ACTORS OF PROTECTION AND THE APPLICATION OF THE INTERNAL PROTECTION ALTERNATIVE

NATIONAL REPORT

HUNGARY

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APAIPA National Report – Hungary

I. Acknowledgments.

This report is based on the research carried out by Júlia Iván, Tamás Fazekas and Gábor Győző (Hungarian Helsinki Committee, HHC).

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II. Glossary of acronyms.

AA: Asylum Act.

OIN: Office of Immigration and Nationality.

III. Background: the national asylum system.

a. Applicable Law.

The main Act is the Asylum Act (Act no. LXXX of 2007 on Asylum[1]). The Asylum Act is implemented by the Government Decree no. 301/2007 (XI. 9.) on the implementation of Act LXXX of 2007 on asylum 301/2007. (XI. 9.) Korm. rendelet a menedékjogról szóló 2007. évi LXXX. törvény végrehajtásáról 301/2007.[2]

The concept of Actors of protection is regulated in section 62/A of the Asylum Act. The concept of Internal Protection Alternative is regulated in Section 63(2) of the Asylum Act.

In 2013, the asylum act was amended. This amendment fully transposed Art. 7 QD 2011 into the Asylum Act. This modification entered into force in July 2013. Article 8 of the QD 2011 was also transposed, the structure of the provision was changed when implementing it into Hungarian law, and subparagraph 2 may be read from different provisions in the Asylum Act and the implementing Government Decree.

b. Institutional Setup.

The ***Office of Immigration and Nationality*** (OIN),[3] a government agency under the Ministry of Interior, is in charge of the asylum procedure through its Directorate of Refugee Affairs (asylum authority). The OIN is also in charge of operating open reception centres and closed asylum detention facilities for asylum seekers.

The ***Regional Courts*** (RC): The Public Administrative and Labour Law Courts, organised at the level of regional courts (at the second-instance level) have jurisdiction over asylum cases, which are dealt with by single judges. Judges typically are not asylum specialists, nor

[1] 2007. évi LXXX törvény a menedékjogról. http://www.njt.hu/cgi_bin/njt_doc.cgi?docid=110729.234354
[2] 301/2007. (XI. 9.) Korm. rendelet a menedékjogról szóló 2007. évi LXXX. törvény végrehajtásáról http://www.njt.hu/cgi_bin/njt_doc.cgi?docid=112508.239659
[3] Bevándorlási és Állampolgársági Hivatal (BÁH)

are they systematically trained in asylum law. The competent administrative courts are located in the cities of Budapest, Debrecen, Győr, Pécs[4] or Szeged.[5]

c. The Procedure.

The ***regular asylum procedure*** is a single procedure where all claims for international protection are considered.

The procedure consists of two instances. The first instance is a public administrative procedure carried out by the OIN, composed of a preliminary assessment (admissibility) phase and the in-merit phase (so called "detailed examination" of the claim).

The admissibility assessment starts out with an interview by an asylum officer and an interpreter, usually within a few days or weeks after arrival. The deadline to finish the admissibility procedure is 30 days. The admissibility procedure will end by either referring the application to the in-merit procedure for a detailed examination, or it will be found inadmissible or manifestly ill-founded. Inadmissibility grounds are EU citizenship, refugee status in the EU or in a third country, repeated applications on the same factual basis, or where the asylum seeker originates from a safe third country. The application will be considered manifestly ill-founded if it contains no or little relevant information, conceals the country of origin or the applicant cannot present good reasons for having delayed the submission of the application beyond a reasonable time.
The decision to refuse the detailed examination of the application may be challenged in the course of judicial review at the regional appellate court in 3 calendar days.

If the application is admissible, the asylum authority should close the in-merit procedure in two months. The asylum authority should consider whether the applicant should be recognised as a refugee, or should be granted subsidiary protection, also if the protection from *refoulement* applies (tolerated status). A personal interview is compulsory in general, however, the OIN may issue its decision based on the information available from the preliminary interview in the absence of the applicant (Section 66 (3) of the Asylum Act).

The second instance is a judicial review procedure carried out by local administrative and labour courts (not specialised in asylum) at the seat of the regional appellate court. The applicant may challenge the negative OIN decision by personally requesting judicial review from the regional court in 8 calendar days. The judicial review request will have suspensive effect on the OIN decision in the procedure concerning a first asylum application. The court should take a decision in 60 days; this in practice generally takes 3-5 months. A personal hearing of the applicant is compulsory, except if the applicant has disappeared or the application is a subsequent application. The court may change the
OIN decision and grant a protection status to the applicant, or may order the OIN decision null and void and order a new procedure.

There is no further domestic appeal possible.

[4] In practice no asylum seeker is accommodated on the area of Pécs. Therefore no cases end up before the Administrative and Labour Court of Pécs.
[5] The courts mostly involved in asylum cases are those of Debrecen and Budapest.

Hungarian law does not provide for ***accelerated procedures***.

There is only one type of ***border procedure*** in Hungary: the "airport procedure".[6] The airport procedure is rarely applied in practice. The airport procedure cannot be applied in case of persons with special needs. Asylum seekers may not be held in the holding facility at the Budapest international airport transit zone for more than 8 calendar days. If the application is not deemed inadmissible or manifestly ill-founded in the preliminary procedure or 8 calendar days have passed, the asylum seeker has to be allowed entry into the country and a regular procedure will be carried out. The decision is taken by the same authority as in regular procedures, i.e. the Office of Immigration and Nationality. There is no border procedure for those asylum seekers whose application is registered at land borders; instead, these applications are dealt with in the admissibility procedure.

Since 1 July 2013, applicants who have made an asylum application in the airport procedure will be detained in asylum detention.

d. Representation and Legal aid.

In terms of Section 37(3) of the Asylum Act, "The person seeking recognition shall be given the opportunity to use legal aid at his/her own expense or, if in need, free of charge as set forth in the Act on Legal Assistance, or to accept the free legal aid of a registered non-governmental organisation engaged in legal protection."

