, stating that the initial authorities insufficiently considered relevant factors in concluding that protection was available through an effective legal system.

**Excerpt of Judgment:**

**Dutch Council of State: 5 August 2008**<sup>186</sup>

The wording of Art 7(2) of the Qualification Directive provides no grounds for considering that the existence of an ‘effective legal system’ is an independent factor which has to be in place before it can be held that protection is available. Actors other than the state can provide protection. It is therefore possible that other factors play a role in determining whether, in general, protection can be provided. Art 7(2) of the Qualification Directive contains no relevant change in the law.

The Council of State went on to state that by answering the question if an applicant can receive protection in the country of origin it will first be determined whether in general protection is provided. This will be based on the information about the general situation in the country of origin, in particular deriving from country reports from the Ministry of Foreign Affairs and reports from international organisations. Only when this question is answered in the affirmative, can it be addressed whether the applicant has demonstrated that asking protection is dangerous or useless for him. If this has not been made reasonable by the applicant only an unsuccessful call for protection can lead to the conclusion that the authorities are not willing and able to provide protection.

The criteria used to determine whether a legal system is effective vary from case to case in **Belgium, France, Germany** and **Sweden**. In the **UK**, effectiveness “*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*”.<sup>187</sup> A few cases from **Italy** assessed the effectiveness of the legal system in the country of origin. According to the Supreme Court, authorities’ ability to protect the applicant must be based on adequate logical support or facts.<sup>188</sup> Courts have ruled that the existence of anti-discrimination laws or conviction and punishment of alleged agents of persecution demonstrate effectiveness,<sup>189</sup> and have accepted reports of NGOs and international organisations and lack of success of authorities’ inquiries against such agents as showing ineffectiveness.<sup>190</sup> In most cases where an actor of protection is invoked, however, decision-makers merely refer to the possibility (or lack thereof) of protection by state authorities.<sup>191</sup> The willingness and ability of authorities in the country of origin to undertake prosecution play an important role in this assessment in the **Netherlands**.<sup>192</sup> The presence of police stations in the country of origin is also considered.<sup>193</sup> According to practice in **Austria**, a legal system should be shown to have been effective in detecting, prosecuting and punishing acts of persecution or serious harm, without discrimination against a group to which the applicant belongs. A memorandum accompanying **Belgian** legislation indicates that the assessment should consider for example the general circumstances of the country, state policy towards acts of persecution, the influence of actors of persecution on the state and the existence of practical measures to prevent persecution.<sup>194</sup>

<sup>183</sup> In **Sweden** it is often not part of the assessment and it is not defined what it means in practice, in particular in relation to the detection, prosecution and punishment of acts of persecution. In **Hungary**, Government Decree 301/2007 (XI.9), Section 91 requires the existence of appropriate laws as well as enforcement institutions.

<sup>184</sup> See e.g.: (**BE**): CNDA, 25.11.2011 (KOS31M).

<sup>185</sup> **NL**: Council of State, 3.09.2012 (MON43FNSNO).

<sup>186</sup> **NL**: (translation by the authors). Dutch Council of State, 5 August 2008, (no. 200708107/1) <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2008:BD9606>

<sup>187</sup> **UK**: UKUT, SA Pakistan, 24.01.2011.

<sup>188</sup> **IT**: Supreme Court, 25.01.2012 (GHA01MRE).

<sup>189</sup> **IT**: Tribunal of Rome, 20.12.2012 (KOS64MNSLG), Court of Appeal (Bologna), 20.4.2012 (KOS63MNSLG) (anti-discrimination laws); Tribunal of Bologna, 30.07.2012 (PAK34MNS) (actors of persecution were convicted and detained for 7 years).

<sup>190</sup> **IT**: Territorial Commission of Torino, 10.04.2013 (NIG06FRSVT); Tribunal of Cagliari, 3.04.2013 (NIG43FRSTO); Tribunal of Rome, 20.12.12 (GHA64MRS).

<sup>191</sup> **IT**: See e.g., Tribunal of Rome, 12.04.2011 (ALB67MNS) (Albanian authorities’ inability or unwillingness to protect “must be excluded on the basis of what is widely known about Albania”); Tribunal of Bologna, 15.06.2011 (PAK73MNS) (acts alleged by the applicant are prosecutable in Pakistan); Territorial Commission of Bari, 02.02.2012 (IRQ09SPPD/TO) (a married couple whose in-laws did not accept the marriage could be protected by “organs of the Iraqi state”); Territorial Commission of Torino, 17.12.12 (NGE46MNS) (applicant deemed not credible, especially for leaving Niger without seeking the protection of the authorities there).

<sup>192</sup> **NL**: See for example the letter of the State Secretary for Security and Justice of 15 January 2013 on the Country Guidance Note on Pakistan (authorities often did not act to protect Ahmadis and Christians against religious violence or to prosecute offenders, resulting in “a climate of inviolability [...] for the offenders”).

<sup>193</sup> **NL**: Council of State, 18/06/2013, (no. 201201084/1/V1) (Nepal). But see District Court of Arnhem AWB 11/32480 (20/09/2013) Nepal (NEP12MRENO); the construction of police stations did not mean the applicant could be effectively protected against the Youth Communist League.

<sup>194</sup> **BE**: Explanatory memorandum to the proposal modifying the Law of 15 December 1980 regarding the entry, residence, settlement and removal of aliens introduced Article 48/5 §2 Aliens Act in 2006, (Chamber Doc: DOC 51 2478/001) p. 87-88.



Decisions in **France** and **Sweden** provided little detail as to which criteria were used to assess the effectiveness of the legal system.<sup>195</sup>

Cases reviewed from **Austria, Belgium, Hungary** and **Italy** consistently took special needs of individuals into account when assessing the effectiveness of protection.<sup>196</sup> Practice was inconsistent in **Germany, Sweden** and the **UK**.<sup>197</sup> In cases relating to trafficking or domestic violence, authorities in the **Netherlands** take into consideration particular circumstances when assessing the effectiveness of a legal system.<sup>198</sup> It was not possible to determine whether the assessment of effectiveness carried out in **France** generally takes vulnerabilities into account.<sup>199</sup> The study found very few asylum cases involving trafficking victims, apparently because many of the Member States studied consider that would-be applicants could find protection from other institutions in either the Member State.

Little analysis is given in some countries to the practical effectiveness of protection. Usually in **Spain**, and in some cases in the **Netherlands**, the practical availability of protection is not mentioned, with protection considered available if laws prohibit the feared acts of persecution. Also, in **Hungary**, while the OIN policy defines a system as effective if legal provisions are applied in practice to protect the victims and if law enforcement agencies are ready and able to investigate violations, the practical effectiveness of protection is less analysed in practice in individual applications. This practice is not in line with the recast Qualification Directive 2011, which indicates that

“the assessment of an application for international protection [...] includes taking into account all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and *the manner in which they are applied*”.

Not assessing the practical availability of protection in the country of origin leads to situations where the applicant might be denied international protection while still being in danger of persecution in his/her home country. The existence of legislation providing protection in a country of origin, while being an important element in the assessment of the effectiveness of protection, cannot on its own satisfy the decision maker that effective protection is available to the applicant. As UNHCR indicates, actual practice “is key to the assessment of the effectiveness of protection”.<sup>200</sup>

**Recommendation:** The availability of protection for the applicant must be demonstrated in practice, not merely in principle, it must be available to the particular person concerned or similarly situated persons, not merely in general terms. It should be demonstrated that the particular applicant can be effectively protected by a specific actor of protection and will have access to protection and that the protection is not temporary.

Member States generally assess the effectiveness of protection. The level of effectiveness required by Member States is below “absolute protection”. The main, if not only, criteria used for the assessment of the effectiveness of protection is the operation of a legal system for the detection, prosecution and protection of acts of persecution or serious harm. In some countries, such as Hungary, the Netherlands and Spain, the availability of protection for the applicant is sometimes not demonstrated in practice, the decision maker being satisfied if the act of persecution is prohibited by the law of the country of origin.

### 3.1.2. Durability of Protection

The recast Qualification Directive foresees that protection against persecution or serious harm must be “*effective and of a non-temporary nature*” (Article 7(2)). The Court of Justice of the European Union, in the *Abdulla* case, interprets “*non-temporary*” in the cessation context as requiring that “*the factors which formed the basis of the refugee’s fear of persecution may be regarded as having been permanently eradicated*” (§73) in 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>201</sup>

<sup>195</sup> Only a few of the decisions studied in **Sweden** mentioned the existence of a legal system as a factor.

<sup>196</sup> **IT:** See e.g., Tribunal of Trieste, 12.04.2010 (IVO55FNS) (Ivorian legal system is effective against FGM because FGM is illegal and perpetrators are prosecuted); Territorial Commission of Torino, 10.04.2013 (NIG06FRSVT) (Nigerian legal system ineffective in protecting trafficked women, despite some protective laws); Supreme Court, 10.01.2013 (NIG48FRETO) (lower court must consider actual practice of the government in protecting victims of gender-based violence); Supreme Court, 24.09.2012 (DRC54FRETO) (DRC authorities unable or unwilling to protect against gender based violence).

<sup>197</sup> Practice in the **United Kingdom** appears to vary depending on the judge and on whether the Home Office or the Immigration Tribunal is assessing the case.

<sup>198</sup> **NL:** District Court of Assen AWB 13/1411 (25/06/2013) Burkina Faso (BUR36MNSVT) (considering the implementation of anti-trafficking laws in the country of origin); General Administrative Law Act, paragraph 3(2) (if a woman asserts protection is not available against domestic violence, the State Secretary must assess her individual situation).

<sup>199</sup> There are no specific provisions for vulnerable migrants in **French** legislation, no OFPRA or CNDA internal notes on this issue, and few relevant cases from the CNDA.

<sup>200</sup> UNHCR, Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002), February 2003, § 15 available at: <http://www.refworld.org/docid/3fe9981e4.html>

<sup>201</sup> CJEU, Joined cases C-175/08, C-176/08, C-178/08 and C-179/08 Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi & Dier Jamal v Bundesrepublik Deutschland, Judgment of the Court of Justice of the European Union (Grand Chamber), 2 March 2010. § 73.

In **Austria**,<sup>202</sup> **Belgium**, **Germany**, **Hungary** and the **UK** the law requires that protection be “non-temporary”,<sup>203</sup> but only Germany indicates how to interpret that term.<sup>204</sup> In **Germany**, in the cessation context it is examined whether the state has been re-established and whether the risk has ceased sustainably.<sup>205</sup> The Federal Administrative Court and the Federal Constitutional Court also refer to the necessity of a regime of a “certain duration”.<sup>206</sup> Nevertheless, often the question of durability of protection is looked at in a quite short-term perspective by the German decision practice. A court ruling in **Austria** granted protection because although the threat in question had receded (al-Shabaab militia in Mogadishu), despite the fact that it might return.<sup>207</sup> **UK** courts have indicated that an internal protection alternative based on short term protection in churches or shelters is not reasonable.<sup>208</sup> In the **Netherlands**, INS instructions provide that in order for protection to be durable there should be “no concrete indications that effective protection will end within the foreseeable future”.<sup>209</sup> Case law however considers short-term protection sufficient.<sup>210</sup> Durability of protection was not assessed in cases reviewed from **Belgium**, **France**, **Hungary**, **Italy**, **Poland**, **Spain** or **Sweden**.<sup>211</sup>

It is of concern that, in many countries, the durability of protection is rarely assessed, and so even in Member States where legislation and case law, predating the recast Qualification Directive, clearly entailed such a requirement. The explicit inclusion of the “non-temporary” requirement in the recast Qualification Directive, should force Member States to fully include this criteria into the assessment of the nature of protection. When carrying out this assessment, due regard must be paid to the CJEU interpretation of the ‘non-temporary protection’ as laid out in the *Abdulla* judgement.

**Recommendation:** Member States should interpret the criterion that protection must be “non-temporary” to mean that it must be established that the factors, which formed the basis of the refugee’s fear of persecution, have been permanently eradicated, and that there are no further well-founded fears of being exposed to acts of persecution or a risk of serious harm, including by actors other than the original actor of persecution.

### 3.1.3. Access to Protection

Article 7(2) of the Qualification Directive (and its recast) requires that the applicant has access to protection. This is assessed in **Austria**, **Belgium**, **Germany**, **Sweden** and the **UK**.<sup>212</sup> In **Hungary**, **Italy** and **Poland** access to protection is required by national law but rarely assessed in practice.<sup>213</sup> In **Belgium**, both legal and practical obstacles to protection should be evaluated,<sup>214</sup> and some of the cases reviewed looked at the access to protection when assessing the internal protection alternative.<sup>215</sup> In **France**, Article 7(2) of the Qualification Directive 2004 is not transposed, but there is a requirement in law to assess the access to protection in the context of the internal protection alternative.<sup>216</sup>

In decision practice in **Germany**, access is seen as a part of the risk assessment, often making it difficult to see what standard is actually applied when assessing access. The practice generally takes social status and vulnerability into account. In **Austria** access to protection has to be reasonable. **UK** first instance decision letters of refusal reviewed during this research tended to treat evidence of the existence of complaints mechanisms and of complaints being registered in the country of origin as demonstrating accessibility of protection for all types of applicants. There is little information on criteria used to assess access. The main criteria relate to the personal circumstances of the applicant and to their efforts to obtain protection in the country of origin. No specific criteria were found in **Germany**, **Spain** or **Sweden**.

#### 3.1.3.1. Personal Circumstances

Article 4 of the Qualification Directive, which applies to evaluating access to protection as it does to all aspects of status

<sup>202</sup> **AT:** Administrative High Court, 19.2.2004 (2002/20/0075) and Administrative High Court, 24.6.2004 (2001/20/0420).

<sup>203</sup> In the **UK** this is usually subsumed in “sufficiency of protection”. The question of whether protection would be “effective and non-temporary” may be assessed, but it is up to the applicant to raise it. In **Austria**, jurisprudence requires protection to be non-temporary and for it to be reasonable to return applicants.

<sup>204</sup> In **Austria**, jurisprudence requires protection to be non-temporary and for it to be reasonable to return applicants.

<sup>205</sup> In **Germany**, this is mainly assessed in “Iraqi revocation cases”.

<sup>206</sup> **DE:** FCC, 10.08.2000, 2BvR 260/98 (5AFG01MSB); FAC, 24 February 2011, 10C 3.10, §17 (5IRQ05MSB).

<sup>207</sup> **AT:** AC, 29.05.2013 (SOM73MRSUM).

<sup>208</sup> **UK:** See e.g., CA, AA (Uganda) v SSHD, 22.05.2008: UKUT, KA (Pakistan), 14.07.2010.

<sup>209</sup> **NL:** Aliens Circular 2000 (current), paragraph C2/6.1.

<sup>210</sup> **NL:** Council of State 201108446/1/V1 (Iraq) (IRQ07FNSNO): shelter for woman fearing violence in the KRG (Kurdistan Regional Government).

<sup>211</sup> **France** did not transpose this Article, and the case sample did not contain any indications, however it is likely taken into consideration without written reasoning. No cases reviewed from **Italy** and from **Belgium** referred to the duration of protection.

<sup>212</sup> **UK:** At the stage of refusal letters, access is often not verified case by case, but asserted based on conclusions drawn from COI. The immigration tribunals (appeals) often assess access in the individual’s circumstances.

<sup>213</sup> In **Italy** courts have found protection accessible by virtue of the fact of having lodged a police complaint (Tribunal of Bologna, 15.06.2011 (PAK73MNS)); prominent local membership in the governing political party (Tribunal of Trieste, 15.10.2013 (PAK11MNS)); recent electoral victory by parties espousing the applicant’s religion (Christian parties in Nigeria) (C.A., 24.02.2012 (NIG42FNS)); and having been assisted by a barrister in the home country (Territorial Commission of Bologna (NIG76FNSTO)). In a case from Ghana protection was awarded because the power of the agent of persecution would make protection by authorities inaccessible (Territorial Commission of Foggia, 15.02.2013 (GHA57MSP)). In Poland, the requirement that the applicant has access to protection is prescribed in Article 16(2) of the law in context of actors of protection, and not by Article 18 regulating the IPA. In Hungary the OIN asserts that access is verified, but practitioners consulted did not consistently observe such verification.

<sup>214</sup> **BE:** CALL 77.179, 14 March 2012 (further declaring, “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”).

<sup>215</sup> **BE:** See for instance: CALL, 14.03.2012 (KOS119MNSNO).

<sup>216</sup> **FR:** Article L.713-3 Ceseda.

determination, requires consideration of the applicant's personal circumstances. The personal circumstances of the applicant should be taken into account when assessing access to protection in **Austria, Belgium, Germany, Hungary, the Netherlands** and **Sweden**. This analysis was inconsistent or missing in cases studied from **Poland, Spain** and **Italy**. In practice it is sometimes taken into account in **France**.<sup>217</sup> In the **UK**, case workers are advised to be alert to access issues where the applicant is a member of a discriminated-against group, but it remains the applicant's responsibility to show why in their case protection is inaccessible. In **Sweden**, the Court of Appeal takes into account the applicant's statement and country of origin information (COI) on the availability of state protection. An individual assessment must always take place, and take into account age and gender. Gender-related asylum claims in **Sweden** are often rejected with reference to the availability of state protection.<sup>218</sup>

Some of the Member States studied assess the relationship between an applicant's particular needs and the likelihood that authorities in the country of origin would protect a person with those needs. Protection is sometimes granted in **Spain** against gender based persecution, citing a "culturally accepted practice" in the country of origin that prevents the state from protecting the applicant.<sup>219</sup> Analysis of **French** decisions indicates that the vulnerability of the applicant is a key factor to consider when assessing access to protection and is sometimes taken into account by the CNDA. In **Italy**, no standard practice was identified, but the vulnerability of the applicant is sometimes taken into account when assessing the role of the state as actor of protection, especially with regard to gender based violence.

The discriminatory attitude of the authorities, for example towards women or a certain ethnic or religious group, is sometimes taken into account. More broadly, law or policy in several Member States recognises that people with particular vulnerabilities may find it difficult to approach authorities, due to the perception of a power imbalance between themselves and those authorities. This is applied more to women than to other categories of applicants. For example, **UK** Asylum Policy Instructions address why a woman might not approach authorities,<sup>220</sup> and the law in **Spain** requires consideration of gender. Internal guidelines of the **Belgian** asylum authority require that decision-makers consider the difficulty applicants with special needs may have in approaching authorities in their home country for protection.<sup>221</sup>

However, in **Austria, Hungary, Poland** and the **UK**, it was noted that even where decision makers cite factors that might make it difficult to obtain protection from national authorities, decisions sometimes appear not to draw the conclusions those factors point toward.

### 3.1.3.2. Seeking Protection in Country of Origin prior to Flight

In all Member States studied except the **Netherlands**, in particular when assessing claims where there is evidence of past persecution, if the applicant had not approached authorities in the country of origin to seek protection previously, it tended to contribute to an adverse credibility finding regarding their testimony as a whole.<sup>222</sup> This demonstrates that Member State authorities link the use of the legal concept of actors of protection concept with credibility findings: the applicant's failure to request protection from authorities in the country of origin before fleeing is considered by decision makers as a reason to doubt their stated fear of persecution. This is not in keeping with the forward looking nature of risk assessment, and risks conflating the decision maker's subjective impressions of the applicant's credibility into the objective portion of the well-founded fear analysis.<sup>223</sup> It is important to stress that credibility assessment and findings of fact should not be conflated with the legal concept of actors of protection. There is no obligation under international law to first seek protection in the country of origin prior to the flight particularly where such protection would not be forthcoming and/or where persecution emanates from a State authority.

Expecting the applicant to have first approached their national authorities is a matter of policy or standard practice in **Belgium**,<sup>224</sup> **Poland**,<sup>225</sup> **Spain** and the **UK**.<sup>226</sup> It is not automatically assessed in **Germany, Hungary** or **Sweden**, but if it arises it can still affect a credibility determination. In **Germany**, generally applicants must explain why they did not turn to the authorities if they feared non-state actors. In the **Netherlands**, it is not possible for this to affect a credibility finding, as the availability of protection is only assessed after determining that the applicant has a real fear of persecution. However two Council of State decisions ruled that the ability to request protection showed protection was not impossible, even

<sup>217</sup> While consideration of personal circumstances is not explicitly required in **French** law (Article 7(2) was not transposed), it is apparently taken into account in case law, but the relevant decisions are often not detailed enough to be certain on this point.

<sup>218</sup> Gensen Project, Gender-related asylum claims in Europe: Comparative analysis of law, policies and practice focusing on women in nine EU Member States, May 2012, p. 53.

<sup>219</sup> **ES**: See for example Mol, 21.09.2013 (AFG08MRSLG); Mol, 22.08.2012 (ALG40FRSLG); Mol, 22.08.2012 (RUS47FRSSPTO).

<sup>220</sup> **UK**: Asylum Policy Instruction, *Gender Issues in the Asylum Claim*, 29 September 2010.

<sup>221</sup> **BE**: CGRS Internal Guidelines on Actors of Protection, 27 August 2013, p. 3 – 4.

<sup>222</sup> Decision makers appear to reason that if the applicant were being truthful about the events that led to flight, they would have sought help from local authorities. In **Austria** it may be that not having approached the authorities instead affects the perception of how reasonable it is to expect the claimant to return to the country of origin.

<sup>223</sup> On the issue of credibility in asylum claims, see: UNHCR, *Beyond proof: credibility assessment in EU Asylum Systems: Full Report*, May 2013.

<sup>224</sup> **BE**: The applicant should either approach authorities for protection, or provide a reason as to why they failed to do this. CALL, 26.10.2007 (no. 3253); CALL, 30.09.2008 (no. 16.682); CALL, 17.05.2009 (no. 27.494); CALL, 25.06.2009 (no. 29.108).

<sup>225</sup> **PL**: Decisions frequently stated that in order to receive international protection applicants must first exhaust all opportunities to obtain protection from the authorities in their home country (if fearing persecution from state authorities, the applicant was expected to approach those authorities responsible for protecting against abuses of power), often citing three supreme court rulings that predate the Qualification Directive.

<sup>226</sup> **UK**: The Home Office expects the applicant to go to the police unless they are a member of a discriminated-against group, and has refused protection to applicants who unsuccessfully sought police protection because they did not show "a sustained and systemic failure of state protection". See e.g., UK Home Office decision, 06.05.2011.

though in one case police declined to respond due to distance from the applicant’s residence, and in the other a country report indicated that protection was generally unavailable.<sup>227</sup> This focus on the applicant’s situation and actions prior to leaving the country of origin is incompatible with the forward-looking nature of asylum assessment. The analysis should be focused on the risk upon return at the point of the international protection assessment.

The assessment of credibility and the assessment of the availability of protection are two different assessments, the former based on findings of fact whilst the other requires consideration of a legal concept. The approach of some Member States risks conflating these two distinct analysis, which should be clearly separated. There is no requirement in international law for the applicant to have exhausted the protection possibilities in the country of origin when assessing the credibility of an applicant’s account.

**Recommendation:** 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, and should be clearly separated and distinct from credibility assessments.

Nature of Protection – Criteria for the assessment of Protection											
	AT	BE	DE	ES	FR	HU	IT	PL	NL	SE	UK
“Willing and able to provide protection”	X	X	X		X	X	/	X	X	X	X
“Reasonable steps”	X	X	X	/	/	X	/	X	X	X	/
“Effective protection”	X	X	X		X	X	/			X	/
“Durable protection”	X	X	X			/			/		X
State actor of persecution: Presumption?	X	X		X	X	X	X		X	X	X
Access to protection	X	X	X		/	/	/	/	X	X	X

X: Criterion is generally considered. /: Criterion is occasionally considered.

### 3.2. Actors of Protection

**Article 7 (1) Qualification Directive 2011/95/EU**  
 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.<sup>228</sup>

Article 7(1) of the Qualification Directive lists the types of actors that can provide protection as described in Article 7(2). These are states, and “parties or organisations” that control at least “a substantial part” of a state. The 2011 recast made explicit that actors of protection must be “willing and able” to offer protection. This section presents how the Member States interpret “willing and able”,<sup>229</sup> then discusses the criteria they apply to decide whether specific states can serve as actors of protection, and factors which make them unable to do so. The last subsections discuss such criteria and factors as they relate to non-state actors of protection, and the types of non-state entities that Member States have considered may be able to provide protection.

In most Member States there is a presumption that protection is not available if a state actor is the source of or tolerates

<sup>227</sup> NL: Council of State, 18.06.2013 (no. 201201084/1/V1) (NEP37MNSNO) and Council of State, 31.12.2013 (no. 201306331/1) (AFG82MNSNO).  
<sup>228</sup> See also Art. 7(1) Qualification 2004/83/EC: “Protection can 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.”  
<sup>229</sup> Please note that the decisions analysed for this research were collected before the recast Qualification Directive was transposed. However, the “willing and able” requirement was already present, in various forms, in most Member States.



persecution (2011 Qualification Directive, Recital (27)) (**Austria, Belgium, Hungary, France, the Netherlands, Sweden, UK**). In **Belgium** the state “will not be considered an actor of protection when it knowingly covers the acts of persecution, while it has the possibility to intervene and to guarantee an efficient protection, regardless of its motivation not to do so”.<sup>230</sup> In the **UK**, the judicially constructed rule is that “the more senior the officers of state concerned, and the more closely involved they are in the refugee’s ill-treatment, the more necessary it will be to demonstrate clearly the home state’s political will to stamp it out and the adequacy of their systems for doing so and for punishing those responsible, and the easier it will be for the asylum seeker to cast doubt upon their readiness, or at least their ability, to do so.”<sup>231</sup> In **Austria** and **Hungary**, the presumption is irrefutable: there is no possibility of a determination that the state can provide protection, when the persecution is caused by a state actor.<sup>232</sup> Based on cases reviewed from **Italy**, there seems to be a presumption in practice that there is no effective protection when the state is the actor of persecution,<sup>233</sup> but not when it tolerates the persecution.<sup>234</sup> In **Spain** there is no formal presumption, but it was not argued in any of the cases assessed that an applicant could find protection in their country of origin against persecution by a state actor. The presumption that protection is not available if a state actor is the source or tolerates the persecution can be overcome if the persecutor is acting as a private individual rather than through their capacity as a state agent (**Belgium, Sweden**), if the persecution stems from local authorities (**Netherlands**) or if the authorities do not have control over the whole territory (**France**). There is no such presumption in **Germany** or **Poland**. In **Germany**, the decisions analysed show that there is a presumption that effective protection is available if the state is able to protect and persecute. This is especially the case if lower ranking authorities are the actors of persecution and it is deemed that the state does not generally tolerate the persecution. The question of whether an actor of protection is available is in these cases does not generally feature prominently.

**Recommendation:** Where state agents are the actors of, or tolerate, persecution or serious harm, effective protection should be considered unavailable.

### 3.2.1. General Criteria: Willingness and Ability to Provide Protection

All Member States studied except **Spain** require that actors of protection be “willing and able” to provide protection, as defined in the Qualification Directive. This is established by law in **Belgium, Germany, Hungary** and **Poland**,<sup>235</sup> by case law in **Austria, France** and the **UK**,<sup>236</sup> and by government policy instructions in the **Netherlands** and **Sweden**.<sup>237</sup> In **Italy**, some cases refer to an ability or willingness to protect but others simply assert that the applicant could find protection from the home state, without any explicit evaluation of willingness and ability.<sup>238</sup> Only in **Spain**, it seems that whether an entity is willing and able to protect is not assessed.

In the **Netherlands**, courts appear to be quickly convinced that higher authorities can provide protection. Willingness is often considered sufficient. In the **UK**, first instance refusal letters rarely address willingness and ability. The effectiveness, accessibility and durability of protection are not normally separately addressed. Refusal is often based on COI that shows the existence of a police force, even if it at times also questioning the ability of that force to protect.<sup>239</sup> The Upper Tribunal has ruled that a judge must consider the ability of the authorities to protect the particular individual.<sup>240</sup> In **France**, an OFPRA internal note states that assessing the ability of a state to provide protection requires an extensive knowledge of the judicial system, its security policy, both in terms of prevention and prosecution of crimes, and the victim’s access to this system. Authorities in **Belgium** look, among others, at whether the official measures taken by the State are efficient, and whether the possible absence of reaction of the State to the act(s) of persecution is systematic.

In **Germany**, the Federal Administrative Court uses, for the assessment of an actor of protection, the standard defined

<sup>230</sup> **BE**: Council of State, 144.725, 20 May 2005  
<sup>231</sup> **UK**: *Svazas v Secretary of State for the Home Dept* [2002] (opinion of Simon Brown LJ).  
<sup>232</sup> In **Hungary** the presumption also applies to non-state actors controlling the state. Government Decree no. 301/2007 (XI. 9.), Section 92 (4). In **Austria** the same rule applies if the state actor tolerates the persecution.  
<sup>233</sup> **IT**: In only one case was an IPA identified against a state actor of persecution, the police in Turkey. Tribunal of Milano, 12.11.2009 (TUR50MNS) (not presuming, but concluding that ethnic intolerance would be less in another part of Turkey).  
<sup>234</sup> **IT**: In some cases of non-state actors of persecution the decision maker raised the IPA without considering the role of the state as an actor of protection, or whether it tolerated the persecution.  
<sup>235</sup> In **Germany**, this requirement was already established in case law before the Qualification Directive was transposed. **Poland** did not explicitly transpose “willing and able” but is arguably implicit in Article 16(2) of the protection law under which protection is provided when relevant actors “take necessary measures to prevent persecution or serious harm”. In **Belgium**, the 2006 memorandum introducing Article 48/5§2 of the Aliens Act indicated that the state needs to be “willing and able to apply [the legal] system in such a way that the risk of persecution or other serious harm is in fact minimal”.  
<sup>236</sup> **France** did not transpose Article 7(2) of the Qualification Directive but case law requires “willing and able” (CNDA, 16.02.2007). A decision of the CNDA also confirms that the Court considers that willingness alone is not sufficient. An actor of protection must also be able to provide protection (CNDA, 29.06.2012 (IRK43MRS)). In the **UK** Horvath is understood to require willingness and ability to protect.  
<sup>237</sup> This is required by the Aliens Circular 2000 in the **Netherlands**. In **Sweden** the rule is found in a leading document from Migration Board on state protection in Iraq, 12/2011 and in an asylum decision (MIG 2011 :6).  
<sup>238</sup> **IT**: Territorial Commission of Bari, 02.02.2012 (IRQ09SPPD/TO); Territorial Commission of Torino, 17.12.12 (NGE46MNS). In one case where the applicant’s family had continued to live in the Casamance region, where rebels from whom the applicant feared persecution were active, it was determined that the fact that the family stayed indicated state authorities were willing and able to protect. Territorial Commission of Torino, 21.09.2012 (SEN17MNS).  
<sup>239</sup> **UK**: For example, a Home Office letter of 12.04.2011 (NIG28FNP) advised that the applicant should pursue a complaint to the police, then quoted an Amnesty International report: “most complaints against law enforcement officials are not processed”.  
<sup>240</sup> **UK**: UKUT, SA Pakistan, 24.01.2011; UKUT, AW (sufficiency of protection) Pakistan, [2011].



by the Federal Constitutional Court for actors of persecution.<sup>241</sup> The test is whether a de facto territorial authority, in all or part of the country, in the sense of an overall regime of a certain duration is in principle able to protect and prosecute. The Federal Administrative Court has also indicated that “it is essentially sufficient if a state or statelike authority may afford the necessary protection, albeit with the assistance of multinational troops”.<sup>242</sup> In **Spain**, eligibility officers seem to assess whether the applicant’s state provides protection, but apparently without being aware and making use of the concept of actor of protection contained in Spanish legislation. It is sometimes not clear that decision makers carefully establish whether an entity is a state or non-state actor of protection. The ruling regime in Chechnya was cited as an example in **Germany** and **Poland**.

