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- Article 15(c) Qualification Directive (2011/95/EU) (2014);
- Introduction to the Common European Asylum System for courts and tribunals (2016);
- Qualification for international protection (Directive 2011/95/EU) (2023, second edition);
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- Reception of applicants for international protection (Reception Conditions Directive 2013/33/EU) (2020);
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European Union Agency for Asylum

The European Union Agency for Asylum (EUAA), whose predecessor was the European Asylum Support Office, is an agency of the European Union. It has the mandate to support the enhancement of quality standards and to strive for consistency in the implementation of the legal instruments of the Common European Asylum System. To that end, the EUAA contributes to the development and consistent implementation of the Common European Asylum System, promotes practical cooperation among Member States on asylum, and provides operational and technical assistance to Member States, in particular where their asylum and reception systems are under disproportionate pressure.

Article 8(1) 2022 EUAA regulation* specifies that the agency must establish, develop and review training for members of courts and tribunals in EU Member States. For this purpose, the EUAA is to take advantage of the expertise of academic institutions and other relevant organisations, and take into account the EU's existing cooperation in the field with full respect for the independence of national courts and tribunals. The EUAA, as the EU centre for expertise in the field of international protection, supports the development of judicial training materials and activities. These are available to members of courts and tribunals of the EU, its associated countries (EU+ countries)** and beyond.

International Association of Refugee and Migration Judges

The International Association of Refugee and Migration Judges (IARMJ)*** is a transnational, non-profit association that seeks to foster recognition that protection from persecution on account of race, religion, nationality, membership of a particular social group, or political opinion is an individual right established under international law, and that the determination of refugee status and its cessation should be subject to the rule of law. Since the foundation of the association in 1997, it has been heavily involved in the training of members of courts and tribunals around the world dealing with asylum cases. The Europe Chapter of the IARMJ (IARMJ-Europe) is the regional representative body for judges and tribunal members within Europe. One of the chapter's specific objectives under its constitution is 'to enhance knowledge and skills and to exchange views and experiences of judges on all matters concerning the application and functioning of the Common European Asylum System (CEAS)'.

Contributors

This judicial analysis was developed through a process with two components: (1) an editorial team of judges and tribunal members with overall responsibility for the final product and (2) a drafting team of experts.

* Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, [2021] OJ L 468/1. See also Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, [2010] OJ L 132/11.

** EU+ countries include the Member States of the European Union plus Norway and Switzerland.

*** The IARMJ was formerly known as the International Association of Refugee Law Judges (see https://www.iarmj.org).

Editorial team of judges and tribunal members

In order to ensure the integrity of the principle of judicial independence and that the EUAA judicial publications are developed and delivered under judicial guidance, an editorial team composed of serving or recently retired judges and tribunal members, with extensive experience and expertise in the field of asylum law, was selected under the auspices of a joint monitoring group. The group is composed of representatives of the contracting parties, the EUAA and IARMJ-Europe. The editorial team reviewed drafts, gave detailed guidance to the drafters, drafted amendments and was the final decision-making body on the scope, structure, content and design of the work. Its work was undertaken through a combination of in-person and virtual meetings, as well as regular electronic communication.

The members of the editorial team were judges and tribunal members: **Mona Aldestam** (Sweden, Co-Chair), **Michael Hoppe** (Germany, Co-Chair), **Johan Berg** (Norway), **Nadine Finch** (United Kingdom), **Peter Nedwed** (Austria), **John Stanley** (Ireland) and **Boštjan Zalar** (Slovenia).

The editorial team was supported and assisted in its tasks by the project manager, **Clara Odofin**.

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Hana Lupačová and **Hugo Storey** were the drafters. Consultants, **Frances Nicholson** and **Claire Thomas**, provided editorial and didactic support, respectively.

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All these comments were taken into consideration by the editorial team in finalising the text for publication. The members of the editorial team and the EUAA are grateful to all those who made comments, which have been very helpful in finalising this judicial analysis.

The methodology adopted for the production of this judicial analysis is set out in Appendix D.

This judicial analysis will be further updated, as necessary, by the EUAA, in accordance with the methodology for the EUAA judicial publications.

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Abbreviations

AIT	Asylum and Immigration Tribunal (United Kingdom)
APD	Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status
APD (recast)	Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court) (Germany)
BVerwG	Bundesverwaltungsgericht (Federal Administrative Court) (Germany)
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of All forms of Discrimination against Women
CJEU	Court of Justice of the European Union
CNDA	Cour nationale du droit d'asile (National Court of Asylum Law) (France)
COI	country of origin information
CRPD	Convention on the Rights of Persons with Disabilities
CRR	Commission des recours des réfugiés (Refugee Appeals Commission) (France)
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EU Charter	Charter of Fundamental Rights of the European Union
EUAA	European Union Agency for Asylum
EWCA	Court of Appeal of England and Wales (United Kingdom)
FGM	female genital mutilation
GC	Grand Chamber (of both the CJEU and the ECtHR)
Geneva Convention	see *Refugee Convention*
GRETA	Group of Experts on Action against Trafficking in Human Beings (Council of Europe)
HRC	Human Rights Committee (UN)
IAC	Immigration and Asylum Chamber (United Kingdom)
IARMJ	International Association of Refugee and Migration Judges
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IDP	internally displaced person
ILC	International Law Commission
IPCC	Intergovernmental Panel on Climate Change (UN)
ISIS	Islamic State of Iraq and Syria
NGO	non-governmental organisation
QD	Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
QD (recast)	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)
Refugee Convention	Convention Relating to the Status of Refugees (1951), as amended by its Protocol (1967) (referred to in EU asylum legislation as the 'Geneva Convention')
returns directive	Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
RVV/CCE	Raad voor Vreemdelingenbetwistingen / Conseil du contentieux des étrangers (Council for Alien Law Litigation) (Belgium)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UKIAT	UK Immigration and Asylum Tribunal
UNGA	United Nations General Assembly
UNHCR	Office of the United Nations High Commissioner for Refugees
UNHCR *Handbook*	*Handbook on procedures and criteria for determining refugee status and guidelines on international protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*
VG	Verwaltungsgericht (administrative court) (Germany)
VGH	Verwaltungsgerichtshof (high administrative court) (Germany)
VwGH	Verwaltungsgerichtshof (Supreme Administrative Court) (Austria)

Preface

The European Union Agency for Asylum (EUAA), like its predecessor the European Asylum Support Office (EASO), works in close cooperation with courts and tribunals of EU Member States and with other key actors to develop dedicated publications for members of courts and tribunals. This series aims to provide courts and tribunals with a full overview of the Common European Asylum System (CEAS) on a step-by-step basis. Soon after EASO became operational in 2011, it established a network of courts and tribunal members. Following consultations with members of this network, including the Europe Chapter of the International Association of Refugee and Migration Judges (IARMJ-Europe), it became apparent that there was a pressing need to make available to courts and tribunals judicial professional development materials on certain core subjects dealt with in their day-to-day decision-making. It was recognised that the process of developing such core materials required the involvement of judicial and other experts in a manner fully respecting the principle of independence of the judiciary and accelerating the development of the EUAA judicial publications overall.

The first edition of this judicial analysis was the product of a project carried out by EASO and IARMJ-Europe. This (second) edition has been updated pursuant to a framework contract between EASO (now the EUAA) and the IARMJ. An up-to-date list of all the publications is provided at the end of this preface in Table 1.

This judicial analysis is primarily intended for use by members of courts and tribunals of EU Member States whose work concerns hearing appeals or conducting reviews of decisions on applications for international protection. It is on qualification for international protection under the qualification directive (QD) (recast)[1]. As now updated, it incorporates the treatment of Article 15(c) QD (recast), which was originally the subject of a separate judicial analysis[2]. It is intended to be of use both to those with little or no prior experience of adjudication in the field of international protection within the framework of the CEAS and to those who are experienced or specialist judges in the field. Therefore, it aims to be a useful point of reference for all members of courts and tribunals concerned with qualification for international protection. The structure, format and content have been developed with this broad audience in mind.

This judicial analysis provides a detailed analysis of qualification for refugee and subsidiary protection in Parts 1 and 2, highlights particular situations in the new Part 3 and provides an analysis relating to both refugee status and subsidiary protection status in Part 4. The analysis is supported by appendices. These provide, among other things, decision trees setting out the questions that courts and tribunals of Member States need to ask when examining applications for international protection.

The aim is to set out the current state of the law clearly and in a user-friendly format. This new edition analyses the law as it stood in March 2022. However, the reader will be aware that this

[1] Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9 (QD (recast)). Unless otherwise indicated, any reference to 'article(s)' in this judicial analysis should be taken as referring to the QD (recast).

[2] EASO, *Article 15(c) Qualification Directive (2011/95/EU) – A judicial analysis*, 2014 (hereinafter EASO, *Article 15(c) QD (recast) – A judicial analysis*).

is a rapidly evolving area of law and practice. There are two aspects of this rapidly evolving area worth noting. An obvious one is that there will continue to be new case-law from the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR), and national courts and tribunals. There is also the fact that, on 13 July 2016, the Commission proposed the adoption of a new qualification regulation[3]. Its progress has been delayed by several factors, including the European Parliament election in May 2019 and the COVID-19 pandemic. This judicial analysis makes note of the latest proposed changes in the body of the text as and when appropriate.

This judicial analysis, together with others in the EUAA judicial publications[4], will be further updated periodically as necessary. However, it will be for readers to check whether there have been any changes in the law. The analysis contains a number of references to sources to help readers to check for changes.

Table 1: EUAA judicial publications: the judicial analyses and compilations of jurisprudence developed so far

Date	Judicial analysis[5]	Compilation of jurisprudence
2014	*Article 15(c) Qualification Directive (2011/95/EU)*	
2016	*An introduction to the Common European Asylum System for courts and tribunals*	
2016	*Qualification for International Protection (Directive 2011/95/EU)*	
2018	*Evidence and credibility assessment in the context of the Common European Asylum System*	Compilation of jurisprudence
2018	*Asylum Procedures and the Principle of* Non-refoulement	Compilation of jurisprudence
2018	*Judicial Practical Guide on Country of Origin Information*	Compilation of jurisprudence
2019	*Detention of applicants for international protection in the context of the Common European Asylum System*	Compilation of jurisprudence
2020	*Reception of Applicants for International Protection (Reception Conditions Directive 2013/33/EU)*	
2020	*Exclusion: Articles 12 and 17 qualification directive* (2nd edition)	Compilation of jurisprudence
2021	*Vulnerability in the Context of Applications for International Protection*	Compilation of jurisprudence
2021	*Ending International Protection* (2nd edition)	Compilation of jurisprudence

3 European Commission, Proposal for a regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, COM(2016) 466 final – 2016/0223(COD) (hereinafter European Commission, Proposal for a qualification regulation).

4 The judicial publications are listed in full on the EUAA website. This web page also shows the languages in which each document is available.

5 In the case of judicial analyses that have been updated, only the latest edition is listed in this table. Note that the *Judicial Practical Guide on Country of Origin Information* is a practical guide rather than a judicial analysis.

Key questions

This judicial analysis aims to provide an overview of the topic of qualification for international protection for members of courts and tribunals of European Union Member States. It concerns qualification both for refugee status and for subsidiary protection status, and endeavours to answer the following main questions (the sections of this judicial analysis in which the questions are answered are provided in brackets).

A. Questions on international protection in general

1. **How does the QD (recast) define international protection?** (General introduction)

2. **Who is respectively a refugee or a beneficiary of subsidiary protection?** (Sections 1.2 and 2.2)

3. **Does the QD (recast) impose an order in which to address qualification as a refugee and qualification as a beneficiary of subsidiary protection?** (General introduction and Sections 1.1 and 2.1)

4. What is the **personal and territorial scope** of the QD (recast) when it comes to qualification for refugee protection (Section 1.3) and subsidiary protection (Section 2.3)?

B. Questions specifically on refugee protection

5. What does **persecution** mean under Article 9(1) and (2) QD (recast)? (Section 1.4)

6. What is meant by **well-founded fear** of persecution for the purposes of qualifying for refugee protection under the terms of Articles 2(d), 4(4) and 5(1) and (2) QD (recast)? (Section 1.5)

7. How should an **act of persecution** be connected to one or more reason(s) for persecution or to the absence of protection against such acts under the terms of Article 9(3) QD (recast)? (Section 1.6.1)

8. What are the **reasons for persecution** defined in Article 10 QD (recast)? (Section 1.6)

9. Which **actors of persecution** are recognised in Article 6 QD (recast)? (Section 1.7)

10. What is meant by **effective protection** against actors of persecution and by which actors can such protection be provided by virtue of Article 7 QD (recast)? (Section 1.8)

11. What does **internal protection** mean and entail for Member States applying Article 8 QD (recast) in the context of refugee protection? (Section 1.9)

12. What does the QD (recast) say about ***sur place* applications** in the context of refugee protection? (Section 1.10)

C. Questions specifically on subsidiary protection

13. What does **serious harm** mean under Article 15 QD (recast)? (Section 2.4)

14. What does the phrase **'substantial grounds have been shown for believing that the person would face a real risk'** of suffering serious harm mean for the purposes of qualifying for subsidiary protection under the terms of Articles 2(f), 4(4) and 5(1) and (2) QD (recast)? (Section 2.5)

15. Which **actors of serious harm** are recognised in Article 6 QD (recast)? (Sections 1.7 and 2.6)

16. What is meant by **effective protection** against actors of serious harm and by which actors can such protection be provided by virtue of Article 7 QD (recast)? (Sections 1.8 and 2.7)

17. What does **internal protection** mean and entail for Member States applying Article 8 QD (recast) in the subsidiary protection context? (Sections 1.9.1 and 2.8)

18. What does the QD (recast) say about ***sur place* applications** in the context of subsidiary protection? (Sections 1.10 and 2.9)

D. Questions on refugee status and subsidiary protection status

19. What does the granting of **refugee status** entail? (Section 4.1.1)

20. What is the situation of **family members** of a refugee who do not qualify for refugee protection in their own right under Article 23 QD (recast)? (Section 4.1.2)

21. What does the granting of **subsidiary protection status** entail? (Section 4.2.1)

22. What is the situation of **family members** of subsidiary protection beneficiaries not qualifying for subsidiary protection in their own right under Article 23 QD (recast)? (Section 4.2.2)

General introduction

Aims and objectives

This judicial analysis concerns qualification for international protection under Directive 2011/95/EU (QD (recast))[6]. Its principal aim is to provide a comprehensive analysis of the requirements laid down in the QD (recast) for establishing eligibility for refugee status and subsidiary protection status.

The QD (recast) is an essential part of the EU asylum *acquis*, and derives its legal basis from primary law in Articles 78(1) and (2)(a) and (b) Treaty on the Functioning of the European Union (TFEU)[7]. The TFEU requires the adoption of measures for a CEAS comprising a uniform status of asylum and a uniform status of subsidiary protection. The significance of the fact that the QD (recast) is in the form of a directive is analysed further in EASO, *An introduction to the Common European Asylum System for courts and tribunals – A judicial analysis*, 2016[8]. Because interpretation of each CEAS instrument requires regard to its specific objectives, certain preliminary observations about the QD (recast) are in order here.

The QD (recast) is a second-phase legal instrument of the CEAS; it entered into force on 21 December 2013. It reinforces the harmonisation of asylum law within the Union[9]. This purpose is manifested by the EU legislature's decision to avoid the expression 'minimum standards', as is apparent from the new wording of Article 1 QD (recast), as follows.

Article 1 QD (recast)

The purpose of this Directive is to lay down **standards** for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a **uniform status** for refugees or for persons eligible for subsidiary protection, and for the content of the protection-granted. [Emphasis added.]

Recital 8 QD (recast) explains that 'considerable disparities' remained among Member States 'concerning the grant of protection' and the content of such protection after the adoption of the QD[10]. Therefore, the objective of the QD (recast) is 'to achieve a higher level of approximation of the rules on the recognition and content of international protection

6 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9.

7 Consolidated version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/47. Article 78(2) states '2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: (a) a uniform status of asylum for nationals of third countries, valid throughout the Union; (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection ...'.

8 EASO, *An introduction to the Common European Asylum System for courts and tribunals – A judicial analysis*, 2016 (hereinafter EASO, *Introduction to the CEAS – A judicial analysis*), pp. 66–67.

9 CJEU Grand Chamber (GC), judgment of 7 June 2016, *Mehrdad Ghezelbash* v *Staatssecretaris van Veiligheid en Justitie*, C-63/15, EU:C:2016:409, para. 60.

10 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L 304/12 (hereinafter 'QD').

on the basis of higher standards' (recital 10 QD (recast)). According to recital 13, achieving this objective should 'help to limit the secondary movement of applicants for international protection between Member States, where such movement is purely caused by differences in legal frameworks'.

Although the QD (recast) has the purpose of laying down standards for a uniform status, it continues to permit Member States to introduce or retain more favourable standards. However, as before, this is subject to the reservation that those standards are compatible with the QD (recast) (see 'More favourable standards (Article 3)' below).

All EU Member States except Denmark and Ireland are bound by the QD (recast). Denmark does not take part in the adoption of measures based on Article 78 TFEU and is therefore not bound by either the QD or the QD (recast)[11]. Ireland has not taken part in the adoption of the QD (recast)[12] but, because it opted into the QD, it remains bound by the QD[13]. See Table 2.

Table 2: Adoption of the QD and its recast by Denmark and Ireland[14]

	QD	QD (recast)
Denmark	✗	✗
Ireland	✓	✗

Prior to 31 January 2020, the United Kingdom was an EU Member State and its courts and tribunals applied EU asylum law (except for the recast qualification and procedures directives (QD (recast) and APD (recast)). As from 31 January 2020, the United Kingdom ceased to be a Member State[15]. However, by virtue of domestic legislation implementing the EU–UK agreement[16], the United Kingdom continues to apply EU law unless specifically revoked[17]. In the area of asylum law, the United Kingdom has revoked national legislation that had implemented the qualification directive and the Dublin III, Eurodac and EASO regulations[18]. CJEU jurisprudence has been treated as binding only if decided prior to 31 December 2020.

11 Protocol No 22 on the position of Denmark, annexed to the TFEU in [2012] OJ C 326/299.

12 Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TFEU in [2012] OJ C 326/295.

13 Recitals 38 and 39 QD. It should be noted that the International Protection Act 2015 (Ireland) includes provisions that embody some of the changes introduced by the QD (recast).

14 The EU also has a number of agreements with EU+ countries, which means that those countries apply EU asylum law to a greater or lesser degree.

15 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 2019/C 384 I/01; UK Parliament, European Union (Withdrawal) Act 2018; and UK Parliament, European Union (Withdrawal Agreement) Act 2020.

16 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 2019/C 384 I/02.

17 The EU (Withdrawal) Act 2018 ('the 2018 Act'), as amended by the European Union (Withdrawal Agreement) Act 2020 ('the 2020 Act'), Section 6(7), creates a category of 'retained EU law', which includes UK legislation transposing directives as they had effect in domestic law immediately before 'exit day', namely 31 January 2020 (see European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No 3) Regulations 2019).

18 National legislation implementing the Dublin III, Eurodac and EASO regulations was revoked by the Immigration, Nationality and Asylum (EU Exit) Regulations 2019, regulations 1–3. National law transposing the QD was revoked by the Nationality and Borders Act 2022, Section 30(4).

Structure and scope

This judicial analysis exclusively considers qualification for international protection. It comprises:

- the General introduction setting out the objectives and structure of the analysis and providing an overview of the rules of interpretation of the QD (recast), the principle of the best interests of the child, the definition of an application for international protection and the limited scope for more favourable standards;
- a detailed analysis of qualification for refugee protection and its definitional elements as laid down in the QD (recast) (Part 1);
- a detailed analysis of qualification for subsidiary protection and its definitional elements as laid down in the QD (recast), as far as these differ from the criteria for refugee status; this includes full treatment of Article 15(c), which was previously dealt with in a separate judicial analysis[19] (Part 2);
- a new part entitled 'Particular situations', which analyses in more depth four cross-cutting issues that have been identified as especially difficult for members of courts and tribunals; these comprise situations of armed conflict and generalised violence; trafficking; environmental dangers; and COVID-19-related situations (Part 3);
- a final part addressing refugee status and subsidiary protection status (Part 4);
- six appendices as described in more detail below.

In relation to refugee and subsidiary protection status, this analysis covers only those elements of the QD (recast) relevant to inclusion as opposed to exclusion (see below).

This judicial analysis does **not** cover the following.

- The assessment of facts and circumstances (Article 4). These issues are dealt with in EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial analysis*[20].
- Ending international protection (Articles 11, 14, 16 and 19). These provisions are dealt with in EASO, *Ending International Protection – Judicial analysis*[21].
- Exclusion from international protection (Article 12 for refugee protection and Article 17 for subsidiary protection). These are dealt with in EASO, *Exclusion: Articles 12 and 17 qualification directive – Judicial analysis*[22].

[19] EASO, *Article 15(c) QD (recast) – A judicial analysis*, op. cit., fn. 2.

[20] EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial analysis*, 2018 (hereinafter EASO, *Evidence and Credibility Assessment – Judicial analysis*).

[21] EASO, *Ending International Protection – Judicial analysis*, 2nd edn, 2021 (hereinafter EASO, *Ending International Protection – Judicial analysis*).

[22] EASO, *Exclusion: Articles 12 and 17 qualification directive – Judicial analysis*, 2nd edn, 2020. The present judicial analysis does not deal with the exclusion clauses set out in Article 12, which means that it does not address what has been recognised, in Article 1(D) Refugee Convention, as a 'contingent inclusion clause'. See Goodwin-Gill, G. S. and McAdam, J., *The Refugee in International Law*, 4th edn, Oxford University Press, Oxford, 2021 (hereinafter Goodwin-Gill and McAdam, *The Refugee in International Law*), p. 185, and the aforementioned judicial analysis on exclusion, Section 2.2.2.

- Any matters relating to the temporary protection directive[23], which addresses situations of mass influx of displaced persons. While temporary protection is a legal mechanism 'reserved for events of mass influx of displaced persons', it does not form part of the regime of international protection as defined in Article 2(a) QD (recast). In particular, it is not a form of subsidiary protection.

The QD (recast) sets out some uniform criteria for eligibility for both refugee protection and subsidiary protection (Articles 5, 6, 7 and 8 in particular), which will be addressed in full in Part 1. The treatment of these criteria in Part 2 is thus quite brief, with the corresponding sections in Part 1 being cross-referenced.

The analysis is supported by appendices. Appendix A contains decision trees, which are designed to encourage a structured approach to the assessment of qualification for international protection. They provide a visual overview of the criteria for qualification for international protection, and set out the questions that courts and tribunals of Member States need to ask when examining applications for international protection[24]. Further appendices list not only relevant EU primary and secondary legislation and relevant international treaties of universal and regional scope, but also all relevant case-law of the CJEU, together with the most relevant case-law of the ECtHR. In addition, the appendices contain selected jurisprudence of the courts and tribunals of EU+ countries, non-EU+ countries and international courts. These are organised according to the structure of this judicial analysis. Hyperlinks to the relevant legislation and case-law ensure that these documents are easily and quickly accessible to readers using the digital version. To enable readers to consult the QD (recast) easily, its full text is set out in Appendix F.

The QD (recast) comprises **two components**: the provisions regarding **qualification for international protection** (in Chapters II–VI) and the provisions regarding **the content of international protection** (in Chapter VII) (see also recital 12 QD (recast)). Table 3 summarises the structure of the QD (recast) and highlights in bold the elements that are addressed in this judicial analysis.

[23] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, [2001] OJ L 212 (temporary protection directive), pp. 12–23.

[24] Note that the order in which the relevant provisions of the QD (recast) are addressed in the analysis is slightly different from the order in which they are addressed in Appendix A. In the latter, the actors of persecution and the lack of protection against persecution are considered before the connection between the act of persecution or the absence of protection and one or more reasons for persecution.

Table 3: Structure of the QD (recast) and scope of this judicial analysis

Chapter I: General provisions	**Article 1: Purpose** **Article 2: Definitions** **Article 3: More favourable standards**
Chapter II: Assessment of applications for international protection	Article 4: Assessment of facts and circumstances **Article 4(4): Previous persecution or serious harm** **Article 5: International protection needs arising *sur place*** **Article 6: Actors of persecution or serious harm** **Article 7: Actors of protection** **Article 8: Internal protection**
Chapter III: Qualification for being a refugee	**Article 9: Acts of persecution** **Article 10: Reasons for persecution** Article 11: Cessation Article 12: Exclusion
Chapter IV: Refugee status	**Article 13: Granting of refugee status** Article 14: Revocation of, ending of or refusal to renew refugee status
Chapter V: Qualification for subsidiary protection	**Article 15: Serious harm** Article 16: Cessation Article 17: Exclusion
Chapter VI: Subsidiary protection status	**Article 18: Granting of subsidiary protection status** Article 19: Revocation of, ending of or refusal to renew subsidiary protection status
Chapter VII: Content of international protection	Article 20: General rules **Article 21: Protection from *refoulement*** Article 22: Information **Article 23: Maintaining family unity** **Article 24: Residence permits** Article 25: Travel document Article 26: Access to employment Article 27: Access to education Article 28: Access to procedures for recognition of qualifications Article 29: Social welfare Article 30: Healthcare Article 31: Unaccompanied minors Article 32: Access to accommodation Article 33: Freedom of movement within the Member State Article 34: Access to integration facilities Article 35: Repatriation
Chapter VIII: Administrative cooperation	Article 36: Cooperation Article 37: Staff
Chapter IX: Final provisions	Article 38: Reports Article 39: Transposition Article 40: Repeal Article 41: Entry into force Article 42: Addressees

Interpretation of the qualification directive (recast)

The QD (recast) requires eligibility for refugee protection to be addressed **before** considering eligibility for subsidiary protection[25]. The CJEU has confirmed this, stating that 'an application for subsidiary protection should not, in principle, be considered before the competent authority has reached the conclusion that the person seeking international protection does not qualify for refugee status'[26]. It has yet to rule on the specific process to determine this[27].

Being an instrument established under EU primary law (Article 78 TFEU), the matter of the correct interpretation of the QD (recast) is principally the responsibility of the CJEU. The court's judgments have binding effect in all Member States. In its case-law, the CJEU has made it clear that the QD – and by extension the QD (recast) – 'must be interpreted in the light of its general scheme and purpose, and in a manner consistent with the [Refugee] Convention and the other relevant treaties referred to in Article 78(1) of the TFEU'[28]. There are two aspects of this.

First, as to the relevance of the Refugee Convention (Convention relating to the Status of Refugees (1951), as amended by its Protocol (1967), referred to in EU asylum legislation as the 'Geneva Convention') for the interpretation of the provisions of the QD (recast) relating to refugee protection, the CJEU has held, in *Alo and Osso*, that it is clear from recitals 4, 23 and 24 QD (recast) that the Refugee Convention 'constitutes the cornerstone of the international legal regime for the protection of refugees'[29]. It underlined that 'the provisions of the directive for determining who qualifies for refugee status and the content of that status were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria'[30].

Second, as regards the relevance of the Refugee Convention to the content of international protection, the CJEU held in *Alo and Osso* that 'Chapter VII [QD (recast)], which relates to the

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25 See Article 2(f), which defines a beneficiary of subsidiary protection as a third-country national or stateless person 'who does not qualify as a refugee', and recital 33, which states that subsidiary protection 'should be complementary and additional to the refugee protection enshrined in the [Refugee] Convention'. See also Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), [2013] OJ L 180/60 (APD (recast)), Article 10(2).

26 CJEU, judgment of 8 May 2014, *HN* v *Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-604/12, EU:C:2014:302 (hereinafter CJEU, 2014, *HN*), para. 35 and paras 29–34.

27 What is said here about ordering concerns only the substantive requirements for qualifying for international protection. In actual cases, sometimes matters of procedure and/or evidence and credibility assessment may come first.

28 See, for example, CJEU, judgment of 7 November 2013, *Minister voor Immigratie en Asiel* v *X, Y and Z* v *Minister voor Immigratie en Asiel*, Joined Cases C-199/12 to C-201/12, EU:C:2013:720 (hereinafter CJEU, 2013, *X, Y and Z*), para. 40; CJEU (GC), judgment of 19 December 2012, *El Kott and Others* v *Bevándorlási és Állampolgársági Hivatal*, C-364/11, EU:C:2012:826 (hereinafter CJEU (GC), 2012, *El Kott*), para. 43; and CJEU (GC), judgment of 1 March 2016, *Kreis Warendorf* v *Ibrahim Alo and Amira Osso* v *Region Hannover*, Joined Cases C-443/14 and C-444/14, EU:C:2016:127 (hereinafter CJEU (GC), 2016, *Alo and Osso*), para. 29. The relevance of the Refugee Convention is further elaborated on in EASO, *Introduction to the CEAS – A judicial analysis*, op. cit., fn. 8, Section 3.1, pp. 61–63.

29 CJEU (GC), 2016, *Alo and Osso*, op. cit., fn. 31, para. 28. See, in relation to the original QD, CJEU (GC), judgment of 2 March 2010, *Aydin Salahadin Abdulla and Others* v *Bundesrepublik Deutschland*, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105 (hereinafter CJEU (GC), 2010, *Abdulla*), para. 28.

30 CJEU (GC), 2016, *Alo and Osso*, op. cit., fn. 31, para. 28. See also CJEU (GC), judgment of 14 May 2019, *M* v *Ministerstvo vnitra and X; X* v *Commissaire général aux réfugiés et aux apatrides*, Joined Cases C-391/16, C-77/17 and C-78/17, EU:C:2019:403 (hereinafter CJEU (GC), 2019, *M, X and X*), para. 74; and CJEU, judgment of 13 September 2018, *Shajin Ahmed* v *Bevándorlási és Menekültügyi Hivatal*, C-369/17, EU:C:2018:713 (hereinafter CJEU, 2018, *Shajin Ahmed*), para. 40.

content of international protection, is to apply, in accordance with Article 20(2) of the directive, both to refugees and to beneficiaries of subsidiary protection status, unless otherwise indicated'[31].

When interpreting the QD (recast), an 'EU judge'[32] must consider EU primary law, including the EU Charter[33], and 'other relevant treaties' as stated in Article 78(1) TFEU. The matter is dealt with in more detail in EASO, *An introduction to the Common European Asylum System for courts and tribunals – A judicial analysis*[34]. According to the CJEU, the QD (recast) must be 'interpreted in a manner consistent with the rights recognised by the Charter'[35]. How the EU Charter should be applied and interpreted follows from Articles 52–54 EU Charter.

Article 52(3) EU Charter

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Recital 16 QD (recast) emphasises 'This Directive respects the fundamental rights and observes the principles recognised in particular by the [EU Charter]'[36].

Article 78(1) TFEU does not define 'other relevant treaties', and the CJEU has yet to clarify the components of its definition. Its definition may include those treaties identified in Article 9 and recitals 17, 18, 31 and 34 QD (recast).

Table 4 provides a (non-exhaustive) list of treaties that may be relevant for the interpretation of the QD (recast)[37]. Those expressly referred to in the QD (recast) are highlighted in bold.

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31 CJEU (GC), 2016, *Alo and Osso*, op. cit., fn. 31, paras 31–33. See also CJEU, 2018, *Ahmed*, op. cit., fn. 33, paras 37 and 42; CJEU (GC), judgment of 24 April 2018, *MP* v *Secretary of State for Home Department*, C-353/16, EU:C:2018:276 (hereinafter CJEU (GC), 2018, *MP*), para. 36; and CJEU, judgment of 19 November 2020, *EZ* v *Bundesrepublik Deutschland*, C-238/19, EU:C:2020:945 (hereinafter CJEU, 2020, *EZ*), for example paras 40 and 42.

32 When national courts or tribunals are required to interpret the provisions of EU law, the national judge is required to act as an 'EU judge', as explained in EASO, *Introduction to the CEAS – A judicial analysis*, op. cit., fn. 8, p. 61.

33 Charter of Fundamental Rights of the European Union (as amended on 12 December 2007), [2007] OJ C 303/01.

34 EASO, *Introduction to the CEAS – A judicial analysis*, op. cit., fn. 8, Section 2.1.3, pp. 28–32.

35 CJEU (GC), 2016, *Alo and Osso*, op. cit., fn. 31, para. 29; and CJEU, 2018, *Ahmed*, op. cit., fn. 33. See also, in relation to the QD, CJEU (GC), judgment of 5 September 2012, *Bundesrepublik Deutschland* v *Y and Z*, Joined Cases C-71/11 and C-99/11, EU:C:2012:518 (hereinafter CJEU (GC), 2012, *Y and Z*), para. 48; and CJEU (GC), 2012, *El Kott and Others*, op. cit., fn. 31, para. 43.

36 Recital 16 also notes that the QD (recast) 'In particular … seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members and to promote the application of Articles 1, 7, 11, 14, 15, 16, 18, 21, 24, 34 and 35 of that Charter, and should therefore be implemented accordingly'.

37 While the list given in Table 4 is confined to human rights treaties, the open-ended wording of Article 78(1) would appear capable of encompassing, for example, other public international law treaties relating to nationality and statelessness, which have an important bearing on the interpretation of the directive's personal scope.

Table 4: Treaties that are or may be of relevance for the interpretation of the QD (recast)[38]

Treaties	Provision of the QD (recast)
Charter of the United Nations, 1945[39]	Article 12(1) and (2)(c), recital 31
European Convention on Human Rights, 1950[40]	Article 9(1)
Convention Relating to the Status of Refugees, 1951[41]	Articles 2(c), 5(3), 9(1), 12(1), 14(6) and 20(1), recitals 3, 4, 14, 22, 24, 29 and 33
Convention Relating to the Status of Stateless Persons, 1954[42]	
International Covenant on Civil and Political Rights, 1966[43]	
International Convention on the Elimination of All Forms of Racial Discrimination, 1965[44]	
Convention on the Elimination of All Forms of Discrimination against Women, 1979[45]	
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984[46]	
UN Convention on the Rights of the Child, 1989[47]	Recital 18
Rome Statute of the International Criminal Court, 1998[48]	
Convention on the Rights of Persons with Disabilities, 2006[49]	

38 Treaties specifically mentioned in the QD (recast) are in bold. Articles and recitals in this table refer to the article/recital of the QD (recast) expressly referring to the instrument concerned.

39 Charter of the United Nations, 26 June 1945.

40 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

41 Convention Relating to the Status of Refugees, 28 July 1951.

42 Convention Relating to the Status of Stateless Persons, 28 September 1954.

43 International Covenant on Civil and Political Rights, 16 December 1966. The CJEU has identified this as one of the international instruments for the protection of human rights of which it takes account in applying the general principles of community law in a number of cases. See, for example, CJEU, judgment of 18 October 1989, *Orkem* v *Commission*, C-374/87, EU:C:1989:387, para. 31; CJEU, judgment of 18 October 1990, *Massam Dzodzi* v *État belge*, Joined Cases C-297/88 and C-197/89, EU:C:1990:360, para. 68; CJEU, judgment of 17 February 1998, *Lisa Jacqueline Grant* v *South-West Trains Ltd*, C-249/96, EU:C:1998:63, para. 44; and CJEU (GC), judgment of 27 June 2006, *European Parliament* v *Council of the European Union*, C-540/03, EU:C:2006:429 (hereinafter CJEU, 2006, *Parliament* v *Council*), para. 37.

44 International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966.

45 Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979.

46 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984. Note the reference to this treaty in CJEU (GC), 2018, *MP*, op. cit., fn. 34, paras 52ff.

47 United Nations Convention on the Rights of the Child, 20 November 1989. CJEU (GC), judgment of 27 June 2006, *Parliament* v *Council*, op. cit., fn. 45, para. 37, explicitly referring to the UN Convention on the Rights of the Child.

48 Rome Statute of the International Criminal Court, 17 July 1998. See EASO, *Introduction to the CEAS – A judicial analysis*, op. cit., fn. 8, Section 3.4, pp. 70–80, which elaborates on the obligations arising from international human rights law and the importance of international human rights treaties with regard to the interpretation of the secondary legislation included in the CEAS.

49 Convention on the Rights of Persons with Disabilities, 13 December 2006. This instrument is also part of EU primary law. See Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23, pp. 35–36, Articles 1(1) and 2(1). Following the EU's ratification of the Convention on the Rights of Persons with Disabilities (CRPD), the CJEU has held that the CRPD may be relied upon for the purposes of interpreting secondary EU law, which must, as far as possible, be interpreted in a manner that is consistent with the CRPD. See also CJEU, judgment of 1 December 2016, *Mohamed Daouidi* v *Bootes Plus SL and Others*, C-395/15, EU:C:2016:917, paras 40–41 and the case-law cited; and CJEU, judgment of 9 March 2017, *Petya Mikova* v *Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*, C-406/15, EU:C:2017:198.

The interrelationship between EU law and the jurisprudence on the European Convention on Human Rights (ECHR)[50] is dealt with in more detail in EASO, *An Introduction to the Common European Asylum System for courts and tribunals – A judicial analysis*[51], but the following points require emphasis here.

The CJEU has stated that the texts that constitute the CEAS signify that it was conceived in a context that supports the assumption that all Member States observe fundamental rights. This includes the rights based on the Refugee Convention and its 1967 Protocol and on the ECHR[52]. The fundamental rights set out in the EU Charter form part of primary EU law.