The Legal Aid Act provides that asylum applicants are entitled to free legal aid if they are entitled to receive benefits and support under the Asylum Act (Section 4(b) and 5(2)(d)). Section 3(1)(e) provides that legal aid shall be available to those who are eligible for it, as long as the person is involved in a public administrative procedure and needs legal advice in order to understand and exercise their rights and obligations, or requires assistance with the drafting of legal documents or any submissions. However, according to the Act on Legal Assistance legal aid is not available for legal representation during public administrative procedures,[7] including the asylum interview conducted by the Office of Immigration and Nationality (OIN). Asylum seekers may have free legal aid in the judicial review procedure contesting a negative asylum decision (Section 13(b)).

Legal aid providers may be attorneys, NGOs or law schools who have registered with the Legal Aid Service of the Judicial Affairs Office of the Ministry of Justice and Public Administration. Although asylum seekers have been eligible for free legal aid since 2004, very few have availed themselves of this opportunity due to several practical and legal obstacles. Firstly, with very few exceptions, asylum seekers are not aware of the legal aid system and do not seek the services of legal aid providers. Second, the legal aid system does not cover translation and interpretation costs, hence the opportunity to seek legal advice in the asylum procedure is rendered almost impossible; in addition, most Hungarian lawyers based in towns where reception and detention facilities are located do not speak

[6] This procedure is regulated in Section 72 of the Asylum Act and Section 93 of the Government Decree no. 301/2007.

[7] Now, the state-run legal aid service provides legal assistance in the administrative procedure with funding from the European Refugee Fund. The efficiency of such legal assistance has been questioned.

foreign languages.

IV. Methodology: sample and interviews.

a. Methodology used.

The methodology was based on desk research, selection and analysis of decisions at both the administrative and court level and interviews/consultations with national stakeholders.

During July and September 2013, the researcher had 5 structured interviews with representatives of the ION, the UNHCR Regional Representation for Central Europe and attorney and legal officers of the HHC.

b. Description of the sample.

The four countries that were selected for the case file review were Afghanistan, Iraq, Pakistan, Kosovo and one case was selected from Kenya and Sri Lanka. These countries were selected after having considered that

- there is no publicly available statistical data on the application of IPA therefore a representative sample could not be generated from official statistics of the OIN
- the IPA may only be considered for those asylum cases where the applicant would face persecution or serious harm in the region of origin therefore countries of origin from where applications are usually rejected as manifestly ill-founded were left out from the sample (e.g. Algeria, Morocco, Nigeria).

The above presumption was confirmed by the discussions with stakeholders, namely that the concept of IPA is mostly applied for these countries.

The lack of a publicly available database of all RSDP decisions compelled the researcher to collect relevant cases through the lawyers' network of the Hungarian Helsinki Committee hence the cases do not reflect the overall practice of OIN on the application of IPA.

Altogether 37 decisions 15 cases were selected from the (first instance) administrative procedure and 22 from the Budapest and Debrecen Administrative (and Labour) Courts.

Due to the lack of a balanced and available data from all selected countries of origin, the research mostly focused on the IPA concept in the cases of Afghan asylum seekers which evidently lead to the predominance of Afghan cases.

In order to collect the cases to be examined the HHC formulated a questionnaire to its lawyers' network (composed of its contracted attorneys and legal officers) based on the case selection criteria elaborated by ECRE. The attorneys and legal officers reported their relevant cases to the researcher and provided her with the case files.

Country of Origin	Total	Instance		Gender		Outcome	
		OIN	MC	Female[8]	Male	Positive	Negative
Afghanistan	26	12	14		26	16	10
Iraq	3	1	2		3	3	
Kenya	1		1	1			1
Kosovo	3		3	1	2	3	
Pakistan	3	3			3		2
Sri Lanka	1		1		1	1	
TOTAL	**37**	**16**	**21**	**2**	**35**	**23**	**13**

V. National Overview.

a. Actors of Protection.

The concept of actors of protection is anchored in the Section 62/A of the Asylum Act. Articles 7 and 8 QD 2011 were fully transposed in the Asylum Act.

The concept of non-state protection was rejected by the Hungarian government at the time of transposing the QD 2004, and was hence not present in the Asylum Act until its amendment in 2013.

i. The Nature of Protection.

The rules for assessing an actor of protection do not differ based on whether refugee status or subsidiary protection is at stake.

1. Prevention of persecution or serious harm.

Actors of protection are required to take *appropriate* steps to prevent and punish acts that could qualify as persecution or serious harm. There is no guidance or information available on what measures are considered appropriate.[9] The Asylum Act refers to the operation of an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm" (Section 62(2)). There are no publicly available guidelines and specific requirements on how to assess whether a legal system is effective.

According to the OIN, the legal system of the state is effective if legal provisions are applied in practice to protect the victims and law enforcement agencies are ready and able to investigate them. Section 91 of the 301/2007 (XI.9.) Government Decree foresees the criteria on the effectiveness of the protection:

> "*The requirement for availability of efficient tools for the application of Section 63 (1) of the Act is fulfilled if the State from which the applicant is forced to flee a) possesses efficient laws for the detection of acts qualifying as persecution or serious harm, and*

[8] The overall number of female asylum seekers is usually very low in Hungary contrary to many other EU member states. The proportion of female applicants was only 5% of the HHC total caseload in 2013.

[9] It should be noted that the Hungarian translation of the QD does not use the term "reasonable steps" but changed it to "appropriate steps".

persecution and punishment of such acts through criminal proceedings, and institutions dedicated to their enforcement, and b) is making appropriate and efficient steps in particular with the help of the tools identified in Subsection a) to prevent persecution and suffering of serious harm."

OIN usually examines if the state has adopted laws and set up institutions to provide protection from persecution but the practical effectiveness of such protection mechanism is less analysed in practice, which remains a concern in many cases.

The OIN considers that protection is generally provided if, statistically,[10] in the vast majority of the cases the state is able to respond (through its criminal justice system, police and prosecution) to the violation of fundamental human rights but this does not exclude that extreme incidents may happen.