### 3.2.2. State Actors of Protection

Cases where state authorities in a country of origin were deemed unable to provide protection were reported in all Member States studied. The most common situation involved a failed state, or a state unable to control its territory. Examples include Somalia,<sup>243</sup> Afghanistan,<sup>244</sup> and Syria.<sup>245</sup> **Spain** and **Hungary** grant subsidiary protection to all applicants from countries where it is deemed that the state cannot provide protection, as a matter of policy. This can however prevent a refugee status inquiry. **Austria** considers that the general situation in Afghanistan requires subsidiary protection for persons without family support there. Widespread corruption,<sup>246</sup> ineffectiveness (actual inability to protect),<sup>247</sup> and indifference<sup>248</sup> were also indicated as factors that could disqualify a state as an actor of protection. A case in **Belgium** considered that Russia could not be expected to protect people of African descent due to widespread racism in the police force.<sup>249</sup> Cases were reported from **Belgium** and **Poland** in which a state that knowingly concealed acts of persecution was deemed an inappropriate protection actor.<sup>250</sup> **Italy** refers to the power of the actor of persecution (e.g.: Taliban in Afghanistan, Maliki group in Mali). **Sweden** implicitly often does not consider a state an actor of protection in situations of “internal armed conflicts” and “severe conflicts”.

Little information was found in most of the Member States studied regarding the factors considered in evaluating whether following a regime transition a new government is a suitable protection actor.<sup>251</sup> According to OIN practice in **Hungary**, such a transition may not be problematic if the new government is able to ensure a functioning justice system without a seriously discriminatory practice.<sup>252</sup> For example, there are criminal procedures against officers of the previous regime in Ivory Coast but according to the OIN’s assessment there is no reprisal against them. The same criteria are set for outgoing governments as to whether they can protect or not. In the **Netherlands**, factors such as the willingness to protect, the measures taken since the political change, the functioning of the police, the consideration and the handling of reported crimes by higher authorities are taken into account. In **Germany**, the Federal Administrative Court determined that the new Iraqi government was a suitable actor of protection because it “has eliminated the former state sanctions and abuses related 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”.<sup>253</sup> In order to determine whether an outgoing regime can still provide protection, the conditions mentioned above need to be fulfilled, i.e. a de facto territorial authority in the sense of an overall regime of a certain duration that is in principle able to protect and persecute.

### 3.2.3. Non-State Actors of Protection

#### Article 7(1) Qualification Directive 2011/95/EU

Protection against persecution or serious harm can only be provided by [...] (b) **parties or organisations**, including international organisations, **controlling the State or a substantial part of the territory of the State**.<sup>254</sup>

The Refugee Convention does not refer to the idea of refugee protection provided by non-state actors.<sup>255</sup> UNHCR indicates that “not all sources of possible protection are tantamount to State protection. [...] The general rule is that it is inappropriate to equate the exercise of a certain administrative authority and control over territory by international

241 DE: Federal Constitutional Court, 10.08.2000, (no. 2BvR 260/98) (5AFG01MSB); FAC, 20.03.2007, C 34.06 (4IRQ01FSB), § 19.

242 DE: FAC, 7.02.2008 (4IRQ02MCJEU), § 28.

243 Cited in cases in **Austria, Germany, Hungary, Italy, the Netherlands, Spain** and **Sweden**.

244 Cited in cases in **Germany, Hungary, Italy, Spain** and **Sweden**.

245 Cited in cases in **Sweden**.

246 Cited in cases in **Austria, Hungary, Italy** and the **Netherlands**.

247 Cited in cases in **Austria, France, Germany, Hungary, the Netherlands, Poland, Spain** and **Sweden**. See for instance, CNDA, 7.01.2013 (HT61MRS): an applicant in France was granted protection based on “doubts about the efficiency of the policy and justice in Haiti”.

248 Decisions in **Italy** cited cases from Kenya where FGM was considered a tribal matter and no concern of the state. Similar issues arose in decisions in Austria.

249 BE: CGRS, 31.01.2012 (RUS155).

250 BE: Council of State 144.725, 20 May 2005.

251 In **Italy** in one case from Guinea and one from Ivory Coast, a new regime was considered not yet able to provide protection. Tribunal of Rome, 10.06.2013 (GUI12MSP) and Tribunal of Roma, 12.02.2012 (IVO70MSP). **PL**: some recent cases re: Georgia (2013) disregarded the changes in government in that country in late 2012, which led to a large change in the personnel at various levels of public administration.

252 In **Hungary**, the threshold for considering a practice seriously discriminatory could not be identified.

253 DE: FAC, 24.02.2011 (no. 10C 3.10) (4IRQ).

254 See also Art. 7(1) Qualification 2004/83/EC: “Protection can be provided by: (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.”

255 See Section 2.2.1.2.

organisations on a transitional or temporary basis with national protection provided by States. Under international law, international organisations do not have the attributes of a State. Similarly, it is inappropriate to find that the claimant will be protected by a local clan or militia in an area where they are not the recognised authority in that territory and/or where their control over the area may only be temporary. Protection must be effective and of a durable nature: It must be provided by an organised and stable authority exercising full control over the territory and population in question.”<sup>256</sup> The Qualification Directive requires that a non-state protection actor be in control of “*the State or a substantial part of*” its territory and that it provide protection as defined in Article 7(2). The concept remains controversial. Commentators, including ECRE, have argued that only states can provide refugee protection, as non-state actors are legally and practically unable to provide the full content of protection envisaged in the Convention.<sup>257</sup>

The findings show that decision makers do not usually treat non-state entities as stand-alone protection actors. If they are referenced, it is as reinforcement for state-provided protection, as for example with protection with the aid of multinational forces. In the **UK** and **Germany**, the idea of non-state actors supplementing state protection seems to have extended into the assessment of a risk of persecution. For example, recent cases in the **UK** have considered clan protection in deciding whether it is reasonable to expect someone to stay in a region.<sup>258</sup> Similarly in **Germany**, there are cases where clans or families are practically considered as actors of protection,<sup>259</sup> although in no case in the research sample was such protection decisive in denying asylum. No cases were identified in the **UK** citing multinational forces as actors of protection, but the presence of such forces, for example in Afghanistan and Iraq, can influence a finding of sufficiency of protection. **UK** refusals concerning Nigerian women sometimes refer to family in lieu of police protection. In several cases in **Austria** where the existence of an actor of protection was cited as a secondary argument, it was considered that family, relatives or friends could provide protection from serious harm.

**Excerpt of Judgment:**

**UK Asylum and Immigration Tribunal: *DM (Majority Clan Entities Can Protect) Somalia v. Secretary of State for the Home Department*, 27 July 2005:**<sup>260</sup>

*“All that is essential for Refugee Convention and Human Rights Convention purposes, therefore, is that as a matter of fact an entity within a country or state affords effective protection. Plainly, an entity which relies for its law and order functions on drug barons or armed militias may be less able to provide effective protection than one which can rely on those functions being performed by properly trained, properly resourced and accountable police or army personnel whose standards of human conduct are exemplary. But variations of this type simply go to the factual question, “Is protection afforded?” not the legal question of “is there an entity or are there entities qualified to afford protection?”*

### 3.2.3.1. Criteria for a Non-State Actor to be an Actor of Protection

Little information emerged in this study regarding the details of the assessment by which Member States qualify a non-state actor as an actor of protection. **Spain** and the **UK** have detailed this in a few cases.<sup>261</sup> No references were found in **Italy**, in the sample used, to non-state actors of protection. A court in the **Netherlands** ruled that the asylum authorities should establish whether actors in the country of origin can actually protect, not simply state that they exist.<sup>262</sup> In **France**, the Constitutional Court indicated that in cases where the law foresees that protection may be provided by international or regional organisations, the OFPRA and the CNDA should assess whether those organisations ensure the effective protection of the applicant.<sup>263</sup> In **Austria**, **Belgium** and **Spain**, full control over a part of the territory and population is a criterion. In **Belgium**, internal guidelines also require that the non-state actors be stable without providing further information. Under the **German** interpretation, protection may be provided by a “*quasi-state organisation*”, which is a sustainable territorial authority of a certain duration that has sufficient practical power to be able to either persecute or protect.<sup>264</sup> No details were found on how this is assessed in **Hungary**, the **Netherlands**, **Poland**, **Spain** or **Sweden**.

<sup>256</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, December 2011, HCR/1P/4/ENG/REV. 3, § 16 and 17, available at: <http://www.refworld.org/docid/4f33c8d92.html> ; See also the UNHCR Guidelines on IFA (§ 16), which recommend that refugee status not be denied “solely” on the basis that protection is available from an international organisation. A local clan or militia would probably not be an appropriate protection actor, which should be “an organised and stable authority exercising full control over the territory and population in question” (§17).

<sup>257</sup> Maria O’Sullivan, Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?, International Journal of Refugee Law Vol. 24 No. 1, February 2012, pp. 85-110, p. 109; Hemme Battjes, European Asylum Law and International Law, 2006, p. 249. See also, ECRE, Comments on the European Commission Proposal to recast the Qualification Directive, March 2010, p. 7; 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.

<sup>258</sup> **UK**: See e.g., UKUT, AMM Somalia, 25.11.2011; HH AM, J and MA (Somalia) v SSHD [2010] EWCA Civ 426 ; UKIAT, NM and Others (Lone women – Ashraf) Somalia CG [2005].

<sup>259</sup> **DE**: FAC, 20.03.2007, 1C 34.06 (4IRQ01FSB), §27.

<sup>260</sup> **UK**: UKAIT, 27.07.2005 (SOM58FNP).

<sup>261</sup> For the **UK** see DM (Majority Clan Entities Can Protect) Somalia [2005] UKAIT 00150 (clans were implicitly recognised as controlling enough territory to provide protection. The absence of a legal system was not regarded as significant since Somalia was a state and had some state functions operating). For **Spain** see HNC Appeal 478/2010 (rejecting the argument that NGOs in Nigeria could provide sufficient protection).

<sup>262</sup> **NL**: District Court of Dordrecht, 15.06.2012, AWB 11/41454.

<sup>263</sup> **FR**: Constitutional Court, 4 December 2003 (§16).

<sup>264</sup> **DE**: This requirement derives from jurisprudence. See FCC, 10.08.2000, 2BvR 260/98 (5AFG01MSB) and FAC, 20.02.2001 (4AF01MSB).

### 3.2.3.2. Types of Non-State Actors of Protection

In Member States, decision makers sometimes take non-state actors into consideration as possible actors of protection.

Non-State Actors											
	AT	BE	DE	ES	FR	HU	IT	PL	NL	SE	UK
<b>IOs</b>	/	X <sup>265</sup>	X		X			X	X		
<b>Multinational forces</b>	X Amisom	X Eulex, Kfor, Unmik			X	X Unmik		X ISAF	X ISAF		
<b>Clans or Tribes</b>	/	X	/						X <sup>266</sup>	/ Mandeian Church in Iraq; clans in Somalia <sup>267</sup>	X <sup>268</sup>
<b>Other parties or organisations</b>	X <sup>269</sup>	X <sup>270</sup>		X	X <sup>271</sup>			X	X		

X: actors of protection mentioned and considered when granting/refusing international protection.

/: actors of protection mentioned but not critical in granting/refusing international protection.

#### • International Organisations

In **France**, the law only refers to international and regional organisations as possible non-state actors of protection. Several decisions refer to international organisations but do not provide details on the assessment of whether they can provide protection. In some decisions regarding Kosovo, protection was deemed available because of a “close network of national and international actors of protection”,<sup>272</sup> but UN efforts in Palestine, Haiti and the DRC have been found inadequate.<sup>273</sup> Similarly in **Belgium** applicants were expected to request protection from international forces in Kosovo, but the UN mission in the DRC was treated as unable to provide protection.<sup>274</sup>

Elsewhere it is unusual to find an international organisation referenced as a protection actor. In **Hungary**, no such cases were found.<sup>275</sup> The same is true of the **UK** since the adoption of the Qualification Directive 2004/83/EC.<sup>276</sup> A few cases in **Austria** made general references to protection by international organisations, e.g.: IOM in Kabul, but none denied protection on that basis. In **Sweden**, while in principle only a state can protect, one decision considered international organisations as possible actors of protection, alongside the state.<sup>277</sup> One case in the **Netherlands** found that a UN employee could have sought the aid of his employer in obtaining protection, as well as trying harder to contact the Afghan police, rather than taking a forward-looking viewpoint as is necessary in assessing refugee status.<sup>278</sup> In a decision in **Poland**, the authority asserted that a stateless Palestinian from Iraq could upon return “benefit from the protection of UNRWA” alongside the Iraqi state authorities.

#### • Multinational Forces

The law in **France** does not mention multinational forces as actors of protection. Nevertheless some decisions referred to actors such as UN Interim Administration in Kosovo (UNMIK), the Kosovo Force (KFOR) etc.<sup>279</sup> The Federal Administrative

<sup>265</sup> **BE**: International Organisations as actors of protection were not witnessed in the sample of decisions.

<sup>266</sup> **NL**: In Country Specific Guidance on Iraq : family.

<sup>267</sup> **SE**: In all these cases, the Mandeian Church as well as the clans in Somalia were considered unable to provide protection.

<sup>268</sup> **UK**: With regard to some Somali clans, but it seems that now no authority regards them as actors of protection..

<sup>269</sup> **AT**: Family, other relatives and friends were mentioned, but not seriously assessed.

<sup>270</sup> **BE**: See e.g., District Court the Hague, 03.11.2005, AWB 04/32096 (Kosovo). See also: District Court of Dordrecht 15/06/2012, AWB 11/41454, mentioning ISAF.

<sup>271</sup> **FR**: De facto authorities (Abkhasia, Ossetia, Ivory Coast, regional organisations and – a contrario - NGOs and families.

<sup>272</sup> **FR**: CNDA, 26.03.2012 (KOS32F).

<sup>273</sup> **FR**: CNDA, 5.03.2012 (PAL40FRS) (UNRWA); CNDA, 7.01.2013, (HT61MRS) and CNDA, 28.02.2006 (HT47MRS) (MINUSTAH); CNDA, 30.11.2006 (DRC46FSPVUL) (UN force in Ituri).

<sup>274</sup> **BE**: only as part of a credibility assessment..

<sup>275</sup> **HU**: The law transposing the concept of non-state actors into Hungarian Law only entered into force in July 2013.

<sup>276</sup> **UK**: The Court of Appeal held in 2001 that UNMIK supported by KFOR was discharging international protection duties with the host country's consent, and providing sufficient protection for Albanian Kosovars to return. R (on the application of Vallaj) v Special Adjudicator and Canaj v Secretary of State for the Home Department [2001] INLR 342.

<sup>277</sup> **SE**: MC,5.01.2012 (KOS80FND).

<sup>278</sup> **NL**: Council of State, 21.01.2013 (no. 201113400/1/V4)

<sup>279</sup> **FR**: See for instance : CNDA, 26.03.2012 (KOS32F).

Court in **Germany** has considered that the Iraqi government together with multinational troops could be an actor of protection.<sup>280</sup>

**Hungary** considered UNMIK as an actor of protection as it was proactively present, providing services and functions as the state would (police, justice system, enforcement of local administration etc.). A decision in **Austria** found that the forces of the African Union Mission to Somalia (AMISOM) could provide protection, but was overruled based on COI. In another case the court ruled that government forces in combination with AMISOM provided sufficient protection through their control over Mogadishu.<sup>281</sup> In **Poland** the International Security Assistance Force (ISAF) in tandem with Afghanistan state authorities have been recognised as a protection actor, but the AMISOM forces with Somali state authorities have been rejected. If multinational forces were present, the level of security in the actor's area of operation was considered by **Poland**, in terms of the number of violent incidents and operational patterns. In 2004 and 2005 the **Netherlands'** asylum authority argued that KFOR and UNMIK could provide protection, but courts rejected the arguments.<sup>282</sup> In **Belgium**, a court considered that a reference to the MONUC (UN Organization Mission in the DRC) as an actor of protection lacked relevance.

### • Clans or Tribes

A 2005 **UK** case asserted that clans could provide protection in Somalia,<sup>283</sup> but the question of whether a clan can meet the *Horvath* standard has not been litigated since the transposition of the Qualification Directive 2004/83/EC.<sup>284</sup> COI in **Austria** regarding Iraq state that in principle clans could protect, and some cases mention the possibility of protection by family or friends, but none of these was decisive in any of the cases reviewed. In **Belgium**, internal guidelines state that local clans or tribes that do not represent the recognised authority or only have temporary control cannot sufficiently protect. However movements that fight for national liberation or secession of a part of the territory could be an actor of protection. The case analysis during this research only revealed one case where an internal protection alternative was said to be possible, in Herat, given the presence of traditional protection mechanisms such as family, clan or tribe.<sup>285</sup> In practice in **Sweden**, only states can be considered actors of protection. Four decisions concerning applicants from Somalia nonetheless assessed the possibility of clan protection, and three regarding applicants from Iraq considered protection by the Mandeian Church,<sup>286</sup> but the Migration Board determined these actors were not able to provide protection. The premise of the assessment by the Migration Board was that clans could be considered as protection actors.

### • Other Parties or Organisations

In **France**, an *a contrario* reading of some decisions in the sample could be interpreted as considering that actors such as armed militia, family or NGOs could be actors of protection.<sup>287</sup> Across the Member States studied, NGOs were the types of "other parties or organisations" most often referenced as protection actors. Cases in **Belgium** (regarding Kosovo and Russia) and **Poland** (regarding Georgia and Russia) raised the possibility of protection by a national NGO as a supplement to state protection, but only by asserting that such NGOs exist. In **Belgium**, this can affect a credibility determination: some cases referred to international aid organisations, political parties, associations, lawyers or "your local Roma representative" as parties applicants would have approached, had they really been in danger. The practice in **Germany** is to presume that registered residence equates to protection in Russia, and to advise applicants to approach the authorities or to turn to NGOs to facilitate obtaining residence permission. In **Spain** when reference is made to specific non-state actors of protection, it is usually to NGOs that provide support or protection for women.<sup>288</sup> In **Hungary**, an asylum claim grounded in a risk of FGM was rejected with the argument that courts in Kenya strictly punish, but also that protection could be found in a shelter run by an NGO.<sup>289</sup> Similarly, in **Austria** the possibility of protection from an NGO that supports women was indicated.<sup>290</sup>

**French** decisions also refer to de facto authorities or recognise other organisations as actors of protection, such as South Ossetia, Abkhazia, the authorities administering Abidjan and the Palestinian authorities. In a case in the **Netherlands**, the asylum authority argued that Sunni militias in Iraq could be considered actors of protection, but the court disagreed. Another Dutch court rejected the asylum authority's assertion that the applicant could have sought protection from private security guards in Afghanistan.<sup>291</sup>

<sup>280</sup> **DE**: FAC, 7.02.2008, (41RQ02MCJEU), § 28.

<sup>281</sup> **AT**: Respectively AC, 29.05.2013 (SOM74MRE) and AC, 13.06.2013 (SOM72MNS).

<sup>282</sup> **NL**: See e.g., District Court the Hague, 03.11.2005, AWB 04/32096 (Kosovo). See also: District Court of Dordrecht 15/06/2012, AWB 11/41454, mentioning ISAF.

<sup>283</sup> **UK**: DM (Majority Clan Entities can Protect) Somalia [2005] UKAIT.

<sup>284</sup> **UK**: House of Lords *Horvath* [2000] UKHL 37. In *Horvath* the House of Lords held that for there to be sufficient protection there must be a legal system which does not necessarily protect against all harm, but the assessment of its effectiveness is judged by a practical standard, taking into account the state's duty to its own nationals. There must also be a reasonable willingness to enforce it.

<sup>285</sup> **BE**: CALL, 18.09.2012 (AFG03MNSNO).

<sup>286</sup> **SE**: M.B. 31.08.2012 (IRA01MRS); M.B., 23.03.2012 (IRA39FSP) and M.B., 22.02.2012 (IRA24MND).

<sup>287</sup> **FR**: See e.g., CNDA, 7.11.2011 (SOM49MFRSVUL).

<sup>288</sup> **ES**: See for example CIAR, October 2012 (NIG78FNSTO); Mol, 6.11.2012 (NIG12MNSTOSP); CIAR, January 2012 (NIG79FNSTO); CIAR, October 2012 (NIG81FNSTO); CIAR, October 2012 (NIG83FNSTO).

<sup>289</sup> **HU**: Metropolitan court of Budapest (Case no. 17.K.32.826/2007/15).

<sup>290</sup> **AT**: It is however not clear whether the availability of NGO support is seen as reflecting on the applicant's credibility, or the reasonableness of expecting her to stay in the IPA region.

<sup>291</sup> **NL**: District Court of Dordrecht (15/06/2012), AWB 11/41454 (the applicant was abducted by the Haqqani network, shown a murder and warned the same would happen to him if he contacted the police). The court was sceptical as to "why an applicant who fears a real risk of treatment in breach of Article 3 ECHR can be expected to request protection from private security guards".



The Member States covered in this study consider the State as the main actor of protection. Except Italy, all other Member States refer, at least occasionally, to non-state actors of protection, but do not usually treat them as stand-alone protection actors. If they are referenced, it is rather as reinforcement for state-provided protection. From both a principled and a practical point of view, non-state actors should never be considered as actors of protection. Non-state actors are not and cannot be parties to international human rights instruments and therefore cannot be held accountable under international law and are often only able to provide 'protection' which is limited in duration and scope. Because refugee protection must be effective and non-temporary,<sup>292</sup> it is extremely unlikely that non-state actors will be able to fulfil this requirement in practice.

**Recommendation:** Non-state actors should never be considered as actors of protection. Non-state actors cannot be held accountable under international law and may only be able to provide protection which is temporary and limited in its effectiveness.

<sup>292</sup> See Article 7(2) of the recast Qualification Directive 2011/95/EU. See also: CJEU, Joined cases C-175/08, C-176/08, C-178/08 and C-179/08 *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi & Dier Jamal v Bundesrepublik Deutschland*, Judgment of the Court of Justice of the European Union (Grand Chamber), 2 March 2010.





***THE INTERNAL  
PROTECTION ALTERNATIVE***





## IV. The Internal Protection Alternative

The internal protection alternative (IPA) is applied in at least some cases in all Member States studied. The use of the IPA rarely differs depending upon whether refugee status or subsidiary protection is being assessed. This section presents the main research findings relating to the IPA. The first subsection discusses the ways in which Member States analyse some of the elements that the Qualification Directive specifies as necessary if the IPA is considered. The second subsection examines the question of in which phases of the asylum procedure and for what types of cases or applicants Member States apply the IPA.

**Italy** and **Spain** did not transpose Article 8 of the Qualification Directive.<sup>293</sup> This has led to opposite effects: in **Italy** the Supreme Court ruled in 2012 that the lack of transposition indicates the IPA may not be applied,<sup>294</sup> while in **Spain**, with no law on point, the asylum authorities continue the prior practice of using it at their discretion.<sup>295</sup> In **France**, there is no practice of application of the IPA at first instance (OFPRA). At the appeal stage (CNDA), there is an emerging – but still very limited and uncertain – practice of applying the IPA.<sup>296</sup>

### 4.1. Assessment of the IPA

#### Article 8(1) Qualification Directive 2011/95/EU:

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.<sup>297</sup>

Under Article 8(1) of the Qualification Directive, Member States may deny protection if in a part of the country of origin, there is either no risk of persecution or serious harm, or protection is available. The applicant must be able to “safely and legally travel to and gain admittance to” that region, and “reasonably be expected to settle there”. Article 8(2) instructs Member States 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”, when considering whether there is either no risk or protection in the region.

This subsection presents the research results relating to these concepts. Its first part addresses the issue of whether Member States identify a specific protection region when they invoke the IPA. The three subsequent parts describe how the Member States approach questions of safety in the region from persecution or serious harm, whether it is reasonable to expect an applicant to settle there, and safe and legal access to the region. In assessing safety, Member States predominantly appear to concentrate mainly upon general circumstances in the country rather than the applicant’s personal circumstances, except for applicants with recognised special needs. Personal circumstances arise more frequently in the inquiry as to whether it is reasonable to expect an applicant to stay or settle in the region.

#### 4.1.1. Identifying a Protection Region

In invoking the IPA Member States do not always identify a relocation area. This is not a requirement in **Belgium**.<sup>298</sup> In **Hungary**, a government decree requires the refugee authority to name “the part of the country where its view is that protection is available”.<sup>299</sup> The **UK** instructions require case workers to identify a specific area. However, these instructions are not always followed.<sup>300</sup> In **Sweden**, a protection location is suggested in most decisions. The Migration Board has the responsibility to identify a specific region. Mere reference to “larger cities” is not sufficient.<sup>301</sup> Following **Salah Sheekh’s** instruction that the location must be accessible, decision makers in the **Netherlands** identify a location.<sup>302</sup> Under **Austrian** jurisprudence a protection region must have clear boundaries. According to the French Constitutional Court, the area should be circumscribed in a sufficiently detailed manner and be a substantial part of the country.<sup>303</sup>

<sup>293</sup> At the time of the research, **Spain** had not transposed the recast Qualification Directive. However, according to government stakeholders, the new implementing regulation of asylum will incorporate the IPA into Spanish legislation.

<sup>294</sup> **IT**: Supreme Court, 25.01.2012 (GHA01MRE). Cases reviewed during this study indicate that since this decision, almost all decision-makers who had applied the IPA stopped doing so.

<sup>295</sup> **ES**: See e.g. High National Court, 2 October 2012, 770/2011.

<sup>296</sup> **FR**: The research identified 45 decisions referring to an IPA. According to the CNDA, this is a (quasi) exhaustive set of CNDA decisions invoking or applying the IPA since this concept was introduced into French law. In 2013, the CNDA took 38,250 decisions.

<sup>297</sup> See also Art. 8(1) Qualification Directive 2004/83/EC: “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 there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.”

<sup>298</sup> **BE**: Council of State, 21 November 2012 (221.445). CGRS often proposes a specific area or city for relocation, but in several cases, the applicant was simply said to be able to live “elsewhere” in the country (or reference was made to “major cities”).

<sup>299</sup> **HU**: Section 92 (2) (1) (b) Government decree no. 301/2007 (XI. 9.) on the implementation of Act LXXX of 2007 on asylum 301/2007. (XI. 9.).

<sup>300</sup> Within the research sample, 7 out of 19 decisions of the **French** National Court on Asylum (CNDA) that applied the IPA identified a protection region.

<sup>301</sup> **SE**: Migration Court of Appeal, 14 January 2009, UM 4118-07 - MIG 2009:4.

<sup>302</sup> ECtHR, *Salah Sheekh v. The Netherlands*, Application no. 1948/04, 11 January 2007.

<sup>303</sup> **FR**: Constitutional Court, 4 December 2003 (Decision n° 2003- 485-DC), Official Journal of 11 December 2004, p. 21085

**Good Practice:** In Hungary, the government decree explicitly states that “the refugee authority shall specifically name the part of the country where its view is that protection is available”.<sup>304</sup>

Most of the Member States frequently indicate the same areas of relocation. For example, **Spain** tends to direct Nigerian applicants to Lagos, or to northern or southern Nigeria (depending upon their religion) as **Poland** also does. **Belgium** identifies Conakry as the IPA for Guinean applicants. When the IPA is applied to applicants from Afghanistan, Kabul is almost always specified. In the **UK** the authorities often direct the applicant to the capital city in the country of origin, but may also identify some other location based on COI or the applicant’s personal history. **Germany** and **Poland** direct Chechen applicants to unspecified urban areas, or areas where Chechen communities are established elsewhere in Russia.

If the applicant spent time in another part of the home country before leaving, most states use this as a ground to invoke the IPA. Jurisprudence in **Germany** considers whether it can be treated as a new ‘home’ region.<sup>305</sup> This is also argued in some cases in **France**. Recent residence in an area can lead the **UK** to raise the IPA,<sup>306</sup> which according to case law still must consider current risks.<sup>307</sup> Family ties are considered in **Austria**. In **Hungary**, the Office of Immigration and Nationality (OIN) case-workers are instructed to ask about the last place of residence in the country of origin to assess whether that area may be considered as an IPA. If an applicant in **Spain** has relocated within the country of origin prior to leaving without coming to harm,<sup>308</sup> or relocated with family and the family remained in the new location apparently safely,<sup>309</sup> this will usually be indicated to justify the IPA. When the IPA is raised in **Spain** it is usually stated that it would be more logical for the applicant to seek safety in another part of the home country than to relocate to a distant, unfamiliar country.

The concept of the IPA relies on the existence of a region of relocation. This is clear from the wording of Article 8 QD 2011, which refers to *a part of the country of origin* where there is no well-founded fear of being persecuted or no real risk of suffering serious harm and where the applicant can safely and legally travel to and gain admittance. This is also explicitly highlighted in the UNHCR Guidelines on the Internal Flight or Relocation Alternative: “if internal flight or relocation is to be considered in the context of refugee status determination, a *particular area* must be identified”.<sup>310</sup> Not identifying a region of relocation, or identifying it vaguely, does not allow for an adequate assessment of the IPA, which needs to look at the absence of risk and the possibility to settle in a region, as well as the feasibility to safely and legally travel to such a region. Furthermore, the absence of a precise identification of a region of relocation can put the applicant in a situation where he/she needs to show that there is no safe region “anywhere in their home country” in order to avoid rejection of the claim. It is thus important to ensure that the authority conducting the assessment indicates a specific location, which must be easily identifiable by the applicant. The applicant also needs to be informed promptly about the consideration of a specific region as a possible IPA, and given the possibility to present arguments and evidence against it.

**Recommendation:** If the IPA is proposed or applied, the authority conducting the assessment must indicate a specific location within defined boundaries. This location should be easily identifiable by the applicant.

#### 4.1.2. Safety in the Region

##### Article 8(2) of the Qualification Directive 2011/95/EU:

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.<sup>311</sup>

<sup>304</sup> **HU:** Section 92(2) (1) (b) Government Decree. no. 301/2007 (XI. 9.) on the implementation of Act LXXX of 2007 on asylum 301/2007. It must be noted that, in practice, Hungarian authorities, while determining an area of relocation, often fail to carry out a meaningful examination of the IPA, and also routinely indicate the same areas of relocation, which is usually the capital city (e.g.: Kabul for Afghanistan).

<sup>305</sup> There are three different approaches in **German** practice. If it emerges at a preliminary phase that the applicant spent time in another part of the country before leaving, it can either (1) be considered that the flight was not related to the risk and therefore the person would not be seen as ‘previously persecuted’ in the sense of Article 4 (4) QD, (2) an IPA may be invoked and this region proposed as an IPA, or (3) this region may be assessed as the region of return (and in some cases then, the home region may be considered for an assessment of the IPA).

<sup>306</sup> **UK:** Home Office, Asylum Policy Instruction: Internal relocation, February 2007. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257391/internalrelocation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257391/internalrelocation.pdf)

<sup>307</sup> **UK:** HoL, Januzi, 15.02.2006.

<sup>308</sup> **ES:** Two examples: (1) case of a 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”

<sup>309</sup> **ES:** See e.g., CIAR, May 2013 (DRC64MNSUM) (the brothers of the applicant (unaccompanied minor) remained safely in Kinshasa); CIAR, January 2012 (COL74MNSNO) (the family moved to another part of Colombia from Barranquilla and remained there safely).

<sup>310</sup> UNHCR Guidelines on IFA, §6.

<sup>311</sup> See also Art. 8(2) Qualification Directive 2004/83/EC: “In examining whether a part of the country of origin is 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.”