As noted in EASO, *An introduction to the Common European Asylum System for courts and tribunals – A judicial analysis*[53], the ECHR has a certain interpretive relevance in the context of defining both persecution and serious harm. As regards persecution, Article 9(1)(a) QD (recast) refers directly to basic human rights and, in particular, the rights from which derogation cannot be made under Article 15(2) ECHR (see Section 1.4.2 below). In relation to serious harm, the CJEU has ruled that Article 15(b) QD (recast), which states that serious harm consists of, inter alia, 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin', 'corresponds, in essence, to Article 3 of the ECHR'[54] (see Section 2.4.3 below). In turn, the ECtHR has sometimes addressed points of correspondence between Article 3 ECHR and the subsidiary protection regime[55].

In addition to direct references to the ECHR or rights corresponding to ECHR rights in Articles 9 and 15 QD (recast), ECHR rights may also be relevant to the interpretation of the fundamental rights set out in the EU Charter if the rights of the EU Charter correspond to those guaranteed by any of the articles of the ECHR[56]. As the CJEU recalled in *MP*, 'in accordance with Article 52(3) of the Charter, in so far as the rights guaranteed by Article 4 thereof correspond to those guaranteed by Article 3 of the ECHR, the meaning and scope of those rights are the same as those laid down by Article 3 of the ECHR'[57].

Besides the ECHR and the jurisprudence of the ECtHR as sources of interpretation in the specific respects identified above, 'horizontal judicial dialogue' with regard to the interpretation of EU law is also important, which is underlined in EASO, *An introduction to*

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50 See, for example, CJEU (GC), judgment of 17 February 2009, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, C-465/07, EU:C:2009:94 (hereinafter CJEU (GC), 2009, *Elgafaji*), para. 28; and CJEU (GC), judgment of 18 December 2014, *Mohamed M'Bodj v Etat belge*, C-542/13, EU:C:2014:2452 (hereinafter CJEU (GC), 2014, *M'Bodj*), para. 40.

51 EASO, *Introduction to the CEAS – A judicial analysis*, op. cit., fn. 8, Section 3.4.1, pp. 71–75.

52 CJEU (GC), judgment of 21 December 2011, *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, Joined Cases C-411/10 and C-493/10, EU:C:2011:865 (hereinafter CJEU (GC), 2011, *NS and ME*), para. 78.

53 EASO, *Introduction to the CEAS – A judicial analysis*, op. cit., fn. 8, Section 3.4.1, pp. 71–75.

54 CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 28; and CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 38. Note that both Article 3 ECHR and Article 4 EU Charter provide that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' In CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 38, the court cited ECtHR (GC), judgment of 13 December 2016, *Paposhvili v Belgium*, No 41738/10, CE:ECHR:2016:1213JUD004173810 (hereinafter ECtHR (GC), 2016, *Paposhvili*), paras 174–175, for its guidance on health cases arising under Article 3 ECHR.

55 For example, the ECtHR in its case-law has considered the extent to which subsidiary protection is comparable to protection under Article 3 ECHR. See, for example, ECtHR, judgment of 28 June 2011, *Sufi and Elmi v United Kingdom*, Nos 8319/07 and 11449/07, CE:ECHR:2011:0628JUD000831907 (hereinafter ECtHR, 2011, *Sufi and Elmi*), paras 225–226.

56 Article 52(3) EU Charter and CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 28.

57 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 37.

the Common European Asylum System for courts and tribunals – A judicial analysis[58]. For members of courts and tribunals tasked with acting as 'EU judges' and interpreting provisions of the QD (recast), the national case-law of other Member States may be relevant, especially if the interpretation of a certain provision has not yet been clarified by the CJEU. Indeed, in that context, national case-law has a relevance that the ECtHR does not because, whereas national courts and tribunals interpret EU law, the ECtHR has jurisdiction to interpret only ECHR law. National case-law of other Member States may also provide examples of how to apply a particular CJEU judgment to a specific case. However, when a question concerning the interpretation of the QD (recast) is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on that question is necessary to enable it to give judgment, request the CJEU to make a ruling thereon. If there is no judicial remedy under national law against that court or tribunal decision, it must refer the matter to the CJEU[59].

The interpretation of the legislative provisions of the CEAS and the roles of the CJEU and national courts and tribunals are addressed in more depth in EASO, *An introduction to the Common European Asylum System for courts and tribunals – A judicial analysis*[60].

Best interests of the child

The principle of the best interests of the child is a general principle of (international and) EU law, as set out in Article 24(2) EU Charter.

Article 24(2) EU Charter

In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

The principle is incorporated in the QD (recast) in recitals 18 and 19, the last sentence of recital 27, recital 38, Article 20(5) and Article 31. There should be no doubt that, in the case of an applicant who is a child, the principle of the best interests of the child must be a primary consideration when assessing the qualification criteria for international protection, even when the principle is not expressly mentioned[61].

Further evidence of the workings of this principle in the QD (recast) are the references in Article 4(3)(c) QD (recast) to the relevance of age when assessing an application for international protection and in Article 9(2)(f) QD (recast) to the fact that acts of persecution can take the form of 'acts of a … child-specific nature'. Child-specific acts of persecution must be assessed through the lens of vulnerability, as minors who are victims of acts of persecution should be considered particularly vulnerable per se[62].

58 EASO, *Introduction to the CEAS – A judicial analysis*, op. cit., fn. 8, Section 3.6, pp. 84–89.

59 Article 267 TFEU.

60 EASO, *Introduction to the CEAS – A judicial analysis*, op. cit., fn. 8, Section 3, pp. 61–89.

61 In CJEU, judgment of 6 June 2013, *MA, BT and DA* v *Secretary of State for the Home Department*, C-648/11, EU:C:2013:367 (hereinafter CJEU, 2013, *MA, BT and DA*), the CJEU makes clear that, even where no express mention of the best interests of the minor is made in a provision of secondary EU law, the effect of Article 24(2) EU Charter, in conjunction with Article 51(1) thereof, is that the child's best interests must be a primary consideration in the interpretation and application of that provision.

62 See EASO, *Vulnerability in the context of applications for international protection – Judicial analysis*, 2021 (hereinafter EASO, *Vulnerability – Judicial analysis*), Section 2.4 and Part 6.

The principle of the best interests of the child is also relevant to the interpretation and application of procedural rules and standards[63]. For more details of this principle as applied to qualification for refugee status, see Sections 1.4.4.8 and 1.6.2.4.2 below.

Application for international protection

Article 2(h) QD (recast) defines an 'application for international protection' as follows.

> **Article 2(h) QD (recast)**
>
> … a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately.

This definition, together with the definition of 'applicant' in Article 2(i) QD (recast)[64], makes it clear that an applicant must be a third-country national or stateless person. As explained in Sections 1.3.1 and 1.3.3 below, this definition means that nationals of EU Member States – that is, EU citizens – are excluded from the directive's definitions of both refugee status and subsidiary protection status[65]. Article 4(3) requires an individual assessment of each application[66].

According to Article 2(a) QD (recast), **'international protection' means refugee status and subsidiary protection status as defined in Article 2(e) and 2(g) QD (recast)**. By virtue of Article 2(h), a request for either status constitutes an application for international protection. While its wording conveys that a request can be made for one or the other ('which can be understood to seek refugee status **or** subsidiary protection status' (emphasis added)), the directive envisages that subsidiary protection will be considered only after an applicant has been determined not to be a refugee. This is indicated by both the use of the term 'subsidiary' and the wording of Article 2(f) QD (recast) (which defines a person eligible for subsidiary protection as a person 'who does not qualify as a refugee')[67]. Moreover, the CJEU has highlighted that, since applicants for international protection may not be 'in a position to ascertain the kind of protection applicable to their application'[68], it is for the authorities of the Member States to 'determine the status that is most appropriate to the applicant's situation'[69]. It is for the applicant to make an application, but it is then for the determining authority of the Member State to decide whether the person meets the requirements for refugee status or, if not, subsidiary protection status.

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63 EASO, *Vulnerability – Judicial analysis*, op. cit., fn. 64, and EASO, *Asylum Procedures and the Principle of* Non-refoulement *– Judicial analysis*, 2018 (hereinafter EASO, *Asylum Procedures – Judicial analysis*), Sections 3.4 and 4.2.8.

64 Article 2(i) QD (recast) reads '"applicant" means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken'.

65 Applications by EU citizens fall outside the scope of this directive; see recital 20. Their situation is governed by Protocol No 24 on asylum for nationals of Member States of the European Union (also known as the Aznar Protocol).

66 CJEU, judgment of 4 October 2018, *Ahmedbekova v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, C-652/16, EU:C:2018:801 (hereinafter CJEU, 2018, *Ahmedbekova*), para. 43.

67 CJEU, 2014, *HN*, op. cit., fn. 29, paras 29–30. See also recital 33.

68 CJEU, 2014, *HN*, op. cit., fn. 29, para. 34.

69 Ibid.

The QD (recast) does not contain a definition of **territorial scope**, but Article 3(1) APD (2013/32/EU) (APD (recast))[70] does define the territorial scope[71] of an application for international protection. It specifies that an application must be made 'in the territory, including at the border, in the territorial waters or in the transit zones of the Member States'. The APD (recast) does not apply to requests for diplomatic or territorial asylum submitted to representations of Member States (Article 3(2) APD (recast))[72]. The CJEU has yet to rule on this matter, but it may be that this definition of the territorial scope will be seen to also apply for QD (recast) purposes[73].

More favourable standards (Article 3)

Article 3 QD (recast) provides the following.

Article 3 QD (recast)

Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.

Recital 14 QD (recast) states as follows.

Recital 14 QD (recast)

Member States should have the power to introduce or maintain more favourable provisions than the standards laid down in [the QD (recast)] for third-country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention, or a person eligible for subsidiary protection.

Third-country nationals or stateless persons 'who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a **discretionary basis** on compassionate or humanitarian grounds fall outside the scope of [the QD]' (recital 15, emphasis added). This was confirmed by the CJEU in its judgments *B and D*[74] and *M'Bodj*[75].

[70] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), [2013] OJ L 180/60 (APD (recast)). Particular attention should be paid to recitals 49 and 50, as well as to Articles 45 and 46(1)(c) APD (recast).

[71] EASO, *Asylum Procedures – Judicial analysis*, op. cit., fn. 65, Section 2.2.

[72] CJEU (GC), judgment of 7 March 2017, *X and X* v *Etat belge*, C-638/16 PPU, EU:C:2017:173 (hereinafter CJEU (GC), 2017, *X and X* v *Etat belge*), paras 49 and 51.

[73] In addition to Article 3, Articles 2(b) and 6 APD (recast) also contain provisions relating to applications for international protection.

[74] CJEU (GC), judgment of 9 November 2010, *Bundesrepublik Deutschland* v *B and D*, Joined Cases C-57/09 and C-101/09, EU:C:2010:661, para. 118.

[75] CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 46.

In the judgment *B and D*, the CJEU decided on the preliminary question of whether Article 3 QD must be interpreted as restricting a Member State (in that case Germany) from recognising that a person excluded from being a refugee pursuant to the exclusion clause in the QD has a right of asylum under its constitutional law. The CJEU clarified that 'in view of the purpose underlying the grounds for exclusion [in the QD], which is to maintain the credibility of the protection system provided for in [the QD] in accordance with the [Refugee] Convention', a provision granting refugee status to such a person would be incompatible with the QD[76]. However, the CJEU confirmed that 'Member States may grant a right of asylum under their national law to a person who is excluded from refugee status pursuant to Article 12(2) of the directive, provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive'[77].

The case of *M'Bodj*[78] concerned a third-country national whose application for international protection had been rejected. He had, however, been granted leave to reside in the territory of the Member State (in this case Belgium) under national legislation, as he was suffering from an illness occasioning a real risk to his life or physical integrity and there was no appropriate medical treatment in his country of origin. The question before the CJEU was whether he was entitled to social welfare and healthcare benefits under the QD. The CJEU stated that such an applicant's situation does not fall within the scope of serious harm as defined in Article 15 QD unless they are intentionally deprived of healthcare. Accordingly, the CJEU turned to consider whether the phrase 'in so far as those standards are compatible with [the QD]' in Article 3 QD precludes Member States from introducing or retaining a provision granting subsidiary protection in this situation[79]. The CJEU concluded that 'it would be contrary to the general scheme and objectives of [the QD] to grant refugee status and subsidiary protection status to third country nationals in situations which have no connection with the rationale of international protection'[80]. Therefore, a provision granting leave to reside in this situation 'cannot be regarded, for the purpose of Article 3 [QD], as introducing a more favourable standard for determining who is eligible for subsidiary protection'[81]. In addition, the CJEU reiterated that persons in such a situation who are granted leave to reside 'on a discretionary basis on compassionate or humanitarian grounds' do not fall within the scope of the QD[82].

The CJEU came to the same conclusion – that requests for other kinds of protection fall outside the scope of the QD – in *Abdida*[83], although its judgment in this case related to the returns directive (2008/115/EC)[84].

76 CJEU (GC), 2010, *B and D*, op. cit., fn. 76, para. 115.
77 CJEU (GC), 2010, *B and D*, op. cit., fn. 76, para. 121; see also paras 113–120.
78 CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52.
79 Ibid., para. 43.
80 CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 44.
81 CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 45.
82 CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 46.
83 CJEU (GC), judgment of 18 December 2014, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida*, C-562/13, EU:C:2014:2453 (hereinafter CJEU (GC), 2014, *Abdida*).
84 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L 348/98.

In *Ahmedbekova*, the CJEU confirmed its previous guidance provided in *B and D* and *M'Bodj*. In particular, the court confirmed that Article 3 applies, inter alia, to standards that grant such refugee or subsidiary protection status. One of the questions the referring court asked was whether Article 3 QD (recast) must be interpreted as permitting a Member State to provide for an extension of the scope of international protection to members of the family of the person granted such protection. The CJEU found that:

> in the present case, the possibility of granting refugee status or subsidiary protection status to Mrs Ahmedbekova's son and husband on account of her refugee status would, due to the need to maintain the family unity of those concerned, be consistent with the rationale of international protection underlying the granting of that status[85].

In *LW*, the Grand Chamber of the CJEU confirmed the position it took in *Ahmedbekova*: the automatic granting of refugee status, under national law, to the family members of a person with refugee status is not, a priori, without connection to the rationale of international protection[86]. It considered such a connection to have been created by the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons of 25 July 1951[87], which resulted in the adoption of the Refugee Convention. First, by highlighting in the final act that 'the unity of the family ... is an essential right of the refugee' and recommendings that the signatory states 'take the necessary measures for the protection of the refugee's family, especially with a view to ... ensuring that the unity of the refugee's family is maintained', the 'authors of that convention have created a close connection between those measures and the rationale of international protection'[88]. The CJEU Grand Chamber further noted that 'the existence of that connection has, moreover, been confirmed on numerous occasions by UNHCR bodies'[89] Second, the QD (recast) itself 'recognises the existence of such a connection by laying down, in general terms in Article 23(1), an obligation for Member States to ensure that the family unity of the beneficiary of international protection is maintained[90]. However, the Grand Chamber stated that any such measures must ensure compliance with the requirement in Article 23(2)[91]. The court identified two provisos. First, the child must not be 'caught by a ground for exclusion referred to in Article 12(2) of that directive'. Second, the child must:

> not, through his or her nationality or any other element characterising his or her personal legal status, [be] entitled to better treatment in that Member State than that resulting

85 CJEU, 2018, *Ahmedbekova*, op. cit., fn. 68, para. 73. See also para. 74, stating that this was subject to the proviso 'that they do not fall within the scope of a ground for exclusion laid down in Article 12 of that directive and that their situation is, due to the need to maintain family unity, consistent with the rationale of international protection'.

86 CJEU (GC), judgment of 9 November 2021, *LW v Bundesrepublik Deutschland*, C-91/20, EU:C:2021:898 (hereinafter CJEU (GC), 2021, *LW*), para. 41, referring to CJEU, 2018, *Ahmedbekova*, op. cit., fn. 68, para. 72.

87 Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951.

88 CJEU (GC), 2021, *LW*, op. cit., fn. 88, para 42.

89 CJEU (GC), 2021, *LW*, op. cit., fn. 88, para 42.

90 CJEU (GC), 2021, *LW*, op. cit., fn. 88, para 43.

91 CJEU (GC), 2021, *LW*, op. cit., fn. 88, paras 39, 45–48 and 52. Article 23(2) QD (recast) provides that 'Member States shall ensure that family members of the beneficiary of international protection who do not individually qualify for such protection are entitled to claim the benefits referred to in Articles 24 to 35, in accordance with national procedures and as far as is compatible with the personal legal status of the family member.'

from the grant of refugee status. It is not relevant in that regard to ascertain whether it is possible and reasonably acceptable for the child and the child's parents to move to that other third country[92].

Several principles illustrated in the *B and D*, *M'Bodj*, *Abdida*, *Ahmedbekova* and *LW* judgments can be drawn on to construct a framework of what types of national protection fall outside the scope of the QD (recast).

- While it remains possible for Member States to have national rules under which a right of asylum is granted to persons who fall outside the scope of the QD (recast), a clear distinction must be drawn between national protection and international protection under the QD (recast).
- In general, international protection covered by the QD (recast) requires an actor of persecution or serious harm (Article 6) (see Sections 1.7 and 2.6 below). This implies that cases in which no actor of persecution or serious harm can be identified generally have no connection with the rationale of international protection. Therefore, deprivation of basic human rights caused by extreme poverty, such as after a catastrophic event, does not meet the requirements of the QD (recast) for international protection unless attributable to an actor of persecution or serious harm[93].
- The granting of national protection status to a third-country national or stateless person who has had a traumatic experience or incident in their country of origin entirely unrelated to a current fear of being persecuted or a current real risk of suffering serious harm is likely to constitute protection outside the scope of Article 3 QD (recast). National protection status could be considered on a discretionary basis on compassionate or humanitarian grounds, but such a situation does not fall within the scope of the QD (recast). As a result, the directive is not applicable to those situations.
- By contrast, where Member States grant refugee or subsidiary protection status to family members of a person to whom that status was granted under the system established by the QD (recast), that status falls within the scope of Article 3 QD (recast) because of its connection to the rationale for international protection.
- For the granting of international protection to a child family member of a person who has refugee status or is a beneficiary of subsidiary protection status to fall within the scope of Article 3 QD(recast), two provisos must be met. First, 'the child [must] not [be] caught by a ground for exclusion referred to in Article 12(2) of that directive'. Second, 'the child [must] not, through his or her nationality or any other element characterising his or her personal legal status, [be] entitled to better treatment in that Member State than that resulting from the grant of refugee status. It is not relevant in that regard to ascertain whether it is possible and reasonably acceptable for the child and the child's parents to move to that other third country'[94].

The CJEU has not yet made a final decision on when more favourable standards are within the scope of the QD (recast), particularly when the issue concerns more favourable rules that govern the requirements for qualification for refugee or subsidiary protection. On the one hand, the purpose of the QD (recast) is to introduce common criteria (see recitals 24

92 CJEU (GC), 2021, *LW*, op. cit., fn. 88, para. 62.
93 For further discussion of these issues, see Section 3.4 below.
94 CJEU (GC), 2021, *LW*, op. cit., fn. 88, para. 62.

and 34) and a higher level of approximation of the rules on the recognition and content of international protection (see recital 10). On the other hand, many of the provisions of the QD (recast) governing qualification for international protection are mandatory. In that regard, CJEU Advocate General de la Tour has pointed out that a Member State may not:

> use its discretion to define … common concepts and criteria differently and to adopt legislation under which refugee status or subsidiary protection status may be granted on grounds other than those expressly referred to in [the QD (recast)] and on the basis of an assessment of an application which is not individual[95].

The Slovenian Administrative Court held that it could not introduce higher standards for protection than those defined in Article 9 QD (recast) on acts of persecution, because Article 9(1) QD (recast) uses the expression 'must be'. Moreover, it noted that the QD (recast) is no longer based on minimum standards, but is now based on common standards[96].

[95] CJEU, Opinion of Advocate General de la Tour of 12 May 2021, *LW v Bundesrepublik Deutschland*, C-91/20, EU:C:2021:384, para. 104.

[96] Administrative Court (Upravno Sodišče) (Slovenia), judgment of 8 January 2014, *Berisha and Pireva*, I U 766/2013, SI:UPRS:2014:I.U.766.2013, para. 42. This judgment was upheld by the Supreme Court in its judgment of 6 March 2014, I Up 79/2014.

Part 1. Qualification for refugee protection

This part has 10 sections, as set out in Table 5. They address the various requirements for qualification for refugee protection. Articles 5, 6, 7 and 8 QD (recast) set out criteria that are common to qualification for both refugee protection and subsidiary protection, but the focus of this part is on refugee protection.

Table 5: Structure of Part 1

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Appendix A contains decision trees and a list of requirements aiming to summarise, inter alia, the ground covered in Part 1.

1.1. Introduction

The provisions in the QD (recast) regarding the criteria for qualifying as a refugee and the granting of refugee status largely reflect those of the Refugee Convention. Recital 4 QD (recast) identifies the Refugee Convention as 'the cornerstone of the international legal regime for the protection of refugees'. Recital 24 QD (recast) notes that 'It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the [Refugee] Convention'. Recital 25 QD (recast) states that 'In particular, it is necessary to introduce common concepts of protection needs arising *sur place*, sources of harm and protection, internal protection and persecution, including the reasons for persecution'.

The CJEU jurisprudence has repeatedly underlined the importance of these recitals[97]. It has frequently stated that the Refugee Convention 'constitutes the cornerstone of the international legal regime for the protection of refugees' and that the QD and the QD (recast) aim to guide the authorities of the Member States in the application of the Refugee Convention 'on the basis of common concepts and criteria'[98].

[97] See, for example, CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 39; and CJEU (GC), 2016, *Alo and Osso*, op. cit., fn. 31, para. 28.

[98] See, for example, CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 52; CJEU (GC), judgment of 17 June 2010, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal*, C-31/09, EU:C:2010:351, para. 37; CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 47; CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 39; and CJEU (GC), 2016, *Alo and Osso*, op. cit., fn. 31, para. 28. This last judgment makes the same statement as the QD (recast). See also recital 23 QD (recast).

Recital 22 QD (recast) indicates that UNHCR 'may provide valuable guidance for Member States when determining refugee status according to Article 1 of the [Refugee] Convention'[99]. The role of UNHCR is further explained in EASO, *An introduction to the Common European Asylum System for courts and tribunals – A judicial analysis*[100].

1.2. Who is a refugee?

Article 2(d) QD (recast) defines a refugee as follows.

Article 2(d) QD (recast)

... a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.

The definition set out in Article 2(d) QD (recast) largely corresponds to the definition of the term 'refugee' in Article 1A(2) Refugee Convention[101] except for two significant differences. One relates to personal scope: unlike the Refugee Convention, which applies to 'any person', Article 2(d) is **limited to third-country nationals** and stateless persons (see the beginning of Section 1.3, and Section 1.3.1). The other significant difference relates to persons with more than one nationality (see Section 1.3.2.7)[102].

In common with the position taken in the UNHCR *Handbook*[103], the QD (recast) makes a distinction between 'being a refugee' and 'refugee status'[104]. Recital 21 QD (recast) states

99 See also CJEU, judgment of 30 May 2013, *Zuheyr Freyeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerski savet*, C-528/11, EU:C:2013:342, para. 44, holding, with regard to UNHCR publications, that 'it should be recalled that documents from the UNHCR are among the instruments likely to enable the Member States to assess the functioning of the asylum system in the Member State indicated as responsible by the [Dublin II regulation]' and that those documents 'are particularly relevant in that assessment in the light of the role conferred on the UNHCR by the [Refugee] Convention'.

100 EASO, *Introduction to the CEAS – A judicial analysis*, op. cit., fn. 8, Section 3.1, pp. 62–63.

101 According to Article 1A(2) Refugee Convention and its 1967 Protocol, 'the term "refugee" shall apply to any person: Who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.'

102 There are other minor differences: for example, the inclusion of a reference to exclusion grounds in Article 12, the replacement of the term 'not having a nationality' with the term 'stateless person' and the replacement of the semicolon before 'or who, not having a nationality' with a comma.

103 UNHCR, *Handbook on procedures and criteria for determining refugee status and guidelines on international protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 1979, reissued February 2019, HCR/1P/4/ENG/REV. 4 (hereinafter UNHCR, *Handbook*), para. 28: 'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.'

104 See also Section 4.1.1.1 below.

'The recognition of refugee status is a declaratory act'. In *M, X and X*, the CJEU noted that 'As can be seen from recital 21 of that directive, that recognition is declaratory and not constitutive of being a refugee'[105]. Article 2 distinguishes between the terms 'refugee', which is defined in Article 2(d), and 'refugee status', which is defined in Article 2(e). Article 2(d) is concerned with the requirements for qualifying as a refugee. As stated by the CJEU in *M, X and X*, 'within the system introduced by [the QD (recast)], a third-country national or a stateless person who satisfies the material conditions set out in Chapter III of that directive is, on that basis alone, a refugee for the purposes of Article 2(d) thereof and Article 1(A) of the [Refugee] Convention'[106].

Article 2(e), by contrast, is concerned not with what constitutes being a refugee but with recognition[107]. It provides that '"refugee status" means the recognition by a Member State of a third-country national or stateless person as a refugee'. The term thus refers to the status granted through formal recognition by a Member State in the light of the criteria set out in the QD (recast), with the result that the person concerned is 'entitled … to all the rights and benefits laid down in Chapter VII of that directive'[108]. As the CJEU noted in *M, X and X*:

> the fact of being a 'refugee' for the purposes of Article 2(d) [QD (recast)] and Article 1(A) of the [Refugee] Convention is not dependent on the formal recognition of that fact through the granting of 'refugee status' as defined in Article 2(e) of that directive, read in conjunction with Article 13 thereof[109].

This issue is discussed further in Part 4.

Subsequent articles of the QD (recast) contain more detailed requirements relating to several elements of the definition in Article 2(d). These concern primarily Articles 9 (acts of persecution), 6 (actors of persecution), 7 (actors of protection), 10 (reasons for persecution) and 5 (*sur place* activities). Article 4 also contains some related provisions. However, no article contains more detailed requirements concerning well-founded fear. Another provision of relevance in this context, in Article 8, albeit not mandatory for Member States, contains detailed requirements for when internal protection should be considered available.

1.3. Personal and territorial scope

The definition of the term 'refugee' in Article 2(d) QD (recast) clarifies that the personal scope of the directive is **limited to third-country nationals or stateless persons**. These limits are discussed in Sections 1.3.1 and 1.3.2 in relation to third-country nationals and nationality, and Sections 1.3.3 and 1.3.4 in relation to stateless persons.

As regards territorial scope, the QD (recast) applies to applicants who are **outside their country of nationality**, in the case of third-country nationals, **or outside their country of former habitual residence**, in the case of stateless persons. This second requirement for being a refugee is discussed in Section 1.3.5.

105 CJEU (GC), 2019, *M, X and X*, op. cit., fn. 33, para. 85.
106 CJEU (GC), 2019, *M, X and X*, op. cit., fn. 33, para. 86; see also paras 76, 87, 90, 92, 97, 99, 106 and 109–110.
107 CJEU (GC), 2019, *M, X and X*, op. cit., fn. 33, para. 85.
108 CJEU (GC), 2019, *M, X and X*, op. cit., fn. 33, paras 79–92, especially para. 91.
109 CJEU (GC), 2019, *M, X and X*, op. cit., fn. 33, para. 92.

Section 1.3 has five subsections, as set out in Table 6.

Table 6: Structure of Section 1.3

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1.3.1	Third-country nationals	44
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1.3.1. Third-country nationals

Defining refugees as third-country nationals means that nationals of EU Member States – that is, EU citizens – are excluded from the refugee definition under the QD (recast). It remains open to nationals of EU Member States to apply for refugee status in another Member State under the Refugee Convention.

Their applications are governed by the protocol (No 24) on asylum for nationals of Member States of the European Union (also known as the Aznar Protocol)[110], as indicated in recital 20 QD (recast)[111]. This protocol's sole article provides that 'Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters'. This issue very rarely arises; however, in such cases the protocol provides that 'any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only in the following cases'[112]:

- where the Member State of which the applicant is a national takes measures derogating in its territory from its obligations under the ECHR;
- where suspension proceedings under Article 7(1) Treaty on European Union (TEU) have been initiated by the Council[113];
- where the Council has adopted a decision under Article 7(1) or (2) (serious and persistent breach by the Member State concerned of the values referred to in Article 2 TEU);
- where the Member State to which the application is made unilaterally decides to accept the application for processing; in such cases, the Council must be informed and the application must be dealt with on the basis that it is manifestly unfounded[114].

110 Protocol No 24 on asylum for nationals of Member States of the European Union, op. cit., fn. 67.

111 Recital 20 QD (recast) states 'This Directive is without prejudice to the Protocol on Asylum for nationals of Member States of the European Union as annexed to the Treaty on European Union (TEU) and the TFEU.'

112 See, for example, Council of State (Conseil d'État) (France), judgment of 30 December 2009, *OFPRA c M. C.*, No 305226, FR:CESSR:2009:305226.20091230; and National Court of Asylum Law (Cour nationale du droit d'asile (CNDA)) (France), judgment of 30 March 2011, *M. L.*, No 10013804, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2011*, 2012, pp. 17–18. See also Court of Appeal (England and Wales, United Kingdom), judgment of 30 July 2021, *ZV (Lithuania) v Secretary of State for the Home Department*, [2021] Court of Appeal of England and Wales (EWCA) Civ 1196.

113 Treaty on European Union (consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009)), [2012] OJ C 326/13. This is a complex and extreme process requiring a reasoned proposal supported by one third of Member States and a four-fifths majority of the Council members, with the consent of the European Parliament, in cases of clear risk of serious breach of the area of freedom, security and justice pursuant to Article 2 TEU. It has never been invoked in practice.

114 Sole article of Protocol No 24, op. cit., fn. 67. For further discussion on the protocol, see EASO, *Introduction to the CEAS – A judicial analysis*, op. cit., fn. 8, Section 2.1.4, p. 33.

1.3.2. Nationality

The term 'nationality' denotes the legal tie between the individual and the state. It is important not to confuse this meaning with the wider meaning given to the term as part of the definition of a refugee: as one of the five reasons for persecution[115].

As noted above, being either a third-country national or a stateless person is a prerequisite for an applicant to qualify for international protection under EU law[116]. The decision-maker must therefore identify the applicant's nationality/ies or lack thereof. Hence, even though courts or tribunals dealing with applications for international protection may not have specific jurisdiction to determine the nationality of an applicant, they are required to make an assessment of the country/ies of which the applicant is a national in order to assess an application.

In many applications for international protection lodged by third-country nationals, the nationality of an applicant will not be in dispute, but there are cases in which this is very much a live issue. The CJEU has not yet been asked, in the context of the CEAS, to respond to the question of how to determine a case in which the nationality of the applicant is disputed or indeterminate or in which the applicant has changed their nationality[117]. National case-law on such issues is limited. The national court or tribunal member must come to a decision as to whether a person's stated nationality can be accepted for the purposes of the assessment of qualification for international protection in accordance with Article 4 QD (recast) on the assessment of facts and circumstances[118].

In this regard, members of courts or tribunals may take the following into consideration.

1.3.2.1. States' national legislation regarding formal attribution of nationality

It is an established principle of international law that every state determines who its nationals are under its own law[119]. This has to be recognised by other states insofar as it is consistent

[115] See Articles 2(d) and 10(1)(c) QD (recast) and Section 1.6.2.3 below for the discussion of nationality as one of the five reasons for persecution.

[116] Protocol No 24 on asylum for nationals of Member States of the European Union, op. cit., fn. 67. See also EASO, *Evidence and Credibility Assessment – Judicial analysis*, op. cit., fn. 23, Part 5.1.

[117] In CJEU, judgment of 23 May 2019, *Mohammed Bilali v Bundesamt für Fremdenwesen und Asyl*, C-720/17, EU:C:2019:448 (hereinafter CJEU, 2019, *Bilali*), the court was concerned with a decision to revoke subsidiary protection status under Articles 16 and 19(1) QD (recast), which had been granted to an applicant who had later been found by the determining authority to have given a false nationality, but there was no consideration of the rules governing acquisition or loss of nationality.

[118] For further detail, see EASO, *Evidence and Credibility Assessment – Judicial analysis*, op. cit., fn. 23, Part 5.1.

[119] Permanent Court of International Justice, Advisory Opinion No 4 of 7 February 1923, *Nationality Decrees Issued in Tunis and Morocco*. See also CJEU, judgment of 2 March 2010, *Janko Rottmann v Freistaat Bayern*, C-135/08, EU:C:2010:104 (hereinafter CJEU, 2010, *Rottmann*), para. 39; and CJEU, Opinion of Advocate General Maduro of 30 September 2009, *Janko Rottmann v Freistaat Bayern*, C-135/08, EU:C:2009:588, para. 17.

with applicable international conventions, customary international law and other principles of law generally recognised with regard to nationality[120].

The **predominant modes of acquiring nationality** are by descent from a national and/or by birth within the territory of a particular state, and naturalisation, which is usually based upon habitual residence and fulfilment of integration requirements or other real connections with a state[121].

1.3.2.2. Nationality *ex lege*

Being a national by operation of law means that the individual concerned is *ex lege*, or **automatically**, considered a national. Assessment of whether there has been automatic acquisition of nationality places focus on the national legislation and practices of the country of origin[122]. The fact that a person might have a possible entitlement to nationality in view of the eligibility requirements for naturalisation based on discretionary criteria is normally considered irrelevant, since this does not constitute current or actual nationality[123], as discussed in the next section.

1.3.2.3. Current or actual nationality

The CJEU has yet to address the issue of the temporal scope of nationality in the context of Article 2(d) QD (recast). Nevertheless, on both a literal and a purposive construction, nationality in this context would appear to mean current or actual nationality. The definition of a refugee in Article 2(d) (like that in Article 1A(2) Refugee Convention) employs the present tense ('is outside …', etc.). Placing focus on whether an applicant currently possesses a nationality would also appear to serve the principle of legal certainty, since the alternative would require a predictive assessment of 'potential' nationality with no clear parameters. Thus, it would appear that an individual's nationality is to be assessed as at the time of decision on

[120] International Court of Justice (ICJ), judgment of 6 April 1955, *Nottebohm (Liechtenstein v Guatemala)*, pp. 4 and 20. See, for example, Weis, P., *Nationality and Statelessness in International Law*, 2nd edn, Brill, Leiden, 1979; and Hailbronner, K., 'Nationality in public international law and European law', in Baubock, R, Ersbøll, E., Groenendijk, K. and Waldrauch, H. (eds), *Acquisition and loss of nationality policies and trends in 15 European states, Vol. 1: Comparative analyses*, Amsterdam University Press, Amsterdam, 2006, p. 52 (1.2) (hereinafter Hailbronner, 'Nationality in public international law and European law'). The CJEU's approach in several cases outside the context of asylum is to apply general principles of international law except where there is a connection with EU law through the impact on EU citizenship. See CJEU, Opinion of Advocate General Maduro, 2009, *Rottmann*, op. cit., fn. 119, paras 23 and 29–34; CJEU, 2010, *Rottmann*, paras 14–21 and 48–58, especially paras 48 and 50–54; CJEU, Opinion of Advocate General Mengozzi of 12 July 2018, *MG Tjebbes et al v Minister van Buitenlandse Zaken*, C-221/17, EU:C:2018:572, paras 55 and 122; and CJEU, judgment of 12 March 2019, *M.G. Tjebbes et al v Minister van Buitenlandse Zaken*, C-221/17, EU:C:2019:189, paras 2–6 and 30–31.

[121] Hailbronner, 'Nationality in public international law and European law', op. cit., fn. 120.

[122] See, for example, League of Nations, Protocol relating to a Certain Case of Statelessness, 12 April 1930, Article 1; United Nations General Assembly (UNGA), Convention on the Reduction of Statelessness, 30 August 1967, Articles 1(a) and 4(a); Council of Europe, Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, 6 May 1963, Article 2(2); and Council of Europe, European Convention on Nationality, 6 November 1997, Articles 6(1), 6(2)(a) and 14. See also Batchelor, C. A., 'Statelessness and the problem of resolving nationality status', *International Journal of Refugee Law*, Vol. 10, No 1-2, 1998, pp. 156 and 171.

[123] UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, para. 50 (hereinafter UNHCR, *Stateless Persons Handbook*), para. 50.

their application for international protection. This would appear to mean that an individual who is part way through a process of acquiring nationality cannot be considered a national[124].

1.3.2.4. Nationality in law and practice

Establishing nationality is not simply a matter of consulting the nationality legislation of the relevant state. When seeking to establish whether an individual is or is not considered a national under operation of the law of a particular state, the interpretation of the national law concerned must also encompass ministerial decrees and 'customary practice'[125]. In that sense, the High Administrative Court of North Rhine-Westphalia (Germany) ruled that a person who has, according to the state practice of the Ethiopian authorities (which is based on an incorrect application of the law), *de facto* lost their Ethiopian nationality cannot per se be considered an Ethiopian national, as long as it is not established that they can immediately regain nationality[126]. At the same time, the Court of Appeal (England and Wales, United Kingdom) judged that an applicant who has an apparent automatic entitlement to nationality, but denies it, can be required to take reasonable steps to obtain recognition and evidence of their nationality[127].