2. Durability of protection.

The protection needs to be durable. The Asylum Act foresees that the protection must be "effective and durable.[11] Among the decisions analysed, no decisions had a clear and reliable future-oriented analysis.

3. Access of the applicant to protection.

The applicant needs to have access to the proposed protection (Section 62/A(2) Asylum Act).

Section 92 (2) a) of the Government Decree no 301/2007 (XI.9.) prescribes that "*the applicant can reasonably be required to return to the part of the country concerned – with regard also to his/her personal circumstances (such as health, need for special treatment, age, gender, religion, nationality and cultural ties) – if a) the applicant can access that part of the country in a lawful, safe and practical way,(...).*"

The asylum act also indicates that protection against persecution or serious harm may be regarded as duly granted if effective tools are available in the state from which the applicant is forced to flee to prevent persecution or acts of serious harm as well as to punish the persons committing acts constituting persecution or causing serious harm, and the applicant can avail himself/herself of such protection." (Section 63(1)).

OIN claims that the power imbalance between the applicant and the available actors of protection is taken into account by examining the practical implementation of laws aiming at protecting the applicant and practices. This practice is rarely witnessed by practicing lawyers interviewed by the HHC as in most of the cases the argumentation confirming the application of IPA is not elaborated enough to contain references to the applicant's individual vulnerabilities.

In several cases, it was held against the applicant that he/she did not approach would-be protective authorities in the country (e.g. go to the police).

[10] It is not clear which statistics are being used and whether they are reliable.
[11] Section 62/A (2) Asylum Act.

ii. Actors of Protection.

Protection against persecution or serious harm can be considered as provided if protection against persecution or serious harm is being provided by:

a) the state; or

b) parties or organizations, including international organizations, controlling the state or a substantial part of the territory of the state, suppose they are willing and able to provide protection.

1. General criteria.

As mentioned in the Asylum Act (Section 63(1)), Actors of Protection need to be willing and able to provide protection. This is often not examined and assessed in practice.

In a case on the IPA, the Court considered that if the State authorities are unable to provide protection from persecution in one part of the country it may be presumed that the state would not be able or willing to grant protection in another part of that country.[12] This presumption has been made non reputable by the Government Decree, which indicates that "*the protection […] is not guaranteed if the State or the party or organisation controlling the State from which the applicant was forced to flee is behind the persecution or serious harm*".[13] This presumption extends to non-State actors "controlling the State".

2. State actors of protection.

According to the OIN, the criteria to consider a state an actor of protection are that the protection offered by the state should be effective and accessible to the applicant. The legal system and the criminal justice system should be able to respond to human rights violations, offer compensation and punish perpetrators in practice. In practice, corruption may typically be a phenomenon that would prevent a state from being considered as an actor of protection since it is then unable to grant effective protection. A state like Somalia can be considered as a failed State and unable to provide protection.[14]

According to the OIN's practice the transition from one governing regime to another may not be problematic if the new government is able to carry out a functioning justice system without a seriously discriminatory practice. For example, there are criminal procedures against officers of the previous regime in Ivory Coast under the new government but according to the OIN's assessment there is no reprisal against them. The same criteria are set for outgoing governments. The threshold to consider a practice seriously discriminatory could not be identified during the research.

[12] Case no. 21.K.31555/2009/6, I.A.Z. v. OIN, 15 October 2009. It is important to note that this judgment was delivered at a time when Art.8 QD was transposed but not the concept of non-state protection.

[13] Section 92 (2)(4) Government Decree.

[14] Somalia is considered a failed state where no return measures are likely to be effective therefore the OIN never sends anyone back to Somalia. However, as indicated in the case I.A.Z. v OIN, while the return is not carried out, it may occur that a Somali asylum seeker's claim is rejected, and Somalia and the applicant considered fit for return by the OIN.

3. Non-State Actors of protection.

The concept of the QD 2004 of non-state protection was rejected by the Hungarian government at the time of transposing the QD 2004 back in 2007. In 2013 the policy changed and the concept of non-state protection was included in Hungarian Law (Asylum Act).

Interestingly, the Government decree, which implements the Asylum Act, only regards the IPA as applicable if the state is the actor of protection.[15]

i. Criteria for a Non State Actor to be Actor of Protection.

The Non State Actor of Protections need to control the state or a substantial part of the territory of the state. According to the OIN, the notion of "control" should be interpreted as "the main state functions as practiced by those non-state actors instead of the state".

ii. Types of non-state Actors of Protection.

1. International Organisations.

According to the law, international organisations can be actors of protection. The OIN considers however that it is not relevant in practice. No cases were found where international organisations were considered as actors of protection.

2. Multinational forces.

The United Nations Interim Administration Mission in Kosovo (UNMIK) was considered as an actor of protection as it is proactively present, which means that it provides services and functions that the state would do (police, justice system, enforcement of local administration etc.).[16] According to OIN, a multinational force would not qualify as actors of protection if they solely had military presence.

3. Other Parties or organisations.

The experience of OIN indicates that the clan or tribal structure usually follows state structures, namely that the majority clan would "appoint" the head of the local offices of state agencies. Therefore, it is usually not relevant when assessing IPA as an applicant would not be suggested with the option of IPA if belonging to the minority ethnic group or tribe/clan.

The OIN also mentions that considering NGOs as actors of protection is not relevant in their practice. However, in the case of a Kenyan asylum seeker fleeing from FGM both the OIN

[15] Section 91 Government Decree no. 301/2007 (XI.9): "The requirement for availability of efficient tools for the application of Section 63 (1) of the Act is fulfilled if the State from which the applicant is forced to flee
a) possesses efficient laws for the detection of acts qualifying as persecution or serious harm, and persecution and punishment of such acts through criminal proceedings, and institutions dedicated to their enforcement, and
b) is making appropriate and efficient steps in particular with the help of the tools identified in Sub-Section a) to prevent persecution and suffering of serious harm ."