Researchers in **Belgium, Germany, Hungary** and **Sweden**<sup>312</sup> reported that determining authorities verify that there is no risk of persecution or serious harm in the proposed protection region. This is often not done in other Member States, particularly those that rarely specify a protection region. In **Hungary**, the refugee authority must examine whether protection is available for the applicant in the region of relocation.<sup>313</sup> In **France**, the CNDA in some cases simply mentioned the absence of fear of persecution or serious threat in another region,<sup>314</sup> or considered that the fear of persecution in the region of origin is very local, and hence a contrario the rest of the country would be considered safe, without further assessment of the fear of persecution.<sup>315</sup> In **Austria** safety is verified in principle but in practice is only assessed in detail in cases where the IPA is the primary ground for the refusal of international protection. No cases reviewed from **Poland** carried out an assessment of the safety in the region, instead simply asserting that upon relocation the applicant would be safe. In **Germany**, the Federal Administrative Court raised in several decisions doubts that the assessment of the risk of persecution in the proposed region should be part of the IPA assessment and seemed to find that this should rather be part of the analysis of the well-founded fear of persecution/real risk of serious harm.<sup>316</sup> Decision makers in **Italy** usually simply cite a generic availability of state protection or lack of interest from the actors of persecution,<sup>317</sup> or the fact that the applicant or their family had previously lived in the IPA region.<sup>318</sup> The lack of a risk of persecution or serious harm in the protection region is not specifically verified in **Spain**.

The CNDA in **France** take into account **situations or history of armed conflict or widespread violence**. In the **UK**, when the IPA is applied to a claim made pursuant to Article 15c QD, an Article 15c risk need not also be established in the relocation region. A level of generalised violence or conflict in that area can make relocation unreasonable.<sup>319</sup> In **Germany**, if the assessment of the IPA is in an Article 15c setting, the question of situations of armed conflict and widespread violence is assessed. Normally a region of armed conflict or widespread violence will not be considered suitable as an IPA. In **Hungary**, the Administrative and Labour Court of Budapest indicated that countries that face armed conflicts usually cannot offer a safe internal protection alternative because moving frontlines may render previously safe areas unsafe.<sup>320</sup>

**Excerpt of Judgment:**

**Hungary: Administrative and Labour Court of Budapest**<sup>321</sup>

In the case of a young Afghan male applicant with serious psychological problems, the Court ruled that the “authority has to make sure that the applicant would not be at risk of persecution or serious harm in the proposed region of IPA 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.”

In **Hungary, Netherlands**,<sup>322</sup> **Sweden** and the **UK**, the **power of the actor of persecution** in the proposed area of relocation is taken into account. This is a key factor when analysing the risk of persecution in **Germany**. In **France**, legislation requires that the authorities take into account the actor of persecution when assessing the IPA.<sup>323</sup> In **Sweden**, according to leading case law from the Migration Court of Appeal (2009:4),<sup>324</sup> it is necessary to find an area where the actor of persecution cannot threaten the person. If the actor of persecution can reach the person it is necessary to establish that state protection is available in the area. It is also vital to find that the applicant in the IPA area would not face other kinds of threats or other forms of persecution. Case analysis in the **UK** showed cases where the applicant’s assessment of risk, which had been rejected by the Home Office without objective reasons, was later supported by expert independent evidence.<sup>325</sup> The applicant’s own knowledge of her country was not given the weight it merited.

<sup>312</sup> **SE**: Preparatory works (Prop 2009/10:31, p. 135) and established practice (MIG 2007:33:II and MIG 2008:20). However, in practice, the protection location will often be deemed safe without the criteria behind the risk assessment being stated.

<sup>313</sup> **HU**: Section 92 (2) (1) (a) Government Decree no. 301/2007 (XI. 9.) on the implementation of Act LXXX of 2007 on asylum 301/2007. (XI. 9.).

<sup>314</sup> **FR**: See for instance : CNDA, 7.04.2005 (EQUA58M); CNDA, 17.12.2012 (DRC04M).

<sup>315</sup> **FR**: CNDA, 29.07.2010 (TR25M).

<sup>316</sup> **DE**: See for instance: FAC, 5.05.2009 (no. 10 C 19.08) (4RUS02MRS).

<sup>317</sup> **IT**: Tribunal of Trieste, 12.04.2010 (IVO55FNS), Territorial Commission of Roma, 05.06.2013 (MAL83MNS)..

<sup>318</sup> **IT**: Tribunal of Trieste, 12.04.2010 (IVO55FNS), Territorial Commission of Bologna, 02.03.2011 (PAK71MNS).

<sup>319</sup> **UK**: UKUT, AK Afghanistan, 18.05.2012.

<sup>320</sup> **HU**: Administrative and Labour Court of Budapest , 11 October 2011 (no. 6.k.34.830/2010/19).

<sup>321</sup> **HU** : Administrative and Labour Court of Budapest, 11 October 2011 (no. 6.k.34.830/2010/19).

<sup>322</sup> **NL**: See e.g. : Council of State, 21.03.2013, (no 201105922/1) (Kazakhstan): the power and influence of the employer of the applicant did not reach throughout the country ; District Court (Haarlem), case no. 11/37815 (Sri Lanka) : the District Court of Haarlem granted the appeal because the Secretary of State did not sufficiently motivate whether the influence (power) of the persecutor (Kurana Group or TMPV) could not reach into the central authorities.

<sup>323</sup> **FR**: Article L-713-3 Ceseda.

<sup>324</sup> **SE**: Migration Court of Appeal, 14.01.2009, MIG 2009:4 (UM 4118-07)

<sup>325</sup> **UK**: See e.g., Home Office, 5.02.2013 (ALB52FNP); FTT, 02.01.2013 (NIG54FNP); Home Office, 22.06.2011 (GAM56FRS).

**Testimony:**

Congolese woman seeking asylum in Belgium

-“Q: How could he find you elsewhere in Congo?

- A: He is known, he has his men.

- Q: What do you mean? Could you be more precise?

- A: He has friends almost everywhere. His friends also have ties who could easily find me.

- Q: Other reasons that prevent you from settling elsewhere in Congo?

- A: No.

- Q: Who are the ties of your husband who could find you and harm you?

- A: He knows military officers, governors.

- Q: Can you give me names?

- A: I don't know the names.”

The **size of cities** is also sometimes considered as a decisive factor to be able to relocate to these areas and live unnoticed by the actors of persecution (**Sweden**: Kabul, Istanbul). **UK** Home Office decisions often refer to the size of the country of origin, to the country's overall population and in proposed protection regions.<sup>326</sup> While the size of the region of relocation is generally not taken into account in **Hungary**, some cases have considered Kabul as an appropriate IPA based on its size. In **Spain**, OAR eligibility reports often refer to the size of the country and the population density in a region as factors indicating that relocation is possible.

Some Member States consider further factors when evaluating a risk of persecution for women or children. **Austria** evaluates information about the presence of women's shelters, and the **Netherlands** takes into account the general position of women in society. **Austria**, **Belgium** and **France** consider age and educational level, and **Austria** and **Sweden** look at the applicant's health needs. There is no specific analysis in **Spain**. In **Germany**, generally if a person is vulnerable, the IPA will be considered unreasonable. For example, for Afghan nationals, only healthy persons (and mostly males) would normally be considered able to find an IPA in Kabul.<sup>327</sup>

Across all the Member States studied except **Germany**, decision makers rarely made an analytical distinction between safety from the originally feared source of persecution or harm, and other risks that might arise in the region. Analysis tended to focus either on the general safety of the region, or safety from the originally feared persecutor. Some decisions in **Belgium**, **France**, **Germany**, the **Netherlands**, **Sweden** and the **UK** declined to apply the IPA following an assessment of regional risks from the perspective of applicants with particular vulnerabilities.<sup>328</sup> A subset of the decisions reviewed seemed to examine the risk of persecution or harm in an IPA region retrospectively rather than in the forward looking fashion appropriate to an asylum determination. This resulted from a tendency of decision makers to sometimes focus on the question of whether or not an applicant should or could have found protection before leaving the country of origin, rather than their future prospects if returned there.

**Excerpt of judgment:**

**Belgium: Council of Alien Law Litigation, case 41102 of 30 March 2010, para. 5.4.**<sup>329</sup>

“When the [IPA] provision is applied, the relevant question is to know whether the plaintiff can, at the time when the asylum authority takes its decision, return and stay in a part of his country of origin where he would have no reason to fear being persecuted or no real risk of suffering serious harm. In other words, it is necessary to consider the current existence of an internal protection alternative and not the possibility that the applicant may have had, before leaving his country of origin, to go and stay in another region than the one in which he claims to have encountered problems.”

The research, as described above, has shown that the Member States studied, with the exception of **Belgium**, **Germany**, **Hungary**, **Sweden** and, to a lesser extent, **Austria**, inconsistently, and often superficially, assess the risk of persecution or serious harm in the proposed protection region. When such an assessment was carried out, it tended to focus on either the general safety of the region, or on whether the applicant would be safe, if returned, from the originally feared persecution. The IPA analysis however also requires a full assessment of any new risks of persecution in the region of relocation. As mentioned by UNHCR in its guidelines on the internal flight alternative: “If the claimant would be exposed to a new risk of serious harm, including a serious risk to life, safety, liberty or health, or one of serious discrimination, an internal flight or relocation alternative does not arise.”<sup>330</sup>

**4.1.3. “Reasonably expected to stay [settle]”**

Most of the Member States studied require verification that the applicant “*can reasonably be expected to stay [settle]*” (Article 8(1), 2004 [2011] Qualification Directive) in the protection region.<sup>331</sup> Specific analysis of this issue was not found

<sup>326</sup> **UK**: A Home Office letter of 22 June 2011 (granting refugee status) refers to a town in Gambia of 150,000 residents as large.

<sup>327</sup> On the application of the IPA to vulnerable groups, see sections 7.4.1 and 7.4.2.

<sup>328</sup> For further discussion of risk assessment relating to applicants with special needs, see section 7.4.1.: Safety in the Region.

<sup>329</sup> **BE**: CALL, 30.03.2010, (no. 41102) [http://www.cce-rvv.be/rvv/index.php/fr/component/docman/doc\\_download/8540-a41102](http://www.cce-rvv.be/rvv/index.php/fr/component/docman/doc_download/8540-a41102)

<sup>330</sup> UNHCR Guidelines on IFA, § 20.

<sup>331</sup> **Belgium**, **France**, **Germany**, **Hungary**, **the Netherlands**, **Poland**, **Sweden** and **UK**. Belgium and Germany now use “settle”, as does some case law in France.



in cases from **Italy** and **Spain**, and only rarely found in cases from **Poland**. This subsection discusses the circumstances in which Member States consider that an applicant could reasonably settle in a relocation region. It examines the general and personal circumstances such assessments take into account, including how Member States consider the situation from the perspective of applicants with special needs. The final subsection describes the Member States' approach to the issue of the expected duration of the "stay" in the region.

#### 4.1.3.1. General Living Standards in the Protection Region

Most Member States refer to living conditions above a certain "minimum standard". In **Belgium** and the **Netherlands** this requires more than an inquiry into the risk of treatment contrary to Article 3 ECHR.<sup>332</sup> The law in **Sweden** refers to "undue hardship from a humanitarian perspective" (the *Horvath* standard),<sup>333</sup> but many decisions do not specify the details of this assessment. In **Austria**, there should not be evidence of "general hardship", such as starvation, epidemics, environmental or similar natural disasters, and "the person should not be forced to live hidden to prevent persecution".<sup>334</sup> A leading **UK** case [*Januzi*] ruled that a Darfuri farmer could reasonably be expected to relocate to a camp outside Khartoum because "[t]he almost total absence of civil, political and socio-economic rights" there does not in itself mean life would be "unduly harsh"; rather, the relevant threshold is a risk to the "most basic human rights". This standard is not further elaborated upon but in AH (Sudan), also a UK House of Lords case, held that it should not be as low as the level of rights protected by Article 3 ECHR.<sup>335</sup> This seems to have expanded into a general principle applied in other countries and situations, for example in **Germany** where the question of sufficient rights and living standards remains open. Based on the decisions studied, it is only clear that they must be above the standard that is part of the test for humanitarian protection according to Section 60(7)(1) of the Residence Act, which considers that poor living conditions and lack of registered residence may be acceptable if survival is secured.<sup>336</sup> The Federal Administrative Court has stated that this is not sufficient for an IPA, but without specifying what standard should be met.<sup>337</sup>

##### Excerpt of Judgment:

##### Germany: Federal Administrative Court: (Afghanistan).<sup>338</sup>

"Whilst it is true that the court below found that, in respect of Kabul, the prerequisites of fact for a grant of national protection from deportation under Section 60 (7) sentence 1 and 3 of the Residence Act are not present, because no extreme situation of danger prevails there, and it can be expected that returnees can earn a meagre income from occasional work, and could therefore finance a life at the margins of the minimum subsistence level, nevertheless, under Article 8 of Directive 2004/83/EC, in assessing internal protection, a basis for subsistence must be sufficiently assured so that the foreigner can reasonably be expected to stay in that part of the country. This standard of reasonable expectation, however, goes beyond the absence of a substantial danger to life or limb under Section 60 (7) sentences 1 and 3 of the Residence Act; it may remain open what additional economic and social standards must be met" Often comparison is made with the life of the population of the region. The standards in **France** and the **Netherlands** refer to the ability to live a normal life by comparison with the population respectively of the country and the region in question. Practice in the **Netherlands** and the **UK** considers this impossible in an IDP camp in Somalia.<sup>339</sup> **UK** guidance requires consideration of, for example, access without discrimination to services such as education and health care, and the opportunity to make a livelihood.<sup>340</sup> Comparison with other inhabitants is also made in **Belgium** and **Poland** ("general living standards of a Chechen ethnic community in Russia").

The composition of the population is taken into account in **France** and **Sweden** and in **Germany**, in particular for Kabul (in the case sample). The Constitutional Court in **Austria** has ruled that the availability of housing and income can be relevant under Article 3 ECHR.<sup>341</sup>

**Recommendation:** The IPA should not be applied where a returnee might find himself in an IDP camp (Sufi and Elmi). The IPA should not be applied with respect to a region that must already meet the needs of a significant number of refugees or displaced persons because it would not only endanger the human and social rights of the applicant, but would also diminish the availability of resources in the region.

<sup>332</sup> **BE:** CGRS, Internal Guidelines on internal flight alternative or internal relocation, 27 August 2013. According to interviews with CGRS "only extreme situations are considered as unreasonable for an IPA".

<sup>333</sup> **SE:** Prop 2005/06:06, p. 28 and Migration Court of Appeal, 1.07.2008, MIG 2008:20 (UM 3854-07).

<sup>334</sup> **AT:** See VwGH, 19.12.2001 (98/20/0299); VwGH, 18.04.1996 (95/20/0295); VwGH, 20.03.1997 (95/20/0606).

<sup>335</sup> **UK:** Court of Appeal, *Januzi*, paragraphs 59-60 (opinion of Lord Hope of Craighead). One possible explanatory line of reasoning takes the view that since acts of persecution are cast in terms of denial of human rights, the IPA should be assessed by human rights standards. See e.g. AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163(IAC).

<sup>336</sup> **DE:** Protection needs to be granted if there is an extreme danger, which will lead in the short run to a life threatening situation.

<sup>337</sup> **DE:** FAC, 31.01.2013 (4AFG03MSB).

<sup>338</sup> **DE:** Translation by the Court. FAC, 31.01.2013 (4AFG03MSB).

<sup>339</sup> **UK:** See e.g., UKUT, AMM Somalia, 25.11.2011 (poor humanitarian situation and famine); UKUT, AK Afghanistan, 18.05.2012 (difficulties faced by IDPs and poor people generally in Kabul).

<sup>340</sup> **UK:** Home Office Operational Guidance Note on Afghanistan (February 2012), para 2.4.5 -2.4.7 (observation about non-discrimination based on a stakeholder interview).

<sup>341</sup> **AT:** Austrian Constitutional Court (VfGH), 19.602/2011.

### 4.1.3.2. The Applicant's Personal Circumstances

#### Article 4(3) of the Qualification Directive 2011/95/EU:

The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account: [...] (c) 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.

Most countries take personal circumstances into account when evaluating whether it is reasonable to expect the applicant to stay in the proposed region, most frequently family connections, age and gender. In the **UK** this is a consequence of case law according to which virtually any factor except conditions in the host country may be relevant since the reasonableness of IPA must take into account all relevant circumstances of the applicant.<sup>342</sup> In **Germany**, circumstances considered can include language, family connections, ethnic, political, social or cultural ties, age, sex, health, disability, social or other vulnerabilities, education and professional background and employment possibilities. Which are decisive depends on the applicant's personal circumstances and the country of origin.<sup>343</sup> In **Spain** the specific characteristics of the applicant are not considered in connection with the IPA. The same is true in **Poland**, except for a few decisions where the IPA was rejected as unreasonable due to a particular characteristic (e.g. being a single mother). Personal characteristics are rarely considered in **Italy**, but in one case an IPA was considered too difficult because the applicant suffered from diabetes.<sup>344</sup>

#### Testimony:

##### **X, male asylum seeker from Pakistan, 29, single.**

X was threatened and kidnapped by the Lashkar-e Islam terrorist group. He left Pakistan. In Europe, the asylum authority considered that an IPA was possible in Lahore.

*"- During the interview the officer did not ask anything as to whether it is possible for me to move to another part of Pakistan, or what would I think about moving to Lahore. I thought it was clear that I tried to move to other places but these groups [Lashkar-e Islam terrorist groups] have contacts everywhere.*

*"The [asylum] officer did not ask if I have relatives or friends in Lahore, if I could establish a new life there. Lahore is far away from my village and I don't know anybody there. I could not find a job in Kashmir, how could I find one in Lahore? I told during the [asylum] interview that I only finished 7<sup>th</sup> grade at school. I think that it is not enough to examine if there is a war in an area or not. That is not sufficient to start a new life on your own without any help".*

**France** and **Belgium** take into account the **language and the economic status** of the applicant. In **France** a precedent-setting decision rejected the IPA as unreasonable because of "the conditions in which the applicant lived, in particular the impossibility to find a job and the constant fear of being forcibly returned to his area of origin".<sup>345</sup> In **Hungary**, economic status is usually considered: the examination focuses on the potential of the applicant to establish a normal life, although no detailed analysis (regarding professions, salary and average standard of living) was found in the decisions studied. Some decisions in the **UK** cite the educational level of applicants as indicating they could support themselves in an IPA region, although it is not always clear that the level of risk there is assessed.<sup>346</sup>

#### Excerpt of Judgment: Austria: Asylum Court (Asylgerichtshof), 31 October 2012.<sup>347</sup>

"It is – as a rule - possible for unqualified but healthy people to secure a living through occasional jobs (in the worst case as warehouse workers, truck drivers, kitchen porter or waste collector). The fact that thousands of Afghan refugees have already settled there and take an active part in the economic life of the city demonstrates that it is possible to settle as a newcomer in a city like, for instance, Karachi."

In **France**, according to an OFPRA internal note, the absence of relatives in the region is not in itself an obstacle to applying the IPA, but the presence of **family members** is a determinative aspect.<sup>348</sup> **UK** authorities do not consider the absence of family connections a bar to the IPA, but consider it relevant in cases of women in societies where survival outside a family structure is difficult. In **Hungary**, family connections are considered in case of vulnerable asylum seekers but often not in the case of healthy young males.

In **Belgium**, in some cases, arguments that the applicant cannot reasonably stay in an IPA region are rejected for lack

<sup>342</sup> **UK**: HoL, Januzi, 15.02.2006; HoL, AH Sudan, 14.11.2007.

<sup>343</sup> **DE**: For instance, for Somalia ethnic affiliation and political ties are most commonly decisive for the assessment, whereas in relation to Afghanistan it is family connections and educational and health background.

<sup>344</sup> **IT**: Territorial Commission of Verona, 18.07.2011 (NIG44MNS) (granting humanitarian leave to remain).

<sup>345</sup> **FR**: CNDA, 25.06.2004 (ALG59MRS).

<sup>346</sup> **UK**: For example in HO, 28.08.2012 (BAN49MNP); HO, 5.02.2013 (ALB52FNP); FT, 18.07.2013 (ALB53FRS); and FTT, 02.01.2013 (NIG54FNP) IPA, sufficiency of protection and absence of risk are given as reasons to refuse the claim, but without differentiating clearly between the reasons.

<sup>347</sup> **AT**: (Translation by the authors). Austrian Asylum Court (Asylgerichtshof), 31.10.2012 (no. E9 429488-1/2012): [https://www.ris.bka.gv.at/Dokumente/AsylGH/ASYLGHT\\_20121031\\_E9\\_429\\_488\\_1\\_2012\\_00/ASYLGHT\\_20121031\\_E9\\_429\\_488\\_1\\_2012\\_00.pdf](https://www.ris.bka.gv.at/Dokumente/AsylGH/ASYLGHT_20121031_E9_429_488_1_2012_00/ASYLGHT_20121031_E9_429_488_1_2012_00.pdf)

<sup>348</sup> In **France**, IPA is currently not applied at the 1<sup>st</sup> instance level (OFPRA).



of a **nexus to the grounds for persecution** enumerated in the Refugee Convention.<sup>349</sup> In **Germany** if a health issue arises the authorities tend to remove the case to a humanitarian immigration procedure, unless the issue is trauma stemming from the refugee experience in the sense of Articles 11(3) or 16(3) of the Qualification Directive.<sup>350</sup> In the **UK** this “*compelling reasons arising out of previous persecution*” exception is not applied.

In assessing the possibility of an IPA, decision makers in **Austria, Belgium, Germany** and the **UK** sometimes consider the **psychological impact on the applicant of moving and living in a new location**. This does not occur in **Hungary** or **Sweden**. If **Austria** considers applying the IPA to an unaccompanied child or an applicant with special needs, jurisprudence requires an assessment of the effect on them of a change in living conditions; additional specific information such as COI from Austrian embassies might be required. Decision makers in **Belgium, Spain** and the **UK** have cited the psychological hardship of having fled to Europe to argue that the applicant could withstand the psychological trauma of relocating within their own country.

#### 4.1.3.3. Applicants with Special Needs

The case studies did not yield a clear picture of how Member States take into account conditions in a proposed relocation region for applicants with special needs.<sup>351</sup> One reason may be that if special needs are recognised then the IPA is often simply not applied. Another could be that many decision makers use COI in considering the IPA, and COI reports tend to be general rather than considering circumstances that might especially affect a person with particular needs. Special needs usually seem to be taken into account in **Belgium, Germany, Hungary, the Netherlands, Sweden** and the **UK**. There is overall little reference to vulnerability of applicants in **France**. Special needs are not taken into account in **Poland** or **Spain**, and often not in practice in **Austria**.<sup>352</sup>

The IPA is rarely applied to unaccompanied children, usually as a matter of policy or practice rather than law.<sup>353</sup> The same is not true of children applying with their families. Women are not treated as vulnerable per se but most of the Member States studied considered the particular needs of women applicants, including being a single mother of minor children and social structures and attitudes affecting women.<sup>354</sup> Such considerations were not usually found in decisions in **Italy, Poland** or **Spain**.<sup>355</sup> Practice in **Germany** and sometimes in the **UK** reflected a detailed consideration of factors that might particularly affect women.<sup>356</sup> In **Germany** this was done case by case,<sup>357</sup> while in the **UK** it reflects Home Office policy guidelines.<sup>358</sup> Cases from **Austria, Belgium, France** and **Sweden** tended to consider at least some types of vulnerability experienced by women when evaluating whether they could reasonably be expected to relocate.<sup>359</sup> In **Hungary**, societal attitudes are rarely examined for women. Cultural practices are considered if they would be relevant upon return.

Little information emerged concerning the application of the IPA to other potentially vulnerable applicants. **Austria** and **Germany** verify the availability of support or treatment for traumatised persons or persons with other medical needs.<sup>360</sup> It is sometimes assessed in **Belgium, Sweden** and the **UK**. **Hungary** lacks practical mechanisms to identify vulnerable applicants, but a court declined to apply the IPA to an Afghan applicant suffering from serious psychiatric illness on the grounds that no suitable care facilities were available.<sup>361</sup> In the **UK** trauma is considered less frequently than for example violence or factors particularly affecting women. Trauma can be decisive,<sup>362</sup> but if argued, it is often rejected using standardised language after a brief assessment. A country guidance case recognised that psychological damage

349 **BE**: In two case files reviewed elements of access to employment or financial status are called merely economic and said to hold no relation to the Geneva convention. This was confirmed at the appeal stage.

350 Article 11(3) [16(3)] exempts from the cessation provisions “a refugee [beneficiary of subsidiary protection] who is able to invoke compelling reasons arising out of previous persecution [serious harm] for refusing to avail himself or herself of the protection of the country of nationality, or, being a stateless person, of the country of former habitual residence”

351 ECRE’s position is that: « Any refugee seeking protection is in a vulnerable position, but the ability of certain individuals to present an application for international protection is further impaired due to particular personal characteristics or especially traumatic experiences. Such ‘vulnerable groups’ include, but are not limited to, children especially unaccompanied children, disabled people, elderly or persons suffering from serious illnesses, pregnant women, single parents with children, persons suffering from mental health problems, victims of human trafficking and victims of torture, rape or any other form of psychological, physical or sexual violence».

352 Findings regarding applicants with special needs are discussed in more detail in chapter VII.

353 For further discussion of the IPA with respect to unaccompanied minors, see section 7.4.2.3. Children.

354 Member States include: **Austria, Belgium, France, Germany, Sweden** and **UK**.

355 One case in **Poland** cited the vulnerability of a single mother in deciding against the IPA. It appears that the child had a particular vulnerability due to trauma.

356 For further discussion of the IPA with respect to women, see section 7.4.2.2. Women.

357 **DE**: The reasoning will very often be more an overall assessment than an assessment of specific factors. For instance, where return to a Muslim country is considered, the IPA assessment will look at societal attitudes. Depending on circumstances and the deciding body, other aspects such as forced prostitution or other exploitation and opportunities for safe employment are assessed.

358 Some **UK** cases considered factors that may lead to a risk of trafficking or domestic violence. See Home Office, Asylum Policy Instructions, gender Issues in the asylum claim, 11 October 2010: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257386/gender-issue-in-the-asylum.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257386/gender-issue-in-the-asylum.pdf) ; UKUT, AM and BM Albania, 22.03.2010; UKUT, FGM (K and others (FGM) the Gambia, 08.04.2012; UKUT, VM Kenya, 9.06.2008; UKUT, KA and Others Pakistan, 14.07.2010; UKUT, MD Ivory Coast CG, 07.07.2010.

359 In **Austria**, social attitudes and the availability of civil and social rights are considered. Decisions in **Belgium** take into account elements related to the vulnerability of women are taken into account but the study found a number of cases involving for example gender based violence where the IPA was applied. Cases in **France** did not always consider personal circumstances but at times factors such as societal attitudes and male protection or the potential for domestic violence are considered. In **Sweden** there is a policy to consider gender-related factors but it is not always applied.

360 However in **Germany** there are cases where such support is assessed without investigating whether it would actually be available for the individual concerned.

361 **HU**: Case no. 20K.31072/2013/9.

362 **UK**: See e.g., AA Uganda [2008] EWCA Civ 579.(UGA04FSP).

can lead to difficulties for a trafficking victim to re-integrate.<sup>363</sup> Trauma is frequently raised in **Belgium**, but is generally rejected if it is not linked to a Refugee Convention ground for persecution. The research found little consideration of factors affecting LGBTI people, such as societal attitudes and civil and social rights, but these are taken into account in **Germany**, and in at least one case in the **UK**.<sup>364</sup>

Internal Protection Alternative – General and Personal Circumstances <sup>366</sup>											
	AT	BE	DE	ES	FR	HU	IT	PL	NL	SE	UK
<b>General Circumstances</b>											
Living conditions	X				X				X		X
Size of country or region	X			X	X		X			X	X
Population or density				X	X	X					X
Power of Actor of Persecution	X		X	X	X	X	X		X	X	X
Security Situation					X	X	X	X <sup>367</sup>	X		X
Health care	X				X	X			X		X
<b>Personal circumstances</b>											
Language	X		X		X	X			X <sup>368</sup>		
Family	X	X	X	X	X	X <sup>369</sup>	X		X <sup>370</sup>	X	X
Ethnicity		X	X	X	X			X	X	X	X
Religion	X							X		X	X
Age	X	X	X		X	X			X	X	X
Sex	X	X	X			X					X
Health		X	X			X			X	/	
Disability		X	X			X					
Social status		X	X		X					X	
Economic status	X		X			X			X		X
Education		X	X						X		X
Employment prospects		X	X						X	X	X

X: the circumstance is taken by the relevant determining authority into account during the assessment of the internal protection alternative.

The research, as indicated above, has looked at when Member States consider that an applicant can be expected to settle in a region of relocation. Most Member States, with the exception of Italy, Spain and, to a lesser extent, Poland, perform such an analysis. While the living conditions in the relocation region need to reach a certain “minimum standard”, this standard has never been clearly defined in any Member State and there is no agreement as to how this standard should be assessed. A tendency was identified in northern Member States towards considering living standards acceptable if

<sup>363</sup> **UK:** UKUT, AM and BM (Trafficked women) Albania , 22.03.2010. A distinctive feature of the UK asylum system is the system of “Country Guidance Cases”, in which certain cases are singled out by the Tribunal to become binding rulings on the conditions in a certain country.

<sup>364</sup> **UK:** UKUT, 24.06.2011 (recognising an applicant from Jamaica as a refugee).

<sup>365</sup> The list of general and personal circumstances in this table reflects the circumstances most often observed during the analysis of decisions. It is not an exhaustive list.

<sup>366</sup> In Poland, security in the region was the most common, and often the only factor considered in this context.

<sup>367</sup> In the **Netherlands** language is taken into account in the limited circumstance of when an applicant who left Somalia as a child has lived outside the country for so long that their accent or language skills would identify them as an outsider and might render them vulnerable if returned to another region such as Somaliland.

<sup>368</sup> **HU:** Not in case of Afghan adult male applicant.

<sup>369</sup> **NL:** Except for cases from Somalia, family links are usually only considered in cases of single women.

they would not violate Article 3 of the European Convention on Human Rights. References were also made to “undue hardship from a humanitarian perspective” or “general hardship”. Some countries assessed conditions in light of the living standards of the population in the region (France, Netherlands; sometimes in Belgium, Poland). Most Member States took the personal circumstances of the applicant into account when evaluating whether it is reasonable for the applicant to stay in the proposed region, most frequently considering family connections, age and gender. It is critical that Member States, when assessing whether an applicant can reasonably be expected to settle in a region, consider and assess all factors and circumstances particular to the applicant in the region of relocation.

**Recommendation:** In order to determine that an applicant can “reasonably be expected to settle” in a region, the Member State assessing the application must assess all factors and circumstances particular to the applicant in the region of relocation.

#### 4.1.3.4. Duration of Stay in the Protection Region

Article 8 of the Qualification Directive (2004/2011) requires that the applicant can be expected to reasonably “stay” or “settle” in a part of the country of origin. The duration of such a stay in the region of relocation is often not specified. **Belgium**,<sup>370</sup> **France** and the **Netherlands** use the standard of “durable” stay (at least for the time of the need for protection), and **Hungary** and **Poland** refer to “permanent residence”. Case law in the **UK** indicates that short term protection is insufficient.<sup>371</sup> In **France**, both the Council of State and the Constitutional Court refer to the possibility for the applicant to lead a “normal family life”. This would support an interpretation of “stay” or “settle” as meaning permanent residence.<sup>372</sup>

**Good practice:** When assessing whether an applicant can be expected to ‘settle’ in a region of relocation, Poland and Hungary examine whether an applicant can relocate to the IPA on a permanent basis.