1.3.2.5. Indeterminate nationality

There may be cases in which the applicant's nationality cannot be established. Such cases may arise, for example, because of a lack of evidence or too great a degree of doubt, or where the case involves a claim that the applicant was born in transit or was never told their nationality by their deceased parents. The Belgian Council for Alien Law Litigation (Raad voor Vreemdelingenbetwistingen / Conseil du contentieux des étrangers) held, in a case regarding an applicant who claimed to be of Somali nationality, but was born and had lived in Djibouti, that if the nationality of an applicant cannot be established the country of habitual residence should be taken into account. According to the Belgian Council for Alien Law Litigation, the decision-maker had neglected to examine whether the applicant had access to protection

[124] Supreme Court (United Kingdom), judgment of 3 October 2013, *Secretary of State for the Home Department v Al-Jedda*, [2013] UKSC 62, para. 34; UNHCR, *Stateless Persons Handbook*, op. cit., fn. 123; Fripp, E., *Nationality and statelessness in the international law of refugee status*, Hart Publishing, London, 2016, p. 200 (Section 5.7.4) (hereinafter Fripp, *Nationality and statelessness in the international law of refugee status*); and Foster, M. and Lambert, H., *International refugee law and the protection of stateless persons*, Oxford University Press, Oxford, 2019 (hereinafter Foster and Lambert, *International refugee law and the protection of stateless persons*), pp. 127–131.

[125] Supreme Court (United Kingdom), judgment of 25 March 2015, *Pham v Secretary of State for the Home Department*, [2015] UKSC 19 (hereinafter Supreme Court (United Kingdom), 2015, *Pham*), paras 24–25 and 65.

[126] High Administrative Court of North Rhine-Westphalia (Oberverwaltungsgericht für das Land Nordrhein-Westfalen) (Germany), judgment of 23 April 2021, 19 A 4214/18.A, para. 23.

[127] Court of Appeal (England and Wales, United Kingdom), judgment of 2 April 2009, *MA (Ethiopia) v Secretary of State for the Home Department*, [2009] EWCA Civ 289 (hereinafter EWCA (United Kingdom), 2009, *MA (Ethiopia)*). See also Upper Tribunal (Immigration and Asylum Chamber (IAC)) (United Kingdom), judgment of 30 June 2011, *ST (Ethnic Eritrean – Nationality – Return) Ethiopia CG*, [2011] UKUT 252 (hereinafter Upper Tribunal (IAC) (United Kingdom), 2011, *ST (Ethnic Eritrean – Nationality – Return) Ethiopia CG*).

provided by the authorities of Djibouti[128]. However, such an approach would not be of use in a case in which nothing was known about the country of former habitual residence either.

1.3.2.6. Abuse of nationality

The CJEU has yet to directly address issues surrounding abuse of nationality.

It is important to distinguish between two types of possible abuse. There is acquiring (or divesting) of nationality through fraud or misrepresentation. This is not analysed here, but in certain circumstances fraud or misrepresentation can void nationality *ab initio*[129]. There is also acquiring or divesting of nationality without fraud or misrepresentation but where its timing might suggest the purpose was to obtain an advantage in relation to an application for international protection.

In relation to the latter, there are two possible approaches that courts and tribunals can take. The first, analogous to the approach taken by some national courts and tribunals in rejecting the doctrine of bad faith in the context of *sur place* claims, is to take the view that abuse of nationality by the applicant does not negate nationality. The second takes the view that such abuse should be taken into consideration when determining nationality. This is the approach adopted by the Norwegian Supreme Court in a 2020 judgment, which concerned an applicant who appealed against the rejection of her asylum application after being issued with Eritrean nationality[130]. In this case, a majority of the court found that there was abuse and that the applicant could not therefore rely on her Eritrean nationality.

A different approach may be required depending on whether the acquisition of nationality is *ex lege* (automatic) or through a non-automatic mechanism[131].

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128 Council for Alien Law Litigation (Raad voor Vreemdelingenbetwistingen / Conseil du contentieux des étrangers (RVV/CCE)) (Belgium), judgment of 19 May 2011, No 61.832 (English summary). UNHCR, *Handbook*, op. cit., fn. 103, para. 89, states 'Where [a person's] nationality cannot clearly be established, his refugee status should be determined in a similar manner to that of a stateless person, i.e. instead of the country of his nationality, the country of his former habitual residence will have to be taken into account.' In Supreme Administrative Court (Verwaltungsgerichtshof (VwGH)) (Austria), judgment of 30 September 2004, 2001/20/0410, AT:VWGH:2004:2001200410.X00, the case concerned an Armenian citizen who had lived in Azerbaijan with her parents, who had Azerbaijani passports, and who claimed to be persecuted in Azerbaijan as a member of the Armenian minority. The court determined that, due to the dissolution of the Soviet Union, it was not clear whether she had Armenian or Azerbaijani citizenship. Given that her country of origin was one of two possible countries, the court ruled that the relevant country was to be determined and established by the asylum authorities. As in the Belgian Council for Alien Law Litigation case, in assessing a relevant claim with regard to two possible countries of origin (one of which could also be considered the country of former habitual residence), the court found that it was necessary to make substantiated findings on the requirements of para. 1(4) of the Asylum Act. See also Hathaway, J. C. and Foster, M., *The Law of Refugee Status*, 2nd edn, Cambridge University Press, Cambridge, 2014 (hereinafter Hathaway and Foster, *The Law of Refugee Status*), p. 55.

129 See Supreme Court (United Kingdom), judgment of 21 December 2017, *R (Hysaj and Others)* v *Secretary of State for the Home Department; Bakijasi* v *Secretary of State for the Home Department*, [2017] UKSC 82. See also European Convention on Nationality, 6 November 1997, Article 7(1), which provides that one of the situations in which a state party may provide in its internal law for the loss of its nationality *ex lege* is 'acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant'. UNHCR, *Stateless Persons Handbook*, op. cit., fn. 123, para. 46, states 'The impact of fraud or mistake in the acquisition of nationality is to be distinguished from the fraudulent acquisition of documents which may be presented as evidence of nationality. These documents will not necessarily support a finding of nationality as in many cases they will be unconnected to any nationality mechanism, automatic or non-automatic, which actually was applied in respect of the individual.'

130 Supreme Court (Høyesterett) (Norway), judgment of 14 December 2020, HR-2020-2408-A (English summary).

131 UNHCR, *Stateless Persons Handbook*, op. cit., fn. 123, para. 45.

1.3.2.7. Dual or multiple nationality

The definition of a refugee in Article 2(d) QD (recast) differs from that in Article 1A(2) Refugee Convention in its omission of the content of the latter's second paragraph, which deals with refugees of multiple nationality[132]. However, the directive refers elsewhere to Article 1A(2), and the CJEU has stipulated that the QD (recast) has to observe the rules of the Refugee Convention[133].

The CJEU clarified the correct position in *LW*. The case concerned a child with a Tunisian mother and a Syrian father. The father had refugee status in Germany, and the mother, whose application for international protection in Germany had been rejected, was found to face no risk of persecution or serious harm in Tunisia. The CJEU ruled that, although Article 2(d) does not expressly include the provision in the Article 1A(2) definition dealing with persons of multiple nationality, 'it nevertheless follows from Article 2(n) of that directive that each country of which an applicant is, as the case may be, a national must be regarded as his or her "country of origin" for the purposes of that directive'[134]. Article 2(n) states that 'country of origin' means 'the country or countries of nationality or, for stateless persons, of former habitual residence'. The CJEU further noted:

> It thus follows from a combined reading of Article 2(d) and Article 2(n) [QD (recast)] that an applicant who is a national of more than one third country is considered to be deprived of protection only if he or she cannot or, because of the fear of being persecuted, does not wish to avail himself or herself of the protection of any of those countries. That reading is, moreover, confirmed by Article 4(3)(e) of that directive, under which, among the factors which must be taken into account in the individual assessment of an application for international protection, is the fact that it is reasonable to believe that the applicant could rely on the protection of another country where he or she could assert citizenship[135].

The significance of the definition of 'country of origin' in Article 2(n) is that it refers to 'the country **or countries** of nationality' (emphasis added). The second paragraph of Article 1A(2) Refugee Convention concerns those persons who have more than one nationality. Both provisions thereby make it clear that an applicant may have **more than one country of nationality**.

The position that an applicant with multiple nationalities must establish a well-founded fear of persecution in **each** of their countries of nationality (unless there are valid reasons, based on well-founded fear, for not availing themself of the protection of one of the countries of which they are a national) is well-established in the national law of Member States[136]. What is less

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132 For the full quotation of Article 1A(2) Refugee Convention, see fn. 101.

133 CJEU (GC), 2019, *M, X and X*, op. cit., fn. 33, para. 74: 'although the European Union is not a contracting party to the [Refugee] Convention, Article 78(1) TFEU and Article 18 of the Charter nonetheless require it to observe the rules of that convention. [The QD (recast)] must therefore, pursuant to those provisions of primary law, observe those rules'.

134 CJEU (GC), 2021, *LW*, op. cit., fn. 88, para. 32.

135 CJEU (GC), 2021, *LW*, op. cit., fn. 88, para. 33.

136 See, for example, the following decisions of the RVV/CCE, judgment of 26 April 2016, No 166.543, para. 3.8: 'It follows [from Article 1A(2) Refugee Convention] that the asylum application must be examined with regard to each of the countries of nationality of the applicant. If the applicant has no fear of persecution or faces no real risk of suffering serious harm in one of these countries, ... then this is sufficient to reject the asylum application' (authors' translation); judgment of 21 September 2010, No 48.327, para. 4.2.

settled is the precise scope of the exception set out in Article 1A(2), paragraph 2, Refugee Convention, which requires 'any valid reason' to be shown to be based on a well-founded fear because of which an applicant 'has not availed himself of the protection of one of the countries of which he is a national'. One basis for non-availment can be inferred from the principle of *non-refoulement*[137]. It would clearly be contrary to this principle if an applicant sought protection in another country of nationality that would *refoule* them to the country of persecution. Another basis can be inferred from the principle of effectiveness, namely if the other country of nationality would not admit the applicant. Under international law, a state has a duty to (re)admit its own nationals[138].

An applicant who holds the nationality of country X and, in addition, has had **habitual residence in a different country** does not qualify for consideration either as a person who has multiple nationalities or as a stateless person. Such a person is simply a national of country X. This was the approach taken by the Czech Supreme Administrative Court in a case concerning an applicant who was a national of Israel but whose country of last permanent residence was South Africa. It held that the question of whether the applicant had a well-founded fear of being persecuted should be examined with regard to the country of nationality[139]. This is in line with the text of Article 2(d), (f) and (n) QD (recast): that a country of former habitual residence is only relevant as a state of reference for stateless persons.

1.3.3. Stateless persons

Article 1A(2) Refugee Convention refers to a person 'not having a nationality'. By specifically referring in Article 2(d) to 'stateless person', the QD (recast) codifies the widely accepted view that these categories of person are one and the same[140].

The QD (recast) does not contain a definition of a stateless person, but in Article 1(1) UN Convention Relating to the Status of Stateless Persons[141] a stateless person is defined (negatively) as a 'person who is not considered as a national by any State under the operation of its law'.

According to Article 67(2) TFEU, stateless persons must be treated as third-country nationals in the context of the area of freedom, security and justice[142]. The QD (recast) provides for protection of stateless persons equal to that of third-country nationals, as stateless persons can also be eligible for refugee status and subsidiary protection status. However, in some

137 See recital 48 and Article 21 QD (recast).

138 CJEU, judgment of 4 December 1974, *Van Duyn* v *Home Office*, C-41/74, EU:C:1974:133, para. 22, held it 'a principle of international law … that a State is precluded from refusing its own nationals the right of entry or residence'.

139 Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 25 November 2010, *VS* v *Ministry of Interior*, No 6, Azs 29/2010-85 (English summary).

140 UNHCR, *Handbook*, op. cit., fn. 103, paras 101–105; for relevant case-law, see Hathaway and Foster, *The Law of Refugee Status*, op. cit., fn. 128, pp. 64–75; and Foster and Lambert, *International refugee law and the protection of stateless persons*, op. cit., fn. 124, Chap. 4, pp. 90–119.

141 UNGA, Convention Relating to the Status of Stateless Persons, 28 September 1954. Estonia, Cyprus and Poland are not party to this convention, but other Member States are.

142 Article 67(2) TFEU provides '[The Union] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.'

cases the proclaimed statelessness of an applicant is disputed by the authorities of the Member State in which the person is seeking international protection.

To date, the CJEU has not clarified, in the context of the CEAS, how to examine a case in which the statelessness of an applicant is doubted. The aforementioned definition of a 'stateless person' defines statelessness negatively: the absence of nationality. Hence, the rules governing the determination of statelessness are the same as those for the determination of nationality. Drawing on the same international law rules governing the determination of nationality, the national court or tribunal member must come to a decision as to whether a person's claimed statelessness can be accepted for the purposes of the assessment for qualification for international protection in accordance with Article 4 QD (recast) on the assessments of facts and circumstances. According to the UK Supreme Court, when seeking to establish whether an individual has the nationality of a particular state, 'the term "law" should be interpreted broadly as encompassing other forms of quasi-legal process, such as ministerial decrees and "customary practice"'[143].

From Article 4(1) QD (recast), it follows that Member States may consider it the duty of the applicant to substantiate their claim to be stateless. However, considering the nature of statelessness, applicants will often not be able to provide documentation to support their claim.

Issues relating to the types of evidence that courts and tribunals deciding asylum cases can consider when deciding on whether a person is a national, a dual or multiple national, stateless or of indeterminate nationality are dealt with in EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial analysis*[144].

1.3.4. Country/countries of former habitual residence

When it has been established that an applicant for international protection is stateless, the country of former habitual residence must be determined[145]. Some national jurisdictions have held that a country of former habitual residence need not be a state. The term 'country of former habitual residence' has also been seen to apply to territories that, while having the attributes of a state, such as defined borders, systems of law and a permanent population, nevertheless lack statehood[146].

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143 Supreme Court (United Kingdom), 2015, *Pham*, op. cit., fn., 125, para. 25. See also UNHCR, *Stateless Persons Handbook*, op. cit., fn. 123, para. 22.

144 EASO, *Evidence and Credibility Assessment – Judicial analysis*, op. cit., fn. 23, Section 5.1.

145 See, for example, UK Immigration Appeal Tribunal (UK Immigration and Asylum Tribunal (UKIAT)), judgment of 28 January 2005, *SG (Stateless Nepalese: Refugee? Removal Directions) Bhutan)*, [2005] UKIAT 00025, paras 8–11, and Federal Administrative Court (Bundesverwaltungsgericht (BVerwG)) (Germany), judgment of 26 February 2009, No 10 C 50.07, BVerwG:2009:260209U10C50.07.0 (English translation) (hereinafter BVerwG (Germany), 2009, No 10 C 50.07 (English translation)), paras 29–30.

146 In CNDA (France), judgment of 13 February 2012, *M. D.M.L.*, No 11026661C+, quoted in CNDA (France), *Année 2021: Contentieux des réfugiés: jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile*, pp. 32–33, the court considered that a stateless person who had lived all his life in a refugee camp in Algeria, but in an area under the administrative, police, judicial, military and political control of the Sahrawi Arab Democratic Republic, was a 'habitual resident' of the partially recognised Sahrawi Arab Democratic Republic. See also Foster and Lambert, *International refugee law and the protection of stateless persons*, op. cit., fn. 124, pp. 132–133 (who also cite Australian and New Zealand case-law).

The CJEU has given guidance on the meaning of the term 'habitual residence' in the context of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning family law[147] and social security[148]. However, it cannot necessarily be assumed that the CJEU would regard this guidance as automatically transferable to the QD (recast).

According to the German Federal Administrative Court, the habitual residence of a stateless person does not need to have been lawful[149]. Instead, habitual residence can be considered when a stateless person did not merely spend a short time in a country, but their life was centred in that country[150]. According to the same court, it is also required, for habitual residence to apply in such a case, that the authorities of that country did not take measures to terminate their residence[151].

Another German case concerned an applicant who had lived as an unregistered refugee in Bangladesh for many years. In its judgment, the Administrative Court of Düsseldorf accepted that he originated from Rakhine State (Myanmar) and that he did not have Bangladeshi citizenship. It found that it was therefore not necessary to determine whether he had Myanmar citizenship, since Myanmar was, in any case, either his country of nationality or, as a stateless person, his country of habitual residence. The court therefore ruled that his claim should be assessed in relation to Myanmar. Regarding Bangladesh as a possible country of habitual residence, it noted that such residence did not have to be lawful, but that the person had to have their *de facto* centre of life there and not risk termination of their residence. In this case, the fact that he was not registered, did not receive state support and had no prospect of a certain length of stay meant that Bangladesh could not be considered his country of habitual residence[152]. The court concluded that he had a well-founded fear of persecution in Myanmar as a member of the ethnic group of Muslim Rohingya/Bengalis and that he should be recognised as a refugee.

Just as a person can have more than one nationality, so can a person have more than one country of former habitual residence. In line with international practice, Article 2(n) QD (recast)

147 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. See CJEU, judgment of 22 December 2010, *Barbara Mercredi* v *Richard Chaffe*, C-497/10 PPU, EU:C:2010:829, para. 56. See also CJEU, judgment of 2 April 2009, *A reference for a preliminary ruling: Korkein hallinto-oikeus (Finland)*, C-523/07, EU:C:2009:225, paras 37–41.

148 In CJEU, judgment of 11 November 2004, *Adanez-Vega* v *Bundesanstalt für Arbeit*, C-372/02, EU:C:2004:705, para. 37, the court held that 'it is clear from settled case law that the place of "residence" is determined by the place where the habitual centre of interests is situated'.

149 BVerwG (Germany), 2009, No 10 C 50.07 (English translation), op. cit., fn. 146, paras 31–33. See also Council of State (Conseil d'État) (France), judgment of 18 June 2014, No 362703, FR:CESJS:2014:362703.20140618.

150 RVV/CCE (Belgium), judgment of 24 June 2010, No 45.396 (English summary). It was determined that Kosovo could be considered the country of former habitual residence, since the applicant had stated that he was of Roma ethnicity, that his place of birth was in Kosovo and that he had lived a large part of his life there. See also BVerwG (Germany), 2009, No 10 C 50.07 (English translation), op. cit., fn. 146. In this latter decision, the court also held that habitual residence required residence for at least 5 years by analogy with the period required for the satisfaction of the term 'lasting residence' in instruments concerning minimum residence required prior to naturalisation. That view might be considered too quantitative and prescriptive when considering the CJEU approach in the family law context. See, for example, CJEU, 2010, *Mercredi*, fn. 148, paras 27 and 56, which avoids a fixed definition and instead takes into account 'indicators' or 'factors'.

151 BVerwG (Germany), 2009, No 10 C 50.07 (English translation), op. cit., fn. 146, para. 34. See also RVV/CCE (Belgium), judgment of 24 June 2014, No 126.144, para. 2.8.

152 VG Düsseldorf, judgment of 26 February 2018, 5 K 11138/17.A, DE:VGD:2018:0226.5K11138.17A.00.

provides that, for stateless persons, 'country of origin' means 'the country **or countries** … of former habitual residence'[153].

The CJEU has not yet had to consider either whether 'former' is to be read literally to apply to any country of former habitual residence, or whether it must be understood as applying only to a person's 'last' country of habitual residence[154]. If the latter approach is taken, it entails treating such a person as having only a single country of former habitual residence and hence no issues arise concerning whether stateless persons with multiple countries of former habitual residence are required, analogous to those with multiple countries of nationality, to show a well-founded fear of persecution in each of their countries of former habitual residence[155].

Just because an applicant is accepted as being a stateless person does not mean that they are exempt from having to meet the requirements that apply to nationals with regard to establishing a well-founded fear of being persecuted in accordance with the QD (recast)[156]. The wording of Article 2(d), which refers to stateless persons being outside the country of former habitual residence 'for the same reasons as mentioned above', imposes a symmetry in the criteria for establishing a well-founded fear of persecution[157].

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153 Emphasis added. In this respect, the QD (recast) codifies the position taken by UNHCR in its *Handbook*, op. cit., fn. 103, para. 104, and the wider literature. See, for example, Foster and Lambert, *International refugee law and the protection of stateless persons*, op. cit., fn. 124, pp. 138–143. By contrast, a single country of former habitual residence approach was taken by the High Court of Ireland, judgment of 21 December 2012, *DT (No 2) v Refugee Appeal Tribunal and Others*, [2012] IEHC 562, in granting leave to appeal to the Irish Supreme Court. The applicant claimed to have former habitual residence in both Bhutan and Nepal. The Supreme Court eventually struck the case out for abuse of process on receipt of new evidence, indicating that the applicant had given false particulars regarding his claimed lack of nationality. See Supreme Court (Ireland), judgment of 14 June 2017, *DT v Refugee Appeals Tribunal and Another*, [2017] IESC 45.

154 As is specified in Section 3(1) German Asylum Procedure Act (English translation). The German Federal Administrative Court stated in 2009 that this provision 'focuses on the country where the foreigner, as a stateless person, last "had" his habitual residence'. See BVerwG (Germany), 2009, No 10 C 50.07 (English translation), op. cit., fn. 146, paras 30 and 36. However, neither the text of Article 1A(2) Refugee Convention nor that of Article 2(d) QD (recast) contains any reference to 'last'. For some academic commentators (see, for example, Foster and Lambert, *International refugee law and the protection of stateless persons*, op. cit., fn. 124, pp. 139–140), this speaks strongly against importing such a criterion into the text.

155 As to whether those with and without a nationality should be treated identically in this respect, there is no settled view. Contrasting positions can be found, for example between the Federal Court of Appeal (Canada), judgment of 11 May 1998, *Thabet v Canada (Minister of Citizenship and Immigration)*, [1998] 4 FC 21, which stated that 'Stateless people should be treated as analogously as possible with those who have more than one nationality', and Foster and Lambert, *International refugee law and the protection of stateless persons*, op. cit., fn. 124, pp. 140–141.

156 Court of Appeal (England and Wales, United Kingdom), judgment of 31 July 2000, *Revenko v Secretary of State for the Home Department*, [2000] EWCA Civ 500; CNDA (France), judgment of 16 November 2011, *M. B.*, No 10018108 R, reported in CNDA (France), *Année 2011, Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale de droit d'asile*, p. 118; judgment of 23 December 2010, *M. D.*, No 09002572 C+, reported in CNDA (France), *Année 2010, Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale de droit d'asile*, pp. 33–36 and 59–61 (hereinafter CNDA (France), 2010, *M. D.*, No 09002572 C+); BVerwG (Germany), 2009, No 10 C 50.07 (English translation), op. cit., fn. 146; and High Court (Ireland), judgment of 17 July 2009, *AD v Refugee Appeals Tribunal and another*, [2009] IEHC 326. (All cases are cited by Foster and Lambert, *International refugee law and the protection of stateless persons*, op. cit., fn. 124, p. 96.)

157 In doing so, the QD (recast) also removes the semicolon in the Article 1A(2) text '; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events'. It is these words that Article 2(d) substitutes with 'for the same reasons as mentioned above'.

1.3.5. Outside the country of nationality or of former habitual residence

After being determined to be a third-country national or stateless person, the requirement that the applicant must be **outside** the country of nationality or of former habitual residence is the second element in determining qualification for being a refugee. When the country of nationality or of former habitual residence has been identified, the question of whether the applicant is outside this country is merely a matter of fact. 'Outside' is to be understood as being physically outside the territory of the state concerned, with territory being understood in a jurisdictional sense[158]. This requirement entails that an applicant who claims asylum at a foreign embassy while still in their country of origin does not fall within the territorial scope of the directive (see 'Application for international protection' above)[159].

In relation to nationals, the 'outside the country' requirement does not preclude refugees *sur place*, who may not necessarily have ever lived in their country of nationality before, from applying for international protection. A person may be in this situation if, for example, they acquired their nationality by descent, but were born in another state. By contrast, the territorial scope of the EU temporary protection directive is limited to persons who 'have had to leave their country or region of origin, or have been evacuated'[160].

Since the country of reference of stateless persons must be one that is 'former' and in which their residence was 'habitual', it is necessary for them to show that they have lived there before applying for international protection.

1.4. Acts of persecution (Article 9(1) and (2))

In accordance with Article 2(d) QD (recast), 'refugee' means a third-country national or stateless person who, inter alia, has a 'well-founded fear of **being persecuted**'. In setting out a definition of 'acts of persecution', Article 9(1) QD (recast) contains one of the main ways in which the QD (recast) seeks to elaborate the Article 2(d) definition (which, in turn, is closely modelled on Article 1A(2) Refugee Convention (see Section 1.2)).

However, sight must not be lost of the fact that the QD (recast) does not provide further definitional detail of all aspects of this definition. That has enhanced the importance of the CJEU's interpretative guidance on a number of aspects of the definition[161]. In relation to the 'being

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158 ICJ, judgment of 20 November 1950, *Asylum Case (Columbia/Peru)*, ICJ Reports, No 71. The UNHCR *Handbook*, op. cit., fn. 103, para. 88, states 'International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country'. See also House of Lords (United Kingdom), judgment of 9 December 2004, *Regina* v *Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others*, [2004] UKHL 55, para. 16.

159 For an example of a Member State that makes provision in its national law for applicants to apply for international protection from its embassies and consulates in third countries provided that the applicant is not a national of the country in which the diplomatic representation is located, see Article 38 of the Spanish legislation (Law 12/2009 on the right of asylum and subsidiary protection). In a 2002 study, Noll, G. and Fagerlund, J. (*Safe Avenues to Asylum? The actual and potential role of EU diplomatic representations in processing asylum requests*, Danish Institute for Human Rights and UNHCR), specify Belgium, Germany, Ireland, Italy and Luxembourg as countries that provide for applications to their embassies and consulates. They note that, at that time, a further six EU countries allowed access to their territory for protection reasons in exceptional cases (Austria, Denmark, France, the Netherlands, Spain and the United Kingdom).

160 Article 2(a) and (c) temporary protection directive. To seek to apply such an approach to stateless persons would, however, be at odds with the requirement to establish the country of former **habitual** residence.

161 See, for example, CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, paras 55–59; and CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 72.

persecuted' element of the definition, one point made by the CJEU, which is not dealt with in Article 9 or anywhere else in the directive, is that to qualify as a refugee an applicant must 'have a well-founded fear of **being personally the subject of persecution**' (emphasis added)[162].

Article 9 QD (recast) on acts of persecution has a three-part structure, as illustrated in Table 7.

Table 7: Structure of Article 9 QD (recast)

1	**Article 9(1)**	The **definition of acts of persecution**
2	**Article 9(2)**	A **non-exhaustive list of acts** that may constitute persecution
3	**Article 9(3)**	The requirement for a **connection between the reasons for persecution and the acts of persecution or the absence of protection** against such acts

The present section focuses on the first two elements, namely the definition of acts of persecution laid down in Article 9(1) (see Section 1.4.1, which considers Article 9(1)(a) and (b)) (Sections 1.4.2 and 1.4.3 respectively) and the illustrative list of the possible forms of acts of persecution provided in Article 9(2) (see Section 1.4.4). As is made apparent in the decision trees (see Appendix A), it is necessary to determine whether there is any connection between the reasons for persecution and the acts of persecution or the absence of protection against such acts when analysing the reasons for persecution. Such connection is addressed below in Section 1.6.1.

Section 1.4 thus has four subsections, as set out in Table 8.

Table 8: Structure of Section 1.4

Section	Title	Page
1.4.1	The meaning of 'acts' of persecution	60
1.4.2	Severe violation of basic human rights (Article 9(1)(a))	65
1.4.3	Accumulation of measures (Article 9(1)(b))	80
1.4.4	Enumeration of possible acts of persecution (Article 9(2))	83

1.4.1. The meaning of 'acts' of persecution

The Refugee Convention refers to a well-founded fear of 'being persecuted' without providing a definition of the term 'being persecuted'. Article 1A(2) of that convention does not specify which acts may constitute persecution. Hitherto, attempts to define persecution have been unsuccessful owing (it has, inter alia, been said) to the impossibility of enumerating, in advance, all the forms of ill treatment that might legitimately entitle persons to benefit from the protection of a foreign state[163]. Consequently, it has been left to states parties to interpret

[162] CJEU, 2020, *EZ*, op. cit., fn. 34, para. 21: 'it must be noted that, under Article 2(d) [QD (recast)] the term "refugee" refers, in particular, to a third-country national who is outside the country of nationality "owing to a well-founded fear of being persecuted" for reasons of race, religion, nationality, political opinion or membership of a particular social group and is unable or, "owing to such fear", unwilling to avail himself or herself of the "protection" of that country. The national concerned must therefore, on account of circumstances existing in his or her country of origin, have a well-founded fear of being personally the subject of persecution for at least one of the five reasons listed in that directive and the [Refugee] Convention (see, to that effect, [CJEU, judgment of 26 February 2015, *Andre Lawrence Shepherd* v *Bundesrepublik Deutschland*, C-472/13, EU:C:2015:117], paragraph 24 and the case-law cited).' In CJEU, 2018, *Ahmedbekova*, op. cit., fn. 68, para. 49, the CJEU expressed this as 'a well-founded fear of being personally persecuted'.

[163] UNHCR, *Handbook*, op. cit., fn. 103, paras 51–53; see also UNHCR, Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, April 2001, paras 16–22.

this fundamental term, which has sometimes led to divergent jurisprudence[164]. The QD and its recast were intended to remedy that by guiding the competent authorities of the Member States in the application of the Refugee Convention on the basis of common concepts and criteria[165]. They are the first international instruments to elaborate on the **concept of 'being persecuted' in the context of Article 1A Refugee Convention**. The criteria of Article 9(1) QD (recast) largely reflect common attempts to define the term 'being persecuted' in Article 1A Refugee Convention in state practice and academic writings.

In line with the objective of the QD (recast) to guide the competent authorities of Member States in the application of the Refugee Convention, Article 9(1) QD (recast) defines 'acts of persecution' as follows.

Article 9(1) QD (recast)

In order to be regarded as an act of persecution within the meaning of Article 1(A) of the [Refugee] Convention, an act **must**:

(a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the [ECHR]; **or**

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a). [Emphasis added.]

Article 9(1) explicitly refers to Article 1A Refugee Convention. Thus, its approach to the definition of 'being persecuted' is based on human rights norms; this definition specifically refers to the provisions of the ECHR. The preamble of the Refugee Convention itself refers to the UN Charter and the Universal Declaration of Human Rights[166], which 'have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination'.

Article 9(1) sets out two conditions, which are worded in the alternative. It follows that an act can be persecutory **either** by taking the form set out in Article 9(1)(a) **or** by taking the form set out in Article 9(1)(b). From their wording, it is clear that **both** conditions require an act to be sufficiently serious or sufficiently severe to amount to persecution.

As regards the meaning of 'acts' of persecution, Article 9(1)(b) clarifies that acts can take the form of 'measures'. Article 9(2) confirms that the word 'acts' is to be understood broadly to encompass, for example, both physical acts and legal, administrative, police and/or judicial 'measures' (see Section 1.4.3). The CJEU has made it clear that, in order to qualify as persecution, these acts must be attributable to an actor (see Section 1.7)[167], but Article 9(1)

[164] See Goodwin-Gill, G. S., *The Refugee in International Law*, 2nd edn, Oxford University Press, Oxford, 1996, p. 62; and Storey, H., 'Persecution: towards a working definition', in Chetail, V. and Bauloz, C. (eds), *Research Handbook on International Law and Migration*, Edward Elgar, Cheltenham, 2014 (hereinafter Storey, 'Persecution'), pp. 462–463.

[165] CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, paras 39 and 51.

[166] UNGA, Universal Declaration of Human Rights, 10 December 1948, Resolution 217 (IIII).

[167] CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 35.

notably avoids reference to the motives or 'persecutory intent' of actors[168]. Instead, it focuses on whether the effect of these acts is sufficiently serious by nature or repetition to constitute a severe violation of basic human rights or an accumulation of measures sufficiently severe to affect an individual in a similar manner. The role of motives and intention is addressed below in Section 1.7. See also Section 1.6.1.2.

Acts of persecution can include threats of persecution. Thus, for example, in *Ahmedbekova* the CJEU noted that 'account must be taken of the threat of persecution and of serious harm in respect of a family member of the applicant for the purpose of determining whether the applicant is, because of his family tie to the person at risk, himself exposed to such a threat'[169].

While laying down specific criteria regarding what constitutes 'acts of persecution', the QD (recast) nevertheless makes it clear that these have to be applied in accordance with **the principle of individual assessment**. Whether or not human rights violations or an accumulation of various measures as defined in Article 9(1) QD (recast) constitute persecution has to be assessed under Article 4(3) QD (recast) on an individual basis. This involves taking into account 'all the relevant facts as they relate to the country of origin at the time of taking a decision on the application, ... the relevant statements and documentation presented by the applicant, and ... his individual position and his personal circumstances'[170].

Common to the two options set out in Article 9(1)(a) and (b) is the requirement that the **act be sufficiently serious or severe** to be considered an act of persecution[171]. Within Article 9(1)(a), the threshold of sufficient seriousness can be crossed by the 'nature' of one single act as a severe violation of basic human rights. Alternatively, it may be crossed by the 'repetition' of an act, which, if committed as a single act, might not qualify as a severe violation. The difference between Article 9(1)(a) and (b) is that (b) is not restricted to violations of basic human rights and enables account to be taken of a wider range of measures provided their cumulative effect is sufficiently severe to affect an individual in a similar manner to (a).

Article 9(1) requires one to address whether the act (or acts) constitute(s) a severe violation of basic human rights (Article 9(1)(a)) or whether it/they constitute(s) an accumulation of various measures, including violations of human rights, of equivalent sufficient severity (Article 9(1)(b)). This does not mean, however, that, when applying Article 9 in practice, a sharp distinction need always be drawn between the two, particularly if it is doubtful whether an interference with individual rights amounts to a violation of 'basic' human rights. The decisive element of persecution 'is therefore the severity of the measures and sanctions adopted or liable to be

168 This is consistent with international jurisprudence, which generally does not require any need to establish a 'persecutory intent' behind acts of persecution. See Zimmermann, A. and Mahler, C., 'Article 1 A, para. 2 (definition of the term "refugee" / Définition du terme "réfugié")', in Zimmermann, A. (ed.), *The 1951 Convention Relating to the Status of Refugees and its Protocol: A commentary*, Oxford University Press, Oxford, 2011 (hereinafter Zimmermann (ed.), *The 1951 Convention and Protocol: A commentary*), pp. 349–350 and 372–373; and Goodwin-Gill and McAdam, *The Refugee in International Law*, op. cit., fn. 25, pp. 80–81.

169 CJEU, 2018, *Ahmedbekova*, op. cit., fn. 68, para. 51; and Zimmermann, A. and Mahler, C., 'Article 1 A, para. 2 (definition of the term "refugee" / Définition du terme "réfugié")', in Zimmermann (ed.), *The 1951 Convention and Protocol: A commentary*, op. cit., fn. 169, pp. 348–349.

170 See CJEU, 2015, *Shepherd*, op. cit., fn. 163, para. 26; and CJEU, 2018, *Ahmedbekova*, op. cit., fn. 68, paras 57–58. The latter judgment described it as 'settled case-law that every decision on whether to grant refugee status or subsidiary protection status must be based on an individual assessment' (para. 48). In the preceding paragraph, it linked the principle of individual assessment to Articles 13 and 18 QD (recast), read in conjunction with the definitions of 'refugee' and 'person eligible for subsidiary protection' set out in Article 2(d) and (f) thereof.

171 CJEU, 2020, *EZ*, op. cit., fn. 34, para. 22, states 'It is clear from those provisions that, for an infringement of fundamental rights to constitute persecution within the meaning of Article 1(A) of the Refugee Convention, it must be sufficiently serious ...', referring also to CJEU, 2015, *Shepherd*, op. cit., fn. 163, para. 25, and the case-law cited there.

adopted against the person concerned', and it is this that 'will determine whether a violation of the right guaranteed by Article 10(1) of the Charter constitutes persecution within the meaning of Article 9(1) of the Directive'[172].

Consistent with this understanding, the CJEU does not draw a sharp distinction between the different forms of persecutory acts described in Article 9(1)(a) and (b). The court refers to the purpose of the directive being 'to guide the competent authorities of Member States in the application of the [Refugee] Convention'[173]. It interprets the provisions of Article 9 as a definition of the elements that support the finding that acts constitute persecution within the meaning of Article 1A Refugee Convention[174].

Both of the above conditions require courts or tribunals of Member States to make a specific assessment as detailed in the present section and schematised in Table 9. For methodological purposes, this table provides a schematic presentation of the questions entailed by the criterion of sufficient seriousness for an act to qualify as persecution under Article 9(1) QD (recast). In practice, it may not be necessary to make such sharp distinctions between the different questions and their answers, as they may often overlap.

Table 9: The criterion of sufficient seriousness for an act to qualify as persecution (Article 9(1))

1. Is the act, by its nature or repetition, sufficiently serious to constitute a severe violation of basic human rights (Article 9(1)(a))?	
(i) Does a 'basic human right' risk being violated or has it already been violated?	(a) Is the right at stake a non-derogable right? If the right is one of those listed as non-derogable under Article 15(2) ECHR, it is automatically to be considered a basic human right.
	(b) If the right is a derogable one, is it nevertheless of a basic or fundamental nature and thus comparable to a non-derogable right? While for non-derogable rights no limitation can ever be legitimate (Article 15(2) ECHR), for derogable rights it has to be assessed whether the alleged infringement would be legally justified as a derogation or as a limitation.
(ii) Does the violation of a 'basic human right' risk being severe or is it in fact severe?	(a) Is the act sufficiently serious by its nature to constitute a severe violation? While the violation of non-derogable rights may be considered severe, the violation of derogable rights has to be of a severity equivalent to infringements of non-derogable rights.
	(b) If the act is not sufficiently serious by its nature to constitute a severe violation, is the act sufficiently serious by its repetition?
If the act meets these two cumulative conditions (conditions (i) and (ii)), it has to be considered an act of persecution within the terms of Article 9(1)(a) and the meaning of Article 1A Refugee Convention. If the act does not fulfil these two cumulative conditions, it can still amount to an act of persecution provided it fulfils the conditions laid down in question 2 below (Article 9(1)(b)).	