[16] Interview with OIN.

and the court was of the opinion that an NGO is able to provide effective protection for single women facing the risk of FGM in Kenya.[17]

b. The Internal Protection Alternative.

Article 8 QD 2011 was transposed partially in the Asylum Act (Section 63 (2)) and in the Government Decree (Section 92). According to the Asylum Act, "protection […] may be regarded as duly granted if in the state from which the applicant is forced to flee, the requirement of well-founded fear or the effective risk of serious harm does not prevail in a part of the country, and the applicant can reasonably be expected to remain in that part of the country".[18] This provision does not include the safety and legality test nor the requirements foreseen by Article 8 (2) QD 2011, i.e. the need to take into account personal and general circumstances when assessing the feasibility of an IPA. These elements are partly codified in the Government Decree.

The Government Decree provides a series of further indications regarding the application of Section 63 (2), including the safety and legality test, the requirement to take the applicant's personal circumstances into account as well as a series of additional elements.[19]

i. Assessment of the Internal Protection Alternative.

1. Safety in the region.

The authorities need to identify the specific area of relocation. The Government decree explicitly indicates that "the refugee authority shall specifically name the part of the country where its view is that protection is available".[20] For example, in the case of a traumatized Somali woman, the OIN did not specify the exact region where the IPA was found available, it only referred to a village where the applicant spent two years before leaving the country,

[17] Case no. 17.K.32.826/2007/15. before the Metropolitan court of Budapest, http://www.asylumlawdatabase.eu/en/case-law/hungary-%E2%80%93-metropolitan-court-16-january-2009-lmn-v-office-immigration-and-nationality#content

[18] Section 63 (2) Asylum Act.

[19] Section 92 (2) Government Decree: "(1) When Section 63 (2) of the Act is being applied, the refugee authority
a) shall examine whether protection is available for the applicant in the case of return to the State from which it was forced to flee;
b) shall specifically name the part of the country where its view is that protection is available.
(2) The applicant can be reasonably required to return to the part of the country concerned – with regard also to his/her personal circumstances – if
a) the applicant can access that part of the country in a lawful, safe and practical way,
b) the applicant has family relations or relatives in the given part of the country or if the applicant's basic subsistence and accommodation are ensured by any other means, and
c) there is no threat that the applicant will suffer persecution or serious harm or other serious infringement of human rights in that part of the country, irrespective of whether these are connected with the reasons for fleeing presented in his/her application.
(3) When the provisions of Subsection (2) are applied the refugee authority shall assess in particular the applicant's health, need for special treatment, age, gender, religious affiliation, nationality and cultural ties as individual circumstances.
(4) The protection identified in Section 63 (2) of the Act is not guaranteed if the State or the party or organisation controlling the State from which the applicant was forced to flee is behind the persecution or serious harm."

[20] Translation by the author. Section 92(2) (1) (b) Government Decree.

which was outside Mogadishu. In the appeal procedure, the Court ruled that the OIN violated the Section 92 of the Government Decree.[21]

Case workers at the OIN are instructed to ask questions about the last place of residence of the applicant to assess whether that area may be considered as an option for the IPA. It appears from the research sample and interviews with lawyers that the IPA assessment would not be forward looking. In the sample decisions, whenever the decision makers have referred to internal protection, those have always related to supportive citation of COI and to events that occurred before the applicant has decided to flee from his/her country of origin.

In the case of victims of trafficking, the protection required against the risk of re-trafficking is not examined as the authority does not have a mechanism to identify victims of trafficking on a regular and automatic basis when certain features would indicate to carry out such identification.

According to the Government Decree, protection "is not guaranteed if the State or the party or organisation controlling the State from which the applicant was forced to flee is behind the persecution or serious harm".[22] The Hungarian Law provides an irrefutable presumption that protection is not available if the State is the actor of persecution, but also if 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 dysfunctioning state) and the appeal phase, which may lead to the misinterpretation of the availability and accessibility of IPA.

2. Securing human and social rights.

i. General circumstances.

There is no explicit requirement in the law on the need to take into account general circumstances when assessing the IPA.

In practice, some general circumstances are taken into account, such as the ethnic composition and the power of the actor of persecution in the region. Ethnic composition is part of the evaluation, either by proposing IPA of a region with similar ethnic majority as of the applicant or proposing the capital as an ethnically mixed area.

The size of the region of relocation is not taken into account. No concrete factors are set for the evaluation whether the proposed area of IPA is sufficiently large in publicly available guidelines and the decisions do not deal with this issue either. In all the cases where IPA is applied in the cases of Afghan applicants Kabul is found appropriate with regard to the size of its population. In cases of Iraqi Kurds the Iraqi Kurdistan is assessed as an applicable option for IPA.

[21] case no. 21.K.31555/2009/6., I.A.Z v. Office of Immigration and Nationality, dated on 15 October 2009, http://www.asylumlawdatabase.eu/en/case-law/hungary-metropolitan-court-15-october-2009-iaz-v-office-immigration-and-nationality#content

[22] Section 92 (4) Government Decree.

The assessment of living conditions mostly consists in looking at the existence of family ties or other social resources in the region of IPA. However, according to the head of the Asylum Department of the OIN, the enjoyment of socio-economic rights is not automatically part of the IPA assessment.

Practice shows that the application of IPA often does not have a clear focus on the possible scenarios in the future, or how durable IPA would be. This has been set out by the Administrative and Labour Court of Budapest in the case of a young Afghan male applicant with serious psychological malfunctions 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."[23]

ii. Personal circumstances.