In most cases in **Germany**, the possibility of a relatively short stay is seen as sufficient, but some decisions assess the possibility to permanently settle. Duration is seldom considered in **Sweden**, and does not seem to be assessed at all in **Spain**. No assessment of duration of stay was found in cases from **Austria**, although some decisions seem to assume that the availability of short-term assistance from family or an aid organisation would lead to eventual self-sufficiency through work.

#### 4.1.4. Access: Safe and Legal Travel

The 2011 recast of the Qualification Directive amended Article 8(1) to specify that Member States may only apply the IPA if the applicant “can safely and legally travel to and gain admittance to” the protection region. In its 2006 *Salah Sheekh* judgment, the ECtHR ruled that the ability to travel to a protection region and gain admittance is a prerequisite to the IPA.<sup>373</sup> If evaluating an IPA, decision makers in **Austria**, **Belgium**,<sup>374</sup> **Hungary**,<sup>375</sup> the **Netherlands** and **Sweden** verify whether the applicant can safely and legally travel and gain admittance to the region. In the **UK**, if the route is not safe, then protection should be granted.<sup>376</sup> In **Germany**, the question is often approached but is not systematically assessed.<sup>377</sup> It is required in **France**,<sup>378</sup> but not often assessed in practice. In **Austria** access is not always assessed, particularly when the IPA is used as an alternative rather than a main argument. In the **UK** travel to the region may be considered, but the applicant bears the burden to show a risk, and often the necessary information is not in the public domain. It is not assessed in **Italy** or **Spain**, and not often assessed in **Poland**. In many of the cases reviewed, no protection location was identified, making an assessment of safe and legal travel impossible.

The cases studied for this research provided little information about how the possibility to travel to the region is assessed. **Belgium**, **Germany** and **Hungary** recognise a need to obtain permission to access the region and to travel through third

<sup>370</sup> **BE:** From the cases analysed in the research, it appears that the CGRS and CALL assess the possibility of long term residence. However, cases were identified where long term options were not taken into account. See Belgium APAIPA National Report.

<sup>371</sup> **UK:** UKCA, 22.05.2008 (support from a church insufficient for lack of evidence it could provide ongoing accommodation and employment opportunities); UKUT, 14.07.2010 (consideration must be given to the prospects facing women victims of domestic violence in Pakistan after they leave shelters).

<sup>372</sup> **FR:** Constitutional Court (Conseil Constitutionnel), 4 December 2003 (Decision n° 2003-485 DC), Official Journal (Journal officiel) of 11.12. 2003, p. 21085; Council of State, 21.12.2012 (01FRSFGM). See also decisions from the CNDA considering that the applicant should “settle durably and peacefully” in a region.

<sup>373</sup> ECtHR, *Salah Sheekh v. The Netherlands*, Application no. 1948/04, 11 January 2007, paragraph 141.

<sup>374</sup> **BE:** The Council of State annulled a CALL decision because it had not evaluated the possibility of safe travel (Council of State, 214.686 of 18 July 2011).

<sup>375</sup> **HU:** The Hungarian Government Decree no. 301/2007 (XI. 9.) on the implementation of Act LXXX of 2007 on asylum 301/2007 (XI. 9.) does not refer to “gain admittance”.

<sup>376</sup> **UK:** HH AM, J and MA (Somalia) v SSHD [2010] EWCA Civ 426 para 81.

<sup>377</sup> **DE:** This question was especially present in the decision practice on ethnic Armenians from Azerbaijan (FAC, 29.05.2008 (4ARMAZEOAMSB)). It did not come up much in the research sample, but the issue of safe and legal travel was also discussed in the former practice in relation to cases of applicants from Iraq and the Russian Federation.

<sup>378</sup> **FR:** Constitutional Court, 4 December 2003 and Council of State, 21.12.2012 (01FRSFGM). See also: CNDA, 21.06.2011 (GEO28F): “the effective nature of the potential protection implies that the applicant is able to have access to the given area without going through areas where his/her life would be threatened”. An OFPRA internal note indicates that access to the protection region is fundamental to the IPA.

countries. The **Belgian** internal guidelines on the IPA indicate that the applicant cannot be expected to travel through a conflict zone or to enter the region illegally, and should be able to obtain permission to live and settle there. The guidelines further refer to ECtHR cases *Salah Sheekh* and *Sufi and Elmi*. None of the cases in the research sample (all of which predated the guidelines) investigated the issue of travel to the protection region. In practice the presence of an international airport is often referred to (**Belgium, Hungary**) as an indicator that the applicant can travel to the protection region. In 2011 the **Dutch** authorities considered the IPA to be unavailable to applicants fleeing generalised violence in Mogadishu because they would have to traverse areas of such violence in order to reach southern or central Somalia. In **Poland** assessment is usually limited to establishing that the applicant is formally entitled to freedom of movement within the country. Safe and legal access is verified by use of COI in **Austria, Sweden** and the **UK**. COI used in **Austria** sometimes includes figures on people who have returned to countries of origin.

The European Court on Human Rights, in its 2006 *Salah Sheekh* judgment, made it clear that the ability to travel to a protection region and gain admittance is a prerequisite to the IPA. While over half of the countries surveyed verify whether the applicant can safely and legally travel to and gain admittance to the protection region, albeit not systematically in some countries (Austria, Germany and the UK), such an assessment is often lacking in France and Poland and non-existent in Italy and Spain. The lack of identification of a region of relocation in several countries (as explained above) is one reason for the lack of assessment of the safety and legality to travel to the region of relocation.

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

The Qualification Directive (QD 2004 and 2011), as well as national legislation and case law, clearly indicates that an IPA requires the absence, in a part of the country of origin, of a well-founded fear of being persecuted or a real risk of suffering serious harm. Despite these clear legal requirements, the research, as described above, has indicated that in some Member States there is a lack of careful consideration of the risk of persecution in the region of relocation and no assessment of the possibility for the applicant to safely and legally travel to that region. This lack of a proper and complete assessment of the IPA criteria risks returning an individual to a region where he/she might face persecution. Moreover, an incomplete IPA assessment, which for example, fails to identify the region of relocation, can lead in practice to the burden of proof being transferred to the applicant, who will in effect be required to demonstrate the absence of an IPA element, such as the absence of safe region of relocation ‘anywhere in the country’.

**Recommendation:** If a State makes use of the IPA, it must do so in full compliance with international law, including international human rights treaties and their interpretation by international human rights monitoring bodies. It must also rigorously follow the guidance provided in the recast Qualification Directive.

## 4.2. Application of the IPA

Most Member States rarely or never apply the IPA if the state is the actor of persecution.<sup>379</sup> The **Netherlands** sometimes applies it when the threat arises from local authorities and the central government is deemed able to provide protection elsewhere. **Poland, Spain** and **Sweden** do not apply the IPA in such cases. In **Germany** if low-ranking or local authorities are the alleged persecutors, effective protection is presumed to be available if the state does not generally tolerate acts of persecution. In the **Netherlands**, the IND presumes that the authorities in the country of origin cannot protect the applicant if the threat comes from the state authorities in the country of origin. However, the Aliens Circular foresees two exceptions to this rule: (1) if the threat to the applicant comes from a person or a group, which is part of the authorities, and it can be expected that a superior of that person or group of individuals can and will take action against the person or group that caused the threat; (2) if the threat comes from local authorities, and the central authorities in the country of origin can and will provide protection to the applicant.<sup>380</sup> In principle in the **UK** the IPA can be applied in cases of state agents of persecution, but in practice this occurs rarely if at all. The **Hungarian** Law provides an irrebuttable presumption that protection is not available if the state or a non-state actor that controls the state is the actor of persecution. State persecution might however be defined differently at the administrative level (formal state agencies/militia/tribes acting as state agents in the case of a dysfunctional state) and at the appeal phase, which may lead to the misinterpretation of the availability and accessibility of IPA.

In a significant proportion of the IPA cases across the Member States studied, the IPA was raised in the form of a secondary argument, that “*even if*” the applicant’s fear of persecution was credible, an IPA would be available (“even if your story were true, an IPA is available”). This is one of the main links identified between the use of the concept of IPA and findings of credibility. This was a very frequent use of the IPA in **Poland** and **Spain**. In cases from **Austria, Germany,**

<sup>379</sup> **BE:** CALL pointed out explicitly that when the State is the actor of persecution, there is a rebuttable presumption that there is no IPA possible, since the state is assumed to have executive power on the whole of the territory (CALL, 31.08.2013 (DRC37FNSNO)). The Belgian CGRS guidelines on the Internal Protection Alternative presume that the IPA should not be applied if the state is actor of persecution. In Italy, only one decision applied the IPA in a case involving a state actor of persecution.

<sup>380</sup> **NL:** Aliens Circular 2000, C2/6.1.



**Italy** (before the 2012 Supreme Court ruling against the IPA), **Poland**, **Spain** and the **UK** there was a frequent pattern of disbelieving the applicant’s main claims, stating that even if they were true, an IPA was available.<sup>381</sup> In such cases where the applicant’s credibility was doubted, the legal criteria for applying the IPA were rarely assessed in detail if at all. The **Netherlands** immigration service has sometimes used this approach, often when the primary ground for denial is the availability of an actor of protection. In cases concerning Article 15(c) of the Qualification Directive **Belgium** and **Germany** tended to use the IPA as a primary rather than an alternative argument. In another recurring type of case, the purported existence of an IPA was cited as an element undermining the credibility of the main claim (if truly in danger, the applicant would have relocated to obtain protection within the country). Most of the CGRS decisions reviewed from **Belgium** that raised the IPA followed this pattern,<sup>382</sup> as did the IPA cases in **Italy** prior to the Supreme Court ruling.<sup>383</sup> This approach can lead to assessing asylum claims with regard to past events, rather than considering future risks of persecution.

**Recommendation:** 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, states must first give priority to their protection duties under international law and need not consider the IPA at all.

## 4.2.1. Procedure

### 4.2.1.1. Types of Asylum Procedures where the IPA is applied

Both the UNHCR Guidelines on the Internal Flight or Relocation Alternative and the Michigan Guidelines on the IPA advise against the use of the IPA in accelerated and admissibility procedures due to the “complex and substantive nature of the inquiry”<sup>384</sup> and the “need to assess the IPA with full knowledge of the risks in other regions of the state of origin”.<sup>385</sup>

No Member State studied considers the IPA when deciding whether to admit an applicant to a full determination procedure (i.e. as part of an admissibility procedure). Only **Austria**, **Belgium** and **Spain** use the IPA in **border procedures**. **Italy**, the **Netherlands**, **Sweden** and the **UK** do not have border determination procedures. In **Germany**, there is only one border procedure (the airport procedure), where the decision to enter Germany depends on whether the asylum application is manifestly unfounded and can be decided within two days. In this procedure (legally) an IPA may be applied. **France**, **Hungary** and **Poland** never use the IPA in border procedures.

The IPA is used in accelerated procedures in **Belgium**, **Spain** and the **UK**, and in the short regular procedure in the **Netherlands**.<sup>386</sup> In **France**, the IPA is not used in accelerated procedures, because there is an accelerated procedure only at the OFPRA level (1<sup>st</sup> instance) and the IPA is in practice applied only by the CNDA. In **Germany**, there is no accelerated procedure at first instance but court proceedings can be accelerated if an application is found to be inadmissible, abandoned or manifestly unfounded.<sup>387</sup> In such cases, the IPA may legally be applied. There are no accelerated procedures in **Hungary**. **Poland** and **Sweden** never use IPA in accelerated procedures.

Scope of Application of the IPA				
Member State	Refugee Status	Subsidiary Protection	Accelerated Procedure	Border Procedure
Austria	X	X		X
Belgium	X	X	X	X
France	X	X	(not in practice)	
Germany	X	X	(not in practice)	

<sup>381</sup> **UK:** This was the case in most of the UK Home Office decisions applying the IPA that were read for this research. It is also the main argument used in Spain to deny international protection. **ES:** 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. The way of applying the IPA varies depending on factors such as: the eligibility officer, the country of origin of the applicant, the credibility of the facts, etc.

<sup>382</sup> **BE:** In the two files where IPA was used as the only argument to refuse refugee status, CGRS had found the protection claim credible.

<sup>383</sup> **IT:** Supreme Court, 25.01.2012 (GHA01MRE).

<sup>384</sup> UNHCR Guidelines on the IFA, § 36.

<sup>385</sup> Michigan Guidelines on the IPA, § 25.

<sup>386</sup> The regular asylum procedure in the **Netherlands** lasts eight working days. If by the fifth day it is clear that the application cannot be resolved in the normal time frame then it is transferred to the extended procedure, where the INS has six months to resolve the case, extendable once for a further six months.

<sup>387</sup> **DE:** Article 34(a) and 36 Asylum Procedure Act.

Hungary	X	X		
Italy	X	X		
Netherlands	X	X	(8-day regular procedure)	
Poland	X	X		
UK	X	X	X	
Spain	X			X
Sweden	X	X		

X: the IPA is considered.

**Good practice:** Hungary, Poland and Sweden never use the internal protection alternative in accelerated procedures.

**Recommendation:** The internal protection alternative should only be applied (if at all) in the context of a full asylum procedure, not for example, in accelerated or border procedures because of the complex nature of the internal protection alternative inquiry and especially the need to assess the individual needs of each applicant against conditions in a particular part of the country of origin.

#### 4.2.1.2. Timing of the IPA Assessment

This section looks at when the Member States assess the internal protection alternative, i.e. before, during or after a well-founded fear of persecution has been established in a part of the country of origin.

According to policy or jurisprudence in **Belgium**,<sup>388</sup> **France**,<sup>389</sup> **Germany**,<sup>390</sup> the **Netherlands**,<sup>391</sup> **Sweden**,<sup>392</sup> and the **UK**,<sup>393</sup> the IPA should be considered only after a well-founded fear of persecution is established in part of the country of origin. However, except in **Belgium** and the **Netherlands**, recent decisions show a tendency to use the IPA before completing the assessment of a well-founded fear. In **Hungary** or **France** the IPA might arise at almost any point in the case.<sup>394</sup> In **Hungary**, the IPA is usually invoked before establishing the well-founded fear, and rarely together with or following the analysis of the risk of persecution, and even more rarely after it has been determined that the applicant would otherwise be entitled to international protection. Similarly in **Austria** when the IPA is invoked especially regarding particular countries of origin such as Nigeria or Pakistan, a well-founded fear assessment is not always conducted. Three cases out of the selected sample in **Italy** also applied the IPA instead of assessing the risk of persecution.<sup>395</sup> **Germany** has moved away from older practice, which first examined whether there was a well-founded fear of persecution in the potential location of the IPA, and only if it was considered that there was no well-founded fear would they then consider further elements of the IPA.<sup>396</sup> In some cases, especially concerning persons of Chechen ethnic origin from Russia, courts have stated that an IPA would exist without fully assessing the risk of being persecuted.<sup>397</sup>

The tendency to invoke the IPA before establishing whether a well-founded fear is a concern, as it does not allow a thorough assessment of the IPA. Only once the risk is known and understood can safety against it be fully measured. The Michigan Guidelines on the Internal Protection Alternative indicate that

“the first question to be considered is [...] whether the asylum-seeker faces a well-founded fear of persecution

<sup>388</sup> **BE:** CGRS internal guidelines on internal flight alternative or internal relocation, 27 August 2013.

<sup>389</sup> **FR:** Interview with CNDA.

<sup>390</sup> **DE:** See for e.g.: FAC, 24.11.2009 (4RUS03MSB) and FAC, 16.02.2010 (4RUS04MSB).

<sup>391</sup> **NL:** Aliens Circular 2000, C2, 6.1.

<sup>392</sup> **SE:** Migration Court of Appeal, 15.06.2007, MIG 2007:33; Migration Court of Appeal, 26.02.2007, MIG 2007:9; prop 2009/10:31, p. 135, and 1996/97:25, p. 101

<sup>393</sup> **UK:** See e.g. KH (Article 15(c) Qualification Directive) Iraq CG [2008] UKAIT 00023: “It is unnecessary for us to consider whether the appellant in this case would have a viable internal relocation alternative because we have not found he faces a real risk of serious harm in his home area.” (para 219).

<sup>394</sup> **FR:** Some CNDA decisions consider that an IPA is available just after recalling the facts of the case, without always establishing these facts or analysing the risk of persecution, other decisions consider whether an IPA is available as part of the assessment of the risk of persecution, and some consider whether an IPA is available after determining that the applicant would otherwise be entitled to international protection.

<sup>395</sup> **IT:** Territorial Commission of Verona, 18.07.2011 (NIG44MNS) (even if claims were true, it was not credible that the feared secret voodoo organisation could find the applicant throughout Nigeria); Tribunal of Trieste, 12.04.2010 (IVO55FNS) (even if threat of FGM and forced marriage were credible, applicant had lived safely in the capital and could return there); Court of Appeal of Bologna, 30.03.2012 (NIG08FNS) (applicant had no strong ties to place of prior residence and could relocate to the capital).

<sup>396</sup> **DE:** The decisions assessed whether the risk was “nationwide” (i.e. also in relation to the relocation region).

<sup>397</sup> **DE:** The main reason for this seems to have been a lack of reliable COI on Chechnya. This reasoning was particularly found in cases where the applicants claim to have been at risk of being persecuted for minor assistance to the rebels. In these cases, it was uniformly stated that there is an IPA in another part of the Russian Federation.

for a Convention reason in at least some part of his or her country of origin. This primary inquiry should be completed before consideration is given to the availability of an ‘internal protection alternative’. The reality of internal protection can only be adequately measured on the basis of an understanding of the precise risk faced by an asylum-seeker.”<sup>398</sup>

**Recommendation:** 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 of origin.

### 4.2.1.3. Notice and Opportunity to challenge the IPA

According to the EU principle of the right to good administration, all persons have the right to be heard before any individual measure which would affect them adversely is taken. This right also requires the authorities to pay due attention to the observations submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision.<sup>399</sup> The asylum seeker must be given clear and adequate notice that the possibility of an IPA is under consideration, and an opportunity to provide arguments that it is not applicable in their case.<sup>400</sup>

In **Sweden**, the applicant has the opportunity to comment on the application of the IPA when it arises during the asylum interview or as part of the final submission by the legal representative. Similarly, in **Germany**, the applicant would in theory be informed and asked about the potential IPA location (in practice it depends on the decision makers). The applicant would then have an opportunity to contest or comment on the IPA during the interview and at the hearing before the court. The BAMF text modules and guidelines set out in which cases an IPA may be used. Therefore, the fact that an IPA might be at stake is usually already known at the time of the asylum interview. The **Netherlands** and the **UK** provide respectively a draft decision and a record of the interview, and give the applicant a brief opportunity to contest or comment on it.<sup>401</sup> The applicant is not usually informed of the possible use of the IPA before the decision in **Austria**, but if informed, may contest its application.

Many applicants do not have a practical opportunity to contest or comment on the application of the IPA before the decision is rendered. In **Hungary, Italy, Poland** and **Spain**, and often in **Austria**, the first opportunity is at the appeal. In **Hungary**, the applicant and the legal representative may access the case files throughout the procedure, but are not informed about the IPA being considered or about COI being collected on the IPA. In **Poland** the applicant is invited to comment on the case file before the decision is taken, but is not informed that the IPA may be invoked. Practice in **Italy** is similar, as the applicant can request corrections to the interview transcript. In **Austria** and **Spain** the IPA is sometimes used to deny refugee status, with subsidiary protection granted instead. While authorities in **Spain** increasingly include a (standard) paragraph on the IPA in their decisions if it was one of the arguments used to deny an application for refugee status, this is not the case if the applicant is granted subsidiary protection instead of refugee status. In such cases, applicants will not know if the IPA has been used, unless they ask to review their case files at the OAR office. In **Belgium**, there is no requirement in law to inform the applicant of the application of the IPA. It is often done in practice, but not always thoroughly. In some of the cases reviewed, the applicant was not asked about the IPA during the interview, but the IPA was applied to deny subsidiary protection under Article 15 (c) of the Qualification Directive.<sup>402</sup>

#### Testimony:

Gambian woman fearing persecution from her husband (FGM).

*“They [the asylum authority] did not ask me about this [the internal protection alternative] in my interview. The suggestion that I could live somewhere else in Gambia came first in the refusal letter. They said I could I go somewhere else in Gambia. They said I could go for instance to X.”<sup>403</sup>*

*X is the place where my husband was educated. He was born in Y and went to primary school in Y. He went to high school and college in X. Our home together was in Z. This is a short bus ride from X – about 20 to 30 minutes. If the Home Office had asked me about this I would have explained. I don’t know why they said X. They did not ask me about it.*

*This worried me a lot. Gambia is very small. My husband is a soldier. He gets posted from one town to another. Normally I would go with him on a posting when it was in Gambia. It was a two/three year posting. He was sent to Sierra Leone and Liberia peace-keeping. I did not go when he went on peace-keeping duties. He knew a lot of people because of that moving around.] She was denied protection.*

<sup>398</sup> Michigan Guidelines on the IPA, 11 April 1999, § 12. See also: UNHCR, Guidelines on the IFA, § 7 (the starting point for the IPA is that “a well-founded fear of persecution for a Convention reason has been established in some localised part of the country”).

<sup>399</sup> CJEU, M. M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General, C-277/11, 22 November 2012. See also the 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), Art. 11 and 12.

<sup>400</sup> UNHCR Guidelines on the IFA, § 35 ; See also Michigan Guidelines on the IPA, §26.

<sup>401</sup> In the **Netherlands** the applicant receives a draft decision on the fifth day of the eight-day procedure, and may contest it the next day. In the **UK** the applicant may comment on the record of the interview within 5 days of receiving it.

<sup>402</sup> **BE:** See for instance: CGRS, 7.08.2012 (AFG26MNSUM).

<sup>403</sup> For confidentiality reasons, the name of the place of relocation has been anonymised.



### Recommendations:

- In keeping with the rights under the EU Charter of Fundamental Rights (CFR), including Article 47, and the EU general principle of the right to good administration all persons should be informed of the reasons for administrative and judicial decisions that affect them. All international protection decisions must be well-reasoned with a clear legal basis, as required by, among others, Article 11 (2) of the recast Asylum Procedures Directive.
- If the internal protection alternative 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 internal protection alternative 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 prior to the first instance decision.

## 4.2.2. Policy

Member States exhibit certain tendencies in their policy choices regarding the IPA, applying it more or less frequently to specific types of applicants. Some of these classifications are common across some or all of the Member States studied, while others are unique to a particular state. Decision makers in **Germany**, **Hungary** and **Sweden**<sup>404</sup> are instructed to consider the IPA in all cases, if a protection need is established. Most Member States do not assess it systematically.<sup>405</sup> The new Aliens Circular in the **Netherlands** no longer states that the INS examines in each case whether an IPA is available. In **Italy** the Supreme Court ruled in 2012 that the IPA should not be applied at all, but it was applied in several cases in the study sample that post-dated that ruling.<sup>406</sup> In **Belgium**, **Spain** and the **UK** it is raised at the discretion of the caseworker.<sup>407</sup>

### 4.2.2.1. Type of Protection Claim

In most Member States covered by the study, the IPA is applied to both refugee status and subsidiary protection. In **Belgium** and **Spain** it is primarily used in asylum cases.<sup>408</sup> In all Member States except **Spain**, the IPA is considered when Article 15(c) of the Qualification Directive is engaged.<sup>409</sup> For example, the **German** Federal Administrative Court indicated that if an armed conflict has not spread to the whole territory an IPA assessment is possible.<sup>410</sup> One exception might be **Austria**, where the law does not address the question, and none of the cases reviewed involved the application of Article 15 (c) in an IPA context. It is established practice in **Sweden** that the IPA cannot be applied to an area of the country where there is a situation of internal armed conflict,<sup>411</sup> but asylum seekers originating from such areas may be returned to other areas of the country. For example, asylum seekers from the Ghazni province in Afghanistan have been relocated to Kabul. The **UK** Upper Tribunal has ruled that to apply the IPA to protect against Article 15(c) generalised violence, the absence of such violence in the protection region is insufficient; it must be safe and reasonable for the applicant to live there.<sup>412</sup>

### 4.2.2.2. Countries and Groups to which the IPA is most often applied

The **Netherlands** makes extensive use of blanket policies. The State Secretary can determine that an IPA exists (or not) for a certain population group, or for applicants from a part of the country that is in an Article 15c situation.<sup>413</sup> This creates a rebuttable presumption that currently applies to categories such as applicants fleeing general violence in the DRC or militants or secret societies in Nigeria or Sierra Leone, or ethnic Armenians fearing persecution in Azerbaijan (IPA in Nagorno-Karabakh or Armenia), or ethnic Azerbaijanis in Armenian regions (to Azerbaijan). In **Germany**, the first instance body (BAMF) specifies such groups in its internal country guidelines and text modules.<sup>414</sup>

Otherwise, the IPA is generally considered on a case by case basis, but patterns are observable with regard to some

<sup>404</sup> **SE**: Migration Court of Appeal, 2.11.2013, MIG 2013:2.

<sup>405</sup> In **France**, the sample of decisions analysed for this research is a quasi-exhaustive set of CNDA decisions invoking or applying the IPA. In light of the annual number of decisions taken by the CNDA each year (37,350 in 2012), it can be concluded that the IPA is hardly ever assessed in France.

<sup>406</sup> **IT**: Court of Appeal (Bologna), 30.03.2012 (NIG08FNS) (claims of persecution by non-state actors not credible, and subsidiary protection denied based on IPA); Tribunal of Bologna, 8.03.2012 (NIG22FNS) (woman from River State could live in a region where MEND is not active); Territorial Commission of Verona, 06.02.2012 (MAL82MNS).

<sup>407</sup> In the **UK** case workers appear to routinely assess the IPA in cases involving non-state actors of persecution. In **Belgium** the IPA can be applied at appeal even if it was not raised at first instance. This was confirmed by the Council of State, 28.09.2012 (no. 208.120).

<sup>408</sup> In first instance cases examined in **Spain**, OAR eligibility reports used the IPA only in the assessment of refugee status.

<sup>409</sup> In **Austria**, the law does not address the question, and none of the cases reviewed in this research involved application of 15c in the IPA context.

<sup>410</sup> **DE**: FAC, 31.01.2013 (4AFG03MSB).

<sup>411</sup> **SE**: Migration Court of Appeal, 1.07.2008, MIG 2008:20 (Afghanistan); Migration Court of Appeal, 06.10.2009, MIG 2009:27 (Somalia); Migration Court of Appeal, 24.02.2011, MIG 2011:4 (Somalia).

<sup>412</sup> **UK**: UKUT, AK Afghanistan, 18.05.2012.

<sup>413</sup> **NL**: Aliens Circular 2000 (2013/09/30).

<sup>414</sup> **DE**: In the decisions examined for this study, text modules were used with regard to an IPA for the Russian Federation (in Chechen/Caucasian cases), Sri Lanka (Tamils from the North and East), Afghanistan (Kabul as a general IPA location) and Iraq (Northern Iraq as an IPA location under certain individual circumstances).

countries of origin in all Member States studied.<sup>415</sup> These patterns are mostly based on eligibility guidelines such as for example CEDOCA briefings (CGRS documentation and research centre) in **Belgium** and leading documents of the Migration Board in **Sweden**. Across the Member States, the IPA arises most frequently with regard to Afghanistan (**Belgium, France, Germany, Hungary, Poland, Spain, Sweden** and the **UK**), Nigeria (**Austria, France, Italy, Spain, UK**) and Pakistan (**Austria, France, Italy, UK**). Other countries of origin appeared more often in particular Member States. For example, **Germany** and **Poland** frequently raise the IPA in cases from Chechnya; **Germany** also often applies it to applicants from Iraq, Sri Lanka and Turkey; IPA cases from **Italy** tend to involve the Casamance region of Senegal; **Austria** often used the IPA in relation to Bangladesh and India; the **UK** often applied it to applicants from Gambia and India; **Sweden** did likewise regarding Somalia and Syria, and **Belgium** regarding Gambia; and many of the IPA cases found in **Spain** concerned Colombia, El Salvador, Honduras and Mexico. General Living Standards in the Protection.

#### 4.2.2.3. Exclusions from the use of the IPA

Policy in the **Netherlands** excludes the application of the IPA to, for example, applicants fearing individually-based persecution in the Democratic Republic of the Congo, women from Eritrea at risk of FGM, people at risk from local authorities in Syria, and applicants from Sudan (except those fleeing situations of indiscriminate violence). Country guidance in the **UK** sometimes specifies certain groups as exempt from the IPA, for example sexual orientation cases from some countries and black African Darfuris. In **Poland** the determination authority agrees in principle with UNHCR guidance that advises against applying the IPA to applicants from Afghanistan or Chechnya, but this is not consistently followed in practice. Verbal instructions not to apply the IPA in cases originating from Belarus, Egypt, Somalia and Syria are apparently followed. There are no specific exclusions in **Germany, Spain** and **Poland**. The study discovered cases in **Spain** concerning female victims of domestic violence where the IPA was excluded and subsidiary protection granted because the authorities of certain Central American countries did not have the capacity to provide protection. In **Sweden**, the IPA is also often excluded for women, if the applicant lacks a social network or connection to the relocation area in for example Afghanistan or Somalia.<sup>416</sup>

Most of the Member States studied exclude unaccompanied children from the application of the IPA.<sup>417</sup> The rest consider it occasionally but very rarely use it. The highest court in **Austria** has ruled against it for unaccompanied children. Similar rules are found in policy guidelines in **Belgium, France** and **Sweden**. In **Hungary**, according to an interview with the OIN, the IPA is not applied to unaccompanied children.<sup>418</sup> In **Austria, Germany** and the **UK** there appears to be an informal policy to allow unaccompanied children to remain until they reach the age of majority, either through discretionary leave or subsidiary protection. In **Sweden**, the IPA is sometimes considered if the authorities assess that there is no protection need and there are reception facilities available for the child in the country of origin. The IPA was considered in one case in **Italy**, but rejected and subsidiary protection granted based on the 2010 UNHCR guidelines for Afghanistan.<sup>419</sup> In **Spain** there is a blanket policy to grant subsidiary protection to applicants from Afghanistan, but some cases used the IPA to deny refugee status to unaccompanied children from Afghanistan. Overall, the small number of IPA cases that concern unaccompanied children did not provide enough information to assess how access to support in the proposed area is verified (family, education, guidance, shelter and emotional support). Assessments in **Austria** and **Sweden** indicate that family and social network play an important role.

#### 4.2.2.4. Application despite Technical Obstacles to Return

Only **Germany, the Netherlands** and the **UK** transposed Article 8(3) of the 2004 Qualification Directive, which permitted the application of the IPA even if actual return is not possible due to “technical obstacles”. The IPA is reportedly applied notwithstanding technical obstacles to return in these countries.<sup>420</sup> The **UK** applies this rule in cases of difficulty in obtaining travel or identity documents.<sup>421</sup> The recast Qualification Directive has removed the possibility to apply the internal protection alternative notwithstanding technical obstacles to return. The transposing provision has since been removed from **Dutch** and **German** law. In **Germany** applicants who for technical reasons cannot be returned are issued a toleration permit (*Duldung*) that may lead to a residence permit under certain circumstances. They can also receive humanitarian protection. No alternative status is provided in the **Netherlands** or the **UK**.

<sup>415</sup> Lack of readily searchable, indexed case databases in most Member States made it impossible to quantitatively establish the countries of origin for which an IPA is most often applied. The information presented here is based on the reports of the project researchers, based on their case samples and interviews.

<sup>416</sup> SE: See Migration Board’s leading documents on Afghanistan and Somalia.

<sup>417</sup> On the use of the IPA with regard to unaccompanied children, please see also section 7.4.1 and 7.4.2.3.

<sup>418</sup> Researchers in **Hungary** and **Poland** reported that most applicants under age 18 leave the country before the merits of their applications are addressed.