172 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 66.

173 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 39.

174 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 52, states 'It is clear from those provisions that for a violation of fundamental rights to constitute persecution within the meaning of Article 1(A) of the [Refugee] Convention, it must be sufficiently serious'.

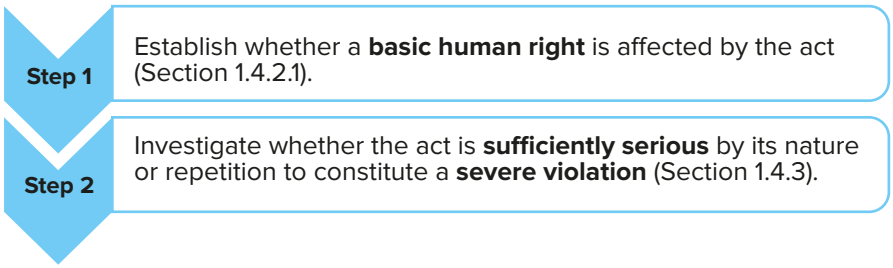
2. Is the act an accumulation of various measures, including violations of human rights, which is sufficiently severe to affect the individual in a similar manner to that set out in Article 9(1)(a) (Article 9(1)(b))?
Under Article 9(1)(b), the measures need not amount to a violation of 'basic' human rights. The term 'measures' covers, in a wide sense, all measures that may affect an individual in the same manner as a severe violation of basic human rights. The accumulation of various measures constitutes persecution only if it affects the applicant in a similar manner to a violation under Article 9(1)(a). The decisive element is the severity of a violation of an individual's rights.
NB: In all cases, the assessment of sufficient seriousness must take into account the personal circumstances of the applicant (Article 4(3) QD (recast)).

Before proceeding to analyse Article 9 in detail, it is salient to note what position the QD (recast) adopts regarding the **difference between persecution and discrimination**. The structure of Article 9 makes it clear that, while discrimination may sometimes be a prominent feature of acts of persecution, it is not a necessary condition of such acts. The enumeration of examples of forms of persecution in Article 9(2) includes three that expressly refer to discrimination (Article 9(2)(a), (b) and (c)) and three that do not. Furthermore, Article 9(3), which requires a 'connection between the reasons mentioned in Article 10 and the acts of persecution', treats 'acts of persecution' and 'reasons for persecution' as separate concepts. These considerations suggest that an act of ill treatment could constitute an act of persecution even though it did not involve any discrimination and/or was unrelated to any of the five reasons mentioned in Article 10[175].

1.4.2. Severe violation of basic human rights (Article 9(1)(a))

In order to apply Article 9(1)(a) and determine if an act[176] is sufficiently serious by its nature or repetition to constitute a severe violation of basic human rights, a two-step assessment needs to be made. This process is set out in Figure 1.

Figure 1: Two-step assessment to apply Article 9(1)(a)



1.4.2.1. 'Basic human rights'

Article 9(1)(a) QD (recast) requires there to have been a violation of 'basic human rights'. From this wording, it is clear that only the violation of a specific category of human rights qualifies as persecution. The article refers to **non-derogable rights under Article 15(2) ECHR** in particular. These are the **right to life**, **prohibition of torture**, **inhuman or degrading treatment**

[175] However, in the case of Article 9(2)(e), the CJEU has said that 'there is a strong presumption that refusal to perform military service under the conditions set out in Article 9(2)(e) of that directive relates to one of the five reasons set out in Article 10 of that directive'; see CJEU, 2020, *EZ*, op. cit., fn. 34, para. 57.

[176] Acts of persecution can include threats of persecution. See Section 1.4.1 above.

or punishment, **prohibition of slavery and forced labour**, and **prohibition of punishment without law** (Articles 2, 3, 4(1) and 7 ECHR)[177]. Thus, the violation of a non-derogable right under Article 15(2) ECHR constitutes a severe violation of basic human rights[178].

However, the reference to Article 15(2) ECHR is **not exclusive**, as the provision includes the phrase 'in particular'. Therefore, rights other than non-derogable rights under Article 15(2) ECHR may constitute 'basic human rights' in the sense of Article 9(1)(a)[179]. The reference to non-derogable rights would appear to convey that violations of those rights, as set out in the ECHR, are sufficiently severe in themselves and for that reason always constitute persecution, but it does not restrict 'basic human rights' to non-derogable rights.

Apart from referring to non-derogable rights under the ECHR, Article 9 QD (recast) does not provide criteria or a particular method for determining what is a basic human right. Nevertheless, the fact that, when referring to non-derogable rights under Article 15(2) ECHR, Article 9(1)(a) uses the expression 'in particular' indicates that derogable rights under the same instrument are not excluded from being 'basic' if they have a comparable quality.

The QD (recast) also attaches significant importance to the EU Charter.

Recital 16 QD (recast)

This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members and to promote the application of Articles 1, 7, 11, 14, 15, 16, 18, 21, 24, 34 and 35 of that Charter and should therefore be implemented accordingly.

177 The relevant ECHR provisions read as follows. Article 2 (right to life): '(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.' Article 3 (prohibition of torture): 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Article 4(1) (prohibition of slavery and forced labour): 'No one shall be held in slavery or servitude.' Article 7 (no punishment without law): '(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. (2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.'

178 See CNDA (France), judgment of 24 March 2015, *Mlle E.*, No 10012810 (English summary) (hereinafter CNDA (France), 2015, *Mlle E.*, No 10012810 (English summary)), concerning a Nigerian woman from Edo State (Benin City), in which the court qualified sex trafficking of human beings as persecution. The judgment refers to the UN Convention against Transnational Organized Crime, 15 November 2000, and its two protocols: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and Protocol against Smuggling of Migrants by Land, Sea and Air, both of 15 November 2000. See also ECtHR, judgment of 7 January 2010, *Rantsev v Cyprus and Russia*, No 25965/04, CE:ECHR:2010:0107JUD002596504 (hereinafter ECtHR, 2010, *Rantsev*); and ECtHR (GC), judgment of 20 June 2020, *S.M. v Croatia*, No 60561/14, CE:ECHR:2020:0625JUD006056114 (hereinafter ECtHR (GC), 2020, *S.M. v Croatia*). For more on trafficking as persecution, see Section 3.3.1.1 below.

179 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 57. See also BVerwG (Germany), judgment of 5 March 2009, No 10 C 51.07, BVerwG:2009:050309U10C51.07.0 (English translation) (hereinafter BVerwG (Germany), 2009, No 10 C 51.07 (English translation)).

The rights enumerated in this recital are in addition to those articles of the EU Charter guaranteeing non-derogable rights. These are, in particular, Articles 2 (right to life), 4 (prohibition of torture and inhuman treatment or punishment) and 5 (prohibition of slavery and forced labour).

The CJEU has not yet directly addressed the meaning of the term 'basic right', but its jurisprudence on Article 9 is instructive for at least two reasons. One reason is that, in incremental fashion, it has identified certain rights other than non-derogable (or 'unconditional')[180] rights as either 'basic' or 'fundamental'[181]. Thus, in its 2012 *Y and Z* judgment, the CJEU ruled that, although subject to derogations under the ECHR, freedom of religion is 'one of the foundations of a democratic society and is a basic human right'. For the court, this implies that:

> Interference with the right to religious freedom may be so serious as to be treated in the same way as the cases referred to in Article 15(2) of the ECHR, to which Article 9(1) of the Directive refers, by way of guidance, for the purpose of determining which acts must in particular be regarded as constituting persecution[182].

The CJEU's reasoning in *Y and Z* indicates a potential overlap between definitions of the **acts** of persecution and of the **reasons** for persecution[183]. Persecution on the ground of religion always ultimately interferes with freedom of religion. Nevertheless, the act of persecution itself may be ill treatment or other severe punishment inflicted in response to the exercise of religious freedom.

The CJEU's 2013 ruling in *X, Y and Z* concerned the right of persons to live according to their individual sexual orientation as an expression of the right to respect for private and family life (Article 7 EU Charter, corresponding to Article 8 ECHR). In its judgment, the court also determined this right to be 'fundamental', even though it is not among the rights from which no derogation is possible[184].

Another important feature of CJEU case-law – the second reason as mentioned above – is its evolving understanding of EU Charter rights, in particular the right to human dignity as guaranteed in Article 1 EU Charter. From this case-law, it is clear that human dignity is considered, in itself, a basic human right and indeed the underlying basis of fundamental rights[185], such as the rights laid down in Title I of the EU Charter. This indicates that another possible means of identifying the basic character of a human right other than those listed as non-derogable rights in the ECHR may be consideration of its **proximity to the right to human dignity**. This also accords with recital 16 quoted earlier in this section.

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180 CJEU, 2020, *EZ*, op. cit., fn. 34, para. 22.

181 While the precise meaning of such terms as 'basic' and 'fundamental' is elusive, the fact that the class of 'basic rights' is wider than that of non-derogable rights would appear to indicate it can include fundamental rights that are not non-derogable. 'Fundamental rights' under the EU Charter clearly encompass a wider range of rights than non-derogable rights; see, for example, CJEU (GC), 2006, *Parliament v Council*, op. cit., fn. 45, para. 38.

182 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 57. In the same sense, see the referring BVerwG (Germany), judgment of 9 December 2010, No 10 C 19.09, BVerwG:2010:091210B10C19.09.0 (English translation), para. 20.

183 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38.

184 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 54.

185 Dörig, H., commentary on Article 9 Directive 2011/95, para. 2, in Hailbronner, K. and Thym, D. (eds), *EU Asylum and Immigration Law: A commentary*, 2nd edn, Hart, 2016 (hereinafter Hailbronner and Thym (eds), *EU Asylum and Immigration Law: A commentary*), referring to the Explanations Relating to the EU Charter of Fundamental Rights, [2007] OJ C 303/17.

Given that the CJEU has yet to fully clarify the meaning of 'basic human rights' in the context of Article 9(1)(a), it is relevant to consider other possible interpretive aids.

First of all, there are the *travaux préparatoires* and the 'general scheme and purpose' of the directive, which have to be interpreted in a manner consistent with the EU Charter, the Refugee Convention and the other relevant treaties referred to in Article 78(1) TFEU[186]. The original version of the article referred to **life, freedom and physical integrity** as examples of basic human rights[187]. This wording was taken from Chapter 4 of the 1996 joint position[188]. The words 'life' and 'freedom' correspond to Article 33(1) Refugee Convention. Subsequent versions of Article 78(1) TFEU referred to the 'right to life, the right not to be subjected to torture or the right to liberty and security of a person' as examples[189] and to 'the rights from which derogation cannot be made under Article 15(2) ECHR'[190]. Reference to 'freedom' was confined to freedom from slavery and servitude (Article 4(1) ECHR). Of possible relevance in this regard is that the correspondence to the wording of Article 33(1) Refugee Convention has widely been seen to indicate that a threat to life or freedom, at least if sufficiently serious, always constitutes persecution[191].

Another possible interpretive aid for shedding light on the notion of basic human rights under Article 9(1)(a) derives from Article 78 TFEU, which authorises reference to **'other relevant treaties'**. In this context, the violation of a right from which derogation cannot be made, even in times of compelling national emergency, under the International Covenant on Civil and Political Rights (ICCPR) may constitute a severe violation of basic human rights[192]. In addition to the rights mentioned by Article 15(2) ECHR, Article 4(2) ICCPR mentions the following as non-derogable: the right to recognition as a person before the law; freedom of thought, conscience and religion; and the prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation[193]. Acts threatening these rights may thus be considered in terms of whether they pass the threshold of sufficient seriousness to amount to acts of persecution.

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186 See CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 40; and CJEU, 2015, *Shepherd*, op. cit., fn. 163, para. 22. See also EASO, *Introduction to the CEAS – A judicial analysis*, op. cit., fn. 8, Part 3, pp. 61–89.

187 European Council, Asylum Working Party, Outcome of Proceedings, Proposal for a Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, 9 September 2002, EU Doc 11356/02 ASILE 40, p. 13.

188 Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonised application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 Relating to the Status of Refugees (96/196/JHA), [1996] OJ L 63/2 (hereinafter Joint Position of 4 March 1996 on the harmonised application of the term 'refugee').

189 European Council, Asylum Working Party, Outcome of Proceedings, Proposal for a Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, 23 October 2002, EU Doc 12620/02 ASILE 54, p. 13.

190 European Council, Asylum Working Party / Strategic Committee on Immigration, Frontiers and Asylum / Coreper, Outcome of Proceedings, Proposal for a Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, 8 November 2002, EU Doc 13648/02 ASILE 61, p. 13.

191 UNHCR, *Handbook*, op. cit., fn. 103, para. 51. Cf. Storey, 'Persecution', op. cit., fn. 165, pp. 492ff.

192 ICCPR, Article 4: '1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.'

193 See ICCPR, Articles 16, 18 and 11, respectively.

The human rights instruments of possible relevance in ascertaining the meaning of 'basic human rights' are listed in Table 10.

Table 10: Human rights instruments of possible relevance in ascertaining the meaning of basic human rights

1	Universal Declaration of Human Rights, 1948
2	International Covenant on Civil and Political Rights, 1966
3	International Covenant on Economic, Social and Cultural Rights, 1966[194]
4	International Convention on the Elimination of All Forms of Racial Discrimination, 1965
5	Convention on the Elimination of All Forms of Discrimination against Women, 1979
6	UN Convention on the Rights of the Child, 1989
7	Convention on the Rights of Persons with Disabilities, 2006
8	International Convention for the Protection of All Persons from Enforced Disappearance, 2010[195]

In general, the wording of Article 9(1)(a), with its reference to the non-derogable civil and political rights set out in the ECHR, does not indicate any automatic extension to economic, social and cultural rights. Furthermore, it is well established that economic hardship alone does not constitute persecution[196]. Indeed, in general, for serious infringements of economic and social rights to qualify as persecution, they must be attributable to an actor (see Section 1.7 below on actors of persecution or serious harm under Article 6 QD (recast)). National case-law has nevertheless confirmed that it is at least possible for socioeconomic harm to constitute persecution[197]. Thus, it may be that whether **social and economic rights** as guaranteed in the European Social Charter[198] or the International Covenant on Economic, Social and Cultural Rights can be considered 'basic' human rights depends on the potential severity of an interference with the basic living conditions of a person.

In any event, as will be discussed in Section 1.4.3 below, violations of economic and social rights laid down in human rights treaties can amount to persecution as a result of an accumulation of various measures under Article 9(1)(b), provided the measures are sufficiently severe to affect the individual in a similar manner to that mentioned in Article 9(1)(a).

1.4.2.2. 'Severe violation'

To fall within the definition of an act of persecution under Article 9(1)(a), it is not enough to identify that the circumstances of a particular case engage one or more basic human rights; it must also be established that there is, or would be, a violation of such rights. The right identified must have been, or be at real risk of being, violated. In the case of non-derogable rights, determining if that is the case requires a simple assessment of whether the right has been, or would be, violated, for instance by ill treatment. However, if the basic human right is of a derogable/conditional character, the situation is different. Interference with such a right will amount to a violation only if there is no permitted **limitation**.

194 International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966.

195 International Convention for the Protection of All Persons from Enforced Disappearance, 23 December 2010.

196 As noted in CJEU, judgment of 20 January 2021, *Secretary of State for the Home Department* v *OA*, C-255/19, EU:C:2021:36 (hereinafter CJEU, 2021, *OA*), para. 49, 'mere economic hardship cannot, as a general rule, be classified as "persecution", within the meaning of Article 9 [QD]'.

197 See, for example, BVerwG (Germany), judgment of 31 January 2013, No 10 C 15.12, BVerwG:2013:300713U1C5.12.0 (English translation) (hereinafter BVerwG (Germany), 2013, No 10 C 15.12 (English translation)), para. 36.

198 See European Social Charter, 18 October 1961, and the Revised European Social Charter, 3 May 1996.

Article 52(1) EU Charter

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The CJEU has stated that 'Interference with the right to religious freedom may be so serious to be treated in the same way as cases referred to in Article 15(2) ECHR … for the purpose of determining which acts must in particular be regarded as constituting persecution'[199]. Nevertheless, it found that:

> that cannot be taken to mean that any interference with the right to religious freedom guaranteed by Article 10(1) of the Charter constitutes and [sic] act of persecution requiring the competent authorities to grant refugee status within the meaning of Article 2(d) of the Directive to any person subject to the interference in question[200].

The CJEU has adjudged:

> Acts amounting to limitations on the exercise of the basic right to freedom of religion within the meaning of Article 10(1) of the Charter which are provided for by law, without any violation of that right arising, are thus automatically excluded as they are covered by Article 52(1) of the Charter[201].

The CJEU has stated that the right to religious freedom enshrined in Article 10(1) EU Charter corresponds to the right guaranteed by Article 9 ECHR[202]. In relation to Article 9 ECHR, the ECtHR decided in *Kokkinakis* v *Greece* that it may be necessary to place restrictions on the Article 9(1) ECHR right to freedom of religion in order to reconcile the interests of the various groups and to ensure that everyone's beliefs are respected[203]. Relevant questions in this context include whether the actions were 'prescribed by law', whether the actions had a 'legitimate aim' and whether the actions were 'necessary in a democratic society'. The court distinguished between 'proper' and 'improper' proselytism, highlighting that the former is a reflection of 'true evangelism … and the responsibility of every Christian and every church', whereas the latter is a 'corruption or deformation of it'. The court observed that improper proselytism could 'take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing'. The ECtHR considers such improper proselytism incompatible with the Article 9 ECHR right[204].

However, the relevance of acts that are not covered by Article 10(1)EU Charter, but may be authorised under derogation clauses in time of war or in a public emergency situation

199 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 57.
200 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 58.
201 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 60.
202 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 56.
203 ECtHR, judgment of 25 May 1993, *Kokkinakis v Greece*, No 14307/88, CE:ECHR:1993:0525JUD001430788.
204 ECtHR, 1993, *Kokkinakis v Greece*, paras 41–47; and ECtHR, *Freedom of Religion Factsheet*, October 2019, p. 5.

(Article 15(1) ECHR) or under a limitation clause provided by the ECHR or by other human rights instruments, is still open to debate. The CJEU is yet to rule on the interpretation to be applied in such a case. The Upper Tribunal (United Kingdom) held that 'Where Article 15 [ECHR] operates, a state cannot be expected to protect against non-securement of derogable rights because such non-securement does not amount to persecution'[205].

In the case of limitations based on public order and security, the character of an infringement as a violation of a basic human right must be examined taking into account the general situation in the country of origin and the individual circumstances of the applicant for international protection.

The French National Court of Asylum Law has, for instance, denied the granting of protection to activists of an African resistance movement promoting the interests of a white minority group in Namibia, who had been imprisoned several times under legislation to protect the public interest and prevent incitement of racial hatred[206]. With regard to freedom of religion, in the jurisprudence of the ECtHR, restrictions on wearing full-face veils or religious symbols in public have been considered justified by the public interest in the preservation of the conditions of 'living together'[207]. Acts that limit the exercise of the basic right to freedom of religion provided for by law but do not violate that right are thus automatically excluded from the scope of application of Article 9[208].

The notion of a **'severe' violation** of a basic human right remains to be considered. To be regarded as an act of persecution, an act must be sufficiently serious by its **nature** or **repetition** to constitute a severe violation of basic human rights. Whereas 'nature' is a qualitative criterion, 'repetition' contains a quantitative dimension. A single act that may not be sufficiently serious by its nature to constitute a severe violation of basic human rights may, by its repetition, constitute a severe violation of basic human rights if it exerts a similarly grave effect upon an individual[209].

The CJEU has considered the decisive criterion to be whether the violation can be considered 'sufficiently serious'[210]. Not all violations of fundamental rights will necessarily reach that threshold[211]. As the court stated in *Y and Z*:

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205 Upper Tribunal (IAC) (United Kingdom), judgment of 3 December 2013, *MS (Coptic Christians) Egypt CG*, [2013] UKUT 00611 (hereinafter Upper Tribunal (IAC) (United Kingdom), 2013, *MS (Coptic Christians) Egypt CG*), para. 120. See also Council of Europe / ECtHR, Guide on Article 15 of the European Convention on Human Rights: Derogation in Time of Emergency, updated 30 April 2021 (hereinafter ECtHR, Guide on Article 15 ECHR: Derogation in Time of Emergency).

206 CNDA (France), judgment of 12 May 2012, No 8919247.

207 ECtHR (GC), judgment of 1 July 2014, *SAS v France*, No 43835/11, CE:ECHR:2014:0701JUD00438351.

208 For a CJEU ruling on this issue, see CJEU (GC), judgment of 15 July 2021, *IX v WABE eV and MH and Müller Handels GmbH v MJ*, C-804/18 and C-341/19, EU:C:2021:594. See also CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 60.

209 Immigration Appeal Tribunal (United Kingdom), judgment of 19 July 2000, *Mustafa Doymus* v *Secretary of State for the Home Department*, [2000] HX-80112-99, quoted in Lambert, H., 'The conceptualisation of "persecution" by the House of Lords: Horvath v. Secretary of State for the Home Department', *International Journal of Refugee Law*, Vol. 13, Nos 1 and 2, 2001, p. 23, and the observations of Judge Kirby in High Court (Australia), judgment of 16 November 2000, *Minister for Immigration and Multicultural Affairs v Haji Ibrahim*, [2000] HCA 55.

210 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 53.

211 Ibid. See also CJEU, 2020, *EZ*, op. cit., fn. 34, para. 22: 'it is clear from those provisions that, for an infringement of fundamental rights to constitute persecution within the meaning of Article 1(A) of the [Refugee] Convention, it must be sufficiently serious (see, to that effect, [CJEU, 2015, *Shepherd*, op. cit., fn. 163, para. 25] and the case-law cited).'

> It follows that acts which, on account of their intrinsic severity as well as the severity of their consequences for the person concerned, may be regarded as constituting persecution must be identified, not on the basis of the particular aspect of religious freedom that is being interfered with but on the basis of the nature of the repression inflicted on the individual and its consequences ...
>
> It is therefore the severity of the measures and sanctions adopted or liable to be adopted against the person concerned which will determine whether a violation of the right guaranteed by Article 10(1) of the Charter constitutes persecution within the meaning of Article 9(1) of the Directive[212].

Thus, it is the nature of the repression and its consequences, rather than the precise identity of a right as 'basic' taken on its own, that forms the basis of identifying acts of persecution. As the CJEU stated in *Fathi*, 'the acts which may be committed by the authorities of [the country of origin] against the applicant on grounds of religion must be assessed according to their gravity'[213]. Under these circumstances, the court in *Y and Z* considered that 'the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9(1)'[214]. However, a term of imprisonment that accompanies such a legislative provision and is actually applied in the country of origin may be considered disproportionate or discriminatory and may thus constitute persecution[215]. If criminal legislation providing for imprisonment is not actually applied in practice, the violation may not be considered sufficiently severe to constitute an act of persecution.

It follows from the court's reasoning that a violation of derogable human rights such as the rights protected by Article 7 EU Charter / Article 8 ECHR must always be required to surmount a threshold of sufficient severity, while a violation of non-derogable rights may be assumed to automatically constitute persecution by the very nature of the act[216]. Thus, in *Fathi*, the CJEU noted that:

> it is apparent from the wording of Article 9(1) of that directive that a prerequisite of the acts in question being regarded as acts of persecution is that there must be a 'severe violation' of religious freedom that has a significant effect on the person concerned ...[217].

In practical terms, problems regarding whether a human right is in itself basic will usually not arise, because in all cases there is a threshold test. As the court made clear in *Y and Z* and in *Fathi*, 'the acts which may be committed by the authorities of those countries against the applicant on grounds of religion [must be] assessed [to be of sufficient] gravity'[218].

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212 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, paras 65–66.

213 CJEU, judgment of 4 October 2018, *Bahtiyar Fathi* v *Predsedatel na Darzhavna agentsia za bezhantsite*, C-56/17, EU:C:2018:803 (hereinafter CJEU, 2018, *Fathi*), para. 83.

214 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 55.

215 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, paras 54–56.

216 See also Section 1.4.2.2 below.

217 CJEU, 2018, *Fathi*, op. cit., fn. 214, para. 94.

218 CJEU, 2018, *Fathi*, op. cit., fn. 214, para. 83.

As noted earlier, the CJEU's analysis of Article 9(1) appears to regard a violation of non-derogable rights as automatically constituting persecution by the very nature of the act. This is also the position adopted by the German Federal Administrative Court, which acknowledged that 'in the event of interference with physical integrity or physical freedom, persecution is to be assumed automatically, provided the interference is covered by Article 3 of the ECHR'[219]. The same conclusion may be drawn by analogy with regard to grave violations of international criminal law, such as genocide or crimes against humanity[220].

The German Federal Administrative Court has adopted a similar approach with regard to the right to nationality and the prohibition of the arbitrary deprivation of a person's nationality under Article 15 Universal Declaration of Human Rights[221]. The right to nationality is not unlimited. A state may, for example, deprive a person of their nationality for reasons relating to their fraudulent conduct even if the person becomes stateless[222]. Nevertheless, an arbitrary withdrawal deprives a person of their fundamental status as a citizen and of related rights of residence and protection. Thus, it may be considered sufficiently severe to constitute persecution[223]. This does not mean that deprivation of nationality automatically equates to persecution; whether it does is a question of fact and degree in any particular case[224].

However, **whether a violation of human rights is, by the type of act and its effect upon the applicant concerned, sufficiently severe to constitute persecution within the meaning of Article 9(1)(a) must be examined in each individual case**. The seriousness of the act must be assessed in the light of Article 4(3), which requires taking into account, inter alia:

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219 BVerwG (Germany), 2009, No 10 C 51.07 (English translation), op. cit., fn. 180, para. 116. See also Bank, R., 'The transposition of the qualification directive in Germany', in Zwaan, K. (ed.), *The Qualification Directive: Central themes, problem issues, and implementation in selected Member States*, Wolf Legal Publishers, Nijmegen, 2007 (hereinafter Bank, 'The transposition of the qualification directive in Germany'), p. 124.

220 Goodwin-Gill and McAdam, *The Refugee in International Law*, op. cit., fn. 25, pp. 73–76.

221 BVerwG (Germany), 2009, No 10 C 50.07 (English translation), op. cit., fn. 146, para. 18. See also, for example, Court of Appeal (England and Wales, United Kingdom), judgment of 7 November 2007, *JV (Tanzania) v Secretary of State for the Home Department*, [2007] EWCA Civ 1532 (hereinafter EWCA (United Kingdom), 2007, *JV (Tanzania)*), paras 6 and 10; Court of Appeal (England and Wales, United Kingdom), judgment of 13 February 1997, *Boban Lazarevic v Secretary of State for the Home Department*, [1997] EWCA Civ 1007 (hereinafter EWCA (United Kingdom), 1997, *Boban Lazarevic*); and Court of Appeal (England and Wales, United Kingdom), judgment of 31 July 2007, *EB (Ethiopia) v Secretary of State for the Home Department*, [2007] EWCA Civ 809, paras 54 and 75. See also Dörig, H., 'German courts and their understanding of the Common European Asylum System', *International Journal of Refugee Law*, Vol. 25, No 4, 2013, p. 770.

222 Article 7(3) European Convention on Nationality, 6 November 1997, specifies the only exception as being 'acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant'. See Hailbronner, K., in Hailbronner, K., Renner, G. and Maaßen, H.-G. (eds), *Staatsangehörigkeitsrecht*, 3rd edn, C.H. Beck, Munich, 2010, para. 467 *et seq.*; and de Groot, R., *Survey on rules on loss of nationality in international treaties and case law*, CEPS Paper No 57, 2013, pp. 20ff. See also CNDA (France), judgment of 5 January 2011, *M. M.*, No 10015655 C, summarised in CNDA (France), *Contentieux des réfugiés Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2011*, p. 76, which found that the applicant faced personalised persecution in part because of the law in force since 1982, which denies Rohingya their citizenship rights; and CNDA (France), judgment of 27 November 2009, *M. P.,* No 643384/09002208, in CNDA (France), *Contentieux des réfugiés: Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2009*, 2010, pp. 90–91 (hereinafter CNDA (France), 2009, *M. P.*, No 643384/09002208), concerning the Lhotshampa minority from Bhutan, who were deprived of their nationality by the authorities.

223 The German Federal Administrative Court has left open whether the violation can be considered sufficiently severe if the person possesses a second nationality: BVerwG (Germany), 2009, No 10 C 50.07 (English translation), op. cit., fn. 146, para. 66. See also CNDA (France), 2009, *M. P.*, No 643384/09002208.

224 EWCA (United Kingdom), 2009, *MA (Ethiopia)*, op. cit., fn. 127, para. 59.

> the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm [Article 4(3)(c)].

In relation to the prohibition of ill treatment, the CJEU has stated that 'the prohibition of inhuman or degrading treatment laid down in Article 4 of the Charter corresponds to that laid down in Article 3 of the ECHR and, to that extent, its meaning and scope are ... the same as those conferred on it by [the ECHR]'[225]. In turn, the ECtHR has emphasised that 'the ill-treatment the applicant alleges that he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this level is relative, depending on all the circumstances of the case'[226] (see also the analysis in Section 2.4.3, in particular Sections 2.4.3.2 and 2.4.3.3 on 'torture' and 'inhuman or degrading treatment or punishment' respectively, together with relevant ECtHR case-law).

Relevant elements of this assessment include the notions of personal integrity and human dignity, as well as the manner and degree of any harm or threat of harm as it affects the individual situation of the applicant, particularly including factors related to vulnerability, such as background, gender and age[227]. A violation of a basic human right may qualify as severe because of its particular impact on a specific applicant[228]. All acts to which a person has been, or risks being, exposed must be taken into account (see Article 4(3) QD (recast)). For further detail, see EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial analysis*[229]; and EASO, *Vulnerability in the context of applications for international protection – Judicial analysis*, especially Sections 6.2.1 and 6.3.1[230].

Minor deprivations of freedom such as a single short unlawful arrest may not suffice to qualify as a severe violation[231]. However, the repetition of such measures may amount to persecution[232]. In addition, the application in practice of a sanction of a term of imprisonment that is disproportionate or discriminatory was recognised as relevant for the assessment of

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225 International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966.

226 ECtHR (GC), judgment of 23 August 2016, *JK and Others* v *Sweden*, No 59166/12, CE:ECHR:2016:0823JUD005916612 (hereinafter ECtHR (GC), 2016, *JK and Others* v *Sweden*), para. 79, which refers to an earlier judgment: ECtHR, judgment of 6 March 2001, *Hilal* v *United Kingdom*, No 45276/99, CE:ECHR:2001:0306JUD004527699 (hereinafter ECtHR, 2001, *Hilal* v *UK*), para. 60.

227 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 68; see, for example, RVV/CCE (Belgium), judgment of 24 June 2019, No 223.104; and Dörig, H., commentary on Article 9 Directive 2011/95, para. 27, in Hailbronner and Thym (eds), *EU Asylum and Immigration Law: A commentary*, op. cit., fn. 186.

228 This accords with the approach of the ECtHR to Article 3 ECHR. In ECtHR (GC), judgment of 21 January 2011, *M.S.S.* v *Belgium and Greece*, No 30696/09, CE:ECHR:2011:0121JUD003069609 (hereinafter ECtHR (GC), 2011, *M.S.S.* v *Belgium and Greece*), the court stated at para. 219 'The assessment of this minimum ... depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim'. See also ECtHR, judgment of 3 December 2013, *Ghorbanov and Others* v *Turkey*, No 28127/09, CE:ECHR:2013:1203JUD002812709, para. 33.

229 EASO, *Evidence and Credibility Assessment – Judicial analysis*, op. cit., fn. 23.

230 EASO, *Vulnerability – Judicial analysis*, op. cit., fn. 64.

231 See, for example, Council of State (Raad van State) (Netherlands), judgment of 30 July 2002, 200203043/1, where it was stated that 'The State Secretary for Security and Justice was right in taking the position that the discrimination against the applicant was not so severe that her situation had become unbearable or would become so within reasonable time'. See also Section 1.4.3 of this judicial analysis.

232 See, for example, Council of State (Netherlands), 2002, 200203043/1, op. cit., fn. 232. See also UNHCR, *Handbook*, op. cit., fn. 103, para. 53, and Section 1.4.3 of this judicial analysis.

persecution by the CJEU in its *X, Y and Z* judgment[233]. It follows that a violation of a human right, even if it is to be considered basic, must pass the test of severity on the basis of the particular impact it has on the applicant[234].

With regard to infringements of the right conferred by Article 10 EU Charter and Article 9 ECHR (freedom of thought, conscience and religion), the CJEU has decided that, notwithstanding the basic character of this right:

> acts which undoubtedly infringe the right … , but whose gravity is not equivalent to that of an infringement of the basic human rights from which no derogation can be made by virtue of Article 15(2) of the ECHR, [cannot] be regarded as constituting persecution within the meaning of Article 9(1) of the Directive …[235].

It follows that not all infringements of the right to freedom of religion constitute persecution within the meaning of Article 9(1) QD (recast).

To determine comparability, no distinction can be made between an interference with religious activities in private (*forum internum*) and an interference with religious activities in public (*forum externum*). A restriction to freedom of religion may constitute a severe violation whether it affects an applicant's right to practise their faith in private circles or publicly, either alone or in the community with others. Therefore, according to the CJEU's 2012 *Y and Z* judgment, it is the seriousness of the measures and sanctions to be adopted or liable to be adopted, 'on account of their intrinsic severity as well as the severity of their consequences for the person concerned', that 'will determine whether a violation of the right guaranteed by Article 10(1) of the Charter constitutes persecution'[236].

Determining whether there is a real risk that a person's participation in formal worship in public will, inter alia, lead to them being prosecuted or subjected to inhuman or degrading punishment by one of the actors referred to in Article 6 QD (recast) establishes the degree of seriousness required to constitute persecution[237].

The CJEU has rejected the need to take into account the possibility for an applicant to avoid the risk of persecution by abstaining from their religious practice and, consequently, renouncing the protection of refugee status that the directive is intended to afford the applicant (see Section 1.5.5 on the issue of concealment)[238]. The fundamental importance of a religious practice for the individual is a significant factor in determining whether sanctions may constitute a real risk of persecution. The court has ruled:

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233 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 56; see also CJEU, 2018, *Fathi*, op. cit., fn. 214, para. 101.

234 See Administrative Court (Upravno Sodišče) (Slovenia), judgment of 19 September 2014, I U 1627/2013-17, para. 87, which was upheld by the Supreme Court in the appellate procedure, stating that the term 'severe' violation of basic human rights from Article 9(1)(a) QD (recast) is 'legally problematic' given that the provision refers primarily to absolute human rights. Therefore, the court went on to state that the term 'severe' cannot be interpreted using a grammatical method – which is not the most important method of interpretation under EU law – but rather using a teleological method taking into account the purpose of international protection under EU law as a whole in conjunction with the particular circumstances of the applicant and the case-law of the ECtHR in relation to absolute protection under Article 3 ECHR (Article 6(3) TEU and Article 52(3) EU Charter).

235 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 61; and CJEU, 2018, *Fathi*, op. cit., fn. 214, paras 81–83.

236 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, paras 65 and 66.

237 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 67.

238 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 78.

> In assessing such a risk, the competent authorities must take account of a number of factors, both objective and subjective. The subjective circumstance that the observance of a certain religious practice in public, which is subject to the restrictions at issue, **is of particular importance to the person concerned** in order to preserve his religious identity is a relevant factor to be taken into account in determining the level of risk to which the applicant will be exposed in his country of origin on account of his religion, even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned[239].

Implementing the CJEU judgment, the referring court – the German Federal Administrative Court – decided to remit the cases to the lower courts in order to find out the degree of objective and subjective severity. It observed that acts directed against such exercises of faith are to be considered sufficiently serious to constitute persecution if they exert intense pressure on a person's decision to practise their faith in a manner the person felt was obligatory to maintain their religious identity[240].

1.4.3. Accumulation of measures (Article 9(1)(b))

Article 9(1)(b) QD (recast) provides for an alternative way for an act or acts to qualify as persecution. Its wording broadly reflects paragraph 53 of the 1979 UNHCR *Handbook*[241] and also the frequent reliance by the ECtHR in the context of its Article 3 jurisprudence on the notion of cumulative harm[242].

If an act, either by its nature or repetition, does not qualify as a severe violation of a basic human right, it is necessary to examine whether various measures in their cumulative effect constitute persecution within the meaning of Article 9(1)(b). While Article 9(1)(a) requires a severe violation of a basic human right, under Article 9(1)(b) other human rights violations and/or 'measures' causing harm or exerting a repressive effect on an individual may cumulatively constitute persecution. The decisive element of persecution is the severity of a violation of an individual's rights. The measures in their combined effect must be assessed in the light of the personal circumstances of an applicant, taking into account all acts to which the applicant has been, or is at risk of being, exposed[243]. Thus, acts or measures in their cumulative effect can constitute persecution, even if not constituting a severe violation of a basic human right under Article 9(1)(a). A comparative assessment determining whether the applicant concerned is affected in a similar manner to a severe violation of a basic human right is, however, indispensable[244].