The Government Decree provides a series of indications on the circumstances to take into account when assessing the IPA, namely the family relations or relatives in that part of the country or the fact that the applicant's basic subsistence and accommodation is ensured by any other means. The refugee authority shall also assess, in particular, the applicant's health, need for special treatment, age, gender, religious affiliation, nationality and cultural ties as individual circumstances.[24]

OIN considers family ties, general health conditions and the ability for employment (qualification, previous work experience) as personal factors to be examined when deciding on IPA. In the case of an Afghan applicant suffering from serious psychiatric disease the court appreciated that the Afghan society may stigmatize persons with mental health problems and the applicant's family alone without proper psychiatric treatment would not be able to deal with the applicant's health conditions.[25]

Family connections are considered in case of vulnerable asylum seekers but often not in case of healthy young males. This practice may be illustrated by the case of a young Afghan applicant who was suffering from chronic PTSD and Borderline syndrome still, the OIN considered that Kabul may be the area of IPA applicable in his case. When overturning the OIN's decision the court ruled that due to the fact that the applicant left Afghanistan as a child and has no family or tribal links in Kabul it cannot be reasonably expected to relocate there.[26] In its reasoning the court recalled the ministerial justification to the Asylum Act whereas "*in case the applicant's family ties would be broken by moving to the indicated area of internal protection alternative and the applicant could not rely on the support of his/her previous social network anymore, it cannot be reasonably expected to relocate in that area*."

The Head of the Asylum Department of OIN estimates that most of the applicants whose case involve the assessment of IPA are relatively young (between 18 and 40) males with almost no educational background, which is the reason why the OIN does not automatically

[23] Case no. 6.K.34.830/2010/19., dated 11 October 2011.
[24] Section 92 (2) (2) (b) and 92 (2) (3) Government Decree.
[25] Case no. 20K.31072/2013/9.
[26] Case no. 6.K.34.830/2010/19., dated 11 October 2011.

evaluate the educational opportunities when assessing IPA although it is foreseen by Section 92 (3) of the 301/2007 (XI.9.) Government Decree.[27]

Economic status is usually taken into account; the examination focuses on the potential of the applicant to establish a proper life – although no detailed analysis (regarding specific professions, average salary, and average standard of living) was found in the 37 decisions and judgments evaluated in this research. In one case, however, the OIN made rather speculative declaration on the industrial capacities and developments of Kabul, which would be sufficient for the applicant to find a job - as a condition to relocate there according to the IPA concept applied.[28]

According to the OIN, although it is not excluded explicitly, IPA is not applied for unaccompanied minors. Most of the applicants leave Hungary before having a final decision therefore the cases are closed and it cannot be examined whether IPA would have been applied if the applicant stayed. The law foresees the authority's obligation to observe the best interest of the child as a primary consideration (Section 4 (1) of the Asylum Act).

Societal attitudes are rarely examined for women. As regards the general situation of Afghan single women returning to Afghanistan, the OIN claimed that IPA would not be applied in those cases "knowing how defenceless these women are in Afghanistan". Contrary to this the present research showed that IPA was applied in the case of an Afghan couple where the woman (being a victim of forced marriage at the age of 13 and then forced to prostitution by her husband) escaped from the brutalising husband with her new partner. The OIN found assessed that despite the fact that the woman stayed outside Afghanistan, her remaining family had strong links in Kabul, which may be an applicable IPA for her and her son. In the appeal phase of the procedure the Administrative and Labour Court of Debrecen united the cases and ruled that the petitioner's (the applicant) partner (the female applicant) has transgressed Afghan social norms by leaving her husband with another man that put her and her family members (partner and son) at risk of persecution. After having assessed that the partner (the woman) and her son have to be recognised as refugees, it immediately extended this protection to the applicant and rightly disregarded the concept of IPA.[29]

Cultural practices are considered if they would be relevant upon return - the OIN stated that female genital mutilation (as "cultural practice") may be considered in the course of IPA assessment if there is a significant probability that it would be exercised upon the applicant's return. In the case of Kenyan single woman fearing FGM and forced marriage[30] the court found that according to country of origin information submitted by the OIN there were several national and international supporting centres where women could ask for assistance in order to find protection. The court found it established that upon return to her country of origin she could receive accommodation, food and support.

OIN claims that if the specific vulnerabilities of the applicant (e.g.: victim of rape or torture) are identified and properly assessed during the procedure then the IPA assessment has to

[27] This is an estimation, which is not based on statistics. Section 92(3) of the 301/2007 (XI.9) Government Decree foresees that the authority assessed the health conditions, need for special treatment, age, sex, religion and ethnic affiliation as well as cultural links. The OIN does not consider that "cultural link (affiliation)" covers educational opportunities.
[28] case no. 106-1-59968/13/10-M, dated 15 April 2011
[29] Case no. 9.K. 30.172/2012/14., dated 15 July 2012
[30] Case no. 17.K.32.826/2007/15. dated 16 January 2009

verify if the treatment or support would be available upon return. It remains, however, a rather theoretical question as most of the asylum seekers leave Hungary before the authority could assess their vulnerabilities, and vulnerabilities are not identified in a formalized procedure for those that stay in Hungary either. Contrary to the OIN's above statements, as the UNHCR revealed in its country report on Hungary in 2012, practice shows that there are no mechanisms to identify vulnerable asylum seekers even if the persons stays in the country and waits until the final decision is delivered.[31] The psychological impact of moving to and living in the region of relocation is not assessed.

Factors such as societal attitudes and civil and social rights are not considered for LGBT people. Hungarian practice still did not pass the so called "discretion clause" (or "discretion requirement") as it was confirmed both by the OIN during the course of the research interview and by a study by the Vrije Universities Amsterdam: "*In the case of an Algerian applicant the Hungarian Office of Immigration and Nationality stated that "even if criminal sanctions against homosexuals or homosexual behaviour are in force, the sexual orientation can be practised in a hidden, discreet way, in order to prevent possible attacks*." [32]

iii. "Stay/settle"

The terms "stay" and "settle" are interpreted with reference to permanent residence based on the citizenship of the applicant (e.g. Kabul for Afghan nationals). While article 8 QD 2011 refers to "settle" (instead of "stay" in Art. 8 QD 2004) it has been transposed into Hungarian legislation by referring to "stay".

3. Safe and Legal Travel.

The Government Decree requires that the applicant can access the region of relocation in a lawful, safe and practical way (Section 92 (2) (2)). There is no reference to "gain admittance" to the country.