<sup>419</sup> IT: Territorial Commission of Foggia, 25.02.2011 (AFG32MSPUM).

<sup>420</sup> In the **Netherlands** the IPA may only be used if the obstacles are short term. In Germany the IPA can still apply despite practical obstacles, but no cases have been identified where this played a decisive role in concluding that an IPA exists. In **France**, an OFPRA internal note indicates that purely technical and temporary obstacles should not necessarily prevent the rejection of an application on the basis of an IPA. This seems not to have been applied in practice.

<sup>421</sup> UK: Home Office, Asylum Policy Instruction, *Internal Relocation*, June 2007, p.4. See also MK (documents – relocation) Iraq CG [2012] UKUT 00126 (IAC). Note that the UK has opted out of the recast Qualification Directive (2011/95/EU).





# *ASSESSMENT OF FACTS AND CIRCUMSTANCES*



## V. Assessment of Facts and Circumstances

According to Article 4 of the Qualification Directive, both Member States and applicants have duties relating to the assessment of facts and circumstances necessary when deciding upon a claim. The same applies to questions regarding actors of protection or the internal protection alternative. Article 8(2) of the 2011 Directive includes a reminder that Article 4 applies to IPA assessments, as it also applies generally to the Directive, including Articles 7 and 8. Article 4(3) requires that decision makers take into account “relevant statements” submitted by the applicant. These must be given due weight as evidence, because in addition to knowing their own situation, applicants often have good knowledge of risks and conditions in their home country or region and relating to its authorities. This section presents how the Member States studied divide the responsibility for establishing the necessary evidence to support arguments based on actors of protection and the IPA between the applicant and the determining authority.

Depending on the legal system in each Member State, the responsibility to demonstrate the availability of protection or the IPA and whether it applies, rests with the state, the applicant, or both. In most cases it is in principle a shared duty. However, the research indicated that in for example **Austria, Belgium** and **Poland**, the state’s share of this responsibility is not always carefully applied in practice. In **Austria, Belgium, Germany**, the **Netherlands** and **Poland** the IPA assessment follows the rules set out in Article 4 of the Qualification Directive (shared duty). It is less clear whether this is upheld in practice in **France, Hungary** and **Sweden**. In **Spain**, 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 from the applicant to refute an IPA.<sup>422</sup> In **Italy**, the inquiry does not follow a precise rule.

**Austria, Belgium, France, Germany, Hungary**, the **Netherlands, Poland, Spain** and **Sweden** cast the asylum inquiry as an administrative law process, in which the state has the responsibility to establish all relevant facts.<sup>423</sup> By contrast in **Italy** although nominally the burden of proof may rest with the authority, asylum is treated as a component of civil law where, following the principle that the party requesting an action must prove their case, it is up to the applicant to (dis)prove the availability of protection or the elements of the IPA. The state then has a duty to cooperate. Because the applicant knows some facts better than the authority, laws in **Austria** and **Germany** add a duty for the applicant to cooperate; a recent amendment in the **Netherlands** has followed this practice, referencing Article 4 of the recast Qualification Directive. In **Sweden**, the applicant must demonstrate the main elements of the claim, but this responsibility normally shifts to the Migration Board as regards the IPA.<sup>424</sup> In practice in **Austria, Belgium**,<sup>425</sup> **France** and **Spain** the authority sometimes simply asserts that protection is available or an IPA is feasible, and leaves the applicant to disprove this. In **Spain** the applicant must then show “sufficient evidence” (an intermediate standard below “full proof”) of risk. In **France**, decisions often put the burden of proof on the applicant.<sup>426</sup> Authorities in **Hungary** do not necessarily locate and present all necessary evidence, which in effect requires the applicant to proactively substantiate the claim.

### Excerpts of Judgement:

#### **Austria: Administrative High Court, 9.9.2003, ZI.2002/01/0497:**<sup>427</sup>

“Given the “exclusion character” of the internal protection alternative, it must be a matter for the authority to show the existence of an internal protection alternative and on the contrary, not up to the asylum seeker to rebut the assumption of such a theoretically possible alternative (see the UNHCR working paper by Hathaway / Foster, Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination (2001), 49).”

#### **Belgium: Council on Aliens Law Litigation, 1st February 2011 (Syria)**<sup>428</sup>

“The application of this [IPA] provision clearly has the effect of restricting access to international protection to persons, for whom it is also admitted that they have reason to fear persecution [...] in a part of the country where they lived before fleeing. The spirit of this restrictive provision, as well as its formulation as chosen by the legislator, indicate that in this case the administration has to demonstrate what it puts forward, namely on the one hand, that there is a part of the country of origin where the applicant has no reason to fear being persecuted [...] and, secondly, that one can reasonably expect that he could stay in this part the country. The competent authority shall also demonstrate that it has taken due account of the general conditions prevailing in the country and of the personal circumstances of the applicant.”

<sup>422</sup> ES: Supreme Court, 2 January 2009, Appeal 4251/2005.

<sup>423</sup> For example in **Belgium**, “it is the administration who will need to prove . . . on the one hand, that there is a part of the country of origin where the applicant has no reason to fear persecution nor any real risk of serious harm and, on the other hand, that one can reasonably expect that he stays in this part of the country”. CALL 63.338 17 June 2011.

<sup>424</sup> SE: According to the Migration Court of Appeal, 14.01.2009, MIG 2009:4.

<sup>425</sup> BE: CGRS Internal Guidelines on internal flight alternative or internal relocation, 27 August 2013 state that the CGRS must demonstrate the elements of protection or IPA, but for example some decisions simply state that the applicant did not establish they could not find a place to live safely within their home country. Some of these decisions were quashed at appeal, on the ground that it is for the CGRS to prove that an IPA is possible.

<sup>426</sup> FR: See e.g., CNDA, 2.09.2010 (NIG21F) (“the applicant did not prove that she could not settle in another part of Nigeria than in this region and that she could not avail herself of the protection of the authorities in her city of origin or locally”).

<sup>427</sup> AT : Administrative High Court, 9.9.2003 (no. ZI.2002/01/0497). See also: A.C., 01.09.2008, E10 249166-0/2008.

<sup>428</sup> BE: (Translation by the author). CALL, 1.02.2011 (no 55443), § 4.5. See also Council of State, case 218.078 of 16 February 2012.

In the **UK** the applicant must prove the main elements of the case. If the state raises the IPA, then it falls to the applicant to demonstrate why it is not feasible. The state has a duty to cooperate in establishing the pertinent facts. In practice, caseworkers should give the applicant an opportunity to put their case forward by asking appropriate questions during the interview.<sup>429</sup> In the **Netherlands**, the applicant must show they unsuccessfully requested protection, or that it would have been useless to do so, or otherwise demonstrate that in their case no protection could be provided, unless country information shows that protection is generally unavailable, or that to request it is useless.<sup>430</sup> Similarly, if the state shows through COI that in general an internal protection alternative is available, the applicant must then show why it should not apply to them.

Particularly with respect to the IPA, the responsibilities for establishing key elements are not always clear in practice. The Supreme Court of **Spain** ruled in 2009 that requiring an applicant to demonstrate the absence of an IPA improperly reverses the burden of proof, but the cases reviewed for this study did not consistently follow this ruling.<sup>431</sup>

**Excerpt of Judgement:**

**Spain: 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 the asylum applicant could obtain protection by internal displacement. [...] The reference to the possibility of an internal flight requires that the person alleging it, in this case the instructor of the administrative file, provide the necessary data evidencing its existence and, therefore, that this alternative is likely to provide real and effective protection.”

In IPA cases assessed from **Poland** the burden often effectively shifted to the applicant through incomplete analysis of the IPA elements, or when the assertion of the IPA relied on the applicant’s past residence in another part of the country. In IPA cases in **Germany** the responsibility can partly shift to the applicant through questions about whether they could live in a particular location.

An incomplete IPA assessment can in effect require the applicant to show that there is no safe region anywhere in their home country in order to avoid the rejection of the claim. In practice in **Italy** it appears that if the state identifies a specific IPA region then it also must demonstrate the safety of that region, but if the possibility of an IPA is merely asserted then the applicant has to demonstrate a risk of persecution throughout the country.<sup>432</sup> In **France** the CNDA in some cases apparently considered that a risk was local and hence *a contrario* the rest of the country was safe, without further assessment.<sup>433</sup> The **UK** Home Office considers it good practice to indicate a specific location, but this is not always followed. Case law in the UK indicates that if an IPA is asserted it should be thoroughly supported by evidence and argument,<sup>434</sup> but it nonetheless appears from case law analysis that the Home Office often presumes the IPA region is safe unless the applicant can establish a risk of persecution there.

In most Member States, the responsibility to demonstrate the viability of a protection actor or the internal protection alternative is a shared duty between the State and the protection applicant. The State often has the responsibility to establish all the relevant facts, except in the **UK**, where the applicant must prove the main elements of the case. Also, in **Italy**, although nominally the burden of proof may rest with the authority, the applicant must disprove the availability of protection or the elements of the IPA, the state has a duty to cooperate. Particularly with regard to the IPA, the burden of proof might shift in practice to the applicant. This happens where the authority merely asserts the possibility of an IPA or carries out an incomplete IPA assessment, for instance by omitting to identify a region of relocation. Such practices in effect require the applicant to demonstrate the absence of an IPA element and, given the demanding nature of the internal protection inquiry, places an enormous burden on the applicant. As indicated by UNHCR, in its Guidelines on the Internal Flight or Relocation Alternative, “the use of the relocation concept should not lead to additional burdens on asylum seekers”. The guidelines go on to state that:

“the decision maker bears the burden of proof of establishing that an analysis of relocation is relevant to the particular case. If considered relevant, it is up to the party asserting this to identify the proposed area of relocation

<sup>429</sup> **UK:** Home Office, Asylum Policy Instruction: Asylum interviews (version 5.0), 31 March 2014, p. 14. The guidance indicates that “Whilst a claimant must substantiate their claim, the interview is not an adversarial process but a cooperative one in which caseworkers should assist the claimant by: (-) ascertaining the relevant aspects of the claim, (-) encouraging disclosure of all relevant information, (-) obtaining and assessing all the available information relevant to the claimant’s case”.

<sup>430</sup> **NL:** Council of State jurisprudence is not always clear regarding what the INS must prove. In one case the council ruled that despite country reports stating that protection is generally available, recent advances by security forces in Iraq made it unclear that authorities could not provide protection.

<sup>431</sup> **ES:** Supreme Court, 2 January 2009, 4251/2005. In denying protection against persecution from non-state actors, authorities frequently indicate that the applicant did not sufficiently demonstrate that the authorities in the country of origin tolerate or cooperate in the persecution, or that the applicant could not obtain sufficient protection from them.

<sup>432</sup> **IT:** Territorial Commission of Torino, 18.01.2012 (COL27MNS).

<sup>433</sup> **BE:** CNDA, 29.07.2010 (TR25M).

<sup>434</sup> **UK:** See *Daoud v Secretary of State for the Home Department* [2005] EWCA Civ 755.



and provide evidence establishing that it is a reasonable alternative for the individual concerned.”<sup>435</sup>

When assessing the claim of the applicant, decision makers must take into account “relevant statements” submitted by the applicant, as requested by Article 4(3) of the Qualification Directive (2004 and 2011). These statements must be given due weight as evidence, because in addition to knowing their own situation, applicants often know the risks and conditions in their home country or region. In addition, Member States should exercise their discretion under the recast Asylum Procedures Directive (Article 10(3)) to seek advice, whenever necessary, from experts on, for example, medical, cultural, religious, child-related or gender issues where appropriate.

#### **Recommendations:**

The authority conducting the assessment bears the burden of establishing each element of the internal protection alternative, as indicated in the UNHCR Guidelines on the Internal Flight or Relocation Alternative (paragraph 34). While the applicants may be expected to cooperate in this assessment, they should not bear the burden of proving the IPA is not feasible or that any element required to apply it is missing.

In accordance with Article 4(3) of the Qualification Directive and its recast, particular attention should be paid to the applicant’s statements, which can provide important information on conditions in the country of origin and how they relate to the applicant’s particular circumstances. Member States should exercise their discretion under the recast Asylum Procedures Directive (Article 10(3)) to seek advice, whenever necessary, from experts on for example medical, cultural, religious, child-related or gender issues where appropriate.

<sup>435</sup> UNHCR Guidelines on the IFA, § 34. See also the The Michigan Guidelines on IPA (§14), which also put the burden of proof on the authorities: “Because this inquiry into the existence of an ‘internal protection alternative’ is predicated on the existence of a well-founded fear of persecution for a Convention reason in at least one region of the asylum-seeker’s state of origin, and hence on a presumptive entitlement to Convention refugee status, the burden of proof to establish the existence of countervailing internal protection as described in para. 13 should in all cases be on the government of the putative asylum state.”





# *DECISION QUALITY*



## VI. Decision Quality

The use of the concepts of actors of protection and internal protection alternative represent specific challenges for the decision maker. This section looks at two issues of particular importance when applying these concepts. First, the quality of country of origin information used in decisions applying the IPA and AP. Secondly, the guidance and support available to decision makers who are making use of such concepts.

### 6.1. Country of Origin Information

#### Article 8 (2) Qualification Directive 2011/95/EU:

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.<sup>436</sup>

The 2011 Qualification Directive states that the assessment of an individual case has to take into account all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied (Article 4 (3) (a)). The recast Asylum Procedures Directive stipulates in Article 10 (3) (b) that Member States shall ensure that precise and up-to-date information is obtained from various sources, such as EASO and UNHCR and relevant international human rights organisations, as to the general situation prevailing in the countries of origin of applicants. Under Article 8(2) of the 2011 Qualification Directive, in assessing the risk of persecution or harm in a proposed IPA region, Member States must support their analysis with “*precise and up-to-date information [from] relevant sources, such as [UNHCR and EASO]*”. The Article 8 (2) explicitly applies to the IPA the same requirement that the Asylum Procedures Directive foresees for asylum proceedings generally.<sup>437</sup>

#### 6.1.1. Sources of Country of Origin Information

In **Germany**, the approach to COI evidence in practice is objective and uses a variety of sources. There is no ‘tendency’ for a use of sources as such, which could be identified in this research. Asylum decisions from **Spain** that cite COI frequently reference recent reports of the UK Border Agency and the US State Department, as well as Amnesty International human rights reports. Human Rights Watch and EASO reports were also cited in assessments concerning applicants from Afghanistan and Algeria.

In **Sweden**, the COI used is mainly based on state reports from the Swedish Migration Board, the UK Home Office and the US State Department. There was little or no reference to other sources in the decisions of the sample. In the **Netherlands** courts and the INS primarily use the COI reports produced by the Dutch foreign ministry, with frequent reference to UNHCR reports as well, and occasionally to reports of international organisations such as Amnesty International and Human Rights Watch. The **UK** Home Office has a COI research service that provides country reports, compiled from generally available sources. Case workers are discouraged from doing their own research.

In **Hungary**, the use of the collected COI evidence by the authority may raise concerns: the use of COI is selective in some cases in order to justify the reasonableness of the IPA. Any authorities in **Austria** who discover COI is no longer accurate have a duty to inform the asylum authority.

Decisions reviewed from **France** rarely referred to the COI used. First instance decisions in **Italy** rarely refer to COI, but courts normally do so. At first instance, UNHCR guidelines are frequently cited. Courts often cite Amnesty International reports and (regarding violence in Nigeria) the website of the Italian Ministry of External Affairs, and in some cases considered reports from the UKBA, US Department of State, Irish Refugee Documentation Centre and the Afghanistan NGO Safety Office (ANSO), as well as European Parliament resolutions. Judicial authorities may request COI reports from a unit of the National Asylum Commission.

<sup>436</sup> See also Art. 4 recast Qualification Directive 2011/95/EC: “The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account: (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied; (b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm”.

<sup>437</sup> See Article 8(2)(b) of the Asylum Procedures Directive; and Article 10 (3) (b) of the recast Asylum Procedures Directive 2013/32/EU: “[...] Member States shall ensure that: [...] (b) precise and up-to-date information is obtained from various sources, such as EASO and UNHCR and relevant international human rights organisations, as to the general situation prevailing in the countries of origin of applicants and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions”.

## 6.1.2. Up-to-Date Country of Origin Information

Article 8(2) of the Qualification Directive specifies that the IPA assessment must relate to conditions “*at the time of taking the decision*” and that the information used must be “*up-to-date*”. According to Member State and ECtHR jurisprudence, COI used in asylum determinations must relate to the current situation, not for example the time of the applicant’s departure or of the first instance decision if the case is at appeal.<sup>438</sup> Thus “*up-to-date*” is best understood as requiring the most recent reports available, supplemented by additional evidence to account for any changes in the situation since the reports were published. The UNHCR warns however that the “*usefulness of such information may [...] be limited in cases where the situation in the country of origin is volatile and sudden changes may occur in areas hitherto considered safe. Such changes may not have been recorded by the time the claim is being heard*”.<sup>439</sup>

Domestic legislation requires the State to ensure that “*precise and up-to-date information is obtained from relevant sources*” in **Austria, Germany, Hungary** and the **Netherlands**, and is established practice in **Sweden**. There is no specific requirement of this kind in **Belgium**,<sup>440</sup> **France, Italy, Poland, Spain** or the **UK**; although in some cases it might be derived from general rules of evidence. The law in **Italy** requires the use of up-to-date information in the asylum procedure, specifically mentioning UNHCR and the Minister of External Affairs as sources.

Researchers in **Austria, Belgium, France, Germany, Italy, the Netherlands, Poland** and **the UK** reported that COI used in decisions is generally up to date. In **Germany**, COI might be out-dated if text modules are used. Some doubts were also expressed regarding **Belgium**,<sup>441</sup> **Sweden, Hungary** and **Austria**. For instance, in **Sweden**, decisions of 2012 (namely Somalia) referred to leading documents and COI from the Migration Board issued in 2009 and 2010, which mentioned clans as actors of protection. In **Hungary**, cases considering Kabul as an IPA were based on two to three year old COI. Courts in the **Netherlands** have found reports from two or more years previously to be outdated. Stakeholders in the **UK** reported judges presented with two to three year old COI sometimes require more up to date information. Home Office COI reports are usually no more than 18 months old.

## 6.1.3. Specific to the Region

When the IPA is at issue, decision makers in **Belgium, Germany, Hungary, the Netherlands, Poland** and **Sweden** consider COI regarding the proposed region of protection separately from general COI for the country. This is not the case in **Italy, Spain** or the **UK**, although in the **UK** more detailed evidence might be introduced at appeal. COI files used in **Austria** include a chapter on the IPA. **UK** Home Office country reports may contain sections on regions within the country, if they have been relevant in refugee claims.

This point is difficult to assess in decisions where the region is not specified or COI is not explicitly referenced. A **UK** stakeholder indicated that IPA sections should not be included in COI reports, because the IPA raises different types of issues than those typically included in COI reports; more anthropological and local sources are needed, including the applicant’s own local knowledge.<sup>442</sup>

### Recommendations:

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 country (COI) of origin information is used to assess the conditions in the region of relocation. The internal protection alternative should not be applied if the COI is unclear or cannot be confidently said to reflect current conditions in the region of relocation.

Given the particular challenges for both the Member State and the applicant in obtaining case by case evidence of sufficient quality to ensure that relocation is safe for an applicant with special needs, collections of publicly available evidence should be established using anthropological, cultural, religious, and other relevant sources from and about particular groups in the relevant country of origin.

Recognising the need for localised country information on proposed sites of internal relocation, COI service providers and refugee practitioners should consult publicly available sources from organisations with presence in those areas which meet the quality criteria of reliability and balance. Published academic research may also provide relevant sources of localised country information.

<sup>438</sup> Gabor Gyulai, Country Information in Asylum Procedures – Quality as a Legal Requirement in the EU, Hungarian Helsinki Committee, 2011, pp. 57-59 (citing the ECtHR judgments in Chahal, Salah Sheekh and Saadi, as well as case law from Austria, the Czech Republic, Germany, Ireland, Poland, Slovakia, Slovenia, Sweden and the UK).

<sup>439</sup> UNHCR, Guidelines on the IFA, § 37.

<sup>440</sup> In **Belgium**, the last sentence of Article 8(2) QD 2011 (which requires that COI is up-to-date) has not been transposed. However, the memorandum of the proposal of the law that partially transposed the QD 2011 in the Alien Act emphasises that CGRS will rely on “precise and up-to-date information”.

<sup>441</sup> **Belgium**: At first instance. See Belgian Refugee Council, “Belgian Refugee Council, “La crainte est-elle fondée? Utilisation et application de l’information sur les pays dans la procédure d’asile”, June 2011, p. 39. Review of cases for this study did not reveal the use of out-of-date COI.

<sup>442</sup> **UK** cases have considered specialised evidence provided by experts in for example social anthropology, health and developmental geography. See e.g., K (Gambia) (UKUT, 08.04.2012); FK (Kenya) (CA, 26.02.2008).



## 6.2. Templates, Guidance and Training

**Templates** used for refugee status determination interviews do not refer to the IPA in **Germany**, **Sweden** and **France**; while they refer to the IPA in **Spain** and **Hungary**. In **Belgium**, each protection officer prepares the interview and the questions to be asked individually, depending on the grounds for the application. Each Territorial Commission in **Italy** uses its own template; some of these regularly ask whether the applicant could find safety in another part of the home country. In the **UK**, operational guidance instructs interviewers on how to apply the IPA, but not on what factors should trigger a decision to raise the IPA. The questions indicated on the form used in **Spain** for protection claims include asking the applicant whether they considered relocation within their country, and whether they complained to or sought help from the authorities there. Templates are not used in the **Netherlands** and **Poland**.<sup>443</sup>

Some assessment authorities in **Belgium**, **Germany** and the **UK** have their own **guidelines** on how to apply the IPA and AP.<sup>444</sup> There are no such guidelines in **Spain**. In **Sweden**, the Migration Board issues leading documents and decisions for case workers and decision makers on how to consider and apply the IPA for certain countries. Similarly, in **Germany** and the **UK**, guidelines and text modules cover AP and IPA with regard to specific countries.<sup>445</sup> In the **Netherlands**, country specific guidance notes refer to IPA and AP.

In **France**, the OFPRA has internal notes on the IPA, however, the IPA is not applied at first instance. The IPA is also often covered in handbooks, such as the handbook on Refugee Status Determination (**Sweden**), or the internal quality assurance handbook (**Hungary**). In some countries, researchers were unable to access these documents.

All Member States studied use **UNHCR guidelines**, albeit not systematically. Eligibility guidelines are often used in **Belgium**, **Germany**, **Hungary** and **Italy**.<sup>446</sup> The UNHCR guidelines on the Internal Flight Alternative are referred to occasionally in **Austria**, **Belgium** and **Sweden**, and in one decision in the **Netherlands**. In **Poland**, cases refer often to the UNHCR Handbook (also in **Sweden**), but not with reference to actors of protection or the IPA, and rarely to other UNHCR guidelines. References were made in **Belgium** to the Michigan guidelines on the internal protection alternative. Courts and tribunals in the **UK** refer to country-specific UNHCR guidelines, which Home Office guidance notes also sometimes cite. Cases in **Spain** also refer to these guidelines, although courts do not cite them unless they were referenced in the eligibility report.

In **Belgium**, the **Netherlands** and **Spain**, the lower the court the likelier it is to take UNHCR guidelines into account. In **Germany** and **Sweden**, the opposite is true. Guidelines are used in all cases where applicable in **Belgium** and **Hungary** but only in some cases in **Germany**, the **Netherlands**, **Spain**, **Sweden** and the **UK**. If **Austrian** authorities disagree with the assessments in reports of UNHCR or other international organisations, they must justify their conclusions and indicate the supporting evidence. In **Italy** and **France**, UNHCR representatives are present on decision panels.

The actors of protection and IPA concepts often feature in **training** for case-workers in **France**, **Sweden** and the **UK**, but not necessarily in depth. They are included in training in **Austria** conducted in cooperation with UNHCR. There is regular training in **Germany** on new legal developments. The BAMF also uses EASO curriculum modules.<sup>447</sup> Case workers in the **Netherlands** are not provided with guidelines, but receive training through for example the EAC training on evidence assessment and the EASO module on 'Inclusion', which provides training on the interpretation and application of the 1951 Geneva Convention and its relation to the recast EU Qualification Directive. The training of **Belgian** protection officers is also done with materials based on the EASO curriculum modules. Eligibility officers from the determination authority in **Poland** also attended the EASO inclusion module in 2009-10. The National Asylum Commission in **Italy** organises training for Territorial Commission members in subjects such as interviewing techniques and the use of COI.

<sup>443</sup> But applicants are frequently asked whether they could obtain protection in their country or settle in another part of the country, which may reflect the use of an assessment form for interviews provided by the Quality Assurance Mechanism developed by the national asylum determination authority and UNHCR.

<sup>444</sup> The CGRS guidelines on actors of protection and on the internal protection alternative in **Belgium** are internal and confidential. Guidelines are publicly available in **Germany** and the **UK**.

<sup>445</sup> In Germany, BAMF uses guidelines for specific countries ("Leitsätze") and respective text modules ("Textbausteine") for a lot of countries. Such BAMF documents are confidential. Courts, including the FAC, also develop and use their own text modules.

<sup>446</sup> In **Hungary**, if UNHCR guidelines differ from the OIN guidance for case workers, the director of the asylum unit issues instructions on how to interpret the UNHCR guidelines.

<sup>447</sup> The EASO Training Curriculum is a common vocational training system designed for asylum officials and other target groups such as managers and legal officers throughout the EU. It is composed of a set of training modules. See: EASO, Training Curriculum Brochure, March 2014, available at: <http://easo.europa.eu/wp-content/uploads/BZ0413152ENC.pdf>



# *VULNERABLE GROUPS*



## VII. Vulnerable Groups

### 7.1. Introduction

ECRE's position on vulnerable persons in the asylum system is that:

“Any refugee seeking protection is in a vulnerable position, but the ability of certain individuals to present an application for international protection is further impaired due to particular personal characteristics or especially traumatic experiences. Such ‘vulnerable groups’ include, but are not limited to, children especially unaccompanied children, disabled people, elderly or persons suffering from serious illnesses, pregnant women, single parents with children, persons suffering from mental health problems, victims of human trafficking and victims of torture, rape or any other form of psychological, physical or sexual violence.”

In this chapter, the term ‘vulnerable groups’ is used interchangeably with ‘special needs’ or ‘particular needs’ where the context so requires. It is hoped that this fluidity in terminology will make the point that the impact of practices in the asylum system is different for different people. The legal tests, laid down in the Qualification Directive and the domestic law of Member States, which govern the application of the internal protection alternative and actors of protection, have particular impacts and implications for particular groups. The premise of a study of vulnerability in this context is that the same provisions affect different people differently, and that in order to achieve a common standard of protection, Member States may need to gear their practices to specific needs. This requirement is implicit in Article 4(3) of the Qualification Directive which requires an assessment of a claim for international protection to be carried out on an individual basis taking into account “all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied” and “the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm”. In UNHCR’s Credo Report, detailed guidance on the application of Article 4(3) underscores this requirement for attention to individual circumstances and specific needs as routine.<sup>448</sup>

With the exception of unaccompanied children, neither the original nor the recast Qualification Directive identify particular groups of people as vulnerable in relation to internal protection or actors of protection. They could have done so, since certain refugees are defined as vulnerable in Article 20 in relation to the content of international protection. The exception for unaccompanied children is in recital 27 of the Recast Directive, which requires that “the availability of appropriate care and custodial arrangements, which are in the best interests of the unaccompanied child, should form part of the assessment” of whether internal protection is effectively available.

The Asylum Procedures Directive 2013/32/EU recital 29, identifies applicants who may be in need of special procedural guarantees due to factors including “their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorder or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence”.<sup>449</sup> Although chapter 2 of the Qualification Directive, which deals with the criteria for obtaining international protection, does not contain an equivalent provision to Article 20<sup>450</sup>, the Article 4(3) requirement for an assessment of facts and circumstances on an individual basis entails the examination of factors which make the applicant vulnerable in the context of applying actors of protection or the internal protection alternative.

In accordance with chapter 2 of the Qualification Directive, the analysis in this chapter is based on an understanding that all asylum seekers are vulnerable<sup>451</sup>, and that, in the context of actors of protection and the internal protection alternative in particular, an assessment of facts and circumstances requires attention to particular needs in order to discharge the international protection obligation.<sup>452</sup>

This chapter discusses risk factors which heighten vulnerability in the case of an IPA and in relation to assessing protection from persecution or serious harm. It draws together some of the research findings to examine:

1. Whether the internal protection alternative is applied to applicants identified as vulnerable or from a vulnerable group, and if so, whether there are any special features in the way it is applied.
2. Whether there are any particular features of the way that actors of protection are assessed in relation to vulnerable applicants.
3. What particular challenges the IPA throws up for vulnerable applicants, and what particular needs vulnerable groups may have where actors of protection are assessed or where the IPA is considered or applied.

<sup>448</sup> UNHCR, *Beyond Proof : credibility assessment in EU asylum systems* (2013), p. 36.

<sup>449</sup> See also Reception Conditions Directive (recast) 2013/33/EU, Articles 21 and 22 requiring assessment of and attention to the special reception needs of specified vulnerable applicants.

<sup>450</sup> See also recital 29 in the Procedures Directive or Articles 21 and 22 of the Reception Conditions Directive.

<sup>451</sup> See ECtHR, *MSS v Belgium and Greece* application no. 30696/09 [2011] ECHR 108 (21 January 2011)

<sup>452</sup> The approach draws on that in Hana Cheikh Ali, Christel Querton and Elodie Soulard, *Gender-Related Asylum Claims In Europe: Comparative Analysis Of Law, Policies And Practice Focusing On Women In Nine EU Member States* (2012), and Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia : Asylum Claims related to Sexual orientation and Gender identity in Europe*, September 2011.



## 7.2. Provisions for Vulnerable Groups in Relation to the Legal Concepts of AP and IPA

Vulnerability or special needs as an overarching factor or concept was not commonly set out in law or policy with respect to interpreting and applying the legal concepts of actors of protection and the internal protection alternative. Only in the **Netherlands** was there a general policy that an applicant with recognised special needs faces a lower burden of proof in relation to IPA.<sup>453</sup> At the same time most Member States had either written guidelines or established practice which applied to particular groups and which either directly affected the application of the internal protection alternative or actors of protection or was capable of doing so. **France** was an exception, with no such written guidance or established exceptions, but this should be seen in the context of the very infrequent use of IPA in France, and did not prevent decision makers from considering the individual circumstances of vulnerable applicants.

In some Member States 'vulnerability' (as a general term) was cited in the research reports as a factor which could protect asylum seekers from application of IPA. In **Germany**, it was found that for vulnerable applicants the IPA would be assessed but often held to be unreasonable. In the **UK**, interviewees said that IPA was more often, though not always, found unreasonable on appeal when the applicant was vulnerable. In **France**, a government interviewee thought that vulnerability should in theory prevent IPA. There were some groups, identified usually by country of origin, for which the IPA was less frequently applied. However, apart from the case of unaccompanied children, there were no fully consistent patterns across Member States about the treatment of people grouped according to a particular kind of vulnerability. It may be that outcomes were driven by individual circumstances and advocacy as much as by policy or binding rules, and there were few national binding policy or legislative requirements for addressing the issues relevant to these groups. In relation to unaccompanied children there were often legal provisions (see section on children and IPA below) and the IPA was rarely applied.