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239 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 70 (emphasis added).

240 BVerwG (Germany), judgment of 20 February 2013, No 10 C 23.12, BVerwG:2013:200213U10C2312.0 (English translation) (hereinafter BVerwG (Germany), 2013, No 10 C 23.12 (English translation)), paras 30 and 39. See Dörig, H., commentary on Article 9 Directive 2011/95, para. 26, in Hailbronner and Thym (eds), *EU Asylum and Immigration Law: A commentary*, op. cit., fn. 186.

241 UNHCR, *Handbook*, op. cit., fn. 103, para. 53, refers to 'various measures not in themselves amounting to persecution' as being capable of constituting persecution on 'cumulative grounds'.

242 See, for example, ECtHR (GC), 2016, *JK and Others* v *Sweden*, op. cit., fn. 227, para. 95; and ECtHR, judgment of 17 July 2008, *NA* v *United Kingdom*, No 25904/07, CE:ECHR:2008:0717JUD002590407 (hereinafter ECtHR, 2008, *NA* v *UK*), para. 130.

243 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 68.

244 BVerwG (Germany), 2013, No 10 C 23.12 (English translation), op. cit., fn. 241, para. 37. See also CNDA (France), 2015, *Mlle E.*, No 10012810 (English summary), op. cit., fn. 179, concerning a Nigerian victim of a prostitution network; the court considered that the different reprisals, threats, stigma and ostracism she would face if returned to her country were an accumulation of acts that as a whole constituted persecution.

The term 'measures' in Article 9(1)(b) QD (recast) covers, in a wide sense, **all measures that may affect an individual in a similar manner to a severe violation of basic human rights**. Violations of human rights that do not qualify as basic are included. That is made clear by the words 'including violations of human rights'. However, the preposition 'including' also conveys that 'measures' can encompass acts, such as discriminatory acts, that do not have the quality of a human rights violation[245]. Indeed, Article 9(2)(b) specifies that acts of persecution can take the form, inter alia, of 'legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner'. Of course, acts of discrimination may well constitute a human rights violation in themselves[246]. In addition, 'measures' may encompass, for example, conduct that puts minor obstacles, difficulties or hardships in an applicant's way, which, when considered cumulatively, are 'sufficiently severe as to affect an individual in a similar manner as mentioned in point (a)' in accordance with Article 9(1)(b).

Whether discriminatory measures in connection with a general atmosphere of insecurity[247] qualify as persecution can be decided only on the basis of the criterion of their being of sufficient severity that they, taken together, affect an individual in a similar manner to that mentioned in Article 9(1)(a). It is not possible to lay down more precise rules as to what cumulative reasons can give rise to a valid claim to refugee status. Whether a combination of measures can qualify as persecution depends on all the circumstances, including the particular geographical, historical and ethnological context[248].

An accumulation of various measures constitutes persecution only if it affects the applicant **in a similar manner** to a violation under Article 9(1)(a) QD (recast). 'Similar' does not appear to mean that there needs to be precisely the same effect. The German Federal Administrative Court refers to the cumulative approach set out in the UNHCR *Handbook*, stating that, with regard to the severity of a violation of the right to religious freedom, various acts or measures with discriminatory effect must be taken into account[249]. It found that such acts or measures include restrictions of access to educational or health facilities or substantial restrictions to occupational or economic possibilities to earn a living. In a French case, an Ahmadi from Algeria not only had been arrested and interrogated on account of his faith before he fled, but had also had his passport taken and been subject to discriminatory judicial measures motivated only by his religion. The court found in this case that the combination of these elements amounted to 'serious indications' of a well-founded fear of persecution[250]. In a judgment prior to the implementation of the QD, the Austrian Supreme Administrative Court likewise considered that the various discriminatory measures against women in Afghanistan were so extreme in their nature that the threshold of persecution within the meaning of the Refugee Convention was met[251].

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245 BVerwG (Germany), 2013, No 10 C 23.12 (English translation), op. cit., fn. 241.

246 See, for example, Articles 2(1) and 26 ICCPR and Article 2(3) ICESCR.

247 UNHCR, *Handbook*, op. cit., fn. 103, para. 55.

248 UNHCR, *Handbook*, op. cit., fn. 103, para. 55.

249 BVerwG (Germany), 2013, No 10 C 23.12 (English translation), op. cit., fn. 241, para. 36.

250 CNDA (France), judgment of 4 July 2019, *M. H.*, No 19000104 C (hereinafter CNDA (France), 2019, *M. H.*, No 19000104 C).

251 VwGH (Austria), judgment of 16 April 2002, No 99/20/0483, AT:VWGH:2002:1999200483.X00, para. 5. See also Upper Tribunal (IAC) (United Kingdom), judgment of 18 May 2012, *AK (Article 15(c)) Afghanistan CG*, [2012] UKUT 00163 (hereinafter Upper Tribunal (IAC) (United Kingdom), 2012, *AK (Article 15(c)) Afghanistan CG*).

Measures of discrimination may constitute persecution if they lead to consequences of a substantially prejudicial nature for the person concerned. Examples include deprivation of the right to earn a livelihood, deprivation of the right to practise one's religion and denial of any access to normally available educational facilities[252]. Furthermore, as noted immediately above, even measures that are not in themselves violations of human rights or even discriminatory may be relevant. In both contexts, the question of whether a cumulative element is involved may become especially important[253].

1.4.4. Enumeration of possible acts of persecution (Article 9(2))

Article 9(2) QD (recast) aims to identify – non-exhaustively – those acts or measures that may qualify as persecution. The 'indicative list'[254] in that article mostly ranges from the general to the particular[255], and is provided in Table 11.

Table 11: Non-exhaustive list of possible forms of acts of persecution in Article 9(2) QD (recast)

Article 9(2)	Forms that acts of persecution can take	Section(s) in which they are addressed
(a)	Acts of physical or mental violence, including acts of sexual violence	1.4.4.1 and 1.4.4.2
(b)	Legal, administrative, police and/or judicial measures that are in themselves discriminatory or that are implemented in a discriminatory manner	1.4.4.3
(c)	Prosecution or punishment that is disproportionate or discriminatory	1.4.4.4
(d)	Denial of judicial redress resulting in a disproportionate or discriminatory punishment	1.4.4.5
(e)	Prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2)	1.4.4.6
(f)	Acts of a gender-specific nature	1.4.4.7
(f)	Acts of a child-specific nature	1.4.4.8

The use of 'inter alia' in the text introducing this list indicates that the enumeration of the possible forms that acts of persecution can take is non-exhaustive. Thus, other types of acts may also constitute acts of persecution[256]. This judicial analysis suggests that acts of persecution may also take the form of 'acts of a disability-specific nature'. The reasons for adding this possibility are explained below in Section 1.4.4.9.

[252] UNHCR, *Handbook*, op. cit., fn. 103, para. 54.

[253] UNHCR, *Handbook*, op. cit., fn. 103, para. 55.

[254] CJEU, 2020, *EZ*, op. cit., fn. 34, para. 41.

[255] Goodwin-Gill and McAdam, *The Refugee in International Law*, op. cit., fn. 25, p. 69.

[256] See, for example, CNDA (France), judgment of 14 November 2013, *M. C*, No 12024083 C, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2013*, 2014, pp. 53–54 (hereinafter CNDA (France), 2013, *M. C.*, No 12024083 C), which considered that the implementation of judicial proceedings against a Bangladeshi national of Hindu religion that resulted in deprivation of property in the well-known context of corruption in the country amounted to persecution.

It should also be observed that the provisions of Article 9(2)(a)–(f) are not hermetically sealed categories. They can overlap. For example, an applicant who argues that they would face disproportionate punishment for refusal to perform military service in a conflict may be able to bring their case under more than one of the three provisions: Article 9(2)(a), (b) and/or (c).

The principal purpose of Article 9(2) is to aid in the identification of what types of acts potentially fall within the material scope of Article 9. The inclusion of acts in the list given in Article 9(2) relieves the decision-maker of the task of examining whether a type of act can potentially be persecutory. The list of acts does not negate the need for the examination in any particular case of whether one of the acts enumerated in Article 9(2) fulfils the requirements of Article 9(1)(a) or (b).

1.4.4.1. Acts of physical or mental violence (Article 9(2)(a))

Acts of physical or mental violence may often be considered ill treatment under Article 3 ECHR and Article 4 EU Charter. Acts of physical or mental violence qualify as persecution within the meaning of Article 9(1) if they are of such intensity that they substantially infringe an individual's physical integrity or mental capacity for independent decision-making. For more on this, see Section 2.4.3 below.

1.4.4.2. Acts of sexual violence (Article 9(2)(a))

Acts of sexual violence have been explicitly included as an example in Article 9(2)(a) to remove any doubt that such acts can be considered acts of persecution. Such acts typically constitute a severe violation of basic human rights, especially the prohibition of ill treatment (Article 3 ECHR, Article 4 EU Charter).

According to Article 8 1998 Rome Statute of the International Criminal Court, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of sexual violence of comparable gravity are classified as war crimes in international or non-international armed conflicts[257]. A variety of international instruments considers that the systematic or widespread use of forms of sexual violence against the civilian population in an armed conflict is a crime against humanity[258].

As an example of sexual violence, **rape**, whether committed in wartime or peacetime, is now recognised as a form of sexual violence that may qualify as persecution. Thus, the Belgian Council for Alien Law Litigation found that the rape of a woman applicant from Côte d'Ivoire was an act of persecution on political grounds[259]. In another case, it noted that, taken cumulatively with other acts, rape was a common method used in Sudan against women[260]. In another case, the same court considered that acts of rape were persecutory because of the nature, intensity and repeated character of the sexual abuses on a minor male applicant in Afghanistan[261]. The CNDA (France) considered that the subjection to rape of a gay man from Lebanon was one of the elements of his case leading to his recognition as a refugee[262].

[257] Rome Statute of the International Criminal Court, 16 July 1998, Article 7(1)(g).

[258] UN Security Council, Resolution 1820(2008) (19 June 2008), UN Doc S/Res/1820(2008), para. 1; and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 27.

[259] RVV/CCE (Belgium), judgment of 24 November 2015, No 156.927.

[260] RVV/CCE (Belgium), judgment of 11 December 2012, No 93.324.

[261] RVV/CCE (Belgium), judgment of 4 February 2013, No 96.572.

[262] CNDA (France), judgment of 29 May 2020, No 19053522.

Other forms of sexual violence may also constitute persecution if they pass the test of sufficient seriousness under Article 9(1)(a) or have a similar, severe effect as part of various measures under Article 9(1)(b). Any act of violence, attempted act of violence or threat of a sexual nature that results, or is likely to result, in physical, psychological or emotional harm of sufficient severity qualifies as an act of persecution[263]. Acts of sexual violence can take the form of persecution irrespective of whether or not they are committed in the context of domestic violence[264].

1.4.4.3. Legal, administrative, police and/or judicial measures (Article 9(2)(b))

Article 9(2)(b) QD (recast)

Acts of persecution as qualified in paragraph 1 can, inter alia, take the form of:

[...]

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner.

Article 9(2)(b) concerns **measures that are persecutory by nature, or have the appearance of legality and are misused for the purpose of persecution, or are carried out in breach of the law**[265]. Whether legislation can, in certain circumstances, amount to persecution depends, inter alia, on whether it is applied in practice[266]. General measures to safeguard public order, state security or public health do not constitute persecution as long as they meet the requirements for valid limitation of, or derogation from, human rights obligations as established by international law[267]. The CJEU notes that Article 9(2)(b) and (c):

> refer to measures taken by the public authorities whose discriminatory or disproportionate nature must, according to the first paragraph of that article, be

[263] RVV/CCE (Belgium), judgment of 8 December 2015, No 157.905. See also UNHCR, *Sexual and gender-based violence against refugees, returnees and internally displaced persons: Guidelines for prevention and response*, May 2003, Chap. 1, p. 10.

[264] See, for example, Special Appeal Committee (Greece), decision of 26 June 2011, No 95/126761 (English summary) (hereinafter Special Appeal Committee (Greece), 2011, No 95/126761 (English summary)), concerning a woman from Iran subjected to, inter alia, domestic violence; and Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 25 January 2011, *RS* v *Ministry of Interior*, No 6, Azs 36/2010-274 (English summary) (hereinafter Supreme Administrative Court (Czechia), 2011, *RS* v *Ministry of Interior*, No 6, Azs 36/2010-274 (English summary)), concerning a woman from Kyrgyzstan in a forced polygamous marriage, who feared violence at the hands of her husband. See also Administrative Court of Sofia (Bulgaria), request to the CJEU for a preliminary ruling, lodged 6 October 2021, *X v Intervyuirasht organ na Darzhavna agentsia za bezhantsite pri Ministerskia savet*, C-621/21, concerning the 'Conditions for granting international protection under [the QD (recast)] in the case of gender-based violence against women in the form of domestic violence; alternative possibility of granting subsidiary protection in the light of real threats of honour killing in the event that the applicant returns to her country of origin'.

[265] See European Commission, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection: explanatory memorandum, 30 October 2001, 2001/0207(CNS), p. 20 (hereinafter European Commission, QD proposal: explanatory memorandum, 2001), referring to what was at that stage Article 11(1)(b).

[266] CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 55; and CJEU, 2018, *Fathi*, op. cit., fn. 214, paras 96–98. See also Storey, 'Persecution', op. cit., fn. 165, p. 500.

[267] CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 60.

> sufficiently serious … to be considered an infringement of fundamental rights constituting persecution within the meaning of Article 1A(2) of the [Refugee] Convention[268].

One example could be the arbitrary deprivation of nationality. For example, German, French and UK courts have long recognised that, in some circumstances, deprivation of nationality may amount to persecution, if the act of deprivation or revocation can be said to be a wilful denial of nationality for a 'capricious or discriminatory reason' and the denial is for one of the reasons set out in the Refugee Convention[269].

Less favourable treatment in the context of differences in the treatment of various groups does not of itself constitute persecution[270]. Discriminatory legislation or application of the law may only qualify as an act of persecution if there are severe aggravating circumstances, such as consequences of a substantially prejudicial nature for the applicant. Serious restrictions to a person's right to earn a livelihood, the right to practise a religion or access to educational facilities[271] may – depending on the circumstances – either per se or in their accumulated effect with other restrictions, amount to persecution if they affect an individual in a similar manner to a severe violation of a basic human right under Article 9(1)(a). In this context, all individual circumstances must be taken into account, in particular the effect of an accumulation of discriminatory acts and/or other measures on a person's living conditions.

1.4.4.4. Disproportionate or discriminatory prosecution or punishment (Article 9(2)(c))

Article 9(2)(c) QD (recast)

Acts of persecution as qualified in paragraph 1 can, inter alia, take the form of:

[…]

(c) prosecution or punishment which is disproportionate or discriminatory.

In principle, criminal prosecution or punishment for breach of an ordinary law of general application does not qualify as persecution[272]. In many cases, the question of whether prosecution or punishment is discriminatory will not arise. Persons fleeing prosecution or punishment for an offence are normally not refugees[273]. Measures, within the meaning of

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268 CJEU, 2015, *Shepherd*, op. cit., fn. 163, para. 49.

269 See, for example, CNDA (France), 2010, *M. D.*, No 09002572 C+, op. cit., fn. 157, regarding black Mauritanians from Mauritania deprived of their rights and nationality in 1988, in which on the facts the CNDA did not accept that deprivation had been proven; BVerwG (Germany), 2009, No 10 C 50.07 (English translation), op. cit., fn. 146; EWCA (United Kingdom), 2007, *JV (Tanzania)*, op. cit., fn. 222, paras 6 and 10; and EWCA (United Kingdom), 1997, *Boban Lazarevic*, op. cit., fn. 222. See also Lambert, H., 'Refugee status, arbitrary deprivation of nationality, and statelessness within the context of Article 1A(2) of the 1951 Convention and its 1967 Protocol Relating to the Status of Refugees', *UNHCR Legal and Protection Policy Research Series*, No 33, 2014; and Foster and Lambert, *International refugee law and the protection of stateless persons*, op. cit., fn. 124, pp. 144–163. For more on deprivation of nationality, see Section 1.4.2.2 above.

270 UNHCR, *Handbook*, op. cit., fn. 103, para. 54.

271 UNHCR, *Handbook*, op. cit., fn. 103, paras 54 and 55. See also CNDA (France), judgment of 20 November 2018, *M. H.*, No 13027358 C, concerning a stateless Rohingya man recognised as a refugee vis-à-vis both Bangladesh and Myanmar, including on account of the impossibility of regularising his stay in Bangladesh and completing his education there.

272 UNHCR, *Handbook*, op. cit., fn. 103, para. 56.

273 Upper Tribunal (IAC) (United Kingdom), judgment of 13 November 2012, *MN and Others (Ahmadis – Country Conditions – Risk) Pakistan CG*, [2012] UKUT 00389. See also UNHCR, *Handbook*, op. cit., fn. 103, para. 56.

Article 9(2)(c), may amount to persecution if the country of origin engages in disproportionate or discriminatory prosecution or punishment[274].

The term **'disproportionate'** may raise difficult issues as to the applicable standards for assessing proportionality in different legal systems and cultures. Article 9 – indeed all the refugee provisions of the QD (recast) – must be interpreted in accordance with the Refugee Convention as 'the cornerstone of the international legal regime for the protection of refugees' to which all EU Member States are parties (see recital 4). Recourse to the EU Charter, generally recognised human rights treaties and general principles of public international law can be used to provide further guidance to assess the proportionality of criminal sanctions.

Issues concerning **whether a prosecution and/or penalties for refusal to perform military service is/are disproportionate** can arise under Article 9(2)(c), as well as in the more limited context of conflict dealt with expressly in Article 9(2)(e)[275]. From the CJEU cases on Article 9(2)(e), the following can be extrapolated to apply to Article 9(2)(c). The CJEU has stated that it is necessary to consider whether such measures 'go beyond [what] is necessary for the State concerned (...) to exercise its legitimate right to maintain an armed force'[276]. This may entail taking into account various factors of a political and strategic nature on which the legitimacy of that right and the conditions for its exercise are based. The CJEU stated that there was nothing in the particular case file to suggest that the imposition of a custodial sentence of up to 5 years and a dishonourable discharge from the army clearly goes beyond what is necessary for the state concerned to exercise its legitimate right to maintain an armed force. However, the CJEU assigns the task of examining all relevant facts in the country of origin to national authorities of the Member States[277].

By virtue of Article 9(3) QD (recast), read together with Article 10 QD (recast), where an applicant can establish a connection between Article 10 reasons and their prosecution or punishment, that in itself indicates it is of a discriminatory character[278]. Thus, prosecution of political opponents, who are perceived to threaten public order, for the commission of acts that are protected by human rights treaties and that have potentially severe consequences may be considered discriminatory and capable of qualifying as persecution.

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274 See European Commission, QD proposal: explanatory memorandum, 2001, op. cit., fn. 266, referring to what was at that stage the proposed Article 11(1)(d).

275 See also Section 1.4.4.6.

276 CJEU, 2015, *Shepherd*, op. cit., fn. 163, para. 52.

277 CJEU, 2015, *Shepherd*, op. cit., fn. 163, para. 53.

278 See, for example, CNDA (France), 2019, *M. H.*, No 19000104 C, op. cit., fn. 251, concerning an Ahmadi from Algeria subjected to discriminatory judicial measures that were motivated solely by his religion; and Supreme Administrative Court (Korkein hallinto-oikeus) (Finland), judgment of 12 February 2019, KHO:20-19:23 (English summary), concerning a Turkish national of Kurdish ethnicity who had been sentenced to 2 years' imprisonment for 'spreading terrorist propaganda'. The court determined that his activities were, in essence, comparable to the many cases in which the ECtHR has stated that the right to freedom of speech or freedom of assembly has been breached and drew attention to the degree of severity of the imprisonment. It concluded that the 2-year prison sentence constituted an unreasonable degree of punishment in proportion to the description of the act recorded in the judgment and that this therefore constituted an act of persecution.

1.4.4.5. Denial of judicial redress (Article 9(2)(d))

Denial of judicial redress can constitute a **violation of the right to a fair trial**, which is a right guaranteed in Article 47 EU Charter[279] and Article 6 ECHR[280]. It is established in the ECtHR's case-law that an issue might exceptionally be raised under Article 6 ECHR by an expulsion or extradition decision in circumstances in which the applicant suffered or risks suffering a flagrant denial of justice in a destination state[281]. The ECtHR has, however, applied a stringent test of unfairness, stating 'What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article'[282]. Although the wording of Article 9(2)(d) differs somewhat from this standard by requiring a denial of judicial redress resulting in disproportionate or discriminatory punishment, the difference may, in practice, be small, since ordinarily to amount to persecution such a denial of judicial redress must also fall within the scope of Article 9(1) QD (recast)[283].

1.4.4.6. Prosecution or punishment for refusal to perform military service in a conflict (Article 9(2)(e))

Article 9(2)(e) is the outcome of a compromise between different approaches to the relevance of a refusal to perform military service and the recognition of a right of conscientious objection. The original Commission proposal corresponded to the UNHCR *Handbook*, according to which prosecution amounts to persecution if the deserter or draft evader faces disproportionately severe or discriminatory punishment[284], or if military service would require participation in military action contrary to the applicant's genuine political, religious, moral

[279] Article 47 EU Charter guarantees both the right to a fair trial and the right to an effective remedy. The latter is addressed in Article 47(1), which provides 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.'

[280] Article 6(1) ECHR states 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

[281] ECtHR (plenary), judgment of 7 July 1989, *Soering v United Kingdom*, No 14038/88, CE:ECHR:1989:0707JUD001403888 (hereinafter ECtHR (plenary), 1989, *Soering*), para. 113; and ECtHR, judgment of 17 January 2012, *Othman (Abu Qatada) v United Kingdom*, No 8139/09, CE:ECHR:2012:0117JUD000813909 (hereinafter ECtHR, 2012, *Othman (Abu Qatada)*), para. 258. In para. 259 of the latter, the court observed 'Although it has not yet been required to define the term in more precise terms, the Court has nonetheless indicated that certain forms of unfairness could amount to a flagrant denial of justice. These have included: conviction *in absentia* with no possibility subsequently to obtain a fresh determination of the merits of the charge; a trial which is summary in nature and conducted with a total disregard for the rights of the defence; detention without any access to an independent and impartial tribunal to have the legality [of] the detention reviewed; deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country' (references to related ECtHR case-law omitted).

[282] ECtHR, 2012, *Othman (Abu Qatada)*, op. cit., fn. 282, para. 260.

[283] The ECtHR has left open the question of whether a flagrant denial of justice arises only when the trial in question would have serious consequences for the applicant (ECtHR, 2012, *Othman (Abu Qatada)*, op. cit., fn. 282, para. 262) because, in the case at hand, it was not disputed that the consequences would be severe.

[284] European Commission, QD proposal: explanatory memorandum, 2001, op. cit., fn. 266, concerning what was at that stage Article 11(d); and UNHCR, *Handbook*, op. cit., fn. 103, para. 169. See also UNHCR, Guidelines on International Protection No 10: Claims to refugee status related to military service within the context of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees, 12 November 2014, HCR/GIP/13/10/Corr. 1 (hereinafter UNHCR, Guidelines on International Protection No 10).

or conscientious objections[285]. The provision was highly contested during negotiations in the Council. Many Member States objected to a recognition of refusal to perform military service based on subjective opinions or political convictions of the applicant on the legality or legitimacy of military action[286]. They suggested that objective criteria be established by referring, for example, to international humanitarian law[287].

The provision was then changed to read:

> Prosecution or punishment for refusal to perform military service in a conflict, which has been condemned by relevant bodies of the United Nations (UN) or where performing military service would include acts falling under the exclusion clauses of this Directive[288].

However, the reference to condemnation by UN bodies, derived from paragraph 171 of the UNHCR *Handbook*, was subsequently deleted[289]. Article 9(2)(e) now states the following.

Article 9(2)(e) QD (recast)

Acts of persecution as qualified in paragraph 1 can, inter alia, take the form of:

[...]

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2)[290].

Article 9(2)(e) is therefore narrower than the approach to conscientious objection taken in the UNHCR *Handbook*, the UNHCR Guidelines on International Protection No 10 and the practice of some Member States. This is because it addresses only situations in which performing military service would include acts falling within Article 12(2) QD (recast) and, a fortiori,

285 UNHCR, *Handbook*, op. cit., fn. 103, para. 170. See also UNHCR, Guidelines on International Protection No 10, op. cit., fn. 285, paras 17ff.

286 European Council, Asylum Working Party, Outcome of Proceedings, Proposal for a Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, 24 April 2002, EU Doc 7882/02 ASILE 20, p. 15; European Council, Asylum Working Party, Outcome of Proceedings, Proposal for a Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, 17 June 2002, EU Doc 9038/02 ASILE 25, p. 15; and European Council, Asylum Working Party, Outcome of Proceedings, Proposal for a Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, 9 July 2002, EU Doc 10596/02 ASILE 36, p. 17.

287 See the documents referred to in the preceding footnote.

288 European Council, Asylum Working Party, Outcome of Proceedings (EU Doc 11356/02), op. cit., fn. 188, p. 14; and European Council, Asylum Working Party, Outcome of Proceedings (EU Doc 12620/02), op. cit., fn. 190, p. 14.

289 Despite the opposition of the Netherlands. See European Council, Presidency note to the Permanent Representative Committee, Proposal for a Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, 15 November 2002, EU Doc 14308/02 ASILE 65, p. 13.

290 The CJEU has yet to consider directly whether a different approach to conscientious objection should be taken in the light of ECtHR (GC), judgment of 7 July 2011, *Bayatyan v Armenia*, No 23459/03, CE:ECHR:2011:0707JUD002345903.

Article 1F Refugee Convention[291]. In particular, it imposes a different test from the 'international condemnation' test advanced in paragraph 171 of the UNHCR *Handbook*. Nonetheless, as noted earlier, prosecution or punishment for refusal to perform military service, where this prosecution or punishment falls outside the scope of Article 9(2)(e), may fall within the scope of Article 9(2)(b), (c) or (d).

The interpretation of this type of persecution has been clarified by the CJEU in two cases.

In its 2015 *Shepherd* judgment, the court was concerned with the case of a US national applying for asylum on account of his prosecution for failure to perform military service[292]. The court clarified that, to come within the scope of Article 9(2)(e), 'the circumstances whose significance the Court is asked to assess in order to define that ambit must therefore relate directly to a particular conflict'[293] and that its terms were not limited to combat troops and that this provision 'covers all military personnel, including, therefore, logistical or support staff'[294]. The court further ruled:

> It does not exclusively concern situations in which it is established that war crimes have already been committed or are such as to fall within the scope of the International Criminal Court's jurisdiction, but also those in which the applicant for refugee status can establish that it is highly likely that such crimes will be committed[295].

The provision's personal scope goes beyond 'those who could be led to commit acts which constitute war crimes personally, such as combat troops', but 'that protection can be extended only to those other persons whose tasks could, sufficiently directly and reasonably plausibly, lead them to participate in such acts'[296]. The court also made it clear that:

> The possibility that military intervention was engaged upon pursuant to a mandate of the United Nations Security Council or on the basis of a consensus on the part of the international community or that the State or States conducting the operations prosecute war crimes are circumstances which have to be taken into account in the assessment that must be carried out by the national authorities[297].

Finally, the refusal to perform military service:

> must constitute the only means by which [an] applicant could avoid participating in the alleged war crimes, and, consequently, if he did not avail himself of a procedure

[291] UNHCR, UNHCR annotated comments on the EC Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304/12 of 30.9.2004), January 2005, p. 21. Apart from conflict, the CNDA (France) regularly grants refugee status to nationals of Eritrea who fled their country to escape to military service or who fled from a military camp (see, for example, CNDA (France), judgment of 6 March 2012, *M. D.S.*, No 11023420). Similarly, refugee status may be granted to Kurds from Turkey who refused to undertake military service alleging they would be sent to regions under conflict and did not want to fight against members of their community, as in CNDA (France), judgment of 13 March 2014, *M. F.G.*, No 13016100. See also House of Lords (United Kingdom), judgment of 20 March 2003, *Sepet and Another, R (on the application of)* v *Secretary of State for the Home Department*, [2003] UKHL 15.

[292] CJEU, 2015, *Shepherd*, op. cit., fn. 163, para. 21.

[293] CJEU, 2015, *Shepherd*, op. cit., fn. 163, para. 35.

[294] CJEU, 2015, *Shepherd*, op. cit., fn. 163, para. 33.

[295] CJEU, 2015, *Shepherd*, op. cit., fn. 163, para. 37; see also para. 39.

[296] CJEU, 2015, *Shepherd*, op. cit., fn. 163, para. 38.

[297] CJEU, 2015, *Shepherd*, op. cit., fn. 163, para. 41.

> for obtaining conscientious objector status, any protection under Article 9(2)(e) [QD] is excluded, unless that applicant proves that no procedure of that nature would have been available to him in his specific situation[298].

In relation to possible alternative means, in *Shepherd*, the court considered it significant that the applicant had enlisted and re-enlisted at a time when the conflict in question (in Iraq) was ongoing[299]. Regarding conscientious objector procedures, the ECtHR has held that:

> the right to conscientious objection guaranteed by Article 9 [ECHR] would be illusory if a State were allowed to organise and implement its system of alternative service in a way that would fail to offer – whether in law or in practice – an alternative to military service of a genuinely civilian nature and one which was not deterrent or punitive in character[300].

The CJEU's 2020 ruling in *EZ* concerned a national of Syria who fled Syria in November 2014 in order not to be required to perform his military service there, fearing that he would have to participate in the civil war. He had been granted a deferment of his military service until February 2015, so that he could complete his university studies. The court confirmed that the 'refusal must constitute the only means by which the person concerned could avoid participating in the crimes referred to in Article 12(2)(a)'[301]. It stated that the:

> fact that the applicant for refugee status did not avail himself or herself of a procedure for obtaining the status of conscientious objector excludes any protection under Article 9(2)(e) [QD (recast)], unless that applicant proves that no procedure of that nature would have been available to him or her in his or her specific situation ...[302].

For the court, it was particularly relevant that the situation in Syria featured the 'context of all-out civil war characterised by the repeated and systematic commission of the crimes and acts referred to in Article 12(2) of that directive by the army using conscripts'. Given that, 'it should be assumed that the performance of his or her military service will involve committing, directly or indirectly, such crimes or acts, regardless of his or her field of operation'[303]. It also stated:

> It should be noted, first of all, that by referring to prosecution or punishment for refusal to perform military service in a conflict, where performing military service would involve crimes or acts falling within the scope of the grounds for exclusions [sic] as set out in Article 12(2) [QD (recast)], Article 9(2)(e) of that directive defines certain acts of persecution according to their reason, and that that reason differs from those exhaustively listed in Article 2(d) and Article 10 of that directive, namely race, religion, nationality, political opinion or membership of a particular social group[304].

298 CJEU, 2015, *Shepherd*, op. cit., fn. 163, para. 46.
299 CJEU, 2015, *Shepherd*, op. cit., fn. 163, para. 44.
300 ECtHR, judgment of 12 October 2017, *Adyan and Others v Armenia*, No 75604/11, CE:ECHR:2017:1012JUD007560411, para. 67.
301 CJEU, 2020, *EZ*, op. cit., fn. 34, para. 27.
302 CJEU, 2020, *EZ*, op. cit., fn. 34, para. 28.
303 CJEU, 2020, *EZ*, op. cit., fn. 34, para. 38.
304 CJEU, 2020, *EZ*, op. cit., fn. 34, para. 46.

Therefore, while the existence of one or more reasons for persecution 'cannot be regarded as established solely because that prosecution and punishment are connected to that refusal', the court considered that there is:

> Nevertheless … a strong presumption that refusal to perform military service under the conditions set out in Article 9(2)(e) of that directive relates to one of the five reasons set out in Article 10 thereof. It is for the competent national authorities to ascertain, in the light of all the circumstances at issue, whether that connection is plausible[305].

1.4.4.7. Acts of a gender-specific nature (Article 9(2)(f))

Article 9(2)(f) QD (recast) states the following.

Article 9(2)(f) QD (recast)

Acts of persecution as qualified in paragraph 1 can, inter alia, take the form of:

[…]

(f) acts of a gender-specific … nature.

By stating that acts of persecution as qualified in Article 9(1) QD (recast) can, inter alia, take the form of 'acts of a gender-specific … nature', the wording of Article 9(2)(f) emphasises the need for a gender-sensitive individual assessment. This echoes the requirements of Article 4(3)(c) QD (recast), whereby it is the duty of Member States to take into account:

> the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm.

In order to understand the nature of gender-specific acts, it is essential to define and distinguish between the terms 'sex' and 'gender'[306]. Sex is a biological determination. Gender has been defined as referring to 'the two sexes, male and female, within the context of society'[307], and it is understood not to be static or innate. Rather, it acquires socially and culturally constructed meaning over time[308]. Gender relations are thus 'based on socially or culturally constructed and defined identities, status, roles and responsibilities'[309]. This is recognised in the wording of recital 30 QD (recast), which provides that 'issues arising from

[305] CJEU, 2020, *EZ*, op. cit., fn. 34, para. 61.

[306] In addressing gender-specific acts of persecution, the UNHCR has historically used the term 'sexual and gender-based violence', often used interchangeably with 'gender-based violence'. With the issuance of UNHCR, UNHCR Policy on the Prevention of, Risk Mitigation and Response to Gender-based Violence, 2020 (hereinafter UNHCR Policy on the Prevention of, Risk Mitigation and Response to Gender-based Violence), p. 20, note 1, it consciously uses the term 'gender-based violence'. On p. 5, it also states that 'The term "Gender-Based Violence" "is most commonly used to underscore how systemic inequality between males and females, which exists in every society in the world, acts as a unifying and foundational characteristic of most forms of violence perpetrated against women and girls."'

[307] Article 7(3) Rome Statute of the International Criminal Court, op. cit., fn. 258.

[308] UNHCR, Guidelines on International Protection No 1: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01 (hereinafter UNHCR, Guidelines on International Protection No 1), para. 3.

[309] UNHCR, Guidelines on International Protection No 1, op. cit., fn. 309, para. 3.

an applicant's gender, including gender identity and sexual orientation, ... may be related to certain legal traditions and customs'. Accordingly, any present-day definition would need to take into account that some people now define themselves, and are defined, as non-binary[310] and/or transgender and that there are also people who have transitioned or are transitioning to a male or female gender. Gender-related applications may be brought by men/boys or women/girls, and by transgender or intersex persons.

The 2007 Yogyakarta Principles define 'sexual orientation' and 'gender identity' as follows.

1) Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or of the same gender or more than one gender.

2) Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms[311].

While the great majority of applications involving gender-specific acts concern women and girls, gender-specific acts can also be committed against men and boys, transgender men and boys and transgender women and girls. Gender-specific acts concerning women 'may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion', as noted in recital 30 QD (recast) in the context of the need for a 'common concept of the persecution ground, "membership of a particular social group"'[312]. They may also encompass forced prostitution or sexual exploitation and trafficking for such purposes, forced marriage and any other form of sexual violence[313]. It must also be borne in mind that, even when persecution is inflicted for reasons of race, nationality, religion or political opinion, a person's gender, including their gender identity and sexual orientation, may make the person more vulnerable to being targeted and subjected to violence.

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310 UNHCR Policy on the Prevention of, Risk Mitigation and Response to Gender-based Violence, op. cit., fn. 307, p. 5, noting that gender-based violence also describes 'the violence perpetrated against women, girls, men and boys with diverse sexual orientations and gender identities as well as non-binary individuals because it is driven by a desire to punish those seen as defying gender norms'.

311 The Yogyakarta Principles – Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 2007, p. 6. See also Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (Yogyakarta Principles Plus 10), 10 November 2017. In her Opinion in *A, B and C*, Advocate General Sharpston states that the Yogyakarta Principles 'are not legally binding, but they nevertheless reflect established principles of international law'. See CJEU, Opinion of Advocate General Sharpston of 17 July 2014, *A, B and C* v *Staatssecretaris van Veiligheid en Justitie*, Joined Cases C-148/13 to C-150/13, EU:C:2014:2111, para. 37.

312 On forced abortion or sterilisation, for example in the context of the one-child policy in China or the sterilisation of Roma in some parts of eastern Europe; cases are shown in Refworld. For more on particular social groups in the context of gender-related persecution, see Section 1.6.2.4.2.

313 See Section 3.3 below for more information concerning human trafficking. See also EASO, *Vulnerability – Judicial analysis*, op. cit., fn. 64, 2021, Section 6.8.2; Pobjoy, J., *The Child in International Refugee Law*, Cambridge University Press, Cambridge, 2017 (hereinafter Pobjoy, *The Child in International Refugee Law*), pp. 116–122; and UNHCR, Guidelines on International Protection No 1, op. cit., fn. 309. For a regularly updated list of cases concerning lesbian, gay, bisexual, transgender and intersex persons, see University of Sussex, 'Sexual Orientation and Gender Identity Claims of Asylum – A European human rights challenge'.

1.4.4.8. Acts of a child-specific nature (Article 9(2)(f)

When assessing applications for international protection involving minors, Member States should have regard to child-specific forms of persecution (recital 28 QD (recast)). This provision represents one important application of the principle of the best interests of the child. Article 4(3)(c) QD (recast) identifies age as one aspect of 'individual position and personal circumstances' that must be taken into account when assessing an application. By stating that acts of persecution as qualified in Article 9(1) can, inter alia, take the form of 'acts of a … child-specific nature', Article 9(2)(f) QD (recast) reinforces the need for such individual assessment to be child-sensitive.

