

3.2. Article 15(b) QD



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COMMON ANALYSIS

Last updated: December 2020

As noted in the chapter on [Refugee status](#), some profiles of applicants from Afghanistan may be at risk of torture or inhuman or degrading treatment or punishment. In such cases, there would often be a nexus to a reason for persecution falling under the definition of a refugee, and those individuals would qualify for refugee status. However, with reference to cases where there is no nexus to a Convention ground, the need for subsidiary protection under [Article 15\(b\) QD](#) should be examined.

Under [Article 15\(b\) QD](#), serious harm consists of torture or inhuman or degrading treatment or punishment of an applicant in the country of origin.

[Article 15\(b\) QD](#) corresponds in general to [Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms \(ECHR\)](#). The jurisprudence of the European Court of Human Rights (ECtHR), therefore, provides relevant guidance in order to assess whether a treatment may qualify as serious harm under [Article 15\(b\) QD](#).

Torture is an aggravated and deliberate form of cruel, inhuman or degrading treatment to which a special stigma is attached.

► According to relevant international instruments, such as the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(CAT\)](#), ‘

torture' is understood as:

- ✓ an intentional act
- ✓ that inflicts severe pain or suffering, whether physical or mental
- ✓ for such purposes as obtaining from the person subjected to torture or from a third person information or a confession, punishing the former for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind.

The distinction between torture and inhuman or degrading treatment or punishment is more a difference of degree than of nature. These terms cover a wide range of ill-treatment that reach a certain level of severity.

- ▶ **'Inhuman'** refers to treatment or punishment which deliberately causes intense mental or physical suffering (which does not reach the threshold of torture).
- ▶ **'Degrading'** refers to treatment or punishment which arouses in the victim feelings of fear, anguish and inferiority capable of humiliating or debasing them.

The assessment whether a treatment or punishment is inhuman or degrading further implies a subjective consideration by the person who suffers such treatment or punishment. No specific purpose on the part of the perpetrator (e.g. obtaining information or a confession, punishing, intimidating) is required in this regard.

When examining the need for protection under [Article 15\(b\) QD](#), the following considerations should be taken into account:

- **Healthcare unavailability and socio-economic conditions:** It is important to note that serious harm must take the form of conduct on the part of a third party ([Article 6 QD](#)). In themselves, the general unavailability of healthcare, education or other socio-economic elements (e.g. situation of IDPs, difficulties in finding livelihood opportunities, housing) are not considered to fall within the scope of inhuman or degrading treatment under [Article 15\(b\) QD](#), unless there is intentional conduct on the part of a third party, in particular the intentional deprivation of the applicant of appropriate healthcare. [\[29\]](#)

See also the profiles of [2.15 Persons living with disabilities and persons with severe medical issues](#) and [2.20 Individuals who were born in Iran or Pakistan](#)

[and/or who lived there for a long period of time.](#)

■ **Arbitrary arrests, illegal detention and prison conditions:** Special attention should be paid to the phenomena of arbitrary arrests and illegal detention, as well as to prison conditions. Arbitrary arrests and illegal detention centres run by different of actors (linked to the State, to militias, to strongmen or to insurgent groups) are widespread in Afghanistan. In general, human rights are not respected in these illegal detention facilities and persons who face a real risk of being illegally detained by these actors may be in need of protection.

When assessing the conditions of detention, the following elements can, for example, be taken into consideration (cumulatively): number of detained persons in a limited space, adequacy of sanitation facilities, heating, lighting, sleeping arrangements, food, recreation or contact with the outside world. Furthermore, it can be assessed that in cases where the prosecution or punishment is grossly unfair or disproportionate, or where subjecting a person to prison conditions which are not compatible with respect for human dignity, a situation of serious harm under [Article 15\(b\) QD](#) can occur. It should also be stressed that in official and unofficial detention centres, torture often takes place [[State structure](#), 2.1.1, 2.1.2, 2.1.3, 2.1.4, 3.6].

See also the profile of [2.19 Individuals accused of ordinary crimes](#).

■ **Corporal punishment:** Article 29 of the Constitution of Afghanistan prohibits ‘punishment contrary to human dignity’, and Afghanistan is a party to the CAT since 1987. However, corporal punishments by the State are permitted by law in Afghanistan due to the pluralistic legal system, whereby Islamic and civil laws interact with one another, allowing individual judges and courts to determine how to prescribe punishments under either code. Corporal punishment, including the use of lashings and beatings, are more frequent in areas controlled by AGEs. In territories under their control, the Taliban operate a parallel justice system based on a strict interpretation of the Sharia. In addition to executions (see [Article 15\(a\) QD](#)), the operation of this system leads to punishments reported by UNAMA to be cruel, inhumane, and degrading [[Anti-Government Elements](#), 2.5; [Criminal law and customary justice](#), 1.6, 1.8].

See also the profile of [2.19 Individuals accused of ordinary crimes](#).

■ **Criminal violence:** Common criminality and organised crime have been reported throughout the country, with an increase in recent years, especially in major cities such as Kabul, Jalalabad, Herat, and Mazar-e Sharif. Reported crimes comprised kidnappings of adults and children, robberies and burglaries, murders, extortion. Criminal groups targeted businessmen, local officials and ordinary people, and foreigners and wealthy Afghans were indicated as the main targets [[Security Situation 2020](#), 1.4.2, 2.1.2; [Society-based targeting](#), 8.5]. Where there is no nexus to a reason for persecution under the refugee definition, the risk of crimes such as the above may qualify under [Article 15\(b\) QD](#).

Other cases for which a real risk of serious harm under [Article 15\(b\) QD](#) may exist are, inter alia, some situations under the profile of [2.10 Children](#), [2.18.2 Land disputes](#), etc.



In some cases, those at risk of torture or inhuman or degrading treatment or punishment (for example, because of mistreatment in prisons) may also have committed or contributed to excludable acts as defined in [Article 17 QD](#). Therefore, although the criteria of [Article 15\(b\) QD](#) would be met, exclusion considerations should be examined (see [6. Exclusion](#)).

[29] CJEU, *M'Bodj*, paras. 35-36. See also CJEU, *MP*, paras. 57, 59. [[back to text](#)]

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