In the majority of host countries included in the APAIPA study, the internal protection alternative was used in cases of non-state persecution and not at all or very infrequently in cases of state persecutors.<sup>454</sup> This has particular relevance for women and Lesbian, gay, bisexual, transgender and intersex (LGBTI) applicants because of the high incidence of non-state persecutors. The Fleeing Homophobia study noted:

"Many LGBTI asylum seekers do not flee persecution emanating only from the State, but they flee persecution or ill-treatment by non-State actors (family, neighbours, fellow-citizens or 'mobs'), or situations involving both State and non-state actors."<sup>455</sup>

And in the Gensen Report in relation to women:<sup>456</sup>

"Due to established gender roles in numerous societies, women are more often at risk of harm at the hands of non-state actors such as their families and communities. Forms of violence such as domestic violence, 'honour' crimes, trafficking and FGM are generally perpetrated by non-state actors and affect women disproportionately [...] Where the risk of persecution emanates from non-state actors, asylum seekers will be required to show that the State is unwilling or unable to provide protection. This effectively adds another element to evidence in asylum cases where the State is not the persecutor."

This means that the internal protection alternative is more likely to be applied to people who have suffered these forms of violence. However, as the next section explains, victims of gender-based or homophobic violence may often be failed by state protection where such violence is socially condoned. IPA may thus create a double risk for a vulnerable applicant. Member States had different general methods or mechanisms for addressing issues of vulnerability in asylum decision-making. At a later date than the cases included in research, **Belgium** introduced some guidelines for IPA which identified different kinds of vulnerability and advocated taking these into account when considering IPA and protection.<sup>457</sup> In some countries there was guidance relating to particular vulnerable groups which was capable of being applied to IPA and actors of protection: policy guidance on gender issues, children's claims in the **UK**; court decisions on e.g. protection of children in the **Netherlands**, and *travaux préparatoires* setting out principles for addressing women's claims in **Sweden**.

In some countries the IPA was, as a matter of usual practice not relied upon for vulnerable groups, for instance in **Germany and Italy**, although exceptions could always be adduced. In other countries, such as **France, Italy, Spain, Poland and Austria**, there was no reference in policy or other generally applicable provisions to vulnerability as an issue in applying these legal concepts.

## 7.3. Actors of Protection and Vulnerable Groups

Vulnerability, as considered in this study, is not an absolute state of the applicant, but is contextual. It is relative, even though there are common patterns across many societies. A vulnerable group is to some extent marginal in their own

<sup>453</sup> **NL**: IND working instruction 2013/14, 26 June 2013: Vulnerable minorities.

<sup>454</sup> See section 4.2 Application of the IPA, above.

<sup>455</sup> Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia : Asylum Claims related to Sexual orientation and Gender identity in Europe*, September 2011.

<sup>456</sup> Hana Cheikh Ali, Christel Querton and Elodie Soulard, *Gender-Related Asylum Claims in Europe : A Comparative Analysis of Law Policies and Practice focusing on Women in Nine EU Member States*, May 2012, p.52.

<sup>457</sup> **BE**: CGRS internal guidelines on internal flight alternative or internal relocation, 27 August 2013.

society. In order to protect against persecutory harm, the state may need to extend itself beyond the norm, because its norm already endorses a marginal position for the vulnerable group. For instance in a generally homophobic society<sup>458</sup>, although violence against the person may be illegal, a gay person needs more assurance than the general criminal law in order to report a crime against them and feel some assurance that they will be protected against repetition of the crime. For the host country determining an asylum claim, responding to a vulnerable applicant therefore entails asking questions about the country of origin which elicit not only the official position, which is likely to replicate the marginalisation of the applicant, but also the questions which bring to light the actual experience of the vulnerable group to which the applicant belongs. Secondly, the host country's own procedures must provide spaces and resources which enable the asylum decision maker to hear an account which challenges the norms.

The APAIPA study asked questions both about how protection was assessed, and about how the applicant could adduce evidence and challenge the official positions represented. The study was not concerned with access to the process outside the decision-making context, and therefore not with issues such as initial accommodation, psychological support and child care, though when asked about access for vulnerable groups two government representatives responded from that perspective.<sup>459</sup>

### 7.3.1. Access to Protection

Access to protection is a key issue for vulnerable groups, and the research questionnaire asked, how the effect of a power imbalance between vulnerable groups and the available protection actors was taken into account. Responses differed greatly among countries but also between policy and practice within the countries. An interesting and important finding was that, in different ways, there was recognition of particular obstacles to access affecting certain groups.

#### 7.3.1.1. Particular Obstacles to Access Recognised in Policy

In **Sweden** the *travaux préparatoires*<sup>460</sup> stated that in some cultures the power imbalance between genders was an undisputed and fundamental part of the society so that it was impossible for women to get state protection from violence, freedom violations and honour-related crimes by their relatives. The *travaux préparatoires* also stated that tradition and power structures can have the same consequences regarding violence and harassment for LGBTI people. It was found that in practice decision makers often did not take these principles into account.

Some obstacles to access to protection were addressed by a legal policy in the **Netherlands**. It was noted that lesbian, gay and bisexual applicants from countries where lesbian, gay and bisexual activities are criminalised are not required to prove that the protection of their government is not available. This policy is not dependent on whether the criminal law is applied, and it eliminates the need to investigate the lack of practical access to protection.<sup>461</sup>

**Good practice:** In the Netherlands, LGBTI applicants from countries where LGBTI activities are criminalised are not required to prove that the protection of their government is not available. This policy is not dependent on whether the criminal law is applied, and it eliminates the need to investigate the lack of practical access to protection.

Also in the **Netherlands**, where a woman asserts that she has been a victim of, and fears, domestic violence, and that protection is not available, the State Secretary must supplement its initial examination of the legal system with an assessment of her individual situation and issue a reasoned decision which deals with access to protection.<sup>462</sup> This provision, like the **Swedish** *travaux préparatoires*, recognises that general assertions about protection mechanisms are unlikely to establish whether a woman really has access to protection from domestic violence. Unfortunately, as discussed in the section below on evidence, such a mechanism is insufficient in itself to establish protection, since the kind of evidence accepted and the standard of proof are also vital components.

In **Poland** and **Spain**, the reasoning of decisions was too brief to identify whether an imbalance between vulnerable groups and protection actors vis-à-vis access to protection had been considered and there were no statutory provisions, case law or administrative guidance requiring or advising such analysis. This was the case for decisions generally, not only for vulnerable applicants. It is difficult to draw any inference from the absence of reasoning other than that the authorities did not in practice demonstrate that they had assessed obstacles to access to protection.

<sup>458</sup> As Jamaica was accepted to be by the Court of Appeal in the UK in R (on the application of JB(Jamaica)) v SSHD [2013] EWCA Civ 666

<sup>459</sup> UK and Belgium.

<sup>460</sup> SE: prop. 2005/06:6, Refugee status and persecution on grounds of gender and sexual orientation p.28 Travaux préparatoires are subsidiary sources of law in Sweden' See Sweden APAIPA national report.

<sup>461</sup> Note in parallel the CJEU's judgment in *Joined Cases C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel*, Judgment of the Court of Justice of the European Union (Fourth Chamber), 7 November 2013: in which the court held that criminalisation of homosexuality identifies gay people as being 'perceived as different' by the surrounding society and thus as constituting a particular social group, but that criminalisation is not per se persecution

<sup>462</sup> NL: Administrative Law Act para 3(2)

**Recommendation:** In keeping with the rights under the EU Charter of Fundamental Rights (CFR), including Article 47 and the EU general principle of the right to good administration, all persons should be informed of the reasons for administrative and judicial decisions that affect them. All international protection decisions must be well-reasoned with a clear legal basis, as required by, among others, Article 11 (2) of the recast Asylum Procedures Directive.

There were categories of cases in **Poland** where it was observed that the relative powerlessness of the vulnerable applicant should have been considered. These included Kurdish applicants originating from Georgia; single mothers, or a broader group of single women, from the Chechen Republic in the Russian Federation, as well as gay applicants from African countries.

In **Sweden, Belgium and Hungary**, there were provisions which required that the practical obstacles to access should be examined. The Belgian authorities produced internal guidelines in August 2013, too recent to have affected the decisions in the study, but providing a useful categorisation of: obstacles linked to the personal situation of the applicant, such as psychological problems, minor, illiterate, handicapped, etc., obstacles related to the importance given to traditions, e.g. some types of complaints not being registered by the police, such as a gender related complaint, or obstacles that related to a discriminatory context, e.g. towards women, or a discriminatory attitude of the authorities, e.g. towards members of a certain ethnic group or that have a certain religion, or any obstacle that is related to the situation of the asylum seeker and persecutor, e.g. if the actor of persecution has an influential position.<sup>463</sup> This categorisation could provide a useful reference point.

Where there was relevant guidance it was not always adopted in practice by decision makers. In **Sweden**, it was found that where women applicants had not exhausted the possibilities of state protection this might be treated alternatively as a failure to prove that protection was not available or else as damaging the credibility of their claim to be in need of protection, despite being subjected to sexual violence in a country where law enforcement authorities did not act on allegations.

**Recommendation:** 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, and should be clearly separated and distinct from credibility assessments.

In **Hungary**, similarly the official position was that the imbalance between the applicant and the available actors of protection was taken into account by examining the practical implementation of laws aimed at protecting the applicant. However, this is rarely seen in practice as in most cases, the application of IPA was not elaborated enough to refer to the applicant's individual vulnerabilities.

The opposite position was apparent in **France, Germany and Italy**, but the absence of a policy requirement to take into account structural vulnerability affecting access to protection did not mean that this was never taken into account. Rather this was done on a case by case basis. In **Germany**, the question of access to protection was part of the overall risk assessment.

In the **UK**, Asylum Policy Guidance on Gender issues<sup>464</sup> advised that women may find it difficult to get protection, and suggested factors to take into account such as “lack of police response to pleas for assistance and reluctance, refusal or failure to investigate, prosecute or punish individuals”. Lack of access to the reasoning of decisions granting status made it difficult to know how often this guidance influenced initial asylum decisions, but at the appeal stage, there was often acceptance by the Tribunal of evidence that women find it difficult to get police protection. In guidance to decision makers on claims from particular countries of origin, obstacles to access to protection were sometimes identified.<sup>465</sup> Guidance on considering claims from unaccompanied children explained obstacles to access to protection: “a child’s relationship with the state is normally mediated through parents or other adults, who may condone the harm, providing active encouragement, participate directly in it or threaten the child with the negative repercussions of non-cooperation”.<sup>466</sup> Operational Guidance notes issued by the Home Office for decision makers<sup>467</sup> and country guidance issued by the Upper Tribunal might give guidance on access to protection for particular groups. For instance, the Upper Tribunal had laid down guidance that lesbians could not obtain protection in Jamaica.<sup>468</sup>

Aside from policy, in the cases studied there were particular instances of vulnerability recognised as an obstacle to access to protection. These cases do not necessarily indicate trends, but give examples.

463 **BE:** CGRS Internal guidelines on internal flight alternative or internal relocation, 27 August 2013, p. 3-4.  
 464 Home Office, Gender Issues in the Asylum Claim 2010 <https://www.gov.uk/government/publications/gender-issue-in-the-asylum-claim-process>  
 465 E.g. for Afghan women, discussed below  
 466 **UK:** Home Office Asylum Policy Instruction : Processing an Asylum Application from a child Para 16.11  
 467 **UK:** UK Home Office Operational Guidance notes are available here : <https://www.gov.uk/government/collections/country-information-and-guidance>  
 468 **UK:** Upper Tribunal, SW (lesbians – HJ and HT applied) Jamaica CG [2011] UKUT 00251(IAC), <https://tribunalsdecisions.service.gov.uk/utiac/2011-ukut-251>

### 7.3.1.2. Youth

A child who is at risk of violence from their family presents a particularly stark case of vulnerability. In a case from **Sweden**,<sup>469</sup> the Migration Court of Appeal found that a young couple who feared ‘honour-based’ violence from their families were not able, because of their youth, to access protection. The applicants were Iraqi nationals who were both under the age of majority. The case was interesting in the cumulative reasoning which resulted in the court concluding that they could not access protection, and that the protection, which did exist for some women facing honour-based violence, would not be effective for them. The Court took 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. In the light of these issues, it was not reasonable to require the applicants to have sought protection from the local authorities, nor was it possible to rely on that protection as an effective safeguard against the risk of honour-related violence. This judgment combines an assessment of past events and future risk. When the Court refers to the ‘reasonableness’ of their actions in not seeking protection, and to the limited knowledge available in Iraq concerning protection for young girls against their parents, it is using these elements to determine that protection was not available for them at the time of their flight. The Court found their claims credible, and the discussion of the reasonableness of their actions is relevant to whether protection would have been available and effective for young people in their position. The Court concludes that it would not. This should not be confused with a quasi-objective ‘reasonableness’ analysis. The Court is assessing what was in reality available, combining personal circumstances and COI as required by Article 4(3) of the Qualification Directive.

### 7.3.1.3. Stigmatised Displaced Population

The case of a Colombian applicant before the **French** National Court on Asylum (hereinafter CNDA)<sup>470</sup> illustrates that an analysis of the specific country situation is essential to identifying a marginalised and vulnerable position in that society which may affect access to protection.

The applicant feared persecution from paramilitary forces and was recognised by the authorities as a displaced person in Bogota. The CNDA considered on the basis of COI that the stigmatisation of the displaced population prevented them from accessing effective protection even in big urban centres. The reason for the persecution was political, the threat coming to the applicant from paramilitary forces who thought he was involved with the revolutionary armed forces (the FARC). The characteristic which makes it difficult for him to access protection is not the same as the reason for the persecution. The court recognised that his marginalised position in the society which he came from impeded his access to protection, and the decision gives due weight to the requirement in Article 7.2 that “the applicant has access” to protection.

### 7.3.1.4. Standing or Influence of the Persecutor

The vulnerability of the applicant is magnified when the persecutor has power and influence, and the respective positions of applicant and persecutor in the power structures of the country of origin have a significant impact on the capacity of the applicant to access protection. In the case of the young Iraqi couple mentioned above, the father of the young girl had social standing which would enable him to influence the authorities and legal system and further limit the couple’s access to protection, beyond the normal power of parents over children. This factor was often important in domestic violence cases. The individual influence and standing of the persecutor could also be related to the effect of corruption and the operation of networks in the country of origin. These factors were critical to assessing access to protection but were often difficult to evidence, since they require local knowledge which is often outside the more available human rights reports. This is discussed further below in the section on Evidence – assessment of facts and circumstances.

**Recommendation:** If an internal protection alternative is considered, the Member State must ensure that additional region-specific country of origin information is used to assess the conditions in the proposed IPA region.

### 7.3.1.5. Gender

There were a number of cases in which it had been accepted that women would not be able to gain access to protection, for reasons associated with how women generally are treated or perceived in their home country. Specific obstacles were not always identified, but some that were included: in a Guinean case in **Belgium** the Commissioner General for Refugees and Stateless Persons (hereinafter CGRS) found that women’s access to justice had been rendered practically impossible because of the lack of information on their rights and the laws that protect them, the high level of illiteracy among women, and the very high cost of procedures.<sup>471</sup> **Swedish** cases identified harassment and discrimination towards

<sup>469</sup> SE: Migration Court of Appeal, 9 March 2011, MIG 2011:6 (UM 3367-10) <http://www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-appeal-9-march-2011-um-3363-10-3367-10>

<sup>470</sup> FR: CNDA 19 November 2012 (COL50MRSVUL)

<sup>471</sup> BE: CGRS 16 August 2012 (GUI72FRSTOSP)



lonewomeninAfghanistan.<sup>472</sup>

In the **UK** the Upper Tribunal gave country guidance in a number of cases on the effect of traditional attitudes towards women. For example, guidance was given on attitudes in rural areas of Cote d'Ivoire,<sup>473</sup> and by corrupt officials in Thailand.<sup>474</sup> Although these were older cases, they remained binding because they gave country guidance.

There were some instances of specific state guidance about particular groups of women. The **Belgian** CGRS in a Subject Related COI Briefing about the safety situation and freedom of movement in Kosovo pointed out that Roma women have problems obtaining access to justice because of the dominant patriarchal structures, their low education level and since they are often not aware of the existence of free legal assistance.<sup>475</sup> Access to protection for trafficked women in Albania was held in the **UK** to depend on:

"individual circumstances including but not limited to: 1) The social status and economic standing of the trafficked woman's family. 2) The level of education of the trafficked woman or her family. 3) The trafficked woman's state of health, particularly her mental health. 4) The presence of an illegitimate child. 5) The area of origin of the trafficked woman's family. 6) The trafficked woman's age."<sup>476</sup>

Despite these examples, overall, in assessing access to protection, it was common for COI to be cited in brief and general terms, and this is considered in the section on evidence.

### 7.3.2. Effectiveness of Protection

This section notes any provisions to take account of special protection needs, and identifies examples where protection available in general was held to be ineffective where particular needs or vulnerabilities were in issue.

Commonly Member States had a policy that the effectiveness of the system for protecting vulnerable groups would be taken into account, but authorities did not always require evidence that protection had in fact been delivered to people in the applicant's position with sufficient regularity to be deemed effective. Where this was not done it tended to result in an analysis of effectiveness which focused on the qualities and activities of the system, rather than on whether protection would be effective for this particular applicant. In support of this approach, some state decision makers stated that no system could guarantee absolute effectiveness of protection, and this caveat is treated as settled law in some jurisdictions (e.g. **Netherlands**<sup>477</sup> and **UK**<sup>478</sup>).

Examples where the country of origin's actual record of protecting vulnerable groups was relied upon in the decision included a case from **Italy** where the court held that in Cote d'Ivoire, not only was female genital mutilation (FGM) forbidden by legislation, but the perpetrators of such crimes were in fact prosecuted.<sup>479</sup> Accordingly there was effective protection available to an individual applicant on these grounds. The researcher noted that the reasoning in the decision was brief, and the sources of information were not cited. As discussed in the section on evidence, the context of such evidence needs to be assessed.

A further example from the **Netherlands** is worth noting, where the District Court of The Hague ruled that the State Secretary could not show that protection against female circumcision could be provided by the Egyptian authorities by pointing to one article published by a newspaper about one criminal charge. The applicant submitted a report by UNICEF which indicated that 91% of all females are circumcised in Egypt.<sup>480</sup> The State authority's submission is an example of the selective and superficial use of COI which was observed in some decisions in the research.

In a **Swedish** case, the Court held that protection would not be effective for the applicant not only because of a lack of effective remedies but also because access to the legal system in Afghanistan was restricted for women and those who carried out honour-related violence were not convicted.<sup>481</sup> In another Swedish case, the Court held that the general system of state protection in Iraq was in place but was insufficient to protect the applicant. The Court held that there were deficiencies in the system, and an individual assessment must be carried out of the protection available to this particular applicant. As an old and ill woman without a male network, the applicant would not be effectively protected.<sup>482</sup> These cases are important for a vulnerability analysis in that they distinguish between the general level of effectiveness of the system, and the particular needs of an applicant who is vulnerable in that society.

472 SE: Migration Board 14 June 2012 (AFG36FaRS) and 17 February 2012 (AFG07FRS).

473 UK: Upper Tribunal 7 July 2010 MD (Women) Ivory Coast CG [2010] UKUT 215 (IAC) ( IVO21FNP) [http://www.refworld.org/category,,GBR\\_UTIAC,CASELAW,CIV,4c3464c02,0.html](http://www.refworld.org/category,,GBR_UTIAC,CASELAW,CIV,4c3464c02,0.html)

474 UK: Upper Tribunal 23 April 2010 AZ (Trafficked women) Thailand CG [2010] UKUT 118 (IAC) (THA46FRS). [http://www.bailii.org/uk/cases/UKUT/IAC/2010/00118\\_ukut\\_iac\\_2010\\_az\\_thailand\\_cg.html](http://www.bailii.org/uk/cases/UKUT/IAC/2010/00118_ukut_iac_2010_az_thailand_cg.html)

475 BE: CEDOCA Subject Related Briefing "Kosovo. Veiligheidssituatie en bewegingsvrijheid van Roma, Ashkali en Egyptenaren", 14 March 2011, p. 21-22.

476 UK: Upper Tribunal 22 March 2010 (AM and BM (Trafficked women) Albania) CG [2010] UKUT 80 (IAC)( ALB14FRS ALB15FRS) [http://www.bailii.org/uk/cases/UKUT/IAC/2010/00080\\_ukut\\_iac\\_2010\\_am\\_bm\\_albania\\_cg.html](http://www.bailii.org/uk/cases/UKUT/IAC/2010/00080_ukut_iac_2010_am_bm_albania_cg.html)

477 NL: C4.2.2.2 of the Aliens Circular 2000

478 UK: House of Lords Horvath [2000] UKHL 37

479 IT: Tribunal of Trieste, 12.04.2010 (IVO55FNS)

480 NL: District Court of The Hague (26/01/2011) Egypt

481 SE: M.B., 14/06/2012, (AFG36FaRS) (Afghan woman),

482 SE: MB, 27.02.2012, (IRA49FSP) (Iraqi woman)



In **Italy**, courts and tribunals identified a number of instances where effective protection could not be offered. The APAIPA national report for Italy lists the following reasons: corruption, e.g. Nigeria, Colombia; inability to control indiscriminate violence, e.g. Nigeria, Afghanistan, Somalia, Ivory Coast, Mali, Guinea, Iraq, for which subsidiary protection is sometimes granted as a blanket policy;<sup>483</sup> inability to protect a particular group (e.g. trafficked women in Nigeria;<sup>484</sup> women at risk of FGM in Kenya;<sup>485</sup> women at risk of gender-based violence in DRC and Nigeria;<sup>486</sup> minority clans in Somalia;<sup>487</sup> power of a non-state agent of persecution, e.g. Taliban in Pakistan and Afghanistan;<sup>488</sup> Mungiki group in Kenya;<sup>489</sup> powerful individuals in Pakistan and Ghana); and a new democracy, e.g. Guinea, not in full control of the army and so giving a high risk of instability.<sup>490</sup>

In some other countries too there were groups who were not expected to seek the protection of the authorities, because it was accepted that it would be ineffective in their case. Examples from the **Netherlands** included Burundi women who feared sexual assault and lesbian, bisexual and transgender women who feared sexual assault in DRC.<sup>491</sup>

An inherent bias in the system was recognised in a **Dutch** Council of State case where the Council of State affirmed that Iranian authorities cannot protect victims of domestic violence, or victims of incest, for whom approaching the authorities could be dangerous.<sup>492</sup>

There were examples from the **UK** where ineffectiveness of protection was a decisive factor. These included trafficking cases where protection was found to be insufficient,<sup>493</sup> and women alone in Afghanistan.<sup>494</sup>

Most of these examples where protection was held to be ineffective for particular groups come from decisions of judicial bodies. It was noted that where there was a policy, as in the example given above of the **Swedish travaux préparatoires** which set out the influence of gendered power structures on the state's willingness and ability to protect, this was seldom or taken into account in the decisions analysed at first instance during this research. It was found that gender-related claims were often rejected on the basis that state protection was available, even when this was against the body of the evidence.

By contrast, in **Poland** and **Spain**, the effectiveness of the legal system for someone with the applicant's profile was not considered. Although in **France** and **Germany** there was no explicit requirement, in practice, case by case, this factor might be considered. An example from **France** concerned an applicant from the USA who suffered severe violence from her husband which did not stop in spite of judicial proceedings, their separation and her new marriage. The CNDA referred to a 2011 UN Report which urged the USA government to reevaluate the mechanisms for the protection of women against violence, punish the perpetrators and adopt standards for enforcing orders of protection. Even though legislation existed, there were very few compelling provisions at Federal level providing for the prevention of and protection against domestic violence. The CNDA also referred to the Inter-American Court of Human Rights which considered that the absence of State action in case of domestic violence created an environment of impunity.<sup>495</sup>

In the **UK**, as in **Belgium**, the senior official interviewed voiced an expectation that the effectiveness of the legal system for someone with the applicant's profile would be considered. In practice, decisions in the **UK** as elsewhere were strongly influenced by the particular group to which the applicant belonged, as illustrated above by the examples of trafficked women from Albania and Thailand or lone women from Afghanistan.

483 IT: For example, based on a circular of the National Commission for the right to asylum in June 2012, applicants from Mali were systematically granted SP until June 2013, when a new circular recommended granting humanitarian protection. See for instance: Tribunal of Roma, 12.02.2012 (IVO70MSP) and CA (Roma) 24.02.2011 (IVO94MSP) (protection granted due to a constant lack of minimal security conditions).

484 IT: Nigeria has been found inadequate to protect against re-trafficking because, even though the legal and institutional framework foresees protection, such measures cannot be guaranteed in each case (Territorial Commission of Torino, 10.04.2013 (NIG06FRSVT)).

485 IT: In rural Kenya FGM is a prerogative of families and tribes which the government is unable to limit (Tribunal of Bari, 28.07.2010 (KEN29FSPTO)).

486 IT: The DRC's authorities were found unable to protect, where the applicant lived in a context of substantial impunity where gender violence is a normal means of revenge or pressure (Supreme Court, 24.09.2012, (DRC54FRETO)). Nigerian authorities were found unable to protect because, according to numerous COI sources, women are seriously exposed to the risk of degrading treatment in Nigeria (Supreme Court (Corte di Cassazione), 10.01.2013 (NIG48FRETO); NIG52FSP; Tribunal of Cagliari, 3.04.2013 (NIG43FRSTO)).

487 IT: Somali authorities have been found inadequate to protect minority groups from Al Shabaab: Territorial Commission of Bologna, 14/06/2012 (SOM31MRS).

488 IT: This was determined based on COI in the case of Pakistan (CA (Naples), 24.06.2012 (PAK24MSP)); Territorial Commission of Bologna 18.09.2012 (PAK02MRS), and on a report from Amnesty International (AFG84MSP) or the UNCHR Eligibility Guidelines (AFG96MSPUM) for Afghanistan. In that case (Territorial Commission of Bologna After December 2012 AFG96MSPUM), subsidiary protection was granted because of the general situation of insecurity in Afghanistan (ie: the Commission found the applicant's statements not credible re: persecution arising from the Taliban).

489 IT: This was determined based on COI Tribunal of Napoli 8/2/11 (KEN51MSP).

490 IT: Tribunal of Rome, 10.06.2013 (GUI12MSP).

491 NL: Netherlands APAIPA national report.

492 NL: District Court Groningen, 28.09.2011, AWB 11/28808 (IRN40FRETO) and confirmed by the Council of State 201110754/1/v2.

493 UK: Upper Tribunal 22 March 2010 (AM and BM (Trafficked women) Albania) CG [2010] UKUT 80 (IAC) (ALB14FRS ALB15FRS) and Upper Tribunal 23 April 2010 AZ (Trafficked women) Thailand CG [2010] UKUT 118 (IAC), (THA46FRS) [http://www.bailii.org/uk/cases/UKUT/IAC/2010/00118\\_ukut\\_iac\\_2010\\_az\\_thailand\\_cg.html](http://www.bailii.org/uk/cases/UKUT/IAC/2010/00118_ukut_iac_2010_az_thailand_cg.html)

494 UK: NS (Social Group – Women – Forced marriage) Afghanistan )CG [2004] UKIAT 00328

495 FR: CNDA, 31.05.2012 (USA64FSPVUL).

### 7.3.3. Non-Temporary Protection

An issue presenting in the cases analysed for the research in relation to the durability of protection was the reliance on shelters for women fleeing domestic violence or trafficking as a form of effective protection. According to Article 7 Qualification Directive, this could only be considered in the cases where the shelters and other resources relied on were provided by the government, since NGOs cannot qualify as actors of protection, but see below for occasional ambiguities on this point.

The effectiveness of shelters as protection has been considered in cases in the **Netherlands**. In 2011, the District Court rejected the State Secretary's argument that a woman victim of domestic violence in Togo could turn to NGOs and temporary shelters for protection, on the basis that only state actors could constitute actors of protection.<sup>496</sup> Where provision was given by the state, the **Dutch** Council of State interpreted the combination of gender officers, the availability of advice, and the existence of shelters<sup>497</sup> as demonstrating that protection was generally available. This was in the context of domestic violence being a serious issue in Kosovo and the duration of the protection was not considered. In 2012 an appeal by a trafficking victim from Nigeria concerned the effectiveness of the shelters run by the National Agency for the Prohibition of Traffic in Persons (NAPTIP)<sup>498</sup> (government body) both in protecting from the risk of re-trafficking, and in providing an opportunity to restart a normal life. Her appeal succeeded in the District Court on the basis that those who end up in a NAPTIP shelter are subject to a real risk of being recruited for prostitution in Europe. Thus NAPTIP was not an effective actor of protection. The Court also held that shelter provided by NAPTIP is temporary and that relocation is in practice impossible if the applicant has no social network in the area of relocation. This decision was overturned by the Council of State, which ruled that NAPTIP's role, which it carried out effectively, was to help victims of trafficking into a new life. COI suggested that NAPTIP would not allow a woman to leave its shelter until her life was established. In terms of the Article 7 Qualification Directive, protection was effective and non-temporary. This evidence put the burden back on the applicant to show that she could not, with the help of NAPTIP, build up a new network and relocate. The Council of State held that she had failed to prove that.<sup>499</sup> In an unreported Upper Tribunal decision in the UK, it was found that time in NAPTIP combined with NGO shelters was limited to 20 weeks and thus was temporary and could not constitute effective protection.<sup>500</sup>

Very occasionally there was an ambiguity in the reasoning of decisions about reliance on NGOs<sup>501</sup> and even the applicant's family. It is clear that in principle these non-state actors do not qualify as actors of protection using the criteria in the Qualification Directive Article 7. In a **Spanish** case of gender-based violence and suspected trafficking, NGOs and churches were cited as providing protection by the first instance decision maker.<sup>502</sup> In one case where the applicant was disbelieved, the first instance decision maker said that "even if" it were true she could move to avoid the problems and stay with relatives.<sup>503</sup>

This may be an area of decision-making which needs further examination, since it is not always clear whether shelters and NGOs are relied on to determine lack of risk, or to protect against it, or to establish the reasonableness of an IPA. Also the distinction between government schemes and NGOs may bear further examination.

### 7.4. Internal Protection Alternative

As in relation to actors of protection, in some Member States for some vulnerable groups from some countries IPA was regarded as not available. For instance, a **Dutch** internal instruction states that '*there is no relocation alternative in Somalia for particularly vulnerable groups such as single women, unaccompanied minors and non-Somali minorities*'.<sup>504</sup> More narrowly defined exceptions existed in other Member States, such as **Sweden** and the **UK**, for instance lone women are accepted not to have an IPA in Afghanistan.

The study revealed little use of IPA for torture survivors, but more for victims of gender-based violence. Relatively few claims were covered in the study were based on sexual orientation and considered or applied the IPA. The sample did include some lesbian, gay and bisexual applicants who were accepted to be at risk of state persecution and so neither AP nor IPA would arise.<sup>505</sup> In **Belgium** and **France**, none of the case files reviewed involved an LGBTI based protection claim.

<sup>496</sup> NL: District Court, Haarlem, 10/5/2011, (TOG63FREVT) 10/27005.

<sup>497</sup> NL: Council of State, 6.08.2013 (no. 201205299/1) (KOS34FNSTO).

<sup>498</sup> National Agency for Prohibition of Traffic in Persons and Other related Matters, a Nigerian government body

<sup>499</sup> NL: Council of State 10/4/2012 and District Court Roermond, 13/15313, 10 July 2013 (Nigeria), (NIG45FNSNO)

<sup>500</sup> UK: Upper Tribunal 14<sup>th</sup> May 2013 (ANGF63RSFIN).

<sup>501</sup> See an ambiguity in CNDA 27/3/2012, (DRC38FSPVUL) where the **French** Court found that the protection of NGOs was not available to a woman fleeing armed groups in DRC. The implication was that if this had been available the NGO would have been treated as an actor of protection.