Children may be subjected to **specific forms of persecution that are influenced by their age, lack of maturity or vulnerability**. The fact that the applicant is a child may be a central factor in the harm inflicted or feared[314]. This may be because the alleged persecution applies only to, or disproportionately affects, children, or because specific child rights may be infringed[315]. Persecutory acts specific to children may be acts that can, by their nature, be inflicted only on a child (e.g. forced underage military recruitment, forced underage marriage). They may also be acts that could be considered mere harassment in the case of an adult but could cause serious physical or psychological harm amounting to persecution in the case of a child. They may also be forms of persecution that are perpetrated mainly during childhood, such as female genital mutilation (FGM)[316]. There are other forms of child-specific acts of persecution that are clearly so serious by their nature or repetition that they constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) ECHR, which would also amount to persecution if the victim were an adult, for example child slavery[317]. In its 1997 guidelines on unaccompanied children, UNHCR observed that 'under the Convention on the Rights of the Child, children are recognized [as having] certain specific human rights, and the manner in which those rights may be violated as well as the nature of such violations may be different from those that may occur in the case of adults'[318].

The Convention on the Rights of the Child, which is expressly mentioned in recital 18 QD (recast), contains a number of specific human rights. Breaches of some of these rights may, either by their nature or by repetition, constitute a violation of a basic human right in the sense of Article 9(1)(a) or, by an accumulation of various measures, be considered an infringement of fundamental rights constituting persecution within the meaning of Article 9(1)(b). Their character as a 'basic human right' may be derived from the fundamental importance of a specific right for a child, pursuant to Article 27(1) Convention on the Rights of the Child, to 'a standard of living adequate for the child's physical, mental, spiritual, moral and social

[314] See, for example, RVV/CCE (Belgium), judgment of 29 June 2016, No 170.819. See also UNHCR, *Guidelines on International Protection No 8: Child asylum claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/09/0822, December 2009 (hereinafter UNHCR, *Guidelines on International Protection No 8*), p. 9.

[315] UNHCR, *Guidelines on International Protection No 8*, op. cit., fn. 315, para. 18.

[316] For further discussion of applications involving FGM and forced underage marriage, see, inter alia, Section 1.6.2.4.2, fn. 464 *et seq*.

[317] EASO, *Vulnerability – Judicial analysis*, op. cit., fn. 64, Section 6.8.1.1. See also UNHCR, *Guidelines on International Protection No 8*, op. cit., fn. 315, paras 19–36; and Pobjoy, *The Child in International Refugee Law*, op. cit., fn. 314, pp. 116–122.

[318] UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, February 1997, para. 8.7.

development' and its proximity to the rights under Article 15(2) ECHR, such as the right to life[319], from which no derogation is allowed. The two optional protocols to the ECHR – on the prohibition of compulsory recruitment of children in armed forces during an armed conflict and on the sale of children, child prostitution and child pornography – support the assumption that the rights of children laid down in these protocols are to be considered, by their nature, basic human rights within the meaning of Article 9(1)(a)[320]. The infringement of other child-specific human rights may qualify as persecution under Article 9(1)(b).

In either case, restrictions to individual rights of the child that are subject to limitations, such as freedom to manifest one's religion or beliefs (Article 14) or freedom of association or assembly (Article 15), constitute persecution only if the violation of the right is sufficiently severe. The test of whether accumulated acts or measures affect the child in a similar manner to a violation of a basic human right applies to interferences with individual human rights and interferences with the rights of a child to receive adequate protection against all forms of physical or mental violence; injury or abuse; neglect or negligent treatment; maltreatment; or exploitation (Article 19).

The CJEU has yet to clarify the precise nature and extent of the impact of Article 24(2) EU Charter (which states that 'In all actions relating to children, ... , the child's best interests must be a primary consideration')[321] on the assessment of child-specific acts of persecution and the assessment of their sufficient seriousness in the light of Article 9 QD (recast). For a possible comparison with the impact of this right on child-specific acts of persecution, see, for example, the interpretation of the CJEU in the case *MA, BT and DA*, which concerned the transfer of unaccompanied minors from one Member State to another under the Dublin II regulation[322]. In this case, the CJEU stated that Article 6(2) of the regulation cannot be interpreted in such a way that disregards the fundamental right set out in Article 24(2) EU Charter[323]. The court went on to add:

> Consequently, although express mention of the best interest of the minor is made only in the first paragraph of Article 6 [of the Dublin II regulation], the effect of Article 24(2) of the Charter, in conjunction with Article 51(1) thereof, is that the child's best interests must

[319] UN Human Rights Committee (HRC), General Comment No 36, Article 6 (right to life), 2 November 2018, CCPR/C/GC/36, para. 60, observes 'Article 24 (1) of the Covenant entitles every child to such measures of protection as are required by his or her status as a minor, on the part of his or her family, society and the State. This article requires adoption of special measures designed to protect the life of every child, in addition to the general measures required by article 6 for protecting the lives of all individuals. When taking special measures of protection, States parties should be guided by the best interests of the child, and by the need to ensure all children's survival, development and well-being.'

[320] See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, both of 25 May 2000.

[321] For more on the best interests of the child, see General introduction, 'Best interests of the child'.

[322] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L 50/1; now replaced by the Dublin III regulation (Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), [2013] OJ L 180/31).

[323] CJEU, 2013, *MA, BT and DA*, *op. cit.*, *fn. 63*, para. 58.

also be a primary consideration in all decisions adopted by the Member States on the basis of the second paragraph of Article 6[324].

For matters relating to credibility and evidence assessment in the case of minors, see also EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial analysis*, 2018, Section 5.2, and EASO, *Vulnerability in the context of applications for international protection – Judicial analysis*, 2021, Section 6.8.1.1.

1.4.4.9. Acts of a disability-specific nature

Article 9(2) does **not** refer to acts of a disability-specific nature but, as noted earlier, its provisions are only indicative. The justification for including in this analysis acts of a disability-specific nature as a further example of specific forms of persecution lies in the fact that CEAS legislation provides that 'disabled people' and 'persons with mental disorders' are particular categories of vulnerable persons[325]. Article 21 reception conditions directive (recast)[326] and Article 20(3) QD (recast) explicitly recognise persons with disabilities and mental disorders as vulnerable. In addition, recital 29 APD (recast) recognises that 'Certain applicants may be in need of special procedural guarantees due, inter alia, to ... their disability ... [and/or] mental disorder'[327].

As noted in EASO, *Vulnerability in the context of applications for international protection – Judicial analysis*, the requirement in Article 4(3)(c) QD (recast) to carry out the assessment of an application for international protection on an individual basis taking into account the applicant's 'individual position and personal circumstances' can be assumed to include factors such as disability and a mental disorder even though this is not explicitly stated[328]. In each case, decision-makers must consider all the specific individual circumstances when determining whether or not the threshold of persecution or serious harm is reached.

An applicant's disability or mental disorder, either on its own or in combination with other characteristics, may lead to their being subjected to specific forms of persecution or serious harm. This may be on account of, for example, social prejudices, stigmatisation or beliefs held about particular types of disability such as cerebral palsy, severe autism, dwarfism and Down's syndrome, or conditions such as albinism and epilepsy[329]. Persons with disabilities and mental disorders may face a real risk of a severe violation of their basic human rights under Article 9(1)

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324 CJEU, 2013, *MA, BT and DA*, *op. cit.*, *fn. 63*, para. 59.

325 EASO, *Vulnerability – Judicial analysis*, op. cit., fn. 64, Section 6.8.5.

326 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), [2013] OJ L 180/96.

327 Ibid.

328 Ibid.

329 See, for example, RVV/CCE (Belgium), judgment of 12 May 2015, No 145.367, concerning a mother and daughter of Somali origin and Tanzanian nationality who were recognised as refugees on the grounds of membership of an albino family; Upper Tribunal (IAC) (United Kingdom), judgment of 24 November 2016, *JA (child – risk of persecution) Nigeria*, [2016] UKUT 560 (hereinafter Upper Tribunal (IAC) (United Kingdom), 2016, *JA (child – risk of persecution) Nigeria*), in which the 7-year-old albino applicant's vulnerability was taken into account in the assessment of the act of persecution, para. 25; CNDA (France), judgment of 13 February 2017, *M. E.*, No 16017097 C concerning an albino man from Nigeria; VG Bayreuth, judgment of 7 May 2019, 4 K 17.33417, concerning an albino man from Côte d'Ivoire; and, in relation to epilepsy, Civil Court of Milan (Tribunale di Milano) (Italy), judgment of 19 September 2020, No 39278/2019 (English summary), concerning an applicant from Guinea who suffered from epilepsy and faced isolation from and discrimination by family and most of the population due to widely held beliefs, thereby affecting his access to healthcare, work and dignified living conditions, with the state not offering sufficient protection for such persons.

(a) as a result of, for example, ill treatment in the form of sexual exploitation or involuntary detention and incarceration, or heightened exposure to torture or inhuman and degrading treatment in institutions and in the private sphere[330]. Such discriminatory acts, if sufficiently serious within the meaning of Article 9(1)(a), constitute acts of persecution. Such persons may also be subjected to an accumulation of various measures, including measures specific to their disability, which amount to persecution pursuant to Article 9(1)(b).

As underlined in Part 7 of EASO, *Vulnerability in the context of applications for international protection – Judicial analysis*[331], it will be important in disability cases to apply special procedural guarantees enshrined in the APD (recast). UNHCR applies special procedural standards for refugee status determination under its mandate for 'applicants with mental health conditions or intellectual disabilities'[332].

1.5. Well-founded fear

'Well-founded fear' is not defined in either Article 1A(2) Refugee Convention or the QD (recast). The definition of a 'refugee' in Article 2(d) QD (recast) refers to:

> a third-country national, who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country ...

'Well-founded fear' is the only element of the refugee definition set out in Article 2(d) that is not defined further in the QD (recast). Nevertheless, the CJEU has addressed the meaning and significance of this element in a number of judgments, in particular in *Y and Z*[333], *Abdulla*[334], *X, Y and Z*[335] and *OA*[336].

Section 1.5 has six subsections, as set out in Table 12.

Table 12: Structure of Section 1.5

Section	Title	Page
1.5.1	Well-founded fear (Article 2(d))	102
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330 See also Crock, M., Ernest, C. and McCallum, R., 'Where disability and displacement intersect: asylum seekers and refugees with disabilities', *International Journal of Refugee Law*, Vol. 24, No 4, 2013, pp. 735–764.

331 EASO, *Vulnerability – Judicial analysis*, op. cit., fn. 64.

332 UNHCR, Procedural Standards for Refugee Status Determination under UNHCR's Mandate, Unit 2.9, Applicants with Mental Health Conditions or Intellectual Disabilities in UNHCR RSD Procedures, August 2020.

333 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38.

334 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32.

335 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31.

336 CJEU, 2021, *OA*, op. cit., fn. 197.

1.5.1. Well-founded fear (Article 2(d))

The CJEU views 'well-founded fear' as intrinsically linked to the concept of protection. In *OA*, the court observed that:

> the existence of protection from acts of persecution in a third country can permit the inference that there is no well-founded fear of persecution within the meaning of that provision only if that protection satisfies the requirements arising, in particular, from Article 7(2) of that directive[337].

The CJEU notes further that, because well-founded fear and protection are intrinsically linked, 'their examination cannot be subject to a separate criterion of protection; their assessment must be made in the light of the requirements laid down in, inter alia, Article 7(2) of that directive'[338].

The phrase 'well-founded fear' means that there must be a reasonable basis for the applicant's fear of persecution[339]. The CJEU stated in *X, Y and Z*:

> It should be noted in that regard that, in the system provided for by the Directive, when assessing whether, in accordance with Article 2(c) [QD, now Article 2(d) QD (recast)] thereof, an applicant has a well-founded fear of being persecuted, the competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that **the person concerned may reasonably fear**, in the light of his individual situation, that he will in fact be subject to acts of persecution[340].

This element of the refugee definition concerns assessment of 'the extent of the risk' of being 'subject to acts of persecution' on 'return to his country of origin'[341]. For the CJEU, the third-country national or stateless person concerned 'must, therefore, on account of circumstances existing in his country of origin and the conduct of actors of persecution, have a well-founded fear that he **personally** will be subject to persecution …'[342]. As the court noted in *Abdulla*, 'Those circumstances will indicate that the third country does not protect its national against acts of persecution'[343]. It has further stated:

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337 Ibid., para. 56.

338 CJEU, 2021, *OA*, op. cit., fn. 197, para. 61. In this regard, the court clearly rejected the position taken by some courts in the United Kingdom, which, the CJEU observed earlier at para. 27, 'consider that the availability of sufficient protection must be taken into account both at the stage of assessing the test of whether there is a "well-founded fear of persecution" and at the stage of assessing the test of whether there is "protection" of which the applicant is unable or unwilling to avail himself or herself, but the requirements to be satisfied in those two stages need not, however, be the same'.

339 As stated by Advocate General Hogan in his opinion of 30 April 2020 in *OA*, C-255/19, EU:C:2020:342, para. 55, 'The use of the term "well-founded" fear in the definition of "refugee" in Article 2(c) [QD] requires, inter alia, an analysis of whether the conditions in the applicant's country of nationality or origin are such as to objectively justify the applicant's fear of persecution', and para. 56, 'This test will necessarily require, in my view, an objective examination of whether or not there is protection in the applicant's country of nationality by actors of protection as defined in Article 7 [QD] against persecution and whether the applicant has access to that protection'.

340 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 76 (emphasis added).

341 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, paras 76 and 78–79; and CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, paras 72–73 and 64. For further discussion of this point, see Sections 1.5.2 and 1.5.5.

342 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 51 (emphasis added); and CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 43. See also the CJEU's earlier formulation in CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 57, as well as CJEU, 2021, *OA*, op. cit., fn. 197, para. 57.

343 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 58.

> Those circumstances form the reason why it is impossible for the person concerned, or why he justifiably refuses, to avail himself of the 'protection' of his country of origin within the meaning of Article 2(c) [QD, now Article 2(d) QD (recast)], that is to say, in terms of that country's ability to prevent or punish acts of persecution[344].

Thus, in order to assess well-founded fear, it is necessary to evaluate the applicant's statements in the light of all the relevant circumstances of the case (Article 4(3) QD (recast)) and to review the circumstances existing in their country of origin and the conduct of actors of persecution[345].

In addition to the definition of 'refugee' in Article 2(d) QD (recast), another provision of the directive is particularly important for understanding the concept of 'well-founded fear'. Article 4(4) QD (recast) stipulates that past persecution or serious harm 'is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm unless there are good reasons to consider that such persecution or serious harm will not be repeated'[346]. In this context, it is important to emphasise that Article 4(4) QD (recast) concerns both refugee protection and subsidiary protection, whereas Article 2(d) and recital 36 QD (recast) apply only to the assessment of qualification for refugee protection.

Traditionally, it has been asserted that 'well-founded fear' has two elements:

- a **subjective element** – that is, the existence of fear in the mind of the applicant in the sense of trepidation;
- an **objective element** – that is, a valid basis for that fear based on the situation in the country of origin and other factors.

Most notably, the UNHCR *Handbook* states:

> To the element of fear – a state of mind and a subjective condition – is added the qualification 'well-founded'. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term 'well-founded fear' therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, **both elements** must be taken into consideration[347].

This two-pronged assessment of well-founded fear is often referred to as the bipartite test or the subjective/objective test. This bipartite test has been adopted by several national high-level courts without further analysis or modification[348].

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344 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 59.

345 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 51; and CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 43. See also the CJEU's earlier formulation in CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 57 (which does not explicitly refer to actors of persecution).

346 For further discussion of past persecution, see Section 1.5.3.

347 UNHCR, *Handbook*, op. cit., fn. 103, para. 38 (emphasis added).

348 High Court (Ireland), judgment of 29 March 2001, *Zgnat'ev v Minister for Justice, Equality and Law Reform*, [2001] IEHC 70, para. 6; and Supreme Court (United Kingdom), judgment of 7 July 2010, *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*, [2010] UKSC 31 (hereinafter Supreme Court (United Kingdom), 2010, *HJ (Iran) and HT (Cameroon)*), para. 17.

However, the requirement for a subjective element so defined has been questioned by national courts and tribunals on several grounds[349]. First, there is an inherent danger of equating lack of credibility with absence of subjective fear. In fact, even where there is a finding that an applicant's testimony is not credible, in whole or in part, the decision-maker must nonetheless assess the actual risk faced by an applicant on the basis of other material evidence. Second, looking at the objective element alone avoids the enormous practical risks inherent in attempting objectively to assess the feelings and emotions of an applicant. Third, the absence of a subjective fear would not, on its own, be determinative, since some applicants, such as young children and those with a mental disability, may not be able to perceive or express fear at all. Others, such as the brave or foolhardy, may simply not be in fear even in the face of grave dangers.

As noted previously, the QD (recast) does not define what is meant by 'well-founded fear'. The CJEU has not directly addressed this issue either. In *Y and Z*, the court did state that, in assessing risk of being persecuted, 'the competent authorities must take account of a number of factors, both objective and subjective', but it is clear that the court had in mind factors personal to an applicant, in particular (in this case) religious identity/belief[350]. It was not referring to fear.

Thus, the relevant judgments of the CJEU that discuss the notion of 'well-founded fear' do not refer to subjective fear as defined by the UNHCR *Handbook* ('fear – a state of mind and a subjective condition')[351]. Rather, the CJEU has viewed the assessment of 'whether an applicant has a well-founded fear of being persecuted' as one requiring the competent authorities 'to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subject to acts of persecution'[352]. That could be regarded as an indication that, for the CJEU, the assessment of well-founded fear does not require the determination that an applicant has subjective fear, and that all that is necessary is an objective test that takes into account both individual and general circumstances in accordance with Article 4(3) QD (recast).

Application of the objective test nevertheless requires careful consideration of matters including subjective factors, such as the applicant's beliefs and commitments. Thus, 'the competent authorities must ascertain, in the light of the personal circumstances of the person concerned, whether that person … runs a **genuine risk**' of being persecuted[353]. As highlighted earlier, for the court, the 'well-founded fear' must be a fear that the applicant '**personally** will

349 See, for example, House of Lords (United Kingdom), judgment of 16 December 1987, *R v Secretary of State for the Home Department, ex parte Sivakumaran and Others*; and Refugee Appeals Commission (Commission des recours des réfugiés (CRR)) (France), decision of 20 October 1999, *Straracexka*, No 140222. For further details, see Zimmermann, A. and Mahler, C., 'Article 1 A, para. 2 (definition of the term "refugee" / Définition du terme "réfugié")', in Zimmermann (ed.), *The 1951 Convention and Protocol: A commentary*), op. cit., fn. 169, pp. 338–341; Hathaway and Foster, *The Law of Refugee Status*, op. cit., fn. 128, pp. 95–105; Colloquium on Challenges in International Refugee Law, 'The Michigan guidelines on well-founded fear', *Michigan Journal of International Law*, Vol. 26, No 2, 2005, pp. 492–502, paras 3–6; and Goodwin-Gill and McAdam, *The Refugee in International Law*, op. cit., fn. 25, pp. 81–82.

350 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, paras 70–71.

351 UNHCR, *Handbook*, op. cit., fn. 103, para. 38.

352 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 72, referring to CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 76. See also CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32.

353 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 72 (emphasis added).

be subject to persecution …'[354]. In other words, the applicant's personal characteristics and circumstances should be taken into account when determining the level of risk to which the applicant will be exposed in the country of origin. In *Y and Z*, the CJEU decided:

> … The subjective circumstance that the observance of a certain religious practice in public … is **of particular importance to the person concerned** in order to preserve his religious identity is a relevant factor to be taken into account in **determining the level of risk** to which the applicant will be exposed in his country of origin on account of his religion, even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned[355].

1.5.2. The standard of proof

The QD (recast) does not prescribe the standard of proof required for the fear to be considered 'well-founded'. However, the CJEU in *Y and Z* clarified that 'well-founded fear' concerns a risk assessment ('assessment of the extent of the risk'[356]) and that, when assessing whether an applicant has a well-founded fear of being persecuted, the competent authorities are required:

> In the system provided for by the [QD] … to ascertain whether or not the circumstances established constitute such a threat that the person concerned may **reasonably** fear, in the light of his individual situation, that he will in fact be subject to acts of persecution[357].

In *Y and Z*, the CJEU uses the expression 'real risk of persecution'[358] apparently synonymously with 'well-founded fear of persecution'.

The CJEU's **'reasonable fear'** test is consonant with the tests for assessing well-founded fear developed by the national courts and tribunals of Member States. For example, for the German Federal Administrative Court, the fear of persecution is well-founded if, in view of the applicant's individual situation, the applicant is in fact threatened with persecution within the meaning of Article 2(d) because of the circumstances prevailing in their country of origin, with a considerable **probability or real risk**[359]. Since, despite this wording, the same court makes it clear that this test has a lower threshold than one that requires a more than 50 % probability[360], the standard would appear to be much the same as that applied by the UK courts and tribunals. For the UK Supreme Court, fear is considered well-founded if there is a **'real and substantial risk'** or a **'reasonable degree of likelihood'** of persecution[361].

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354 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 51 (emphasis added); and CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 43. See also the CJEU's earlier formulation in CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 57. See also CJEU, 2021, *OA*, op. cit., fn. 197, para. 57.

355 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 70 (emphasis added).

356 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 77.

357 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 76 (emphasis added). See also CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 89; and CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 72.

358 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 79. See also Section 2.5.1 below concerning real risk of serious harm.

359 BVerwG (Germany), 2013, No 10 C 23.12 (English translation), op. cit., fn. 241, para. 19.

360 BVerwG (Germany), judgment of 4 July 2019, 1 C 37.18, DE:BVerwG:2019:040719U1C37.18.0, para. 13.

361 Supreme Court (United Kingdom), judgment of 25 July 2012, *RT (Zimbabwe) and Others v Secretary of State for the Home Department*, [2012] UKSC 38 (hereinafter Supreme Court (United Kingdom), 2012, *RT (Zimbabwe)*), para. 55.

Most importantly, all of these tests hold that the fear is well-founded, notwithstanding there being less than a 50 % probability of persecution occurring. Similarly, the ECtHR, in *Saadi v Italy*, in the context of Article 3 ECHR, held that the applicant is not obliged '[to prove] that being subjected to ill-treatment is more likely than not'[362]. The **'reasonable fear' test** thus means that, while the mere chance or remote possibility of being persecuted is not enough of a risk to establish well-founded fear, the applicant does not need to show that there is more than a 50 % probability that they will be persecuted[363].

1.5.3. Current risk, forward-looking assessment and significance of past persecution (Article 4(4))

The present tense of the refugee definition in Article 2(d) ('owing to a well-founded fear of being persecuted … **is** outside the country of his nationality …' (emphasis added)) indicates that the assessment concerns the applicant's current situation and whether the applicant currently has a well-founded fear of being persecuted. The word 'fear' reflects the forward-looking emphasis of the refugee definitions in the Refugee Convention and the QD (recast). For the CJEU, assessing well-founded fear is about assessment of the extent of the risk of being persecuted on return to the country of origin[364]. It also reflects acceptance that a threat of persecution can suffice to constitute persecution[365]. Therefore, a person does not need to wait to have been persecuted before applying for international protection, but may rather be 'in fear of' future persecution.

The CJEU stressed the forward-looking nature of the well-founded fear in *Y and Z*, in which it held:

> when assessing whether, in accordance with Article 2(c) [QD, now Article 2(d) QD (recast)], an applicant has a well-founded fear of being persecuted, the competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he **will in fact** be subject to acts of persecution[366].

In addition, it stressed that the 'assessment of the extent of the risk must, in all cases, be carried out **with vigilance and care**'[367]. The assessment must also be based solely on 'a specific evaluation of the facts and circumstances, in accordance with the rules laid down in particular by Article 4 [QD]'[368]. Although not using the language of vigilance and care, the

362 ECtHR (GC), judgment of 28 February 2008, *Saadi v Italy*, No 37201/06, CE:ECHR:2008:0228JUD003720106 (hereinafter ECtHR (GC), 2008, *Saadi*), para. 140.

363 See cases cited in the previous five footnotes.

364 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, paras 68, 78 and 80; and CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, paras 60, 70 and 74. See also UNHCR, *Handbook*, op. cit., fn. 103, para. 45.

365 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 77; and CJEU, 2018, *Ahmedbekova*, op. cit., fn. 68, paras 45–46 and 50.

366 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 76 (emphasis added). See also CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 89; and CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 72.

367 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 77 (emphasis added). See also CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 90; and CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 73.

368 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 77. At least in appeal procedures before a court or tribunal of first instance, Article 46(3) APD (recast) requires that there be 'a full and *ex nunc* examination of both facts and points of law'.

ECtHR, in a similar vein, states that the assessment of the existence of a real risk concerning a violation of Article 3 ECHR must necessarily be a rigorous one[369].

The CJEU has also yet to address the issue of how far into the future decision-makers can look when undertaking the forward-looking assessment. It is not clear from the jurisprudence on the QD (recast), the EU Charter or the ECHR how imminent the risk of persecution or serious harm must be[370].

An important element in assessing the current risk of persecution is **past persecution** of the applicant. Article 4(4) QD (recast) addresses the significance of past persecution and stipulates the following.

Article 4(4) QD (recast)

The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is a **serious indication** of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated. [Emphasis added.]

Like current persecution, past persecution includes not only acts of persecution, but also threats of persecution[371]. Therefore, both previous acts of persecution and previous threats of persecution are '**indications of the validity** of [the applicant's] fear that the persecution in question will recur if he returns to his country of origin'[372]. If the applicant has already been subject to persecution or to direct threats of persecution, then, in accordance with Article 4(4) QD (now Article 4(4) QD (recast)), this will, in and of itself, be a 'serious indication of well-founded fear'[373].

This means that, while an applicant does not have to show they have experienced **past persecution**, **evidence of past persecution is a serious indication** of the applicant's well-founded fear of persecution, unless there are good reasons to consider that such persecution will not be repeated[374].

A good reason to consider that such persecution will not be repeated could arise from the applicant's individual circumstances, for example because the applicant's persecutors have

369 See ECtHR (GC), judgment of 15 November 1996, *Chahal v United Kingdom*, No 22414/93, CE:ECHR:1996:1115JUD002241493 (hereinafter ECtHR (GC), 1996, *Chahal*), para. 96; and ECtHR (GC), 2008, *Saadi*, op. cit., fn. 362, para. 129.

370 See Anderson, A., Foster, M., Lambert, H. and McAdam, J., 'Imminence in refugee and human rights law: a misplaced notion for international protection', *International Comparative Law Quarterly*, Vol. 68, No 1, 2019 (hereinafter Anderson et al., 'Imminence in refugee and human rights law'). They argue at p. 111 that an 'imminence' test is unsupported by refugee jurisprudence.

371 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, paras 94 and 96–97.

372 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 94 (emphasis added). See also CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 64; and Administrative Court (Upravno Sodišče) (Slovenia), judgment of 24 April 2015, I U 411/2015-57 (hereinafter Administrative Court (Slovenia), 2015, I U 411/2015-57), para. 74 (stressing the importance of the term 'serious indication'). For further analysis of this issue, see also Administrative Court (Upravno Sodišče) (Slovenia), judgment of 18 April 2014, *Essomba*, I U 1982/2013-45; and Administrative Court (Upravno Sodišče) (Slovenia), judgment of 24 April 2014, *Mustafa*, I U 1474/2013-26 (both referring to ECtHR, judgment of 10 December 2009, *Koktysh v Ukraine*, No 43707/07, CE:ECHR:2009:1210JUD004370707, para. 90).

373 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 75; and CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 64.

374 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 33.

now moved to another country. Such reasons could also arise from general circumstances, for example if the circumstances in the country of origin have changed since the persecution occurred. For instance, a regime change may provide good reasons to consider that such persecution will not be repeated[375]. The criteria in the cessation clause stipulated in Article 11(2) QD (recast) could be said to have analogous relevance here.

According to the CJEU in *Abdulla*, this **change of circumstances** 'must be "of such a significant and non-temporary nature" that the refugee's fear of persecution can no longer be regarded as well founded'[376]. The change of circumstances will be of a 'significant and non-temporary' nature, within the terms of Article 11(2) QD (recast), 'when the factors which formed the basis of the refugee's fear of persecution may be regarded as having been **permanently eradicated**'[377]. In other words, 'The assessment of the significant and non-temporary nature of the change of circumstances implies that there are no well-founded fears of being exposed to acts of persecution amounting to severe violations of basic human rights within the meaning of Article 9(1) of the [QD]'[378]. The words 'serious indication' in Article 4(4) QD (recast) thus make it clear that national decision-makers must always consider past persecution (and past serious harm) to be a serious indication of current well-founded fear (and real risk), unless there are good reasons to consider that such persecution or serious harm will not be repeated.

In *Abdulla*, the CJEU also stated that, where, in accordance with Article 4(4) QD (now Article 4(4) QD (recast)), applicants rely on past acts or threats of persecution to demonstrate a well-founded fear of being persecuted, they must also show that 'those acts or threats were connected with the same reason as for the future feared persecution'[379] (see Section 1.6 below on the reasons for persecution).

Nevertheless, an applicant who, before leaving their country of origin, was not subject to persecution, or directly threatened with persecution, can establish – through other evidence – a well-founded fear of being persecuted in the foreseeable future. This is logically implied by Article 5(1) QD (recast), which deals with international protection claims *sur place*. The acceptance of *sur place* claims thus makes it clear that, in assessing the significance of past persecution, it is necessary to distinguish applicants who fled persecution and still have a current well-founded fear from those whose well-founded fear of persecution arose after they left their country of origin[380]. In addition, it must be borne in mind that an applicant may have been subject to previous harm that did not amount to persecution but is nevertheless relevant evidence in assessing well-founded fear of being persecuted in future.

1.5.4. Evidence of risk to persons similarly situated

Even though the applicant is required to have 'a well-founded fear that he **personally** will be subject to persecution'[381], the **considerations of well-foundedness do not necessarily**

375 BVerwG (Germany), judgment of 7 February 2008, No 10 C 33.07, BVerwG:2008:070208B10C33.07.0 (English translation), paras 40 and 41.

376 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 72 (emphasis added).

377 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 73 (emphasis added).

378 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 73.

379 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 94.

380 See Section 1.10, which deals with the concept of refugee *sur place*.

381 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 51; and CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 43. See also the CJEU's earlier formulation in CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 57; and CJEU, 2021, *OA*, op. cit., fn. 197, para. 57.

need to be based on the applicant's own experience[382]. For example, what has happened to the applicant's family or friends or other members of the racial, religious or social group of which the applicant is a member may indicate that the applicant's fear is well-founded[383]. In *Ahmedbekova*, the CJEU observed that:

> in carrying out the assessment of an application for international protection on an individual basis, account must be taken of the threat of persecution and of serious harm in respect of a family member of the applicant for the purpose of determining whether the applicant is, because of his family tie to the person at risk, himself exposed to such a threat[384].

The need to consider whether, in the context of international protection, serious harm may affect an individual merely by virtue of their being a member of a group was underlined by the CJEU in *Elgafaji* in the context of Article 15(c) QD (recast)[385].

1.5.5. Issue of concealment

The issue of concealment is not addressed in the text of either the Refugee Convention or the QD (recast), but it has achieved prominence through applications for international protection based on a fear of religious persecution or persecution on grounds of sexual orientation. The term is used to refer to the erroneous notion that applicants may be expected to conceal or abstain from activities that may lead to them being persecuted and may thereby be denied refugee status. In other words, through this erroneous notion, it has been suggested that, if applicants may prevent their persecution by concealing their activities, their fear is no longer well-founded.

The **CJEU rejected the existence of such a requirement to exercise restraint or to conceal** in its *Y and Z* and *X, Y and* Z judgments. In *Y and Z*, the CJEU was asked whether a fear of being persecuted is well-founded if, without being required to give up religious practice altogether, the person concerned can 'avoid exposure to persecution … by abstaining from certain religious practices'[386]. The CJEU was subsequently asked a similar question in the joined cases of *X, Y and Z*, namely whether the applicant can be expected to avoid being persecuted by 'conceal[ing] his homosexuality [from everyone in his country of origin] … or exercising restraint in expressing it'[387].

In *Y and* Z, the CJEU looked to the rules in Article 4 QD (now Article 4 QD (recast)) as a whole to determine whether an applicant could reasonably be expected to abstain from religious practices that would expose them to risk of persecution. It held:

> None of [the rules in Article 4 QD] states that, in assessing the extent of the risk of actual acts of persecution in a particular situation, it is necessary to take account of

382 UNHCR, *Handbook*, op. cit., fn. 103, para. 43.

383 See in this regard recital 36 QD (recast), which states 'Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status'. See also Section 1.6.2.4.2 below, which deals with the particular social group ground for persecution, including family members.

384 CJEU, 2018, *Ahmedbekova*, op. cit., fn. 68, para. 51.

385 CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, paras 37–43.

386 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 73.

387 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 65.

> the possibility open to the applicant of avoiding the risk of persecution by abstaining from the religious practice in question and, consequently, renouncing the protection which the Directive is intended to afford the applicant by conferring refugee status. It follows that, where it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status … The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant.
>
> […]
>
> In assessing an application for refugee status on an individual basis, [the competent] authorities cannot reasonably expect the applicant to abstain from those religious practices[388].

However, it is relevant to take into account the importance of a particular practice for the applicant in determining the level of risk to which that person would be exposed in the country of origin. As stated by the CJEU:

> The subjective circumstance that the observance of a certain religious practice in public, which is subject to the restrictions at issue, is of particular importance to the person concerned in order to preserve his religious identity is a relevant factor to be taken into account in determining the level of risk to which the applicant will be exposed in his country of origin on account of his religion, even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned[389].

Furthermore, when assessing whether an applicant has a well-founded fear of being persecuted, 'the competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subject to acts of persecution'[390]. This assessment of the extent of the risk must, in addition, 'be based solely on a specific evaluation of the facts and circumstances'[391].

In *X, Y and* Z, the CJEU took an analogous approach and concluded that **applicants** '**cannot reasonably [be] expect[ed], in order to avoid the risk of persecution, … to conceal [their] homosexuality in [their] country of origin or to exercise reserve** in the expression of [their] sexual orientation'[392]. This excludes, however, **acts that are considered criminal** in accordance with the national law of EU Member States[393]. Otherwise, for the purposes of determining the reasons for persecution, there is no limitation on 'the attitude that the members of a particular social group may adopt with respect to their identity or to behaviour which may or may not fall within the definition of sexual orientation'[394]. Requiring members of

388 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, paras 78–80 (emphasis added). See also Section 1.6.2.2 on religion as a ground of persecution.
389 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 70.
390 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 76.
391 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 77.
392 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, paras 74–76.
393 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, paras 66–67.
394 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, paras 67–68.

a social group sharing the same sexual orientation to conceal that orientation is 'incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it'[395]. Nor can applicants be expected to conceal their sexual orientation in order to avoid persecution[396]. The fact that an applicant could avoid the risk of persecution by exercising greater restraint than a heterosexual person in expressing their sexual orientation is not to be taken into account in that respect[397].

The German Federal Administrative Court followed the above approach when applying the CJEU judgment in *Y and Z* in domestic proceedings, finding that no such restraint or discretion can be expected[398].

The abovementioned conclusions from the *Y and Z* and *X, Y and Z* judgments would appear, by analogy, to also be applicable to political opinion[399]. However, the CJEU has not, as yet, had to rule on the issue.

1.6. Reasons for persecution (Articles 9(3) and 10)

This section looks at the nexus between the reasons for persecution and the acts of persecution or absence of protection against such acts. It then examines the five reasons for persecution. It has two subsections, as set out in Table 13.

Table 13: Structure of Section 1.6

Section	Title	Page
1.6.1	Connection between the reasons for persecution and the acts of persecution or the absence of protection (Article 9(3))	115
1.6.2	Reasons for persecution (Articles 2(d) and 10)	121

395 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 70.

396 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 71.

397 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 75; see also Court of Appeal (England and Wales, United Kingdom), judgment of 6 March 2019, *WA (Pakistan)* v *Secretary of State for the Home Department*, [2019] EWCA Civ 302.

398 BVerwG (Germany), 2013, No 10 C 23.12 (English translation), op. cit., fn. 241, para. 27. See also Council of State (Conseil d'État) (France), judgment of 8 February 2017, No 379378, FR:CECHR:2017:379378.20170208, ruling that an applicant should not be required to hide his homosexuality or exercise restraint in the expression of his sexual orientation to avoid a risk of persecution; and Czech Supreme Administrative Court (Nejvyšší správní soud), judgment of 29 May 2014, *XY* v *Ministry of Interior*, No 5, Azs 2/2013-26 (English summary of this case presented and discussed at IARLJ Workshop in Berlin 1 June 2015: 'Refugee Recognition and Discreet Behaviour'). In this case, the Czech court followed the approach taken by the CJEU in *Y and Z* in a case concerning an Iranian convert to Christianity. Relevant country of origin information indicated, inter alia, that despite continued serious repression of converts in Iran (death penalty prescribed by law, torture, imprisonment), they are not sentenced to the death penalty by Iranian courts if they renounce their conversion during the trial, and that Iranian authorities usually tolerate a non-Islamic religion if it is practised in private and not promoted in public places. Referring to the CJEU judgment in *Y and Z*, the Supreme Administrative Court nevertheless reiterated that an applicant for international protection cannot be required to prevent their persecution in the country of origin by refraining from public expression of their faith.