The test is whether there is an operating airport in the region which receives international civilian flights (safety) and if the applicant does not need any legal entitlements to return to his/her country of origin.

The requirement of safe and legal travel is assessed in practice and no issues were identified in that regard during the research.

[31] "While the Hungarian Act on Asylum stipulates that they should receive preferential treatment, there is no formal mechanism to identify asylum-seekers with special needs at an early stage." UNHCR : Hungary as a Country of Asylum, p 19. available at : http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/hungary-as-a-country-of-asylum-2012.html

[32] Vrije Universitat Amsterdam: Fleeing Homophobia, September 2011, available at : http://www.rechten.vu.nl/nl/Images/Fleeing%20Homophobia%20report%20EN_tcm22-232205.pdf
The "discretion requirement" is an explicit or implicit requirement that a person acts discreetly in order to prevent being persecuted on grounds of his or her sexual orientation or gender identity.

ii. The Application of the IPA.

1. Procedure.

i. In which procedure is the IPA applied?

The IPA is not applied in admissibility procedures or in border procedures. There are no accelerated procedures in Hungary.

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

Contrary to the internal logic of the IPA concept, OIN case workers often consider and analyse IPA to reject the application for international protection without establishing the well-founded fear of persecution or serious harm. The IPA analyses serves to justify that the applicant may lead a normal life elsewhere in his/her country of origin.

The IPA would rarely be assessed as part of the assessment of the protection claim (i.e. together with or following the analysis of the risk of persecution) and even more rarely as a possible exception, i.e. after it has been determined that the applicant would otherwise be entitled to international protection.

iii. Procedural safeguards

Practice shows that the OIN strongly relies on all records of preliminary interview in the RSDP or even on the interviews that were conducted by the police upon the applicant's interception at the border. When rejecting a claim, OIN uses all information or inconsistencies found in the records of previous interviews in order to confirm its decision.

In theory, the applicant and his/her legal representative is entitled to have access to the case files throughout the entire procedure but this is not exercised in practice since the applicant (or the legal representative) is not informed about the COI being collected on the IPA therefore he/she does not have the opportunity to use this momentum to contest the content. Therefore the applicant does not have a practical opportunity to contest or comment on the application of the IPA; it is only possible in the request for judicial review contesting the decision. The analysis of the IPA concept is presented in various forms, it is rare however that the decision maker provides a comprehensive analysis supported with the applicant’s testimony, COI of all relevant fact arose with regard to the case and concludes in a clear statement on the applicability of IPA. Whenever well-founded fear of persecution or real risk of serious harm is established, the decision maker is obliged to examine the possible application of the IPA concept. However, this has resulted, particularly in several Afghan cases, the so-called “sewing the coat to the button” effect whereas the serious harm is deemed justified “therefore the Authority examines the possibility of the IPA in relation to Kabul" which is followed by a deductive assessment in which all COI or facts is collected to support the hypothesis of the decision maker. However, there are also decisions in which inductive argumentation is followed as a methodology when assessing IPA which, at the end, leads to the result that IPA prevails

2. Policy.

i. Type of protection claim.

IPA is applied both with regard to asylum and subsidiary protection claims. The application of IPA does not differ in the case of refugee status or subsidiary protection since both protection statuses are examined in the same procedure – first refugee status then subsidiary protection.

ii. Frequency of application

The head of the Asylum Department of OIN claimed[33] that decision makers are only required to assess the applicability of the IPA if it has been established that the applicant would face the risk of persecution or serious harm if returned to (the previous place of residence) the country of origin. IPA analysis is obligatory whatever grounds for international protection is established, provisions are formulated as IPA would be the ultima ratio to reject the application. Decisions, however, often use the "even if" argumentation" as follows. "*Having regard to the statements of the applicant, which are contradictory to such extent that the authority cannot examine the merits of the case whether the applicant upon his return to country of origin would be exposed to serious threat as the consequence of indiscriminate violence used in the course of an international or internal armed conflict (Article 15 c of the QD that is transposed by Section 61 c) of the Asylum Act). Moreover, this cannot be examined in this case because - even if the applicant would be subjected to such serious harm in his province of origin - the relevance of the internal flight would prevail, therefore he/she could be returned to a safer province, but this cannot be examined as his credibility was doubted. Accordingly, the recognition as beneficiary of subsidiary protection under Section 61 c) is not feasible due to the lack of credibility.*"

In one of its decisions[34], after having assessed that the applicant was not credible and did not face persecution or serious harm upon return, when assessing the applicability of IPA, the OIN relied on British country guidance and decisions from 2008 and 2009 without properly quoting and referencing them, only stating that it has been established at "certain judicial forums" in the UK that Kabul may be a reasonable protection alternative for those that would not be safe from the armed conflicts elsewhere within the country.[35] The decision even made speculative statements such as: "it would not be disproportionate to expect the applicant to move to Kabul and assist to rebuild his home country. An IOM Country Fact Sheet estimates the life of those moving to Kabul and looking for a job is not desperate." (p 14) Then the decision listed the job opportunities in Kabul at international organisations or state agencies or in the central and Northern part of the country, where textile and gas production is important.

[33] Inerveiw made with Mr Árpád Szép, the head of Asylum Department of the OIN on 6 September 2013.
[34] case no. 106-1-59968/13/10-M, dated 15 April 2011
[35] CG [2009] UKAIT 00044, MI (Hazara-Ismaili-Associate of the Nadriqi family) CG [2009] UKAIT, RQ (Afghan National Army-Hizb-i-Islami-risk) Afghanistan CG [2008] UAKIT 00013

iii. IPA as blanket policy?

The OIN claims that the IPA concept is applied on a case-by-case basis, which was not entirely reflected by the HHC's case file research that examined 15 first instance (administrative) decisions and 22 judgments. These decisions often used panels, i.e. pre-formulated sentences, that were lacking the consideration of the individual circumstances of the applicant. There is no blanket policy acknowledged to apply to a certain group of applicants by the OIN, however, IPA (to Kabul) is assessed in the cases of almost all Afghan adult male applicants on a quasi-automatic basis.

iv. Scope of application of IPA.

