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ACTORS OF PROTECTION AND THE APPLICATION OF THE INTERNAL PROTECTION ALTERNATIVE

EXECUTIVE SUMMARY

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The concepts of actors of protection and internal protection alternative are increasingly being used in the refugee status determination procedure in most EU Member States. Nevertheless, they remain as two of the most controversial concepts in the Qualification Directive. Their definition in the Directive (2004/83/EC) did not contain adequate criteria for assessing the level and effectiveness of protection required, in line with the Geneva Convention and the European Convention on Human Rights, thus allowing Member States to reject claims and return applicants to their country of origin despite the lack of effective protection.[1] Moreover, the Directive did not put an end to the high degree of divergence in State practices with regard to these concepts. The wording of the recast Qualification Directive (2011/95/EU) has however brought some much-needed clarifications and improvements, often reflecting existing practices in some Member States.

Ten years after the adoption of the Qualification Directive, the present research aims to provide an in-depth analysis as to how the concepts of internal protection alternative and actors of protection are applied both at the administrative and judicial levels in 11 EU Member States.[2] 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 procedure in Europe.

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.[3]

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 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.

2 The research was carried out in 11 EU Member States Austria, Belgium, France, Germany, Hungary, Italy, the Netherlands, Poland, Spain, Sweden and the UK.

3 The main part of the research took place between March and October 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.

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 victims, 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.[4]

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.[5]
- 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.

4 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.

5 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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