399 See Dutch Council of State (Raad van State) (Netherlands), judgment of 21 November 2018, 201701423/1/V2, NL:RVS:2018:3735, paras 5.6, 5.7 and 19.1.

1.6.1. Connection between the reasons for persecution and the acts of persecution or the absence of protection (Article 9(3))

Article 9(3) QD (recast) prescribes the following.

> **Article 9(3) QD (recast)**
>
> In accordance with point (d) of Article 2, there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1 of this Article or the absence of protection against such acts.

In other words, the required nexus can be connected to either:

- the **acts of persecution** (Section 1.6.1.1) or
- the **absence of protection against such acts** (Section 1.6.1.2).

1.6.1.1. Connection with the acts of persecution

The requirement for there to be a connection makes it clear that acts of persecution, in themselves, do not qualify a person as a refugee unless they are committed **for one of the reasons for persecution set out in Article 10 QD (recast)**. These reasons are race, religion, nationality, membership of a particular social group and political opinion. There is general agreement that, in order to establish the required causal link, the acts do not need to be **solely** motivated by one of these five reasons. There may also be other reasons why a persecutory act has been performed[400]. For example, in trafficking cases, the prime motivation of the traffickers may be economic, but they may nevertheless target victims for one or more of the five reasons set out in Article 10[401].

The CJEU has yet to rule on the exact nature of the required connection under Article 9(3). There is significant national case-law that considers that this connection, like the connection that has to be established as per the Refugee Convention, is demonstrated if one of the

[400] See, for example, High Court (Ireland), judgment of 9 November 2016, *SM* v *Refugee Appeals Tribunal*, [2016] IEHC 638 (hereinafter High Court (Ireland), 2016, *SM* v *Refugee Appeals Tribunal*), stating that the Convention ground must be 'a relevant contributing factor' and that the existence of other reasons (in this case bribery of police by the alleged perpetrator of the rape recognised as constituting persecution) 'would not … defeat a claim for protection under the Convention' (para. 66); Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 30 September 2008, *SN* v *Ministry of Interior*, No 5, Azs 66/2008-70 (English summary) (hereinafter Supreme Administrative Court (Czechia), 2008, *SN* v *Ministry of Interior*, No 5, Azs 66/2008-70 (English summary)); and House of Lords (United Kingdom), judgment of 25 March 1999, *Islam* v *Secretary of State for the Home Department Immigration Appeal Tribunal and Another, ex parte Shah*, [1999] UKHL 20 (hereinafter House of Lords (United Kingdom), 1999, *Islam and Shah*).

[401] UNHCR, 'Guidelines on International Protection No 7: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked', 7 April 2006, HCR/GIP/06/07 (hereinafter UNHCR, 'Guidelines on International Protection No 7'), para. 32. See also Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 12 April 2021, No 5, Azs 317/2020-28 (hereinafter Supreme Administrative Court (Czechia), 2021, No 5, Azs 317/2020-28), para. 20. See Section 3.3.1.3 below (on trafficking context).

reasons is a **contributing factor**[402]. Thus, if one of the reasons for persecution is a contributing factor, it does not have to be the sole, primary or main cause, a direct or indirect cause or a 'but for' cause. It is enough that a reason for persecution, as mentioned in Article 10 QD (recast), can be identified as being relevant to the cause of the risk of being persecuted[403].

To similar effect, although using the language of decisiveness, the Czech Supreme Administrative Court held that there is no need for race, religion, nationality, membership of a particular social group, political opinion or gender to be the only ground for persecution of the applicant. It is enough if one of them is the decisive ground for serious harm or results in a refusal to provide protection[404].

How should the existence of a reason for persecution be determined? An applicant may not be able to substantiate the reasons for the persecution.

Article 10(2) QD (recast) states the following.

Article 10(2) QD (recast)

When assessing if an applicant has a well-founded fear of being persecuted, it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.

Thus, in *EZ*, which concerned refusal to perform military service in the context of armed conflict, the CJEU noted that:

> in the context of armed conflict, particularly civil war, and where there is no legal possibility of avoiding military obligations, it is highly likely that the authorities will interpret the refusal to perform military service as an act of political opposition, irrespective of any more complex personal motives of the person concerned[405].

The causal link to the persecutory consequences of an act or measures can be shown either by the **subjective motivation of the persecutor or by the objective impact of the measure in**

402 House of Lords (United Kingdom), judgment of 18 October 2006, *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department*, [2006] UKHL 46 (hereinafter House of Lords (United Kingdom), 2006, *Fornah*), para. 17 (while endorsing a 'contributing cause' understanding, Lord Bingham used the expression 'effective reason'). BVerwG (Germany), judgment of 24 November 2009, 10 C 24.08 (English translation), para. 16; this held that the question is whether the 'measures of persecution will affect the individual, at least in part, because of characteristics that are relevant for asylum'.

403 See also Refugee Status Appeals Authority (New Zealand), judgment of 6 September 2002, No 72635/01, para. 173, which states 'It is sufficient for the refugee claimant to establish that the Convention ground is a contributing cause to the risk of "being persecuted". It is not necessary for that cause to be the sole cause, main cause, direct cause, indirect cause or "but for" cause. It is enough that a Convention ground can be identified as being relevant to the cause of the risk of being persecuted. However, if the Convention ground is remote to the point of irrelevance, causation has not been established.'

404 Supreme Administrative Court (Czechia), 2008, *SN* v *Ministry of Interior*, No 5, Azs 66/2008-70 (English summary), op. cit., fn. 401. Note that gender is explicitly listed as one of the reasons for persecution in the Czech Asylum Act, Section 12(b). See also Colloquium on Challenges in International Refugee Law, 'The Michigan guidelines on nexus to a convention ground', *Michigan Journal of International Law*, Vol. 23, No 2, 2002, pp. 210–21 (hereinafter 'The Michigan guidelines on nexus to a convention ground'), para. 13.

405 CJEU, 2020, *EZ*, 2020, op. cit., fn. 34, para. 60.

question[406]. In the words of the UK House of Lords, 'The persecutory treatment need not be motivated by enmity, malignity or animus on the part of the persecutor, whose professed or apparent motives may or may not be the real reason for the persecution. What matters is the real reason'[407].

1.6.1.2. Connection with the absence of protection

To address potential protection gaps, the Commission's proposal for the amendment of Directive 2004/83/EC stated that there should be explicit provision that the requirement for a connection between the acts of persecution and the reasons for persecution be also fulfilled where there is a connection between the acts of persecution and the absence of protection against such acts[408]. The proposal was adopted and the directive was amended to provide for the causal link between a reason for persecution and the act of persecution or the absence of protection against such acts. Thus, while Article 9(3) of the original QD requires a connection between only the reasons mentioned in Article 10 and the acts of persecution, Article 9(3) QD (recast) provides for an alternative: the reasons for persecution can also be **connected to the absence of protection against acts of persecution**[409].

With this addition introduced by the QD (recast), Article 9(3) addresses the issue of a causal link if persecution is inflicted by non-state actors alone or by a combination of non-state and state actors. The European Commission noted:

> In many cases where the persecution emanates from non-State actors, such as militia, clans, criminal networks, local communities or families, the act of persecution is not committed for reasons related to a [Refugee] Convention ground but, for instance, with criminal motivations or … for private revenge. However, it often happens in such cases that the State is unable or unwilling to provide protection to the individual concerned **because of a reason related to the [Refugee] Convention** (for example religion, gender, ethnicity etc.). To address potential protection gaps, the proposal makes explicit that the requirement of a connection between the acts of persecution and the reasons for persecution is also fulfilled where there is a connection between the acts of persecution and the absence of protection against such acts[410].

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406 Federal Constitutional Court (Bundesverfassungsgericht (BVerfG)) (Germany), decision of 10 July 1989, 2 BvR 502/86 u.a., Vol. 80, 315 (English translation) (hereinafter Federal Constitutional Court (BVerfG) (Germany), 1989, 2 BvR 502/86 u.a. (English translation)).

407 House of Lords (United Kingdom), 2006, *Fornah*, op. cit., fn. 403, para. 17. See also 'The Michigan guidelines on nexus to a convention ground', op. cit., fn. 405, para. 9, and High Court (Australia), *Chen Shi Hai* v *Minister for Immigration and Multicultural Affairs*, [2000] 170 ALR 553, para. 73.

408 European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted and the content of the protection granted: explanatory memorandum, COM(2009) 551 final, pp. 7–8 (hereinafter European Commission, QD (recast) proposal: explanatory memorandum, 2009).

409 See also recital 29 QD (recast), which provides 'One of the conditions for qualification for refugee status within the meaning of Article 1(A) of the [Refugee] Convention is the existence of a causal link between the reasons for persecution, namely race, religion, nationality, political opinion or membership of a particular social group, and the acts of persecution or the absence of protection against such acts'.

410 European Commission, QD (recast) proposal: explanatory memorandum, 2009, op. cit., fn. 409, pp. 7–8 (emphasis added). See also VG München, judgment of 19 April 2016, M 12 K 16.30473; and the following decisions of the RVV/CCE (Belgium): judgment of 11 September 2013, No 109.598; judgment of 29 September 2009, No 32.222; judgment of 12 October 2010, No 49.339; and judgment of 17 December 2015, No 158.868.

If, for instance, an actor of protection does not grant police protection for ethnic or racial groups against criminal activities by private groups or individuals, this unwillingness to afford protection may amount to persecution. This was aptly illustrated by the UK House of Lords in the *Islam and Shah* case when Lord Hoffmann noted:

> A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? Again, in my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question 'Why was he attacked?' would be 'because a competitor wanted to drive him out of business.' But another answer, and in my view the right answer in the context of the Convention, would be 'he was attacked by a competitor who knew that he would receive no protection because he was a Jew'[411].

As detailed below in Section 1.8, the absence of state protection against persecution implies that the actor of protection is unwilling and/or unable to provide protection that is effective, non-temporary and accessible to the applicant. In the above example of the Jewish shopkeeper, the actor of protection (the state in this instance) was obviously unwilling to provide protection.

To summarise, in cases in which the actor of persecution is the state or a party or organisation controlling the state or a substantial part of the territory of the state, the act must have been perpetrated for one of the reasons mentioned in Article 10. However, in cases in which there is a non-state actor of persecution, the connection between the act and the reasons in Article 10 can be established in either of two ways. It must be established if the **non-state actor** has an Article 10 reason for their persecution. But it can also be established if an **actor of protection** (defined in Article 7 as either a 'State or … parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State') does not provide protection against such persecution and one of the reasons for this is race, religion, nationality, membership of a particular social group or political opinion.

In each of these scenarios, the connection must be established through assessment of the evidence[412].

The acts of persecution with which a connection must be shown can obviously take the form of those enumerated in Article 9(2), but this list of acts is only indicative.

[411] House of Lords (United Kingdom), 1999, *Islam and Shah*, op. cit., fn. 401, per Lord Hoffmann.
[412] CJEU, 2020, *EZ*, 2020, op. cit., fn. 34, para. 50.

1.6.2. Reasons for persecution (Articles 2(d) and 10)

The reasons for persecution are an essential component of the refugee definition in Article 2(d) QD (recast). This defines a refugee as follows.

> **Article 2(d) QD (recast)**
>
> ... a third-country national who, owing to a well-founded fear of being persecuted **for reasons of race, religion, nationality, political opinion or membership of a particular social group**, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply. [Emphasis added.]

That definition replicates the content of the definition in Article 1A(2) Refugee Convention in exhaustively identifying five reasons. Unless applicants can establish that they face a well-founded fear of persecution for one or more of these five reasons, they will not qualify as refugees[413].

Article 10(1) QD (recast) sets out a series of elements that must be taken into account when the reasons for persecution are assessed. It seeks to add definitional detail to the reasons stated, but not defined, in Article 1A(2) Refugee Convention. Each of the elements of Article 10(1) is qualified by the term 'in particular', indicating that these are relevant factors but that they are not exhaustive[414].

The five reasons for persecution listed in Articles 2(d) and 10(1) QD (recast) are reproduced in Table 14.

Table 14: Reasons for persecution in Articles 2(d) and 10(1) QD (recast)

1	**Race**	Article 10(1)(a) QD (recast)	Section 1.6.2.1
2	**Religion**	Article 10(1)(b) QD (recast)	Section 1.6.2.2
3	**Nationality**	Article 10(1)(c) QD (recast)	Section 1.6.2.3
4	**Membership of a particular social group**	Article 10(1)(d) QD (recast)	Section 1.6.2.4
5	**Political opinion**	Article 10(1)(e) QD (recast)	Section 1.6.2.5

Neither the QD (recast) nor the Refugee Convention attaches any significance to the order in which they are listed. There is no hierarchy. It is possible for an applicant to establish a link with more than one of the five reasons. Moreover, the reasons may overlap, such as where

413 CJEU, 2020, *EZ*, 2020, op. cit., fn. 34, para. 46.

414 European Council, Asylum Working Party, Outcome of Proceedings, Proposal for a Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, 25 September 2002, EU Doc 12199/02 ASILE 45; and European Council, Asylum Working Party, Outcome of Proceedings (EU Doc 12620/02), op. cit., fn. 229; both cited by Hailbronner, K. and Alt, S., 'Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Articles 1–10' (hereinafter Hailbronner and Alt, 'Council Directive 2004/83/EC, Articles 1–10'), in Hailbronner and Thym (eds), *EU Asylum and Immigration Law: A commentary*, op. cit., fn. 186, p. 1080.

a political opponent belongs to a religious group and attracts persecution on grounds of both political opinion and religion.

Without being able to show at least one reason for persecution, an applicant cannot qualify as a refugee. As discussed further in Section 3.4.2 below, victims of famine or natural disaster, for example, will not have a viable claim for refugee protection unless there is a connection between the reasons mentioned in Article 10 and the act of persecution or the absence of protection against the act. (In addition, they may have difficulty in establishing that their predicament arises from an actor of persecution.) Equally, civilians in situations of armed conflict, who are at risk of indiscriminate violence arising in circumstances in which there is no reason for persecution behind the harm they fear, would have no viable refugee claim[415]. (For more analysis of the circumstances in which such cases can nevertheless establish a link to an Article 10 reason, see Section 3.2.1.3.)

Examination of each of the five reasons ordinarily requires assessing whether the applicant's race, religion, nationality, membership of a particular social group or political opinion operates as a reason for acts of persecution being directed at them personally[416]. So, for example, an act of persecution may target the applicant because they are of a particular religion or political opinion. However, if the applicant does not in fact have that religion or political opinion, that does not necessarily mean that a reason cannot be shown. As is made clear by Article 10(2) QD (recast), the ultimate question is not whether they actually have such a characteristic but whether such a characteristic is attributed to them by the actor of persecution[417].

Article 10(d) QD (recast) states the following.

Article 10(2) QD (recast)

When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.

The text of Article 10(2) reflects the central axiom of refugee law that, ultimately, what matters when assessing the risk of 'being persecuted' on a relevant ground is **not who or what people are but how they are perceived by the actors of persecution**. Indeed, there may even be circumstances in which applying for international protection itself leads to the attribution of an adverse political opinion. This may be the case, for example, if such an action were viewed as striking a hostile posture towards the government of the country of origin and thus

415 CNDA (France), judgment of 4 June 2018, *M. M.A.*, No 16039973 C (hereinafter CNDA (France), 2018, *M. M.A.*, No 16039973 C), para. 7.

416 CJEU, 2015, *Shepherd*, op. cit., fn. 163, para. 24.

417 CJEU, 2020, *EZ*, op. cit., fn. 34, para. 60. See also, for example, CNDA (France), judgment of 8 January 2019, *M. S.*, No 17049487 R; and CNDA (France), judgment of 28 November 2018, *M. O.*, No 18007777 R. In both cases, the CNDA found that the appellants had a well-founded fear of persecution on account of pro-government and pro-Western opinions that would be imputed to them by the Taliban and other opposition groups as a result of their having worked in the army and the local police respectively. Both judgments refer to Article 10(2) QD (recast) and rely on Council of State (Conseil d'État) (France), judgment of 14 June 2010, *OFPRA c M. A.*, No 323669, FR:CESSR:2010:323669.20100614 (English summary) (hereinafter Council of State (Conseil d'État) (France), 2010, *OFPRA c M. A.*, No 323669); and Supreme Court (United Kingdom), 2012, *RT (Zimbabwe)*, op. cit., fn. 361, para. 44.

as constituting the holding of an opinion, thought or belief on a matter related to the potential actors of persecution[418]. Persecutors and victims may even share the identified characteristic that is the reason for persecution. This does not prevent the mistreatment of one by the other being for a reason for persecution (as is the case where the perpetrators of FGM have themselves suffered FGM). As the UK House of Lords noted in such a case, 'Those who have already been persecuted are often expected to perpetuate the persecution of succeeding generations …'[419].

The fact that a specified reason for persecution may exist if an applicant either actually possesses the characteristic concerned or has it attributed to them suggests that it is useful to use a two-step assessment when considering reasons for persecution. This assessment first asks 'is the applicant at risk of persecution for a reason set out in Articles 2(d) and 10 QD (recast) because they actually possess a specific characteristic?' Second, it asks, 'even if they do not possess such a characteristic, will it be attributed to them anyway?'

1.6.2.1. Race (Article 10(1)(a))

Article 10(1)(a) QD (recast)

Reasons for persecution

the concept of race shall, in particular, include considerations of colour, descent, or membership of a particular ethnic group;

The European Commission has noted that race 'should be interpreted in the broadest of terms to include all kinds of ethnic groups and the full range of sociological understandings of the term'[420]. Similarly, the breadth of the concept of race is shown by the International Convention on the Elimination of All Forms of Racial Discrimination, which identifies discrimination based on 'race, colour, descent, or national or ethnic origin'[421].

Anti-discriminatory objectives are central to the European human rights regime. The TEU itself, in Article 2, stresses the centrality of non-discrimination to the values common to

418 UNHCR, *Handbook*, op. cit., fn. 103, para. 83. In Asylum and Immigration Tribunal (AIT) (United Kingdom), judgment of 29 November 2007, *HS (returning asylum seekers) Zimbabwe CG*, [2007] UKAIT 94, the tribunal considered (but eventually rejected) the argument that the Zimbabwean authorities of the day would perceive the mere fact that one of their nationals had claimed asylum as an act of disloyalty amounting to a political opinion.

419 House of Lords (United Kingdom), 2006, *Fornah*, op. cit., fn. 403, para. 110.

420 European Commission, QD proposal: explanatory memorandum, 2001, op. cit., fn. 266, p. 21. The Commission's understanding reflects that outlined in UNHCR, *Handbook*, op. cit., fn. 103, para. 68. This states 'Race, in the present connexion, has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as "races" in common usage. Frequently it will also entail membership of a specific social group of common descent forming a minority within a larger population. Discrimination for reasons of race has found world-wide condemnation as one of the most striking violations of human rights. Racial discrimination, therefore, represents an important element in determining the existence of persecution.'

421 International Convention on the Elimination of All Forms of Racial Discrimination, Article 1(1). The European Commission against Racism and Intolerance has defined direct racial discrimination as any differential treatment 'based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification …'. See European Commission against Racism and Intolerance, ECRI General Policy Recommendation No 7 (revised) on national legislation to combat racism and racial discrimination, adopted 13 December 2002 and revised 7 December 2017. The 2002 recommendations were cited by ECtHR (GC), judgment of 13 November 2007, *DH and Others v Czech Republic*, No 57325/00, CE:ECHR:2007:1113JUD005732500, para. 60.

Member States. Article 21 EU Charter prohibits discrimination on grounds including race, and such discrimination may, when a claim is considered under the ECHR, be a factor leading to a finding of degrading treatment[422]. For example, the High Administrative Court of Baden-Württemberg in Germany recognised a Tibetan woman who had been raped by security forces as a refugee on the ground of her race[423].

1.6.2.2. Religion (Article 10(1)(b))

Article 10(1)(b) QD (recast)

Reasons for persecution

the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

As the CJEU puts it, this represents a 'broad' definition, as, under the directive, religion 'encompasses all its constituent components, be they public or private, collective or individual'[424]. The concept extends, inter alia, to atheism, agnosticism and humanism, as any belief is a possible reason for persecution. In his opinion in *Y and Z*, Advocate General Bot observed that freedom of religion 'concerns the freedom to have a religion, to have none, or to change faith'[425].

For example, a decision of the Austrian Asylum Court recognised that persecution might take place on religious grounds where an Afghan woman might face serious harm for having refused to be subject to the rites and customs associated with a religion[426]. Other examples from French and German jurisprudence include Ahmadis from Algeria[427]; a Muslim from the Central African Republic at risk of persecution, inter alia, by Anti-Balaka militias and radicalised

[422] European Commission of Human Rights, report of 14 December 1973, *East African Asians v United Kingdom*, Nos 4403/70–4419/70, 4422/70, 4423/70, 4434/70, 4443/70, 4476/70–4478/70, 4486/70, 4501/70 and 4526/70–4530/70; ECtHR (GC), judgment of 10 May 2001, *Cyprus v Turkey*, No 25781/94, CE:ECHR:2001:0510JUD002578194, para. 306; and ECtHR, judgment of 15 June 2010, *SH v United Kingdom*, No 19956/06, CE:ECHR:2010:0615JUD001995606.

[423] German High Administrative Court (Verwaltungsgerichtshof (VGH)) of Baden-Wuerttemberg, judgment of 3 November 2011, A 8 S 1116/11 (English summary). See also CNDA (France), judgment of 20 November 2018, *M. H.*, No 13027358 C, concerning a stateless Rohingya man recognised as a refugee on account of his 'Rohingya origins' (vis-à-vis both Bangladesh and Myanmar).

[424] CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 63; and CJEU, 2018, *Fathi*, op. cit., fn. 214, para. 78. See also UNHCR, *Handbook*, op. cit., fn. 103, para. 71.

[425] CJEU, Opinion of Advocate General Bot of 19 April 2012, *Bundesrepublik Deutschland v Y and Z*, Joined Cases C-71/11 and C-99/11, EU:C:2012:224, para. 34.

[426] Asylum Court (Asylgerichtshof) (Austria), judgment of 6 December 2012, C16 427465-1/2012 (English summary). See also VG Stuttgart, judgment of 17 December 2020, A 1 K 3918/20, concerning an Afghan man who no longer identified with Muslim beliefs, would no longer participate in public Muslim ceremonies/practices, did not wish to belong to any religion and was accused of apostasy.

[427] See, for example, CNDA (France), 2019, *M. H.*, No 19000104 C, op. cit., fn. 251; and CNDA (France), judgment of 20 November 2018, *M. H. and Mme K.*, Nos 17046243 and 17054313 C.

members of the Christian population in Bangui[428]; an Afghan of Hazara origin who had converted to Christianity[429]; and an atheist from Gaza[430].

As previously noted, in Section 1.4.1, this broad protection of religious rights pays attention to both beliefs and the right to express those beliefs. These separate legal interests are sometimes designated *forum internum* and *forum externum*, both of which are recognised as protected[431]. This approach reflects the various international law instruments in this area, including, most notably, Article 10 EU Charter. Advocate General Bot, in *Y and Z*, gave his opinion that it would be meaningless to define the core protected area as only freedom of private conscience without similarly protecting that freedom's external manifestation[432]. In its judgment, the court agreed that Article 10(1)(b) encompasses protection from serious acts interfering with the applicant's freedom not only to practise their faith in private circles but also to live that faith publicly[433].

For an analysis of how the reason of religion may be relevant in the context of military service cases, see Section 1.6.2.5.3.

1.6.2.3. Nationality (Article 10(1)(c))

Article 10(1)(c) QD (recast)

Reasons for persecution

the concept of nationality shall not be confined to citizenship or lack thereof but shall, in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

Although this definition is plainly a broad one, there has been very little exploration of this reason for persecution in decisions of the courts or tribunals of Member States[434], and the subject is untouched at CJEU level. Nevertheless, as regards 'national origin' as a ground of discrimination under Article 1(1) International Convention on the Elimination of All Forms of Racial Discrimination, the International Court of Justice (ICJ) has held that it should not be construed as denoting formal nationality[435].

In these special circumstances, it is appropriate to look at interpretations that have been suggested in secondary non-binding sources. The broad exposition of the content of nationality laid down in the QD (recast) reflects the exposition set out many years earlier in the UNHCR *Handbook*:

428 CNDA (France), judgment of 20 March 2019, *M. H.*, No 17000413.
429 CNDA (France), judgment of 3 July 2018, *M. N.*, No 18003724 C.
430 VG Meiningen, judgment of 23 November 2020, 2 K 22386/17.
431 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 62.
432 CJEU, Opinion of Advocate General Bot, 2012, *Y and Z*, op. cit., fn. 426, para. 46.
433 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 63.
434 Upper Tribunal (IAC) (United Kingdom), 2011, *ST (Ethnic Eritrean – Nationality – Return) Ethiopia CG*, op. cit., fn. 127, considers the question of arbitrary deprivation of nationality. Although the case is an interesting example of the circumstances in which such deprivation will be **persecution**, it does not discuss the dimension of the Convention reason.
435 ICJ, judgment of 4 February 2021, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)*.

> The term 'nationality' in this context is not to be understood only as 'citizenship'. It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term 'race'. Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution[436].

This ground has a contribution to make in terms of filling gaps that might otherwise exist in the protection regime. National courts outside the EU and academic writers have suggested that it may deal with the persecution inflicted on refugees or stateless persons on account of their status as 'foreigners'[437]. It may also address the many problems associated with those awarded only 'second-class citizenship' or subordinate forms of 'nationality', and with the situation in which new territories are carved out of previously existing ones, where those expressing allegiance to the antecedent rulers suffer persecution[438].

1.6.2.4. Membership of a particular social group (Article 10(1)(d))

Article 10(1)(d) QD (recast)

Reasons for persecution

a group shall be considered to form a particular social group where in particular:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group;

436 UNHCR, *Handbook*, op. cit., fn. 103, para. 74.

437 Refugee Status Appeals Authority (New Zealand), decision of 30 April 1992, No 1/92 Re SA, particularly the discussion under the heading 'Statelessness'; Federal Court (Canada), judgment of 28 September 1994, *Baffoe* v *Canada (Minister of Citizenship and Immigration)* (1994) 85 FTR 68 (Can FCTD); and Court of Appeals, 6th Circuit (United States), judgment of 20 May 2011, *Stserba v Holder*, No 09-4312 (USCA, 6th Circuit, 2011), 975. See also Zimmermann, A. and Mahler, C., 'Article 1 A, para. 2 (definition of the term "refugee" / Définition du terme "réfugié")', in Zimmermann (ed.), *The 1951 Convention and Protocol: A commentary*, op. cit., fn. 169, pp. 388–390 and 442; Hathaway and Foster, *The Law of Refugee Status*, op. cit., fn. 128, pp. 397–399; and Fripp, *Nationality and statelessness in the international law of refugee status*, op. cit., fn. 124, pp. 146–151.

438 Hathaway and Foster, *The Law of Refugee Status*, op. cit., fn. 128, p. 398.

Table 15 sets out the structure of the following two subsections, which:

- examine the definition of the term 'social group' (Section 1.6.2.4.1);
- provide some illustrative examples of particular social groups (Section 1.6.2.4.2).

Table 15: Structure of Section 1.6.2.4

Section	Title	Page
1.6.2.4.1	Definition of a particular social group	129
1.6.2.4.2	Illustrations of particular social groups	132

1.6.2.4.1. Definition of a particular social group

As is apparent from the wording of Article 10(1)(d) QD (recast), a particular social group is defined by two conditions, as shown in Table 16.

Table 16: Two definitional conditions of a particular social group, as set out in Article 10(1)(d) QD (recast)

1	An innate shared characteristic or common background that cannot be changed, or a shared characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it
2	A distinct identity based on a perception of being different by the surrounding society

These two conditions are illustrated in a decision of the Czech Supreme Administrative Court involving former members of the armed forces in Iraq. This notes:

> [The group was] quite easily defined, as these are the persons who, before the fall of Saddam Hussein's regime, were involved in the Iraqi army and in other armed bodies, or are those who participated in exercising power. This is why they are perceived by the rest of the population to be supporters or representatives of the former regime, especially when they also follow the Sunni religion. This is a group of persons that may be quite accurately identified as they have identical or similar status and these persons could be exposed, according to the mentioned recommendation of the UNHCR, to the risk of persecution by armed groups and attacks, something that the Iraqi government is not able to prevent at the moment[439].

[439] Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 2 August 2012, *HR v Ministry of the Interior*, No 5, Azs 2/2012-49 (English summary).

Article 10(1)(d) uses the conjunction 'and' when setting out these conditions. The CJEU has now stated more than once that these are two 'cumulative' conditions, both of which must be met to qualify as a particular social group[440].

The 'distinct identity' referred to in the second condition may be demonstrated by **discrimination**. As the UK House of Lords put it:

> the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect … In choosing to use the general term 'particular social group' rather than an enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention[441].

Compared with innate/shared characteristics/beliefs or a common background, the distinct identity of the social group refers to how such a **group is perceived to be different by the surrounding society**. This can, for instance, be the case of victims of human trafficking, as, according to the French Council of State, 'beyond the procuring network from which they were at risk, surrounding society or institutions [may] perceive … them as having a particular identity that would constitute a social group within the meaning of the [Refugee] Convention'[442].

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440 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 45; and CJEU, 2018, *Ahmedbekova*, op. cit., fn. 68, para. 89. Although UNHCR's view is a non-binding one, UNHCR has long argued that the case-law of the common law countries breaks down, on analysis, into two approaches – 'protected characteristics' and 'social perception' – and that it is appropriate to reconcile the two in order to ensure that the Refugee Convention offers comprehensive and principled protection. UNHCR's proposed synthesis of the two approaches is that 'a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.' See UNHCR, Guidelines on International Protection No 2: 'Membership of a particular social group' within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/02 (hereinafter UNHCR, Guidelines on International Protection No 2), para. 11. This approach was endorsed by the House of Lords (United Kingdom), 2006, *Fornah*, op. cit., fn. 403, para. 16, which considered that to read these conditions in conjunction 'propounds a test more stringent than Is warranted by international authority'. However, despite being clear that 'and' is used conjunctively, the CJEU has yet to rule on whether, because Article 10(1)(d) uses the words 'in particular', these two conditions can properly be treated as exhaustive. The court's analysis of Article 10(1)(b) in CJEU, 2018, *Fathi*, op. cit., fn. 214, which also uses the words 'in particular', would appear to suggest that they are not exhaustive. In *Fathi*, the court stated that 'it is clear from the wording of that provision, and particularly the use of the words "in particular", that the definition of the concept of "religion" contained therein provides only a non-exhaustive list of components that may characterise that concept in the context of an application for international protection that is based on the fear of being persecuted for reasons of religion' (para. 79).

441 House of Lords (United Kingdom), 1999, *Islam and Shah*, op. cit., fn. 401, as stated by Lord Hoffmann.

442 Council of State (Conseil d'État) (France), judgment of 25 July 2013, No 350661, FR:CESEC:2013:350661.20130725 (English summary), para. 5. The case was sent back to the CNDA (France) after the former judgment was quashed. The court followed the Council of State's approach and identified the social perception to decide that there was a particular social group (see CNDA (France), 2015, *Mlle E. F.*, No 10012810 (English summary), op. cit., fn. 179). However, in CNDA (France), judgment of 29 June 2021, No 20013918, *Mme A* (English summary) (hereinafter CNDA (France), 2021, No 20013918, *Mme A* (English summary)), the CNDA decided that a victim of trafficking in Nigeria could not establish the social perception requirement, since there would not be such a perception in Lagos (her state of origin), but granted subsidiary protection due to the risk she would be exposed to as someone who had left a prostitution network (para. 6).

Importantly, however, as noted by the UK House of Lords, the mere fact of persecution cannot be the only element that gives content to members of a group, as that would be to deprive this ground of any meaningful content. It stated 'It is common ground that there is a general principle that there can only be a "particular social group" if the group exists independently of the persecution'[443].

Nonetheless, as ruled by the CJEU, the existence of laws that stigmatise a particular category of individuals may demonstrate that such individuals are recognised as part of a group and targeted by a particular society. It stated 'the existence of criminal laws … which specifically target homosexuals, supports a finding that those persons form a separate group which is perceived by the surrounding society as being different'[444].

There is no requirement for a particular social group to be a particular size[445]. As examples of women in some societies demonstrate, it is possible for such a group to form a majority of the population. Equally, a particular social group could be very small[446].

Nor is there any requirement that the particular social group be cohesive. UNHCR's Guidelines on International Protection No 2 note wide acceptance in state practice that 'an applicant need not show that the members of a particular social group know each other or associate with each other as a group. That is, there is no requirement that the group be 'cohesive'[447], nor do the members of that group need to publicly identify themselves as belonging to the group[448].

The concept of a 'particular social group' must not be confused with the notion of 'group persecution'. In the context of establishing a Refugee Convention reason based on membership of a particular social group, it is not necessary that an applicant demonstrate that all members of a particular social group are at risk of persecution[449].

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443 House of Lords (United Kingdom), 1999, *Islam and Shah*, op. cit., fn. 401. The relevant reasoning was elaborated upon in an earlier judgment (Court of Appeal (England and Wales, United Kingdom), judgment of 30 June 1995, *Savchenkov* v *Secretary of State for the Home Department*, [1995] EWCA Civ 47, para. 28): 'If a group can have existence solely based on fear of being subjected to persecution, then any person who can establish that he would be persecuted for a reason other than race, religion, nationality or political opinion could automatically claim to be part of the social group and meet the requirements of Article 1. Had this interpretation been intended, the words "or any other reason" could have been substituted for the words "membership of a particular social group".' This is also the position taken by UNHCR in its Guidelines on International Protection No 2, op. cit., fn. 441, para. 2. See also BVerwG (Germany), decision of 23 September 2019, 1 B 54.19, DE:BVerwG:2019:230919B1B54.19.0, para. 8.

444 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, paras 48–49. See also High Court (Ireland), judgment of 10 December 2014, *SJL* v *Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Attorney General*, [2014] IEHC 608, para. 50, which considered that a husband and wife from China 'can be seen as part of a social group defined as people who, contrary to the one child policy in China, have had more than one child without permission. The shared characteristic is that they are parents of more than one child born in China without official permission.'

445 UNHCR, Guidelines on International Protection No 2, op. cit., fn. 441, paras 18–19.

446 UNHCR, Guidelines on International Protection No 2, op. cit., fn. 441, para. 31. See also Section 1.6.2.4.2 below for examples of cases in which the family – a small group – has been considered a particular social group.

447 UNHCR, Guidelines on International Protection No 2, op. cit., fn. 441, para. 15.

448 Council of State (Conseil d'État) (France), judgment of 21 December 2012, *Ms D.F.*, No 332491, FR:CEASS:2012:332491.20121221 (English summary) (hereinafter Council of State (France), 2012, *Ms D.F.*, No 332491), para. 2. This states that membership of a particular social group is an objective social fact that does not depend on the identification of its members with that group, with the same language being used, for example, in CNDA (France), judgment of 23 July 2018, *Mme D.*, No 17042624 R, para. 3.

449 UNHCR, Guidelines on International Protection No 2, op. cit., fn. 441, para. 17. The guidelines note that 'Certain members of the group may not be at risk, if, for example, they hide their shared characteristic, they are not known to the persecutors, or they cooperate with the persecutor'.

1.6.2.4.2. Illustrations of particular social groups

The last paragraph of Article 10(1)(d) refers specifically to sexual orientation and to gender, including gender identity, as common characteristics that may define a particular social group. Other social groups have also been identified by courts or tribunals. This section provides some illustrations of such groups[450].

Concerning gender, including a person's gender identity and sexual orientation, recital 30 QD (recast) illustrates an aspect of the definition of a particular social group based on such characteristics.

Recital 30 QD (recast)

For the purposes of defining a particular social group, issues arising from an applicant's gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant's well-founded fear of persecution[451].

Women have been recognised as persecuted for reasons related to their membership of a particular social group both by reason of their gender alone and more particularly where they form subgroups. As the Irish High Court stated, 'there is no question but that women, generally, or women who are subjected to gender-based violence, may constitute a particular social group for the purposes of the Convention'[452].

Some examples of women from such subgroups who are recognised as refugees are set out in Table 17[453]. Often, the circumstances of their cases involve an accumulation of various forms of gender-based violence.

[450] For a report on the evolution of practice in different EU Member States, see European Commission, *Evaluation of the implementation of the recast qualification directive (2011/95/EU) – Final report*, 2019, pp. 94–98. For victims of trafficking as possible particular social groups, see Section 3.3.1.3 below.

[451] Article 10 QD (recast) does include a group 'based on a common characteristic of sexual orientation'.

[452] High Court (Ireland), judgment of 9 November 2016, *SM* v *Refugee Appeals Tribunal*, [2016] IEHC 638 (hereinafter High Court (Ireland), 2016, *SM* v *Refugee Appeals Tribunal*), para. 54.

[453] The situation of victims of trafficking, who are often women and girls and may be recognised on the basis of their membership of a particular social group, is addressed in Section 3.3.1.3 below.