During the past few years, the country in relation to which IPA was most often used is Afghanistan (Kabul) and Iraq (Kurdistan region) to some extent. In 2013 the HHC witnessed an increase in cases from Mali (Bamako) regarding the application of IPA.

The head of asylum department claimed that IPA is not applied for unaccompanied minors. The case file research showed that in a repeated procedure (after the first decision has been quashed by the court[36]) the OIN granted subsidiary protection to the unaccompanied Afghan minor without even mentioning the concept of IPA (protection was granted and IPA was not even examined).[37]

v. Application if technical obstacles to return.

IPA is not applied when there are technical obstacles to return. The law only provides for the application of IPA when it is physically possible to access the proposed territory of the IPA for the applicant.[38]

c. Assessment of facts and circumstances.

There are no clear rules to define the party that bears the burden of proof in Hungary.[39]

However, some decisions wrongly claim that it is only up to the applicant to verify or substantiate that he or she has a well-founded fear of persecution in the region of IPA or in the entire country of origin. As far as "burden of proof" in the Hungarian RSDP is concerned, it is the decision maker who ascertains the relevant facts of the case and specifies the type and extent of evidence admissible, independently from the applicant's requests concerning evidence. However, in the process of ascertaining the relevant facts of the case, all relevant circumstances shall be taken into consideration.[40]

[36] The first decision was quashed by the court for a reason external to the IPA.
[37] case no. 106-1-26064/7/2010-M, dated 9 September 2010
[38] Section 92 (2) (a) Government Decree.
[39] Despite the fact that the concept of "burden of proof" does not exist in Hungary, there would not be significant variation related to proof depending on whether article 7 or Art. 8 QD is at stake.
[40] Section 50 of Act no. CXL of 2004 on General Rules of Administrative Procedures, which foresee that decision makers in all administrative procedure are obliged to ascertain all facts of the case - if this criteria is not fulfilled the decision may be annulled or changed at second instance or judicial review.

While there is an obligation on the State to explore all relevant facts, it does not mean that the authorities will necessarily proactively bring along all elements of evidence. The “burden of proof” is shared between the state and the applicant in principle but the applicant is obliged to cooperate with the asylum authority during the entire procedure under Section 5 (2) a) of the Asylum Act.[41] As a result, the applicant is required in practice to substantiate his/her claim in the most proactive manner possible. The state is obliged to examine the application and collect country of origin information (COI) from various sources in order to assess the well-foundedness of the claim under Section 41 (2) of the Asylum Act.[42]

In theory, the applicant and his/her legal representative is entitled to have access to the case files throughout the entire procedure but this is not exercised in practice since the applicant (or the legal representative) is not informed about the IPA being considered or about the COI being collected on the IPA. Therefore he/she does not have the opportunity to use this momentum to contest the content. Therefore, the applicant does not have a practical opportunity to contest or comment on the application of the IPA, which is only possible in the request for judicial review contesting the decision.

The analysis of the IPA is presented in various forms, it is rare however that the decision maker provides a comprehensive analysis supported by the applicant’s testimony, COI of all relevant fact arose with regard to the case and concludes in a clear statement on the applicability of IPA.[43] Whenever well-founded fear of persecution or real risk of serious harm is established, the decision maker is obliged to examine the possible application of the IPA concept.

The general provision setting the standard of proof in the asylum procedure is "verification OR substantiation", which allows asylum seekers to comply with lower standard of proof according to Hungarian legal terminology.[44] There are no clear provisions in the Asylum Act or in its implementing Government Decree no. 301/2007 regulating the standard of proof when assessing IPA, and according to the information provided by the OIN no internal norms were set either to define the standard of proof for the decision makers. The head of the OIN's Asylum Department stated that the applicability of the IPA should be more than a mere hypothesis but less than certainty – substantiation, which is the general standard of proof in respect of assessing the well-founded fear of persecution or serious harm.[45]

According to the head of the Asylum Department of the OIN case workers are instructed to ask questions about the last place of residence of the applicant to assess whether that area

[41] Section 5 (2) Asylum Act. A person seeking recognition shall be obliged to
a) cooperate with the refugee authority, in particular to reveal the circumstances of his/her flight, to communicate his/her personal data and to facilitate the clarification of his/her identity, to hand over his/her documents

[42] Section 41 (2) The refugee authority and – in case of need - the court shall obtain the report of the agency responsible for the provision of country information under the supervision of the Minister.

[43] Moreover in some cases the OIN referred to the IPA as applicable but did not specify the requirements as set forth by Section 92 (2) of the Government Decree, namely that OIN did not refer neither to the lawful and safe access of the applicant to the regin concerned, nor to the applicant’s family links, accomodation and subsistence. (Case no 3.K.30.570/2012/10, dated 28 November 2012 by the Debrecen Administrative and Labour Court.)

[44] Section 7 of the Act no. LXXX of 2007 on asylum (Asylum Act) foresees that " the refugee authority shall recognise as refugee a foreigner who **verifies or substantiates** that the criteria determined in Section 6 (1), in compliance with Article 1 of the Geneva Convention, exist in respect of his/her person."

[45] Interview with Mr Áprád Szép, head od Asylum Department, Office of Immigration and Nationality on 6 September 2013 in Budapest.

may be considered as an option for IPA. The applicant's family ties, employment, cultural and social connections to this area also part of the interview. In the case of an Afghan adult male applicant from Ghazni, the case worker explicitly asked during the interview if either the applicant or his family members ever lived in Kabul or the Northern provinces of Afghanistan.[46] Another typical question that is asked from Afghan applicant is: "Did you ever think about living in another part of Afghanistan peacefully?"[47] It has been confirmed by practicing lawyers that the concept of IPA is not explained in details during the interview (no explanation is given why the above questions are asked) it is later assessed by the case worker but without further consulting the applicant. In the interview records, "What would happen to you if you return to your country/region?" questions have been asked randomly and without clarifying that their purpose was to examine the relevance of relocation within the applicant's country of origin. In the case of a 17 years old Pakistani unaccompanied minor asylum seeker whose only remaining relative was his older brother, the minutes of the hearing show that the questions referring to a potential IPA in Pakistan were extremely brief and direct. Moreover, the case officer never explained to the applicant that these questions were asked in order to decide on the application of the IPA.