<sup>502</sup> ES: Inter-ministerial commission for Asylum and Refuge (CIAR, May 2013 (NIG61FNPTOTV). In an **Austrian** case, the first instance decision included the reasoning that NGOs in the alternate location in Somalia could provide assistance and care. The appeal court overturned the decision on the basis that IPA was not safe and assessment of the situation not in accord with COI. (Asylum Court 29/5/2013 (SOM74MRE) (no. A15 431622-1/2013)). [http://www.ris.bka.gv.at/Dokumente/Asyl/GH/ASYLGHT\\_20130529\\_A15\\_431\\_622\\_1\\_2013\\_00.pdf](http://www.ris.bka.gv.at/Dokumente/Asyl/GH/ASYLGHT_20130529_A15_431_622_1_2013_00/ASYLGHT_20130529_A15_431_622_1_2013_00.pdf)

<sup>503</sup> ES: CIAR, April 2013, (NIG60FNSTV).

<sup>504</sup> NL: <http://www.rijksbegroting.nl/algemeen/gerefeerd/1/7/0/kst170590.html>

<sup>505</sup> For instance in **Sweden** a Ugandan gay applicant was accepted to be a victim of state persecution and was granted refugee status, (Migrationcourt Gothenburg (20 November 2012 (UGA105MRS) as were a lesbian couple from Nigeria (Migration Board, 19.12.2102 (NIG12FaRS)).

### 7.4.1. Safety in the Region of Relocation

Generally, safety in the region of relocation was dealt with very briefly or not at all. Where the issue was addressed it was often in terms of the persecutor's capacity to pursue the applicant. Evidencing this was one of the key issues for women in particular.<sup>506</sup> The COI expert interviewed for the **UK** APAIPA research said that how a persecutor locates someone is very localised knowledge and not in the public domain. More anthropological and local sources are needed to give a true picture, and neither the risk nor the social conditions likely to affect a vulnerable person on relocation form part of standard human rights reporting.

The **UK** COI expert also commented that the applicant's own testimony is key in assessing risk. When an applicant's credibility has initially been doubted, establishing their testimony on this point can be problematic. An expert report in a UK case from Gambia provided a lucid example of how an expert's extensive and detailed knowledge of the country of origin was capable of endorsing the applicant's assessment of risk in terms that were persuasive to judicial authorities. The content and effect of this report demonstrated that the operation of Gambian society was not well understood in the **UK** asylum system. Wider use of evidence of this quality could be valuable in making an evidenced assessment of risk.

**Recommendation:** Recognising the need for localised country information on proposed sites of internal relocation, COI service providers and refugee status practitioners should consult publicly available sources from organisations with presence in those areas which meet the quality criteria of reliability and balance. Published academic research may also provide relevant sources of localised country information.

As with claims generally across the study, the assessment of risk in the proposed protection region was largely dependent on the credibility assessment of the whole claim. Where the applicant was disbelieved as to the risk they faced in their home area, it was often asserted that they could be safe elsewhere.<sup>507</sup>

In **France**, though there were no guidelines on the issue, structural factors affecting vulnerability only occasionally appeared in the decisions. In **Spain**, there was no recognised practice of considering individual or structural vulnerability in IPA. In **Germany** also, no guidelines on this issue were cited, but practice tended to be more consistent, with vulnerability tending to be treated as an obstacle to IPA.

In a few cases the vulnerability of the applicant was the decisive factor in determining that they could not obtain safety in the alternative location. In a case from **France**<sup>508</sup> the CNDA found that a young girl who feared violence (FGM) from her family was not able, because of her youth, to access protection. The risk of FGM in her home area was accepted. The CNDA considered the internal protection alternative, but concluded that the applicant was too young to be able to obtain protection in another area against her family.

The **UK**'s Gender Guidelines for caseworkers advised that:

"Where the fear is of members of her family relocation is clearly not appropriate if the situation a woman would be placed in would be likely to leave her with no alternative but to seek her family's assistance and thus re-expose her to a well-founded fear of persecution or of serious harm."<sup>509</sup>

In most countries either no or very few cases involving victims of trafficking appeared in the study, i.e. none in **France**, **Austria**, **Sweden** and **Poland**. One reason advanced for this was that separate mechanisms exist for responding to victims of trafficking, such as in **Spain**.<sup>510</sup> In **Austria** and **Belgium** victims go to specialised NGOs who seek a humanitarian residence permit for them. In the **Netherlands**, a permit is available to victims who agree to testify against the traffickers. If a protection claim is based on a risk of trafficking, authorities in the **Netherlands** consider the home country's implementation of anti-trafficking laws.<sup>511</sup> Another reason was the invisibility of trafficking and the absence of mechanisms, such as in **Hungary**. In **Germany**, gender-specific risks for victims of trafficking were considered and protection granted, though the risk of re-trafficking was not addressed specifically.<sup>512</sup> In **Belgium**, there were very few cases and no specific guidelines. Risks of re-trafficking are not examined in **Hungary** or **Spain**.

The **UK** seemed to be an exception in that, although there were mechanisms for the protection of victims of trafficking, they could advance claims in the asylum system and case law on the issue was well developed. Factors which were said to mitigate the risk of re-trafficking included availability of shelters for victims of trafficking, physical safety of shelters, permitted length of stay in shelters, availability of counselling and medical services, whether women with babies were admitted to shelters, whether women would be met at the airport, whether the trafficking was by a gang or network

<sup>506</sup> See below at 7.5: Evidence: assessment of facts and circumstances.

<sup>507</sup> See Chapter 4.2: Application of the IPA.

<sup>508</sup> FR: CNDA 4/4/2013 MRT24FRSFGM

<sup>509</sup> UK: Home Office Asylum Policy Instruction Gender Issues in the Asylum Claim 2010.

<sup>510</sup> Authorities usually argue that other mechanisms are available, or that it is safe to return because of protection and support provided by government or NGO actors.

<sup>511</sup> NL: District Court of Assen, 25.06.2013 (BUR36MNSVT).

<sup>512</sup> DE: If re-trafficking is considered, it is only as part of a broader assessment of the risk of gender-related persecution. A risk of re-trafficking decisive for granting refugee status in only two cases identified by UNHCR Germany: AC Wiesbaden, 14.03.2011 (K 1465/09.WI.A) and AC Würzburg, 19.09.2005 (W 8 K 04.30919).



rather than an individual.<sup>513</sup> An Upper Tribunal case<sup>514</sup> giving binding guidance on relevant factors in Albania had regard to prosecution of traffickers, opportunities for training or other opportunities to earn a livelihood, independent policing, ability to stand apart from the social beliefs which entailed that women were the possessions of their families and should be returned to them. They also considered laws and government initiatives to prevent trafficking including training of police, judges, lawyers, and reintegration programmes, and factors pertaining to the individual including 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. At the time of the study, practice was developing, and a solicitor in a case reviewed for the research drew on an independent review of the Albanian COI to establish that assurance was required that the police will not disclose the woman's location or return.

A particular risk was identified in relation to victims of trafficking in **Spain**, where in both border and regular procedures claims by trafficking victims were rejected or even not processed on the basis that there are other ways to protect victims of trafficking, or that it is possible to return safely to Nigeria or DRC, because "there are official programs and NGOs working for the defence of the rights of these victims"<sup>515</sup>. These arguments were not used as a standalone reason to not consider the claim; they were supplementary to an initial denial on credibility grounds.

In the case of victims of trafficking, the applicant's employment prospects may be relevant to reduce the risk of re-trafficking. Occasionally, not only in trafficking cases, decisions appeared to outweigh educational level and employments prospects as a protective factor. For instance a Home Office decision stated "you are educated to degree level and it is considered that your level of literacy and education generally, as well as your age, would assist you to access this protection".<sup>516</sup> This was in the context of COI which presented a very mixed picture of the availability of protection, including that 'pervasive corruption in all levels of society continued to affect the government's ability to address trafficking'. The decision did not explain how her high level of education (she was a teacher) would protect her from violence bought by corruption.

In **Belgium**, a woman's claim of fear of FGM and forced marriage was disbelieved. Following this, the CGRS held she could settle elsewhere in Guinea and live there safely, because of her profile: she was 20 years old, a graduate in political science, and spoke several of the languages spoken in Guinea.<sup>517</sup> This reasoning was in the context of a decision on the 'even if' basis, discussed above at in section 4.2 Application of the IPA. By contrast, in another Belgian case, the applicant was granted refugee status because of the threat of a forced marriage. The CGRS evaluation was that, since the applicant was 19 years old, not well educated and had no profession besides helping at the market, IPA was not available.

In the few cases analysed where IPA was applied to a gay applicant, there was an indication that either at first instance or on appeal, the risks in the IPA region had not been assessed on the basis of evidence about that region. In **Poland**, a gay applicant was initially denied protection without any reference to persecution by non-state agents, despite this being his fear. His claim was initially denied only on the grounds that he would not be imprisoned, and IPA was applied.

On appeal the IPA was held inadequately reasoned. In **Sweden**, an IPA was held to be available for a gay applicant. The Court accepted that he was at risk of honour-related violence in his home town and needed protection. However, they held that he could relocate to a large city such as Istanbul and live anonymously there, and difficulties arising from attitudes to his sexual orientation would not be greater there than elsewhere.<sup>518</sup> Similarly in the **Netherlands**, the Council of State approved the use of the IPA for an LGBT applicant, because societal attitudes and the availability of civil and social rights for LGBT people might vary across different regions of Ukraine.<sup>519</sup> In the **UK** Upper Tribunal case giving guidance on claims from lesbians from Jamaica, the Tribunal said that relocation "did not enhance safety", since Jamaica was a 'deeply homophobic society'. This case may be compared to a **Spanish** case where the decision maker said that violence towards women was part of the "mentality" of the country of origin. Both these cases explicitly address the severe obstacles to protection where the persecutory attitude is endemic – an important issue for vulnerable groups. In **Hungary**, it was noted that there was a tendency in the OIN decisions to say that gay applicants could return to their home country and be 'discreet', thus avoiding persecution.<sup>520</sup> This 'discretion' argument is not strictly within the scope of the study since another geographical location is not necessarily prescribed, though it may be. However, it also avoids the need to consider IPA, and 'discretion' is sometimes regarded as an analogy to internal relocation. This analogy was rejected by the **UK** Supreme Court as incompatible with the Refugee Convention,<sup>521</sup> and the requirement for 'discretion' has now been held by the CJEU to be incompatible with the Qualification Directive.<sup>522</sup> The OIN decisions referred to the *X, Y and Z* judgment and no comparable case in **Hungary** has been noted since the judgment was given.

513 **UK**: Court of Appeal 22 February 2011 PO (Nigeria) v SSHD [2011] EWCA Civ 132 (NIG24FRT) <http://www.bailii.org/ew/cases/EWCA/Civ/2011/132.html>

514 **UK**: AM and BM (Trafficked women) Albania CG [2010].UKUT 80(IAC), 22 March 2010 (ALB14FRS & ALB15FRS) [http://www.bailii.org/uk/cases/UKUT/IAC/2010/00080\\_ukut\\_iac\\_2010\\_am\\_bm\\_albania\\_cg.html](http://www.bailii.org/uk/cases/UKUT/IAC/2010/00080_ukut_iac_2010_am_bm_albania_cg.html)

515 **ES**: CIAR January 2012 (NIG90FNPVT)

516 **UK**: Home Office, 5.2.2103 (ALB52FNP1ST)

517 **BE**: CGRS 10.9.2012 (GUI80FNSTO) [http://www.rvv-ccce.be/rvv/index.php/nl/component/docman/doc\\_download/59331-a96992](http://www.rvv-ccce.be/rvv/index.php/nl/component/docman/doc_download/59331-a96992)

518 **SE**: Migration Court, Malmo, 15 February 2012 (TUR102MND)

519 **NL**: Netherlands APAIPA National Report. Council of State, 31.08.2010 (no. 2010005517/1) (UKR23MNSLG).

520 See: Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia: Asylum Claims related to Sexual orientation and Gender identity in Europe*, September 2011, p.33 – 40. This report found this decision practice widely used in Member States and called for its abolition.

521 **UK**: HJ (Iran) and HT (Cameroon) [2010] UKSC 31 para 21

522 CJEU, *Joined Cases C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel*, Judgment of the Court of Justice of the European Union (Fourth Chamber), 7 November 2013.

## New Risks in the IPA Region

For some applicants who are from groups who are marginalised in their country of origin there may be a greater risk of new persecution or serious harm in the IPA site. A key example was the risks attached to women alone in regions where this would attract discrimination, threats, hatred, social exclusion and even physical harm. Societal attitudes, expectations of male protection, cultural practices, religious beliefs and customs, and risks of forced prostitution were sometimes taken into account in relation to IPA for women without always differentiating whether they were considered relevant to new risks of persecution or serious harm, or only to whether it would be reasonable to expect her to settle there. While no Member State was consistent in taking account of these issues, they featured in decisions in **Belgium, France, Germany, Netherlands, Sweden, and UK**.

For instance in some **French** cases, on the basis of COI including the evidence of a Asylum Aid, a British NGO, it was accepted by the CNDA that Somali women who flee violence in the Southern and Central regions of the country suffer from abuse or abductions when they find refuge in IDP camps.<sup>523</sup>

In **Belgium**, the internal guidelines of CGRS pointed out that one of the conditions for IPA is that there is no fear of persecution or real risk of serious harm in the proposed region for relocation, and that this implies the neutralisation of the invoked fear of the asylum application, but also the absence of any other persecution or serious harm.<sup>524</sup>

In the analysed decisions, and in the **UK's** Operational Guidance on Afghanistan<sup>525</sup>, an internal flight alternative was generally considered unsafe in Afghanistan and Somalia for single or unaccompanied women without a male network. The **Swedish** Migration Board considered that the Afghan authorities could not offer protection against honour-related crimes.<sup>526</sup> The capacity for men to exert control over women in Afghanistan was undisputed and such a fundamental part of the social structure that it was not possible for a woman to avail herself of state protection against violence, freedom deprivation or honour-related crimes by men or relatives. Based on COI<sup>527</sup> the Migration Board considers that it is not possible for a woman to travel solely with another woman without any male relative.

A number of **Swedish** decisions accepted that IPA was not available for women in Iraq. These included a case based on honour crimes where the Migration Board accepted that without a male protector or a social network she could not live in a different region of Iraq.<sup>528</sup> This decision had already determined that she could not access state protection, and the factors taken into account in relation to the relocation conditions for her, i.e. male protector and social network, relate not only to whether she can reasonably be expected to settle in another region but also to whether she will be safe there. The risk of forced prostitution was established as a decisive issue where relevant by leading cases in the **UK**<sup>529</sup>, but was not a recognised consideration in most countries.

### 7.4.2. Securing Human and Social Rights in the Alternative Location

In most countries the factors which predominated in the analysis of whether the applicant could reasonably be expected to settle elsewhere were not geared to capturing the issues that would particularly affect vulnerable groups. This was sharply defined in the **Polish** response: the vast majority of Polish refugees are Chechens, and the existence of Chechen communities in Russia is taken as sufficient to establish that other Chechens can also live well enough there.

Where there were no specific guidelines applying to vulnerable groups, there was little to mitigate against this tendency to found the analysis of conditions in the protection region largely on issues which reflected a majority culture. However, even where guidelines existed, there was not necessarily an analysis based on risks of discrimination and the structural factors affecting the vulnerable group. For instance in **Sweden**, the consideration of individual factors focused on the capacity to settle in a new area in terms of social network and employment and housing opportunities. Factors such as gender, age and health are listed as potentially important.<sup>530</sup> In Swedish cases regarding minorities there was often a lack of analysis as to whether discrimination could affect their right to settle and register in the relocation area as well as rights to e.g. employment and housing. A similar position was reflected in **Austria**, where for unqualified but healthy persons the standard of living which would be acceptable in an alternate location could simply be the capacity to survive with occasional jobs, e.g. dishwasher, waste-collector, warehouse-worker, rickshaw driver.<sup>531</sup> While decisions did consider individual circumstances, the research findings reflected a norm of the single healthy young man. Typical considerations

<sup>523</sup> FR: CNDA 24/7/2102 SOM08FSPVUL

<sup>524</sup> BE: CGRS internal guidelines on internal flight alternative or internal relocation, 27 August 2013, p. 3.

<sup>525</sup> UK Home Office Operational Guidance Note on Afghanistan June 2013, para 2.3.10 : 'Discrimination and harassment are common Sufficient protection is not available to them, even in Kabul, and it would therefore generally be unduly harsh to expect single women and female heads of household who have a well-founded fear of persecution in one part of Afghanistan, and who do not have a male support network, to relocate internally, as would be establishing themselves in an area where they did not have such a support network..'

<sup>526</sup> SE: M.B., 14/06/2012, (AFG36FaRS)

<sup>527</sup> SE: MB leading decision RCI on «internal armed conflict», «severe conflicts», state protection and internal flight alternative in Afghanistan, Lifos 22162.

<sup>528</sup> SE: Migration Board 23.3.2012 (IRA38FSP).

<sup>529</sup> UK: AA Uganda [2008] EWCA Civ 579.(UGA04FSP) <http://www.bailii.org/ew/cases/EWCA/Civ/2008/579.html>. and FB(Lone women - PSG – internal relocation – AA (Uganda) considered) Sierra Leone [2008] UKAIT 00090. (SIL05FNP FB) <http://www.bailii.org/uk/cases/UKIAT/2008/00090.html>

<sup>530</sup> SE: Migration Court of Appeal, 1.07.2008, MIG 2008:20 (UM 3854-07).

<sup>531</sup> AT: See e.g. A.C., 31.10.2012 (PAK93MNS).

for an analysis of whether the applicant could reasonably be expected to settle elsewhere were living conditions, housing, employment prospects, assistance by family, relatives or friends, knowledge of the local situation and language, and access to medical care.

In **Belgium**, the internal guidelines of CGRS on IPA say that the vulnerability and the personal situation of the applicant are of capital importance in the evaluation of the reasonableness of relocation.<sup>532</sup> However, as mentioned, the guidelines are recent, and were not able to be taken into account in the cases analysed for the research.

Interestingly, while a standard that reflected the majority culture tended to overlook social issues which would impact on vulnerable groups, a standard which required that the returnee be able to access the same standard of living as others in the location region could have the opposite effect. In these cases, the decision maker sought to avoid discrimination against the returnee, and this was seen to protect vulnerable groups. This standard was explicit in **France** where it was required that the situation of the applicant should be equivalent to that of the inhabitants of this area and enable them to live a normal life. In the Nigerian case mentioned earlier,<sup>533</sup> the fact that the applicant would not be able to marry, because of a social practice which controlled the lives of women, meant that she would not be able to lead a normal life.

**Recommendation:** In accordance with Article 4(3) Qualification Directive and its recast, Member States should have particular regard to country of origin information which describes the position, where relevant to the applicant, of women, LGBTI persons and children in the proposed region of relocation.

#### 7.4.2.1. Victims of Torture, Rape and Other Trauma and persons with Specific Health Needs

In the cases analysed for the research, where it was accepted that the applicant had been tortured at the hands of a state persecutor, IPA was not relevant and not applied. This was explicit in a case of a torture survivor mentioned in the **Swedish** report where it was accepted that she had been subject to state persecution and thus IPA and AP were not relevant.<sup>534</sup> Generally IPA was not mentioned.

In **Spain**, the IPA was only raised where the applicant was disbelieved,<sup>535</sup> accordingly whether the person had been a victim of torture or rape was not discussed since the premise of applying the IPA was that events were not as the applicant had described them. In **Poland** similarly, there was no case in the research which considered the effects of IPA on an applicant who was suffering the effects of trauma, but this was because the IPA was only raised on the basis that the initial claim was disbelieved. Rather than an assessment based on the Qualification Directive, it took the form of a suggestion made to the applicant to deal with their subjective feeling, e.g. “should the applicant feel threatened in the region, than s/he has an opportunity to relocate to another part of the country”.<sup>536</sup>

Where torture was accepted to have occurred at the hands of non-state persecutors, in two cases in **Italy** status was granted and IPA was not considered<sup>537</sup>. In one case in **Germany**<sup>538</sup> and one in **Poland**,<sup>539</sup> the torture which the applicant had experienced was held not to amount to persecution but to be the result of regional instability. In the **Polish** case, the result was that protection was denied, also because the applicant was found not to have approached the authorities for a remedy. In the **German** case, the IPA was applied, without consideration of the impact of the applicant’s past trauma on him.

Where the applicant had been raped or subjected to other gender-based violence at the hands of non-state agents, so IPA was potentially relevant, the impact of trauma in terms of symptoms and need for care was rarely treated as relevant to the outcome of the claim.

In **Hungary** there was a difference between the official position and that revealed by UNHCR which reflected the reported experience by the researchers. Officially, needs for medical care for traumatised people were assessed in the IPA consideration. In cases analysed for the research, it did not appear that there was a mechanism to identify when this assessment should take place.

Cases cited in **Belgium** revealed no reference to the individual effects of rape or sexual abuse when considering IPA, whether or not the IPA was ultimately applied. For instance, an applicant on appeal was granted subsidiary protection on the basis that it was well known that people who fled the Kivu region ended up in a very vulnerable humanitarian and security situation elsewhere in DRC. The fact that she had been raped was not referred to when deciding that IPA was not appropriate.<sup>540</sup> In another Congolese case, the applicant’s political activity was disbelieved, and she herself had accepted the possibility of an IPA in a different region. The effect on her as a victim of sexual abuse was not mentioned in considering the IPA.<sup>541</sup>

<sup>532</sup> BE: CGRS, Internal Guidelines on internal flight alternative or internal relocation, 27 August 2013.

<sup>533</sup> FR: CNDA, 23 April 2008 (NIG19FRSFGM).

<sup>534</sup> SE: M.B., 26 May 2012 (ETI18FRS).

<sup>535</sup> APAIPA **Spain** national report p. 7.

<sup>536</sup> APAIPA **Poland** national report p.14.

<sup>537</sup> IT: Territorial Commission of Bologna 13.12..2011 (CAM74FRSTO); Court of Appeal of Napoli, 17.03.2010 (SIE30MSPTO).

<sup>538</sup> DE: FOMR 13th June 2013 (1RUS12MN).

<sup>539</sup> PL: UDSC 6<sup>th</sup> March 2013 (RUS02MNSTO).

<sup>540</sup> BE: CALL, 6 April 2011 (DRC39FSPTO).

<sup>541</sup> BE: CGRS 23 April 2012 (DRC52FNOTO).



In Belgian cases, there was a tendency, evident though not invariable, to treat a need for medical care as an immigration issue, and to argue that if the applicant needed medical care they should apply through an immigration route, rather than treating this need as relevant to an IPA analysis. This was the case even though the need for health care had arisen in the context of an IPA argument, and *prima facie* fell to be treated as relevant to whether the applicant can reasonably be expected to settle in that area (Article 8.1 QD).

In a similar vein, the **UK** Home Office argued for a distinction between health care needed as a result of trauma, which formed part of the IPA consideration, and other health care, which would be treated as subject to Article 3 and thus the high threshold laid down by the ECtHR in *N v UK*.<sup>542</sup> In the UK the effect of trauma was argued in appeals and psychological evidence adduced, although judges did not always accept that evidence as decisive. Nevertheless in a leading case<sup>543</sup> the Court of Appeal accepted that the appellant, who was traumatised, suffering from anxiety and depression and was at risk of suicide, would be even more vulnerable than unaccompanied young women generally in Kampala and internal relocation was not appropriate. This case set a precedent for internal relocation to be regarded as unduly harsh in similar situations, although each case would still be decided on its merits.

Across Member States overall there was little discussion of a need for health care in the proposed area of relocation. In **Sweden** the need for health care was not discussed in the context of relocation, though the converse was stated – i.e. the applicant is in good health and so their health is not a bar to relocation. There was little or no attention paid to the impact of post-traumatic stress disorder or other mental health needs.

In **Germany**, the applicant's state of health was normally treated as relevant to an IPA, and poor health would generally preclude the IPA from being applied. It was also found that access to specialised and adequate health care for traumatised persons was assessed, although in some cases on a very general level, not necessarily whether this would actually be available in the individual case.

Among the cases from **France**, two applicants who had been raped were held not to be able to access protection in their country of origin, so IPA was not considered.

The IPA was applied only infrequently in **Italy**,<sup>544</sup> and health only appeared once as a consideration in the cases analysed. This was in the case of an applicant who suffered from diabetes. It was accepted that this made relocation difficult even though an IPA had been found to be available in relation to his refugee claim and human rights claim. He was granted humanitarian protection, and although the decision is briefly reasoned this appears to have been on compassionate grounds.<sup>545</sup>

### 7.4.2.2. Women

Women applicants were not treated as vulnerable *per se*, but very often in women's cases the applicant would have particular needs in the IPA region. These could arise from the presence of dependent children, being alone without an adult partner in certain countries of origin, and fleeing gender-based persecution, including domestic violence. When considering whether rights can be secured for women applicants in an alternate location, or whether it is reasonable to expect the applicant to settle there, factors were sometimes considered which are also mentioned above as relevant to new risks in the region, namely societal attitudes, expectation of male protection, cultural practices, religious beliefs and customs, risks of forced prostitution or other exploitation, and opportunities for safe employment. These factors were said to be considered in **Germany** on a case by case basis. The research questionnaires did not reveal an overall pattern which explained the consideration of these factors in some cases and not in others, but there were trends in some host countries and in particular in relation to countries of origin.

In **Germany**, where vulnerability was identified, it usually weighed against the application of the IPA, e.g. the IPA would not usually be applied to a single mother with small children. The general pattern in **Poland** was the opposite, but also subject to exceptions. When the IPA was raised in Poland in the case of women, 'societal, cultural and religious factors, as well as economic sustainability (safe employment) were either not analysed or not analysed individually.'<sup>546</sup> It was unusual to give a reasoned decision on the IPA, or to consider individual factors, but in one case the UDSC (Head of the Office for Foreigners - *Szef Urzędu do Spraw Cudzoziemców*,) found that a woman from Chechnya did not have an IPA in Russia because "she would not be able to sustain herself as a single mother".<sup>547</sup> In the case the UDSC also found that the family could not obtain effective protection. In **Belgium**, it was found that in some of the case files reviewed, the fact

<sup>542</sup> **UK**: In *N v UK* (2008) 47 EHRR 885, the applicant, who was reliant on the treatment for AIDS that she was receiving, had no other basis for leave to remain in the UK. She argued that it would be a breach of Article 3 to return her to Uganda where she would not be able to obtain life-saving treatment, and where her life expectancy would be reduced to a few years. The Court balanced the economic interests of the host state against the claimed inhuman treatment, and set a standard for a breach of Article 3 that can rarely be met unless a person is actually dying at the time of the application.

<sup>543</sup> **UK**: *AA Uganda v SSHD* [2008] EWCA Civ 579. <http://www.bailii.org/ew/cases/EWCA/Civ/2008/579.html>. (UGA04FSP)

<sup>544</sup> **IT**: As discussed in the introduction to chapter IV, Italy did not transpose Article 8 of the Qualification Directive and in 2012 the Supreme Court ruled this means the IPA should not be applied at all.

<sup>545</sup> **IT**: Territorial Commission of Verona 18 July 2011 (NIG44MNS)

<sup>546</sup> APAIPA National report, **Poland** p.13.

<sup>547</sup> **PL**: UDSC, 18.01.2013 (RUS06FSP(SP+TO)).

that the applicant was a single mother with minor children was not given any consideration when applying IPA.<sup>548</sup>

The **UK** Gender Guidelines said that “Women may also face a particular form of discrimination in the place of relocation and thus be unable to work so that they cannot survive in the place of relocation.”<sup>549</sup>

Some **French** cases were based on recognition of social structures affecting women. For instance where an applicant refused a forced marriage and FGM in the Nigerian State of Rivers, the CNDA considered that the applicant, due to her social rank, her educational degree and her ties to several cities in Nigeria, had the financial capacity to resettle in another part of the Nigerian Federation without any fear of being persecuted. However, given the importance of the consent given by parents for a marriage, it would be extremely difficult for her to find another person who would marry her against the will of her parents. The CNDA therefore considered that she would not be able to lead a normal life in another part of the Federation.

There was some consensus on the position of lone women based on their region of origin. For instance, a decision in **Sweden** held that there was no IPA for a lone woman from Kivu in any part of DRC,<sup>550</sup> and a Belgian case held that it is well known that people who fled the Kivu region end up in a very vulnerable humanitarian situation. A lone woman who had no proven ties elsewhere in DRC could not relocate to Kinshasa.

In **Sweden**, despite the fact that authorities stated that the applicant’s gender must be taken into account when assessing the viability of an internal flight alternative, in practice authorities sometimes failed to consider gender-related issues. As found in **Germany** and the **UK**, established decision patterns were more often based on groups in particular countries than on vulnerable groups per se, and tended to relate to the safety of relocation rather than the conditions which would have a bearing on whether it would be reasonable for the applicant to relocate.

### 7.4.2.3. Children

The Qualification Directive recital 18 requires that the best interests of a child be a primary consideration in implementing the directive, and this is reflected in the wider EU legal framework, in particular under primary EU law in Article 24 of the Charter of Fundamental Rights of the EU. In **Belgium**,<sup>551</sup> **Hungary**,<sup>552</sup> the **UK**<sup>553</sup> and **Sweden**,<sup>554</sup> there are legal provisions which require that the best interests of a child should be taken into account in any immigration decision. In practice there seem to be gaps in relation to the IPA.

#### **Children with a Parent/Guardian**

Children who sought asylum with their families would not necessarily avoid IPA according to the cases analysed, although recital 18 in the recast Qualification Directive applies to them. The decisions considered in the research revealed very little reasoning focused on the impact of relocation on children who were to be returned with their parents. By way of example, one **German** decision which found that IPA was possible for a divorced woman with four children took into account that the woman was young, healthy and educated, but did not mention the four children or their needs or interests.<sup>555</sup> Another **German** decision found that IPA was available for a woman whose husband had been killed for political reasons. She had three children, and the protection of the family was mentioned, but the effect on the children of IPA was not addressed.<sup>556</sup>

In other cases where the credibility of the substantive claim was doubted, and the IPA employed as an ‘even if’ argument, it was assumed on the basis that family members existed that they would help to care for the family, and the children’s interests were assumed to be encompassed.<sup>557</sup> In a **Spanish** case of gender-based violence where an IPA in Nigeria was found to be available the needs of the applicant’s four year old child were not referred to.<sup>558</sup> In Belgium, a family with three children was refused international protection stating as the CGRS decided an IPA to Kabul was possible, without taking into account the vulnerability of the three children nor making an assessment of the reasonableness of the relocation to Kabul for them.<sup>559</sup> The Council for Aliens Law Litigation (CALL) confirmed the decisions, stating the Convention on the rights of the Child and article 22bis of the Constitution have no direct effect and the limitation of access to education in Afghanistan has no link to the Geneva Convention.<sup>560</sup> This case illustrates how the needs of dependent children may easily be overlooked. The **Polish** national report records that ‘Decisions where the IPA was alleged against families with

548 **BE**: CGRS, 25.03.2011 (KOS135FNSSP); CALL 10.10.2012 (RUS137FNSSP); CALL, 30.06.2011 (RUS149FNSSPTO).

549 **UK**: Home Office, 2010 Asylum Policy Instruction, Gender Issues in the Asylum Claim para 5.2.

550 **SE**: Migration Board, 27.06.2012 (DRC35FSP).

551 **BE**: Art. 22bis of the Belgian Constitution.

552 **HU**: Asylum Act section 4 (1) “When implementing the provisions of the present Act, the best interests and rights of the child shall be a primary consideration.”

553 **UK**: S. 55 Borders Citizenship and Immigration Act 2009

554 Chapter 1 para 10 § of the **Swedish** Alien Act

555 **DE**: BAMF, 7.6.2013 (1RUS08FN).