- "Who would take care of you if you returned to Pakistan?
- I don't know, I never want to return there, I want to die here.
- Do you know orphanages in Pakistan?
- No."[48]

d. Decision quality.

i. Country of origin information.

According to the experience of HHC contracted and interviewed attorneys, the same sources of information are used to analyse the situation in the region of origin and the proposed region of IPA.

COI is not always up to date. It may happen that the information that would indicate a widening armed conflict confirming the applicant's need for international protection are taken into account with a certain time-lag, and that COI would not always follow the evolution or deterioration of the general situation (e.g. cases considering Kabul as an IPA based on 2-3 years old COI). It can also be observed that the OIN uses outdated evidence of other member states' practice, e.g. UK Country Guidance on Afghanistan from 2009 referring to COI from 2008 when the case was assessed in 2011.

The state submits COI on the region proposed to be the IPA in order to confirm the applicability. The HHC's practice shows that this COI, however, is often too generalised (e.g. ANSO reports in Afghanistan in most of the cases) and does not necessarily reflect the applicant's individual circumstances.

[46] case no. 106-2-2195/2010-Ké. hearing carried out on 25 January 2011 in Debrecen
[47] case no. 106-2-17513/2/2009-M hearing carried out on 14 October 2009 in Debrecen
[48] case no. 106-1-41763/2012-M hearing carried out on 25 July 2013 in Budapest

While the quality of COI is generally satisfying, the use of the collected COI by the case worker may raise concerns. Practice shows that in a significant number of cases of Afghan males, the use of COI is impartial and selective, with a view to justify the reasonableness of the IPA.

In theory, it is possible for the applicant to challenge the accuracy of the COI presented by the state. However, in practice, it is highly improbable that the applicant would be able to challenge the accuracy on his or her own. With the assistance of an attorney it may often be the litigation strategy at the appeal's phase.

ii. Templates, Guidance and Training.

There are no publicly available guidelines for case workers on how to interpret actors of protection or the IPA, but the topic is explained and presented in a separate chapter in the authority's internal quality assurance handbook, which is confidential and could not be researched. Official background information on trainings and policy guidelines was not made available in the framework of the present research.

Eligibility guidelines and country reports of the UNHCR are taken into account in all cases when available and applicable. However, the head of OIN indicated that if the UNHCR guidelines differ from the OIN internal guidance for case workers, the director of the asylum unit issues specific instructions how to interpret the UNHCR guidelines in practice.

No other specific international guidelines or practice recommendations are normally taken into account by decision makers. If the individual circumstances of the case require then specialised UN agencies' reports are taken into consideration (WHO, UNICEF etc.) but the latter are not monitored on a continuous basis. ECtHR judgments are taken into account but mostly when it confirms the position of the OIN and supports the hypothesis of the case worker (e.g. the case of *Husseini v Sweden*[49] is often referred to when rejecting asylum claims of Afghan nationals with a view to apply IPA in Kabul). Accordingly, HHC attorneys confirmed that the OIN heavily relies on the case of Husseini v Sweden citing it in almost all cases of Afghan applicants. CJEU preliminary rulings seem to have a more direct effect but they are still rarely referred to in individual decisions. The preliminary ruling in the case of El Kott and others was shared with case workers in a separate circular as confirmed by Mr Szép, head of the Asylum Department.[50]

[49] *Husseini v. Sweden*, Application no. 10611/09, Council of Europe: European Court of Human Rights, 13 October 2011, available at: http://www.refworld.org/docid/4f8425ad2.html

[50] C-364/11 - Abed El Karem El Kott and Others, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=131971&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5814077

VI. National Recommendations.

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

Actors of protection:

- The availability of protection must be demonstrated in practice, not merely in principle based on the existence of legislation. The effect of that practice must be shown in relation to the particular person concerned or similarly situated persons, not merely in general terms. At least the elements of protection indicated in the Qualification Directive and in Article 62 of the Asylum Act must be considered, as well as any other factors that might be relevant for assessing the availability of protection depending on the individual circumstances.

- The OIN should interpret the criterion that protection must be durable (Section 62/A(2) Asylum Act) to mean that it must be established that « the factors which formed the basis of the refugee's fear of persecution may be regarded as having been permanently eradicated », in that « there are no well-founded fears of being exposed to acts of persecution » or a risk of serious harm.

- 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.

Internal Protection Alternative:

- 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 being used, the decision maker needs to apply it with careful regard to international law, and must rigorously follow the guidance provided in the recast Qualification Directive and in the Asylum Act and Government Decree no. 301/2007 (Section 92).

- As highlighted by the Administrative and Labour Court of Budapest,[51] the OIN 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.

- The authority must identify the special needs of the applicant, and exercise extreme caution in applying the IPA to a protection seeker who has special needs as a consequence of circumstances such as age, gender, health, disability or other aspects of their personal background.

[51] Case no. 6.K.34.830/2010/19, 11 October 2011.

Procedural aspects:

- 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 raised as a possibility, it must be fully assessed and not simply asserted.

- The authority conducting the assessment bears the burden of establishing each element of the IPA. While the applicants may be expected to cooperate in this assessment, they should not bear the the burden of proving that the IPA is not feasible or that any element required to apply it is missing.

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

- According to Article 8(2) Recast Qualification Directive, the decision maker must ensure that well-documented, precise and up-to-date information is obtained. Member States must ensure that additional region-specific County of Origin Information is used to assess the conditions in the proposed region of relocation.

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