556 **DE**: BAMF, 4.6.2013 (1RUS05FN).

557 **DE**: BAMF, 13.6.2013 (1RUS11MN), (1RUS12MN).

558 **ES**: Minister of the Interior, 6.11.2012 (NIG12MNSTOSP).

559 **BE**: Belgian Refugee Council, “L’enfant dans l’asile : prise en considération de sa vulnérabilité et de son intérêt supérieur”, June 2013, p. 8, available at: <http://www.cbar-bchv.be/Portals/0/Information%20juridique/Asile/Analyses/L%27enfant%20dans%20l%27asile.pdf>

560 **BE**: CALL 100.098, 28 March 2013. This practice of applying Refugee Convention criteria to the “reasonably able to stay/settle” test was unique to Belgium. See section 4.1.3.2 The applicant’s personal circumstances, above.

children never included the “best interest” or the “availability of support” assessment in the IPA context. It was reported that for **Spain** there is no relevant ‘best interests’ provision in domestic law.

There were exceptions to the general invisibility of dependent children in the IPA assessment. In a **Dutch** case, a District Court cited a UNICEF report estimating one million children suffered from severe acute malnutrition in DRC, and ruled that the possibility of a humanitarian emergency precluded applying the IPA to a woman with a very young child. This was in the context of a subsequent proceeding where the Court held that the food crisis in DRC could form a new fact or changing circumstance.<sup>561</sup>

### **Unaccompanied Children**

In most countries participating in the APAIPA study, unaccompanied children were not normally returned to their country of origin while still minors, but were given some form of discretionary or subsidiary protection until the age of 17.5 or 18. The question of IPA was rarely encountered for this reason.

An exception was **Austria** where, despite the usual practice of not using IPA for unaccompanied children, and a ruling from the Administrative Court that IPA should not usually be applied,<sup>562</sup> in fact it occasionally was. In such cases, special regard must be paid to the reasonableness of the IPA, and concrete findings made about the relocation in regard to the particular situation of the child.<sup>563</sup> A further reason for the issue not being encountered was reported from **Poland**, where it was recorded that young people commonly disappeared from the international protection procedure before conclusion.

The more typical position was that of **Hungary**, where the IPA was not excluded for unaccompanied children by any legal provision, but as a matter of general policy was not applied. A variant on this was **Italy**, where the IPA had not been applied to unaccompanied children in the few cases where it had been considered, and this was on account of the general situation of violence in Afghanistan, which was their country of origin. A partial exception to this was where the child’s family are in the area to which s/he was to be returned, so s/he would not be alone on arrival. This could be seen in a **Swedish** case as an implicit consideration of the availability of care and custodial arrangements, although the wording of the recast Qualification Directive was not used.<sup>564</sup> Another variant was a case in **Germany** where, unusually, an IPA was applied to a 17 year old<sup>565</sup> (since there is no legal bar to doing so) but would not in practice be carried out since, in Germany as elsewhere, unaccompanied children are not normally returned. Cases such as this raise the question of the treatment of such applicants when they turn 18. The research did not follow individual stories, nor has a mechanism for identifying applicants who were young adults, but this is evidently a major issue in all Member States.

Some countries have particular guidance for dealing with applications from unaccompanied children. This can include e.g. training of protection officers, specific interview techniques, a more generous application of the benefit of the doubt, such as in **Belgium**; a child impact assessment according to relevant government regulation, as in **Sweden**.<sup>566</sup> Little attention is paid to IPA in such guidance, again often because the minor will not be returned, or, as explicitly stated in the Belgian guidance, IPA is considered normally to be unreasonable for an unaccompanied child.<sup>567</sup>

When an applicant’s age is disputed, it is possible that IPA may be applied to a child who is treated as an adult, and in the **UK**, a Supreme Court case held that the authority did not breach its duty where it erroneously but reasonably believed the child to be an adult and had treated him as such.<sup>568</sup>

In the context of IPA, a young person who is over 18 may well be vulnerable if the IPA is applied, but Member States’ policies do not appear to make a specific allowance for this situation. Rather it must be addressed on the basis of the individual and their country of origin, and the young person’s vulnerability argued on the basis of usual principles in the Article 4(3) QD.

The Swedish Migration Board recommended (leading document RCI 01/2010) that the IPA should be excluded for unaccompanied children, and in practice this seems to mean that it is excluded if the child would be alone upon their return. Two cases of proposed return of an unaccompanied child to Kabul as a proposed safe alternate location illustrate this. In one case, the child’s family lived in Kabul, and IPA to Kabul was accepted.<sup>569</sup> In the other, his father was dead and his mother disappeared. The applicant had lived most of his life outside of Afghanistan. IPA to Kabul was held to present undue hardship and was not reasonable. In the 2013 guidelines in **Belgium**,<sup>570</sup> decision makers were advised to consider care and custodial arrangements for applicants. In other countries, these elements were in practice taken into account in decisions concerning unaccompanied children, such as in **Germany**.

<sup>561</sup> **NL**: District Court the Hague, 10.06.2013, AWB 13/467 (DRC21FRESP), referencing UNICEF Humanitarian Action Update, Democratic Republic of Congo, 4 August 2012 (further estimating that the rate of global acute malnutrition exceeds 15%).

<sup>562</sup> **AT**: VwGH 95/20/0427.

<sup>563</sup> **AT**: VwGH 19.10.2006, 2006/19/0297

<sup>564</sup> **SE**: Migrationcourt Gothenburg 7/6/2012, AFG86UmND

<sup>565</sup> **DE**: BAMF, 31.05.2013 (1SOM09FN).

<sup>566</sup> **SE**: Förordning 2007:996 med instruktion för Migrationsverket, 2 § phrase 9.

<sup>567</sup> **BE**: CGRS internal guidelines on internal flight alternative or internal relocation, 27 August 2013, p. 2.

<sup>568</sup> **UK**: R (on the application of AA) v SSHD [2013] UKSC 49.

<sup>569</sup> **SE**: Migration Court Gothenburg 7 June 2012 (AFG86UmND) and Migration Court Malmo 4 January 2012 (AFG58UmSP).

<sup>570</sup> **BE**: CGRS internal guidelines on internal flight alternative or internal relocation, 27 August 2013.

Provisions governing consideration of the care and custodial arrangements for unaccompanied children were generally related to conditions of return, not specifically to the IPA.<sup>571</sup> Since the IPA forms part of the substantive asylum decision, its application to a child was separated from the protective provisions concerning return. For instance, in **Belgium** there is a network of provisions relevant to children. A general constitutional provision referring to all decisions affecting a child<sup>572</sup> does not have direct effect on executive decisions. Although article 74/13 Aliens Act, transposing Directive 2008/115/CE, says that in every decision of removal, the authorities will take into account the best interest of the child, the asylum decision process is treated as separate from removal, so that Belgian experts report that this provision is not used to govern an IPA decision, despite its implication that removal results. Article 61/17 Aliens Act, underlines that when looking for a durable solution for unaccompanied children, the authorities must give priority to the best interest of the child, but an asylum decision is not regarded as within the scope of this provision. Article 14 §4 of the Royal Decree that fixes the CGRS procedure, states that the best interest of the child is a primary concern guiding the CGRS and its protection officers during the assessment of an asylum application.<sup>573</sup> This provision does apply to asylum decision-making, but is a statement of advised practice, not enforceable law.

The position is similar in the **UK, Netherlands** and **Sweden**. In **Sweden** the Aliens Act provides that a decision to return an unaccompanied child cannot be executed if the returning authorities have no assurances that the child will be received by his or her family, placed in a foster family, or a reception centre which can take appropriate care of minors (Chapter 12, 3a §). In the **Netherlands**, a similar position is derived from a judicial decision.<sup>574</sup> In the **UK**, there is a policy that no unaccompanied child will be removed unless the Secretary of State is satisfied that safe and adequate reception arrangements are in place.<sup>575</sup> These provisions do not prevent an IPA being decided upon, but may prevent it from being implemented.

The overwhelming consensus was that IPA was either not applicable (e.g. **Poland**) or not normally applied, e.g. **UK**, for unaccompanied children, or debarred by the general situation of violence in the country of origin, in **Italy**, or theoretically applicable but made irrelevant by a grant of subsidiary protection, as in **Spain**.

Most participating countries noted that the majority of unaccompanied children were boys from Afghanistan, and it is apparent that this has affected practice and policy in **Italy** and **Spain**, where in the case of unaccompanied children the situation of general violence was considered to require the granting of at least subsidiary protection. To add to the context of the **Swedish** and **Italian** decisions above, where the unaccompanied child could be returned to their family, a **Belgian** CALL decision cited the Convention on the Rights of the Child and granted subsidiary protection status to an unaccompanied child, stating that an IPA to the applicant's uncle in Kabul was not possible. The centre of the child's interests were primarily with his parents who lived in the province Maidan-Wardak in Afghanistan, and this should be the region or reference for protection under article 15c) QD 2004.<sup>576</sup>

Unsurprisingly in the light of the above, where decisions about unaccompanied children were included in the sample the number was small.

#### 7.4.2.4. LGBTI Claims

Even allowing for the low number of claims based on sexual orientation which applied or considered IPA, there was still a notable lack of consideration of conditions in the IPA region for LGBT applicants.

**Recommendation:** In keeping with the rights under the EU Charter of Fundamental Rights (CFR), including Article 47 and the EU general principle of the right to good administration, all persons should be informed of the reasons for administrative and judicial decisions that affect them. All international protection decisions must be well-reasoned with a clear legal basis, as required by, among others, Article 11 (2) of the recast Asylum Procedures Directive.

In **Hungary**, it was reported that societal attitudes and civil and social rights are not considered for LGBT people. The **UK** case referred to earlier,<sup>577</sup> which found no protection or IPA available for lesbians in Jamaica, also held that relocation was not reasonable because, perceived lesbians risk social exclusion and consequent loss of employment or being driven from their homes.

<sup>571</sup> CP the requirement of QD 2011 Recital (27) to have regard to care and custodial arrangements when applying IPA to a child.

<sup>572</sup> **BE:** Article 22bis of the Constitution states that the best interest of the child should be a primary consideration in every decision taken about the child. However, CALL confirmed this Article has no direct effect (CALL 100.098, 28 March 2013.)

<sup>573</sup> **BE:** Coordination officieuse de l'arrêté royal du 11 juillet 2003 fixant la procédure devant le Commissariat général aux réfugiés et aux apatrides ainsi que son fonctionnement, 18 August 2010, available at : <http://goo.gl/DxETZW>

<sup>574</sup> **NL:** District Court of Den Bosch, 25-07-2013 (no AWB 13/10622) (Yemen).

<sup>575</sup> **UK:** Home Office, Asylum Policy Instruction: Processing an asylum application from a child: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257469/processingasylumapplication1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257469/processingasylumapplication1.pdf)

<sup>576</sup> **BE:** CALL 48.387, 21 September 2010, referred to in a report by Belgian Refugee Council: "The use and application of COI in the asylum application", June 2011.

<sup>577</sup> **UK:** Upper Tribunal, SW (lesbians – HJ and HT applied) Jamaica CG [2011] UKUT 00251(IAC).



### 7.4.3. Safe and Legal Travel

As discussed in section 4.1.4 Access: safe and legal travel, above, the accessibility of the proposed location was not often addressed in decisions. However, in some cases of vulnerable applicants this factor could be critical and was sometimes addressed. In a case giving guidance on country conditions in Somalia,<sup>578</sup> the **UK** Upper Tribunal held that: “travel by land across southern and central Somalia to a home area or proposed place of relocation [...] may well, in general, pose real risks of serious harm, not only from Al-Shabab checkpoints but also as a result of the present famine conditions. Women travelling without male friends or relatives are in general likely to face a real risk of sexual violence.”

And also that:

“A person from Somaliland will not, in general, be able without real risk of serious harm to travel overland from Mogadishu International Airport to a place where he or she might be able to obtain an unofficial travel document for the purposes of gaining entry to Somaliland, and then by land to Somaliland. This is particularly the case if the person is female.”

In the context of determining that IPA is not possible for lone women in Afghanistan, operational guidance to the **UK**'s decision makers advises that, in Afghanistan, “Unescorted internal travel for single women and female heads of household who do not have a male support network can be extremely difficult.”<sup>579</sup> The **Swedish** Migration Board came to the conclusion that travel for lone women in Afghanistan was impossible because it was not safe.<sup>580</sup>

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

## 7.5. Evidence: Assessment of Facts and Circumstances

The availability and assessment of evidence is critical in assessing IPA and protection for vulnerable applicants. Shortcomings in the availability and quality of evidence relating to minority or marginalised groups have been noted in previous research. The Gensen Report noted the relative lack of Country of Origin Information on issues centrally relevant to women’s claims, including accurate information on levels of domestic violence. The UNHCR gender and gender identity guidelines refer to the problems of evidencing a claim based on gender-based violence or on violence to LGBTI people, including because statistical data or reports may not be available, due to under-reporting of cases, or lack of prosecution.<sup>581</sup>

The implications for this study are that there are deficits in available evidence particularly related to access to protection, effectiveness of protection, and conditions in the IPA region for women and LGBTI applicants. For instance, figures of prosecutions may not be reliable. The APAIPA research asked:

“Is there a requirement to take into account evidence of access to protection for those who share characteristics of the applicant that might affect access, for instance gender, social status, age or health?”

The findings were that, although Member States might refer to a general principle of considering the particular situation of the applicant and the protection to which they would in practice have access, the detail and rigour with which this was actually pursued was highly variable. As referred to above, some decision makers treated evidence that the applicant considered protection not to be available and had not sought it as relevant only to credibility and not to whether protection was in fact available. A salutary comment came from the judge in a **UK** trafficking case, who said that access to protection is not a matter of credibility but of background evidence to show whether protection will be available.<sup>582</sup>

The **UK** Home Office’s Country of Origin Reports are used by some other Member States as a source of COI. In a 2011 study these were found to be inadequate in their coverage of issues affecting women.<sup>583</sup> Although work has been done to improve them, the gaps relevant to the APAIPA study reflect a wider problem of access to local sources and expertise and of omitting the specific situation of *return*, which is not normally the focus of human rights reporting. The report said:

“There is little or no information in any of the COI reports which were reviewed on the risks that a woman might face on her return to her country of origin after making a claim for refugee status (as recommended in UNHCR

<sup>578</sup> **UK**: Upper Tribunal AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC).

<sup>579</sup> **UK**: Home Office, Afghanistan Operational Guidance Note June 2013 para 2.3.10

<sup>580</sup> **SE**: Migration Board 17/2/2012 (AFG07FRS).

<sup>581</sup> UNHCR, Guidelines on International Protection : 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 para 37 and 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 (2012) para 66.

<sup>582</sup> **UK**: Upper Tribunal 23 April 2010 AZ (Trafficked women) Thailand [2010] UKUT 118 (IAC) para 108 ) (THA46FRS) [http://www.bailii.org/uk/cases/UKUT/IAC/2010/00118\\_ukut\\_iac\\_2010\\_az\\_thailand\\_cg.html](http://www.bailii.org/uk/cases/UKUT/IAC/2010/00118_ukut_iac_2010_az_thailand_cg.html)

<sup>583</sup> Heaven Crawley, Thematic review on the coverage of women in Country of Origin Information (COI) reports, Prepared for the Independent Advisory Group on Country Information (IAGCI) (2011).

Gender Guidelines 2002, para. 36x). And there is generally not enough information on the on internal/ regional differences within country of origin or whether the conditions that are being described apply to the whole country. This information is needed by decision makers when considering whether there is an internal relocation alternative available to asylum applicants.” (p.136)

UNHCR’s Gender Guidelines<sup>584</sup> say:

“in relation to gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution. Alternative forms of information might assist, such as the testimonies of other women similarly situated in wri recommendations tten reports or oral testimony, of non-governmental or international organisations or other independent research” (para 37).

This is expanded in the UNHCR Credo report<sup>585</sup>:

“... general COI may lack a perspective on, for example, gender, gender identity, sexual orientation, or age. Relevant and specific COI on the situation and treatment of women, children, and LGBTI individuals is often lacking. This may, for example, be due to a bias in the collation of information, or to the fact that international organizations and other groups are hampered in their ability to monitor and document abuses against certain groups, such as LGBTI individuals. Alternatively, stigma attached to issues such as gender-related violence, sexual orientation and/or gender identity, may result in incidents going unreported. A lack of relevant COI should not automatically lead to the conclusion that the asserted material facts are not credible.”

Similarly, UNHCR Guidelines on claims based on Sexual Orientation/Gender Identity<sup>586</sup>:

“The extent to which international organizations and other groups are able to monitor and document abuses against LGBTI individuals remain limited in many countries. Increased activism has often been met with attacks on human rights defenders, which impede their ability to document violations. Stigma attached to issues surrounding sexual orientation and/or gender identity also contributes to incidents going unreported. Information can be especially scarce for certain groups, in particular bisexual, lesbian, transgender and intersex people. It is critical to avoid automatically drawing conclusions based on information about one group or another; however, it may serve as an indication of the applicant’s situation in certain circumstances.” (para 66)

Considering the application of the IPA to vulnerable groups therefore presents a major challenge in terms of assessing evidence, not only of persecution, but of risk, protection, and likely conditions in a proposed alternate location. In the cases analysed for the APAIPA research both the availability and analysis of evidence presented challenges and cause for concern.

Regarding availability, this was not always clear from the decisions, since the evidence relied on by the decision maker was not always referred to fully. However, it was common to cite very brief COI as a basis for a conclusion. For instance the size of a region, a town or a country was commonly used as a basis for asserting that relocation would be safe, because the applicant would not be found there. More detailed and localised COI could have given a more grounded assessment of risk and the reasonableness of expecting an applicant to relocate there.

**Recommendation:** Recognising the need for localised country information on proposed sites of internal relocation, COI service providers and refugee practitioners should consult publicly available sources from organisations with presence in those areas which meet the quality criteria of reliability and balance. Published academic research may also provide relevant sources of localised country information.

In terms of assessing conditions in an IPA location, a subject discussed above, the availability of shelters for women fleeing violence, may be relevant, but whether they would be available to the particular applicant is the kind of COI that is less available in the usual international human rights reports which may be relied on for an asylum claim but which do not address the issues of people returning to their home country, who may be more similar to Internally Displaced Persons.<sup>587</sup>

**Recommendation:** Because assessments relating to actors of protection or the IPA may be particularly complex, Member States should exercise their discretion under the recast Asylum Procedures Directive (Article 10(3)) to seek advice, whenever necessary, from experts on for example medical, cultural, religious, child-related or gender issues.

The example was given earlier of the legal rule in the *Netherlands* which requires that, where a woman asserts that she

<sup>584</sup> UNHCR Guidelines on International Protection : 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 (2002).

<sup>585</sup> UNCHR Beyond proof: credibility assessment in EU Asylum Systems (2013), p. 172.

<sup>586</sup> UNHCR 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 (2012).

<sup>587</sup> As indicated by the COI researcher interviewed for the UK research



has been a victim of, and fears, domestic violence, the state must issue a reasoned decision which deals with access to protection. In practice, this places the burden of proof back on the woman to show lack of access, and a standard is applied which entails that the woman must prove that the protection available would be 'dangerous or useless' in her case. By way of example, in a Nicaraguan case, the applicant was a victim of domestic violence who turned many times to the police after she was beaten by her husband. The police did not take her seriously. Her husband was arrested several times, but released the day after. She pointed out the impunity in Nicaragua with respect to domestic violence and the fact that no shelter was available. The District Court held that the applicant was heavily abused which resulted in trauma, but that it was not proven that the authorities were not able or willing to provide protection. It followed from general information about Nicaragua that the situation for victims of domestic violence was dire, but also that it was not completely impossible to be provided with protection.<sup>588</sup> Here and in other similar cases, in effect the decision maker treated protection as available if there was a chance of protection.

In these cases there was sufficient reasoning and evidence to be able to ascertain the basis for the decision. A more common problem was that the decision was brief and the reasoning was not apparent, and thus the evidence base was also not apparent. An example given earlier was that of a case from *Italy* where the court held that in Cote d'Ivoire, not only was FGM forbidden by legislation, but the perpetrators of such crimes were prosecuted, and therefore the applicant had access to protection. Because the decision is brief, it is not possible to know whether the court was able to refer to information such as the incidence of FGM and the numbers of prosecutions. As the UNHCR Gender guidelines make clear, accurate information on these matters is difficult to obtain.

In the absence of such evidence, assessment of risk in the proposed area of relocation may be brief and speculative, and may be negated by the surmised subjective intention and resources of the persecutor, rather than the objective evaluation of the risk. For instance, in a *UK* case "your father is a retired accountant and your mother a secretary". Therefore it is considered that they do not have the resources or connections to search for you throughout Guinea should they have the inclination to do so'.<sup>589</sup> By contrast, the woman applicant's own assessment of risk is subject to being dismissed as speculation.<sup>590</sup>

Article 4(3) of the Qualification Directive says that in assessing the facts and circumstances of the claim the decision maker must take into account "the relevant statements and documentation presented by the applicant". Asylum interview extracts were not available in most of the research responses, but where they were, it appeared that the interviewer did not treat the applicant's testimony as having evidential value, and this had an adverse effect on the decision quality. This was particularly significant for applicants where COI might be limited on the issue at hand, for instance the means by which a family member persecutor would track down the applicant, or how networks of contacts, influence and bribery worked. All these are vital for a woman fleeing non-state violence. Examples included an interview of a trafficking victim who said that if she went to the police her traffickers "would kill me and go to my family". The decision letter continued: "However this does not demonstrate that the authorities would be unwilling to grant protection to you. You have never encountered any problems with the police and there is no evidence that they would be unwilling to assist you if you approached them for help."<sup>591</sup> The applicant's own statement was not treated as evidence in this instance.

<sup>588</sup> **NL**: District Court, Amsterdam, 14 December 2012 (NIC44FNSTO).

<sup>589</sup> **UK**: Home Office, 21 July 2011 (GUI57FNP)

<sup>590</sup> **BE**: e.g. in Belgian cases CALL 11 October 2012 (GUI65FNSSP) and CGRS 31 August 2012 (GUI79FNSTO)

<sup>591</sup> **UK**: Home Office 5.02. 2013 (ALB52FNP1ST)



# *CONCLUSION*



## VIII. Conclusion

The European Commission indicated in 2009 that “the definitions of the concepts “actors of protection” and “internal protection” do not contain adequate criteria for assessing the level and effectiveness of protection required, in line with the Geneva Convention and the ECHR, thus allowing Member States to reject claims and return applicants to their country of origin despite the lack of effective protection. Moreover, these concepts are defined in a broad and vague manner which creates a risk of diverse recognition practices.”<sup>592</sup>

Ten years after the adoption of the Qualification Directive, the findings in this report highlight that the application of the concepts of internal protection alternative and actors of protection is still not harmonised among Member States and still gives rise to concerns with regard to its compatibility with human rights and refugee law standards. The wording of the recast Qualification Directive has however brought some much-needed clarifications and improvements, often reflecting existing practices in some Member States.

With regard to the concept of actors of protection, the research revealed that non-state actors are almost never considered as stand-alone actors of protection. If the recast Qualification Directive is applied in a proper manner, the consideration of non-state actors as actors of protection would only be extremely rare, if not impossible. The research revealed some gaps in the assessment of the nature of protection. For instance, some Member States did not demonstrate the effectiveness of protection in practice. There was also a general lack of assessment of the possibility for the applicant to access protection in his/her country of origin and of the durability of such protection.

The internal protection alternative is a demanding concept to apply, requiring substantial evidence of conditions in the country of origin that would affect a returnee with due consideration of the applicant’s particular characteristics. In many instances, a Member States decision to rely upon the IPA was often not fully reasoned. When applied, the IPA was often used as a secondary argument, following an adverse finding of credibility (“*even if your story was true, an IPA is available*”). Such use of the IPA as a “secondary argument” tends to lead to decisions where the IPA is not fully assessed. The research also indicated that in some Member States there is a lack of careful consideration of the risk of persecution in the region of relocation and no assessment of the possibility for the applicant to safely and legally travel to that region. This lack of a proper and complete assessment of the IPA criteria, such as the identification of a region of relocation, can lead in practice to the burden of proof being transferred to the applicant, who will in effect be required to demonstrate the absence of an IPA element, for instance, that there is no safe region of relocation “anywhere in the country”.

Consideration of factors affecting vulnerable groups was carried out in most countries on a case by case basis. Vulnerability was often treated as an obstacle to the IPA, but was not always identified. Once identified its effect in the context of COI was not always individually assessed. Awareness of structural and personal obstacles to protection for vulnerable groups was inconsistent, and did not always appear to be related to the existence of guidance on the issues. There was one main exception to the lack of consistency. Children who were acknowledged to be unaccompanied would not be expected to relocate internally if they did not have close family in the region of relocation.

If applied fully and properly, Articles 7 and 8 of the recast Qualification Directive would be likely to significantly improve national practices regarding actors of protection and the IPA. Further interpretive guidance might still be needed from the European Commission and from the Courts, regarding for example, the assessment of the reasonableness the settle in a region of relocation.

In order to ensure that some of the shortcomings identified in this research are addressed in the legislation and practice of the Member States, and that the principles discussed are applied in a manner consistent with respect for the protection of the fundamental rights of beneficiaries of international protection, specific recommendations have been provided within the report.

It is hoped that the findings of this research will help evaluate the implementation of the recast Qualification Directive, and will assist Member States in improving the examination of internal protection claims by making a better use of the concepts of internal protection alternative and actors of protection.

<sup>592</sup> European Commission, Staff Working Document accompanying the 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 - Impact Assessment, Brussels, 21.10.2009, SEC(2009) 1373 final, p. 12.





# *ANNEXES*



## Annexes:

### I. Recommendations

The following recommendations on the use of the concepts of internal protection alternative and actors of protection seek to provide specific advice on the proposed courses of action, based on both international standards and the findings of the Study.<sup>593</sup>

#### 1. General Recommendations.

##### **European Commission:**

- The European Commission should produce interpretative guidelines on the concepts of actors of protection and on the internal protection alternative in the Qualification Directive. These should be compliant with international law, as well as relevant UNHCR guidelines and other relevant material, and should be revised regularly.

##### **Member States:**

- If States make use of the concepts of actors of protection or of internal protection alternative they must do so in full compliance with international law, including international human rights treaties and their interpretation by international human rights monitoring bodies. They must also rigorously follow the guidance provided in the recast Qualification Directive, in particular Articles 4, 7 and 8.
- Where state agents are the actors of, or tolerate, persecution or serious harm, effective protection should be considered to be unavailable.
- The facts relating to a claim should be clearly established before considering protection needs and analysing actors of protection and internal protection alternatives, if such concepts are being used. Any analysis of the availability of protection or the internal protection alternative should be clearly distinguished and separated from the credibility assessment.<sup>594</sup>
- If the internal protection alternative or actors of protection is raised as a possibility, it must be fully assessed and not simply asserted.

#### 2. Actors of Protection

##### **Member States:**

- Non-state actors should never be considered as actors of protection. Non-state actors cannot be held accountable under international law and may only be able to provide protection which is temporary and limited in its effectiveness.
- Member States should interpret the criterion that protection must be “non-temporary” to mean that it must be established that the factors, which formed the basis of the refugee’s fear of persecution, have been permanently eradicated, and that there are no further well-founded fears of being exposed to acts of persecution or a risk of serious harm, including by actors other than the original actor of persecution.
- The availability of protection for the applicant must be demonstrated in practice, not merely in principle, it must be available to the particular person concerned or similarly situated persons, not merely in general terms. It should be demonstrated that the particular applicant can be effectively 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, and should be clearly separated and distinct from credibility assessments.
- In evaluating protection needs, Member States should clearly distinguish between assessing a risk of persecution or serious harm, and assessing the availability of protection against that risk.

<sup>593</sup> The UK and Ireland will continue to be bound by Directive 2004/83/EC. To maintain consistent protection standards across Europe and to achieve the overall objectives of a CEAS, ECRE recommends that these Member States opt in to the recast Qualification Directive.

<sup>594</sup> On credibility see UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems : Full Report*, May 2013, available at: <http://www.refworld.org/docid/519b1fb54.html>

### 3. Internal Protection Alternative

**Member States:**

- 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, states must give priority to their protection duties under international law and need not consider the IPA at all.
- 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 of origin.
- If the IPA is proposed or applied, the authority conducting the assessment must indicate a specific location within defined boundaries. This location should be easily identifiable by the applicant.
- In order to determine that an applicant can “be expected to settle” in a region, the Member State assessing the applicant must assess all factors and circumstances particular to the applicant in the region of relocation.
- If the applicant falls into a group where social support would normally, in their country of origin, be provided by family, it should only be considered reasonable for the applicant to settle where this support exists in their case or is demonstrably unnecessary.
- The IPA should not be applied where a returnee might find himself in an IDP camp (Sufi and Elmi). The IPA should not be applied to a region that must already meet the needs of a significant number of refugees or displaced persons because it would not only endanger the human and social rights of the applicant, but would also diminish the availability of resources in the region.
- The IPA should not be applied unless it is demonstrated that the applicant will be able to safely and legally traverse each stage of the journey required to travel from the Member State to the identified protection region, including gaining admittance and be legally allowed to settle.

### 4. Procedural aspects

**a. Assessment of facts and circumstances**

**Member States:**

- In accordance with Article 4(3) of the Qualification Directive and its recast, particular attention should be paid to the applicant’s statements, which can provide important information on conditions in the country of origin and how they relate to the applicant’s particular circumstances. Member States should exercise their discretion under the recast Asylum Procedures Directive (Article 10(3)) to seek advice, whenever necessary, from experts on for example medical, cultural, religious, child-related or gender issues where appropriate.
- The authority conducting the assessment bears the burden of establishing each element of the internal protection alternative, as indicated in the UNHCR Guidelines on the Internal Flight or Relocation Alternative (paragraph 34). While the applicants may be expected to cooperate in this assessment, they should not bear the burden of proving the IPA is not feasible or that any element required to apply it is missing.
- In accordance with Article 4(3) of the Qualification Directive and its recast, Member States should have particular regard to country of origin information which describes the position, where relevant to the applicant, of women, LGBTI persons and children in the proposed region of relocation.

**b. Procedural guarantees**

**Member States:**

- In keeping with the rights under the EU Charter of Fundamental Rights (CFR), including Article 47 and the EU general principle of the right to good administration, all persons should be informed of the reasons for administrative and judicial decisions that affect them. All international protection decisions must be well-reasoned with a clear legal basis, as required by, among others, Article 11 (2) of the recast Asylum Procedures Directive.
- If the internal protection alternative 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 Internal Protection Alternative 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 prior to the first instance decision.
- The internal protection alternative should only be applied (if at all) in the context of a full asylum procedure, not for example, in accelerated or border procedures because of the complex nature of the internal protection alternative inquiry and especially the need to assess the individual needs of each applicant against conditions in a particular part of the country of origin.

### c. Country of Origin Information.

#### **Member States:**

- 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 country of origin information is used to assess the conditions in the region of relocation. The internal protection alternative should not be applied if the COI is unclear or cannot be confidently said to reflect current conditions in the region of relocation.
- Given the particular challenges for both the Member State and the applicant in obtaining case by case evidence of sufficient quality to ensure that relocation is safe for an applicant with special needs, collections of publicly available evidence should be established using anthropological, cultural, religious, and other relevant sources from and about particular groups in the relevant country of origin.
- Recognising the need for localised country information on proposed sites of internal relocation, COI service providers and refugee practitioners should consult publicly available sources from organisations with presence in those areas which meet the quality criteria of reliability and balance. Published academic research may also provide relevant sources of localised country information.



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