Table 17: Examples of women recognised by European courts and tribunals as refugees on the basis of their membership of a particular social group

Women	Women subjected to gender-based violence[454]
	Women threatened with forced marriage or who have escaped such marriage[455]
	Widows at risk of, or who have escaped, forced marriage (widow inheritance / levirate marriage)[456]
	Women subject to domestic violence[457]
	Women at risk of being subject to honour crimes[458]
	Divorced women[459]
	Mothers of illegitimate children[460]
	Women accused of transgressing social mores in other ways, in particular by committing adultery and being disobedient to their husbands, and/or who are unprotected by their husbands or other male relatives[461]

454 See, for example, High Court (Ireland), 2016, *SM* v *Refugee Appeals Tribunal*), op. cit., fn. 453.

455 See, for example, CNDA (France), judgment of 5 May 2021, *Mme D.*, No 20030921 (English summary), concerning a Malian woman who had escaped forced marriage; CNDA (France), judgment of 14 September 2020, *Mme A.*, No 19055889 (English summary) (hereinafter CNDA (France), 2020, *Mme A.*, No 19055889 (English summary)), concerning a Palestinian woman from Gaza resisting a forced marriage; VG Augsburg, judgment of 16 June 2011, Au 6 K 11.30092 (English summary) (hereinafter VG Augsburg, 2011, Au 6 K 11.30092 (English summary)), finding 'The persecution threatening the applicant is linked to the persecution ground of her gender affiliation and the membership of a particular social group – unmarried women from families whose traditional self-image also demands a forced marriage'; and VG Gelsenkirchen, judgment of 18 July 2013, 5a K 4418/11.A (English summary) (hereinafter VG Gelsenkirchen (Germany), 2013, 5a K 4418/11.A (English summary)), concerning an Afghan woman in a relationship opposed by her father and threatened with forced marriage to her cousin. For further French cases involving forced marriage in which a particular social group and refugee status was recognised, see fn. 981 below.

456 RVV/CCE (Belgium), judgment of 19 June 2019, No 222.826, concerning a Guinean woman married as a child to a man more than 40 years older than her and threatened after his death with forced marriage to his brother; and Refugee Appeals Board (Denmark), decision of 16 January 2017, unnumbered decision (English summary), concerning an Afghan woman threatened with forced marriage to the brother of her late husband's father, subject to domestic violence and recognised on the basis of the group of 'widows at risk of forced marriage'.

457 See, for example, the following RVV/CCE rulings: judgment of 18 June 2021, No 256.782, and judgment of 17 June 2021, No 256.674, both concerning Guinean women with children born outside marriage, who had escaped forced marriage and domestic violence and who were recognised as facing persecution on the basis of the group of 'women'; and judgment of 31 May 2021, No 255.346, in which the applicant was recognised on the basis of her membership of the group of 'Guinean women' (para. 10); Special Appeal Committee (Greece), 2011, No 95/126761 (English summary), op. cit., fn. 265, concerning a woman from Iran subjected to, inter alia, domestic violence; Supreme Administrative Court (Czechia), 2011, *RS* v *Ministry of Interior*, No 6, Azs 36/2010-274 (English summary), op. cit., fn. 265, concerning a woman from Kyrgyzstan in a forced polygamous marriage, who feared violence at the hands of her husband; and Migration Court of Appeal (Sweden), judgment of 21 November 2008, MIG 2008:39, concerning an Albanian woman who had been subjected to repeated violence by her husband even after her divorce, and her two children. The court recognised that women in such a situation may qualify as refugees but in this case concluded that internal protection was available. See also Section 2.4.3.5.2 for more on cases of applicants subject to domestic violence or sexual violence who have been found to qualify for subsidiary protection.

458 VG Stuttgart, judgment of 8 September 2008, AK 10 K 13/07 (English summary) (hereinafter VG Stuttgart (Germany), 2008, AK 10 K 13/07 (English summary)), concerning a woman with two children who had separated from her abusive husband in Germany and who had received death threats from her brother for leaving her husband and seeking a divorce, and finding that the Lebanese state is not able to protect a woman sufficiently against a threatened 'honour killing'.

459 See, for example, CNDA (France), judgment of 30 April 2021, No 253.776 (English summary).

460 See, for example, Migration Court of Appeal (Sweden), judgment of 21 April 2011, UM 7851/10 (English summary), and the two Belgian cases referred to in fn. 458.

461 House of Lords (United Kingdom), 1999, *Islam and Shah*, op. cit., fn. 401. See also, for example, Special Appeal Committee of Greece, decision of 26 June 2011, No 95/126761 (English summary), concerning an Iranian woman subject to domestic violence by her husband, in which the committee found that her non-conformity with the traditional or cultural conventions and practices of Islam showed her membership of a particular social group; Supreme Court (Tribunal supremo) (Spain), judgment of 6 July 2012, No 6426/2011, ES:TS:2012:4824; and Supreme Court (Tribunal supremo) (Spain), judgment of 15 June 2011, No 1789/2009, ES:TS:2011:4013.

In a case dealing with the last-mentioned subgroup, the UK House of Lords pointed out:

> The unchallenged evidence in this case shows that women are discriminated against in Pakistan. I think that the nature and scale of the discrimination is such that it can properly be said the women in Pakistan are discriminated against by the society in which they live. The reason why the appellants fear persecution is not just because they are women. It is because they are women in a society which discriminates against women[462].

As that case emphasises, identification of a particular social group is dependent on the evidence regarding the operation of the society in question.

Applications for refugee status involving **FGM** are widely accepted as being based on membership of a particular social group. For instance, the French Council of State ruled that '... in a population in which female sexual mutilation is widely practised to the point of constituting a social norm, female children and adolescents who are not mutilated constitute a social group'. However, in order to establish the merits of the application for protection, the Council of State required the applicant to supply detailed information, specifically in relation to family, geography and society, concerning the risks that she personally faced[463].

Similarly, the UK House of Lords (also vis-à-vis a particular social context in which women suffered discrimination and in which non-conformity was distinctly identified within that society) held:

> ... FGM is an extreme expression of the discrimination to which all women in Sierra Leone are subject, as much those who have already undergone the process as those who have not. I find no difficulty in recognising women in Sierra Leone as a particular social group for purposes of article 1A(2).
>
> [...]
>
> If, however, that wider social group were thought to fall outside the established jurisprudence, a view I do not share, I would accept the alternative and less favoured definition advanced by the second appellant and the UNHCR of the particular social group to which the second appellant belonged: intact women in Sierra Leone.
>
> [...]
>
> There is a common characteristic of intactness. There is a perception of these women by society as a distinct group. And it is not a group defined by persecution: it would be a recognisable group even if FGM were entirely voluntary, not performed by force or as a result of social pressure[464].

[462] House of Lords (United Kingdom), 1999, *Islam and Shah*, op. cit., fn. 401, per Lord Craighead. It should be noted that, while for the UK House of Lords discrimination is a necessary condition of there being a particular social group, there is nothing in the text of Article 10(1)(d) that requires that for an applicant to be a member of a particular social group they must be discriminated against; it would appear enough that they have a protected characteristic and that they are perceived as being different.

[463] Council of State (France), 2012, *Ms D.F.*, No 332491, op. cit., fn. 449.

[464] House of Lords (United Kingdom), 2006, *Fornah*, op. cit., fn. 403, para. 31, per Lord Bingham.

Thus, in many cases, gender-specific acts of persecution, such as sexual violence or forced abortion, are committed because of gender-based reasons for persecution. Nevertheless, it is important to bear in mind that they may sometimes, or in addition, be carried out for other discriminatory reasons, such as race, religion, nationality or political opinion.

In addition, the QD (recast) expressly acknowledges that **sexual orientation** may be a common characteristic of a social group[465]. The CJEU has accepted that:

> a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it.
>
> [...]
>
> it is important to state that requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it[466].

A person's identity or behaviour may attract persecution, but individuals are not expected to accept any limitation on their behaviour (see further discussion of the issue of concealment in Section 1.5.5 above). The only exception, as stated in Article 10(1)(d), is where an application relates to acts considered criminal in accordance with the national law of Member States. This provision has been interpreted strictly, but, as the CJEU stated in *X, Y and Z*, just as Article 10(1)(b) protects the public and private spheres with respect to religion, 'nothing in the wording of Article 10(1)(d) suggests that the European Union legislature intended to exclude certain other types of acts or expression linked to sexual orientation from the scope of that provision'[467].

As the UK Supreme Court noted in *HJ (Iran)*, 'There is no doubt that gay men and women may be considered to be a particular social group for this purpose'[468]. The existence of particular social groups on the ground of sexual orientation has been recognised for applicants from countries where homosexuality is criminally penalised or where public indecency laws may

[465] Article 10(1)(d) QD: 'Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation.'

[466] CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, paras 46 and 70.

[467] CJEU, 2013, *X, Y and Z*, para. 67. See also Supreme Court (Tribunal Supremo) (Spain), judgment of 21 September 2012, No 65/2012, ES:TS:2012:5907; and Supreme Court (Spain), judgment of 21 September 2012, No 75/2012, ES:TS:2012:5908.

[468] Supreme Court (United Kingdom), 2010, *HJ (Iran) and HT (Cameroon)*, op. cit., fn. 348, para. 10, per Lord Hope, and referring to House of Lords (United Kingdom), 1999, *Islam and Shah*, op. cit., fn. 401, 643–644, per Lord Steyn.

be used against them. Examples include applicants from Cameroon[469], Jamaica[470], Lebanon[471], Mali[472], Morocco[473], Nigeria[474], Pakistan[475], Senegal[476] and Sierra Leone[477]. Social groups have likewise been recognised in cases of applicants with countries of origin where there are not criminal sanctions in law, but where society is strongly homophobic and the authorities are unwilling or unable to provide protection. This has been the case, for instance, for gay applicants from Armenia[478] and Kazakhstan[479]. Similarly, persons facing persecution as a result of being perceived as gay men or lesbians have also been recognised as a particular social group[480].

With regard to **gender identity**, the experience of intersex and transgender persons is often distinct from that of gay, lesbian or bisexual applicants[481]. They may nevertheless also face similar risks in their country of origin. Indeed, they may be considered gay or lesbian by the society of their country of origin. Examples of such cases, in which membership of a particular social group has been recognised, include:

- a *hijra* from Pakistan[482],

469 See, for example, CNDA (France), judgment of 10 January 2011, *M. N.*, No 09012710 C+, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2011*, 2012, p. 80; judgment of 21 November 2011, *Mlle M. M.*, No 11010494 C, in ibid., pp. 81–82; judgment of 18 October 2012, *M. B.N.*, No 12013647 C, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2012*, 2013, pp. 62–63; and judgment of 3 June 2014, *M. N.M.*, No 14000522 C, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2014*, 2015, pp. 48–49; and VGH Baden-Württemberg, judgment of 7 March 2013, A 9 S 1872/12, DE:VGHBW:2013:0307.A9S1872.12.0A.

470 See, for example, CNDA (France), judgment of 29 July 2011, *M. W.*, No 08015548 C, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2011*, 2012, pp. 86–87; and CNDA (France), judgment of 26 June 2014, *Mme D.*, No 13023823 C, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2014*, 2015, pp. 46–47.

471 See, for example, CNDA (France), judgment of 29 May 2020, *M. C.*, No 19053522.

472 See, for example, RVV/CCE (Belgium), judgment of 29 April 2021, No 253.723, para. 5.6.

473 See, for example, RVV/CCE (Belgium), judgment of 24 April 2019, No 220.190 (English summary), para. 4.2.1.8.

474 Supreme Court of Cassation Civil Section (Corte Supreme di Cassazione) (Italy), judgment of 27 November 2020, No 29739 (English summary) (this is a cassation decision rather than recognition of a refugee).

475 See, for example, CNDA (France), judgment of 4 July 2011, *M. K.*, No 11002234 C, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2011*, 2012, pp. 90–91; and CNDA (France), judgment of 16 March 2015, *M. A.*, No 14032693.

476 See, for example, RVV/CCE (Belgium), judgment of 25 May 2021, No 255.071, para. 4.12 (a lesbian was recognised as a member of the social group of homosexuals in Senegal).

477 See, for example, CNDA (France), judgment of 20 March 2019, *Mme K*, 18030347 (social groups of homosexuals (lesbians) in Sierra Leone and persons resisting forced marriage).

478 See, for example, Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 5 October 2006, No 2, Azs 66/2006-52.

479 CNDA (France), judgment of 28 May 2020, *M. K.*, No 19051793 C.

480 See, for example, Tribunal of Genoa (Italy), judgment of 13 May 2016, unnumbered decision (English summary); and Piraeus Administrative Court of Appeal (Greece), judgment of 12 June 2019, *Appellant* v *Ministry of Migration Policy*, No A401/2019 (English summary).

481 UNHCR, Guidelines on International Protection No 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the regional refugee definitions, 2 December 2016, HCR/GIP/16/12 (hereinafter UNHCR, Guidelines on International Protection No 12), para. 10, noting that their 'experiences … will often be distinct from one another'.

482 Asylum Court (Asylgerichtshof) (Austria), judgment of 29 January 2013, E1 432053-1/2013 (English summary), para. 4.4.2. '*Hijra*' is a term used in South Asia to refer to people assigned male at birth and some but not all intersex people and transgender women. See also Upper Tribunal (IAC) (United Kingdom), judgment of 22 October 2020, *Mx M (gender identity – HJ (Iran) – terminology) El Salvador*, [2020] UKUT 313.

- a gay man from Algeria transitioning to become a transgender woman[483],
- intersex persons from Algeria and Morocco[484].

Concerning **family**, applicants may base their application for refugee status on having been targeted because of their family membership. This may, for instance, be because of their membership of a particular family[485] or because of their membership of a family in which one member has been recognised as a refugee[486]. 'Blood feuds' may be an example of persecution based on family membership[487]. These may arise regardless of whether the original source of antagonism is related to one of the reasons for persecution.

With regard to this respect, the UK House of Lords explained:

> The ties that bind members of a family together, whether by blood or by marriage, define the group. It is those ties that set it apart from the rest of society. Persecution of a person simply because he is a member of the same family as someone else is as arbitrary and capricious, and just as pernicious, as persecution for reasons of race or religion. As a social group the family falls naturally into the category of cases to which the Refugee Convention extends its protection[488].

A practical application of this approach is seen in a decision of the Polish Supreme Administrative Court, which:

> found that the persecution did not directly relate to the Applicant. It should be noted that the [Refugee] Convention links the recognition of refugee status with a well-founded fear of persecution for the reasons cited therein. One such reason is membership of a particular social group. To recognise that the Applicant is a member of a group at risk of persecution means, therefore, that the persecution has an individual character. If,

483 CNDA (France), judgment of 3 October 2019, *M. H.*, No 18031476.

484 Council of State (Conseil d'État SSR) (France), judgment of 23 June 1997, *M. O.*, No 171858, FR:CESSR:1997:171858.19970623; and CNDA (France), judgment of 12 March 2019, *Mme B.*, No 17028590. The latter case concerned an intersex person from Morocco who was transitioning to become a man. The CNDA recognised them as being considered either homosexual or transgender by society in Morocco and thereby potentially qualifying for refugee status on account of membership of the particular social group of lesbian, gay, bisexual, transgender and intersex persons in Morocco, but the person was excluded on the grounds of being a danger to society.

485 See, for example, VG Berlin, judgment of 7 July 2011, No 133 K 79.10 A (English summary), recognising an Afghan couple as refugees because of their advocacy in Afghanistan for democracy, separation of state and religion, and equality between men and women, and their membership of and support for the Comprehensive Movement for Democracy and Progress in Afghanistan party, and recognising their children as refugees on the basis of their membership of a particular social group of 'family'.

486 See, for example, Refugee Appeals Board (Denmark), decision of 10 May 2017, unnumbered decision (English summary), recognising a Syrian woman as a refugee on account of her membership of a family in which the mother had treated injured persons from the Free Syrian Army (and had herself been recognised as a refugee); and Supreme Administrative Court Warsaw (Naczelnego Sądu Administracyjnego w Warszawie) (Poland), judgment of 12 March 2013, No II OSK 126/07 (English summary), concerning a family member of a recognised (Chechen) refugee.

487 See RVV/CCE (Belgium), judgment of 18 May 2021, No 254.685, concerning a Palestinian from Gaza who feared he would become the target of a family blood feud, and recognising family as a social group; and RVV/CCE (Belgium), judgment of 26 August 2021, No 258.620, concerning a husband and wife from Algeria recognised as having a well-founded fear of persecution on account of their membership of the social group of their family, whose members were targeted in a vendetta (para. 4.5). The latter judgment refers to UNHCR, UNHCR position on claims for refugee status under the 1951 Convention Relating to the Status of Refugees based on a fear of persecution due to an individual's membership of a family or clan engaged in a blood feud, 17 March 2006, paras 18–20.

488 House of Lords (United Kingdom), 2006, *Fornah*, op. cit., fn. 403, para. 45.

> therefore, there are grounds for believing that being a family member of a recognised refugee meets the condition of membership of a particular social group, then it is only by demonstrating the absence of a well-founded fear of persecution for this reason that refusal of the application can be justified[489].

Children's best interests are a central consideration in status determination, given that the QD (recast) requires this to be a primary consideration[490] and that child-specific forms of persecution should be given careful attention (see Section 1.4.4.8 above on child-specific acts of persecution)[491]. Being a child is an innate characteristic, and, where children have a distinct identity in a particular society, their application for refugee status may be well-founded for reasons of membership of a particular social group[492]. Some examples are provided in Table 18.

Surveys of case-law indicate a **wide range of other possible particular social groups** depending on the societal context, including trade unionists, landowners, medical personnel, musicians/artists and conscientious objectors to military service[493]. Further examples of particular social groups identified by European courts and tribunals include those set out in Table 18.

489 Supreme Administrative Court (Naczelny Sąd Administracyjny) (Poland), judgment of 12 March 2013, II OSK 126/07; see the English summary, which identifies the court in the third person.

490 Recital 18 QD (recast). See also generally the section 'Best interests of the child'.

491 Article 9(2)(f) and recital 28 QD (recast). See also the cases concerning FGM cited in fn. 464 and fn. 465.

492 See, for example, UNHCR, Guidelines on International Protection No 8, op. cit., fn. 315, paras 49–51, and Administrative Court (Upravno Sodišče) (Slovenia), judgment of 14 February 2012, I U 42.2012 (English summary), concerning an unaccompanied minor from Afghanistan. The court recognised that being a youth with no contact with his parents was an essential characteristic of his identity, and that such youths had a special identity in Afghanistan, given that they were perceived by the Taliban as a group and used them for military and political purposes, while criminal groups used them for other illegal purposes such as slavery, sexual violence and the drug trade.

493 See Foster, M., 'The "ground with the least clarity": a comparative study of jurisprudential developments relating to "membership of a particular social group"', *UNHCR Legal and Protection Policy Research Series*, No 25, PPLA/2012/02, August 2012 (hereinafter Foster, 'The "ground with the least clarity"'). For an analysis of how the reason of membership of a particular social group may be relevant in the context of military service cases, see Section 1.6.2.5.3.

Table 18: Examples of other possible social groups identified by European courts and tribunals

Other possible social groups	Membership of a clan considered inferior by other clans in Somalia[494] or of a particular clan (Wadaan) in Somalia[495]
	Slaves / former slaves in Mauritania[496] and in Niger[497]
	Human immunodeficiency virus (HIV)-positive persons in Côte d'Ivoire[498] and in Guinea[499]
	Undocumented Bedoon from Kuwait[500]
	Roma in Kosovo[501]
	Persons suffering from albinism[502]
	Girls subject to, or at risk of, child/forced marriage[503]
	Bacha bazi or 'dancing boys'[504]
	Orphaned children[505]

The nexus between acts of persecution and membership of a particular social group in the context of civilians in situations of armed conflict, victims of human trafficking and groups

494 Administrative Tribunal (Tribunal administratif) (Luxembourg), judgment of 17 November 2020, No 43028 (English summary).

495 VG Munich, judgment of 21 September 2011, M 11 K 11.30081 (English summary), and other German cases listed in Foster, 'The "ground with the least clarity"', p. 67, fn. 494.

496 CNDA (France), judgment of 23 September 2011, *M. D.*, No 1107337 (English summary); and RVV/CCE (Belgium), judgment of 25 March 2014, No 121.425, para. 4.7.

497 CNDA (France), judgment of 4 July 2017, *M. I.*, No 16014605 C; and RVV/CCE (Belgium), judgment of 9 June 2011, No 62.867 (English summary), finding 'persons considered as slaves' in Niger to be a particular social group, since 'this status passes from generation to generation and constitutes a separate social caste in Niger's society' (para. 4.7.3).

498 RVV/CCE (Belgium), judgment of 2 August 2021, No 258.932.

499 RVV/CCE (Belgium), judgment of 2 August 2021, No 259.933, concerning a vulnerable woman subject to forced marriage to the brother of her deceased husband, who after her arrival in Belgium was subject to sexual violence, after which she was diagnosed as HIV positive, and gave birth to an illegitimate daughter.

500 CNDA (France), judgment of 19 June 2019, *M. M.*, No 18023875 C+; VG Berlin, judgment of 17 September 2020, 34 K 537.17 A; Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 10 January 2007, No 6, Azs 80/2006-64; VG Berlin, judgment of 17 September 2020, 34 K 537.17 A, DE:VGBE:2020:0917.VG34K537.17A.00; AIT (United Kingdom), judgment of 21 June 2006, *HE* v *Secretary of State for the Home Department CG*, [2006] UKAIT 00051; Upper Tribunal (IAC) (United Kingdom), judgment of 24 July 2013, *NM (documented/undocumented Bidoon: risk) Kuwait CG*, [2013] UKUT 356; and Immigration Appeal Tribunal (United Kingdom), judgment of 15 September 2004, *BA and Others (Bedoon – statelessness – risk of persecution) Kuwait CG*, [2004] UKIAT 00256.

501 This designation is without prejudice to positions on status, and is in line with UN Security Council Resolution 1244/1999 and the ICJ opinion on the Kosovo declaration of independence. Metropolitan Court (Hungary), judgment of 5 October 2011, *KH* v *Office of Immigration and Nationality*, No 6.K.34.440/2010/20 (English summary).

502 See cases cited in fn. 329.

503 See, for example, Federal Administrative Court (Bundesverwaltungsgericht) (Austria), judgment of 10 April 2017, W268 2127664-1, granting asylum to an Iraqi woman who was forcibly married as a minor and faced constant violence by her husband and other family members. The court established her membership of a particular social group of 'separated women without family support'. See also CNDA (France), judgment of 23 July 2018, *Mme E.*, No 15031912 A, concerning a young Guinean woman who was orphaned at the age of 13 years, forcibly married at the age of 15 years and subjected to repeated domestic violence and marital rape, and who was recognised as a refugee on account of her membership of the group of young girls and women resisting forced marriage.

504 Federal Administrative Court (Bundesverwaltungsgericht) (Austria), 3 April 2017, W169 2112518 (a case of a boy who had endured years-long sexual exploitation as a *bacha bazi* or 'dancing boy' in Afghanistan); and CNDA (France), judgment of 21 June 2016, *M. Q.*, No 15004692 C.

505 Court of Appeal (England and Wales, United Kingdom), judgment of 22 March 2011, *DS (Afghanistan)* v *Secretary of State for the Home Department*, [2011] EWCA Civ 305, referring to and relying on Immigration Appeal Tribunal (United Kingdom), judgment of 15 March 2007, *LQ (age: immutable characteristic) Afghanistan*, [2008] UKAIT 0005 (7). See also Pobjoy, *The Child in International Refugee Law*, op. cit., fn. 314, pp. 178–182.

fleeing 'natural disasters' (e.g. earthquakes, floods and famine) is addressed Sections 3.2.1.3, 3.3.1.3 and 3.4.2, respectively, below.

1.6.2.5. Political opinion (Article 10(1)(e))

Article 10(1)(e) QD (recast)

Reasons for persecution

the concept of political opinion shall, in particular, include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.

Table 19 enumerates the issues addressed by the subsections that follow.

Table 19: Structure of Section 1.6.2.5

Section	Title	Page
1.6.2.5.1	Broad nature of political opinion	143
1.6.2.5.2	Political opinion attributed by non-state actors	146
1.6.2.5.3	Prosecution by reason of political opinion: the case of military service evasion	147

1.6.2.5.1. Broad nature of political opinion

It has long been recognised that 'political opinion' should be **construed generously** in order to give full effect to the objective of the Refugee Convention to protect certain interests. For example, it has been said, albeit in secondary sources, that political opinion may constitute 'any opinion on any matter in which the machinery of State, government, and policy may be engaged'[506]. As the UK Asylum and Immigration Tribunal (AIT) noted, the Refugee Convention forms part of a wider international human rights regime and so 'political opinion' should be construed with this in mind:

> The need for the 'political opinion' ground to be construed broadly arises in part from the role of the Refugee Convention in the protection of fundamental human rights, which prominently include the rights to freedom of thought and conscience, of opinion and expression and of assembly and association[507].

In order to 'hold' an 'opinion, thought or belief', as mentioned in Article 10(1)(e), it is not necessary for it to be expressed, albeit it will most often be evidenced by pointing to activity undertaken by an applicant. Nor is it necessary – in order to evidence the holding of a political opinion or to express it – for the applicant to be a formal member of a political organisation or

[506] Hathaway and Foster, *The Law of Refugee Status*, op. cit., fn. 128, p. 406, citing Supreme Court (Canada), *Attorney General v Ward*, [1993] 2 SCR. 689, itself citing Goodwin-Gill, G. S., *The Refugee in International Law*, Oxford University Press, Oxford, 1983.

[507] Immigration Appeal Tribunal (United Kingdom), judgment of 24 November 2000, *Gomez (non-state actors: Acero-Garces disapproved) (Colombia)*, [2000] UKIAT 00007 (hereinafter IAT (United Kingdom), 2000, *Gomez (non-state actors: Acero-Garces disapproved) (Colombia)*), para. 30, generally approved by the UK Supreme Court in Supreme Court (United Kingdom), 2012, *RT (Zimbabwe)*, op. cit., fn. 361.

party or in a leadership position[508]. Once again, though, being able to point to involvement in a political organisation may be valuable evidence of its existence.

Table 20 provides examples of relevant cases, including those from national courts and tribunals, in which political opinion is recognised with regard to particular beliefs.

Table 20: Examples of refugees recognised on the basis of their political opinion identified by European courts and tribunals

Political opinion	A member of an association fighting against slavery, racism and oppression of and discrimination against black people[509]
	A female lawyer from Algeria supporting the cause of women there[510]
	A judge refusing to commit acts that are against the rules of his profession[511]
	A woman from Nigeria who had been subjected to rape, FGM and other sexual violence and who was opposed to her daughter being subjected to FGM, who thereby risked being considered a political opponent in Nigeria or as someone outside religious models and social values[512]
	A graphic designer who had worked for women's associations and Fatah in Gaza[513]
	A pharmacist who risked persecution by the Syrian security forces, as they suspected him of providing assistance to insurgents by selling them medicines[514]
	A journalist who worked for the party of the former president (President Saleh) in Yemen and who faced persecution by the Houthis[515]

Given that Article 10(2) QD (recast) specifies that it is immaterial whether the applicant possesses one of the five characteristics identified in Article 10(1), actions may be deemed political in the country of origin notwithstanding that they may be considered low level or not even overtly political. Actions not overtly political can include caring for sick rebel soldiers and conduct that is seen as challenging the exercise of authority by the authorities in the country of origin, even though its political dimension is not necessarily overt[516].

508 Zimmermann (ed.), *The 1951 Convention and Protocol: A commentary*, op. cit., fn. 169, p. 400.

509 CNDA (France), judgment of 12 December 2014, *M. B.*, No 14007634, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2014*, 2015, pp. 30–32.

510 CRR, decision of 17 February 1995, *Ms M.*, No 94006878.

511 CRR, decision of 17 February 1995, *M. A.*, No 94010533.

512 Tribunal of Perugia (Tribunale ordinario di Perugia) (Italy), judgment of 31 January 2021, No 2646/2017 (English summary).

513 VG Halle, judgment of 28 February 2019, 7 A 49/17 HAL.

514 Metropolitan Court (Fővárosi Törvényszék) (Hungary), judgment of 11 July 2013, *MAA v Office of Immigration and Nationality*, 6.K.31830/2013/6 (English summary) (hereinafter Metropolitan Court (Hungary), 2013, *MAA v Office of Immigration and Nationality* (English summary)).

515 CNDA (France), judgment of 25 November 2020, *M. A.*, No 19044153.

516 See, for example, UNHCR, Guidelines on International Protection No 1, op. cit., fn. 309, para. 33; Refugee Status Appeals Authority (New Zealand), decision of 11 September 2008, Refugee Appeal No 76044; and European Commission, QD proposal: explanatory memorandum, 2001, op. cit., fn. 266, concerning what was at that stage Article 12(e), stating 'An action may also be, or be deemed to be by a persecutor, an expression of a political opinion'.

Where opinions have been imputed, the existence of actual political activity is not required: the key question is the **perception of the actor of persecution** regarding the person persecuted and the activities that the said actor defines as and considers 'political activities'[517]. Given the focus on the views of the actor of persecution, undue attention should not be paid to whether or not the applicant was actually a member of a party or an active politician. As the Czech Supreme Administrative Court noted:

> The membership of a political party is one, but not the only opportunity to participate in public life and express political views. The very fact that the applicant was not a member, but only a supporter of the opposition party, does not lead to the conclusion that he did not express his political views sufficiently. It is all the more so if in this country the mere participation in demonstrations, organised by opposition parties, usually leads to persecution by representatives of state power. Therefore, one of the conditions is, that the applicant has some political opinion, he is able to present it adequately, and credibly describe the injustice caused for this reason[518].

To take another example, former child soldiers might face the imputation of political opinion because of the actions with which they are associated during their forced recruitment and/or military service[519].

1.6.2.5.2. Political opinion attributed by non-state actors

The paradigm context in which political opinion is attributed as a reason for persecution occurs when **state actors** interpret a person's actions as having a political characteristic. It is nevertheless also possible that **non-state actors**, such as gangs or guerrilla groups, may target a person for persecution for their political opinion. This could, for example, be because they are seen to pose a threat to their own political ends.

As the French Council of State has noted, non-state actors may attribute **political opinions** to state representatives, where 'the State institution … subjects access to employment within it to the adherence to such opinions, or acts on these grounds only, or fights exclusively all the persons who oppose these opinions'[520]. The UK Immigration and Asylum Tribunal (UKIAT) expressed a similar view:

> … a person who is himself an agent of the state, e.g. a civil servant or policeman, may be at risk of persecution on political opinion grounds if the circumstances are such that non-state actors impute a political opinion opposed to theirs. The decision as to whether a civil servant is at risk of persecution on the grounds of political opinion should never

517 Supreme Court (Spain), judgment of 24 February 2010, No 429/2007 (English summary).

518 Supreme Administrative Court (Czechia), 2008, *SN* v *Ministry of Interior*, No 5, Azs 66/2008-70 (English summary), op. cit., fn. 401. See also CNDA (France), judgment of 1 July 2021, *Mme D.*, No 19043893 C, concerning a policewoman from the region of Donetsk, Ukraine, recognised as a refugee on grounds of imputed political opinion on the part of the authorities, which suspected her of separatism, dismissed her from her post and sought to try her for treason in an arbitrary process that violated her rights of defence.

519 CNDA (France), judgment of 20 December 2010, *M. N.*, No 10004872, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2010*, 2011, p. 48.

520 Council of State (Conseil d'État) (France), 2010, *OFPRA c M A*, No 323669, op. cit., fn. 418. Other French examples include CNDA (France), judgment of 28 November 2018, *M. O.*, No 18007777 R, concerning an Afghan former local police officer subject to persecution and threats by the Taliban, which the court accepted imputed pro-Western and pro-government political opinions to him on account of his work; and similarly CNDA (France), judgment of 8 January 2019, *M. S.*, No 17049487 R, concerning an Afghan army officer to whom adverse pro-Western and pro-government political opinions were imputed by Taliban and rebel groups.

> be made by reference to an a priori argument based on a fixed notion that all that can be imputed to a person in such a position is that he is doing his job. It will always be necessary to examine whether or not the normal lines of political and administrative responsibility have become distorted by history and events in that particular country[521].

In addition, non-state actors can attribute a political opinion to private individuals or groups. For example, a gang or guerrilla group may target villagers for their perceived opposition to their armed operations in the region.

Furthermore, by virtue of Article 9(3) a reason of political opinion may be present even if the non-state actor does not attribute a political reason to a person but the state fails to protect the person concerned for political reasons. This may, for example, be the case if it applies discriminatory policies to everyone who lives in their region (see Section 1.6.1.2 above).

1.6.2.5.3. Prosecution by reason of political opinion: the case of military service evasion

The CJEU has clarified:

> In many situations, refusal to perform military service is an expression of political opinions – whether they consist of the rejection of any use of military force or of opposition to the policy or methods of the authorities of the country of origin – or of religious beliefs, or is motivated by membership of a particular social group. In those cases, the acts of persecution to which that refusal may give rise are also linked to the same reasons[522].

The provisions of the QD (recast) that address prosecution and persecution (see Section 1.4.4.6 above) demonstrate that discrimination or the imposition of disproportionate sanctions within the criminal justice process may lead to legal, administrative, police and/or judicial measures becoming persecutory (Article 9(2)(b) and (c)). If the motivation in question is generated by race, religion, nationality, social group or political opinion, this in turn may show that an Article 10 reason is present.

For example, in *Shepherd*[523], the CJEU considered a case concerning an applicant who objected to serving in the US armed forces in Iraq on the grounds that he believed he would thereby be supporting the systematic, indiscriminate and disproportionate use of weapons without regard to the civilian population. The Advocate General noted in her opinion that a 'belief that one cannot perform military service in a conflict where to do so would possibly lead to committing war crimes' amounted to 'holding a [relevant] political opinion, thought or belief on a matter related to a State and its policies or methods'[524]. She if his refusal to perform further military service was because there was 'a serious and insurmountable conflict between what he reasonably anticipated that that obligation to serve would entail and his conscience', he would be covered by the first indent of Article 10(1)(d). In such circumstances,

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521 IAT (United Kingdom), 2000, *Gomez (non-state actors: Acero-Garces disapproved) (Colombia)*, op. cit., fn. 509, para. 46, generally approved in Supreme Court (United Kingdom), 2012, *RT (Zimbabwe)*, op. cit., fn. 361, para. 44.

522 CJEU, 2020, *EZ*, op. cit., fn. 34, para. 47; see also para. 59.

523 CJEU, 2015, *Shepherd*, op. cit., fn. 163.

524 CJEU, Opinion of Advocate General Sharpston of 11 November 2014, *Andre Lawrence Shepherd v Bundesrepublik Deutschland*, C-472/13, EU:C:2014:2360, para. 48.

she noted that it would then have to be considered if on the basis of the evidence available 'it is reasonable to suppose that, in the US, persons in Mr Shepherd's specific position are regarded differently and are subject to particular treatment by society in general. If so, the second indent of Article 10(1)(d) would also be satisfied'[525].

It is instructive to set out the terms of the guidance the CJEU gave in *EZ* as to how the reason of political opinion could be engaged in the context of armed conflict, particularly civil war, where there was no legal possibility of avoiding military obligations. In this context, the court stated:

> ... it is highly likely that the authorities will interpret the refusal to perform military service as an act of political opposition, irrespective of any more complex personal motives of the person concerned. According to Article 10(2) [QD (recast)], 'when assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution'[526].

1.7. Actors of persecution or serious harm (Article 6)

Using the same wording as the QD, Article 6 QD (recast) provides the following.

Article 6 QD (recast)

Actors of persecution or serious harm include:

(a) the State;

(b) parties or organisations controlling the State or a substantial part of the territory of the State;

(c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

As noted in Section 1.4.1 above, for there to be acts of persecution or serious harm, there must be human agency. As underlined by the CJEU in its *M'Bodj* judgment, persecution or serious harm 'must take the form of conduct on the part of a third party and ... it cannot therefore simply be the result of general shortcomings in the health system of the country of origin'[527]. Persecution or serious harm arising from dire socioeconomic or health conditions in the country of origin that are not attributable to actors of persecution or serious harm are

[525] CJEU, Opinion of Advocate General Sharpston of 11 November 2014, *Andre Lawrence Shepherd v Bundesrepublik Deutschland*, C-472/13, EU:C:2014:2360, paras 49–60. The CJEU took the same approach in CJEU, 2020, *EZ*, op. cit., fn. 34, paras 47 and 59.

[526] CJEU, 2020, *EZ*, op. cit., fn. 34, para. 60.

[527] CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 35; see also CJEU (GC), 2018, *MP*, op. cit., fn. 34, paras 51–57.

therefore excluded when considering qualification for international protection[528]. Following the approach set out by the ECtHR in *Sufi and Elmi*, the acts of harm must be 'solely or predominantly caused by human actors'[529].

The source of persecution is not defined in the Refugee Convention. Article 1A(2) of this convention simply defines refugees as persons who, because of a well-founded fear of being persecuted for a particular reason, are unwilling or unable to avail themselves of the protection of their country of origin. This lack of definition left it unclear whether entities other than a state could be actors of persecution. Member States' interpretations varied[530]. By supplementing the definition of 'refugee' in Article 2(d) QD (recast) (which largely replicates Article 1A(2) of the convention) with Article 6, the EU legislature decided to codify 'the practice of the vast majority of Member States and other global actors', recognising that:

> the fear of being persecuted or suffering serious unjustified harm may also be well founded where the risk of it emanates not only from the State but also from parties or organisations controlling the State or from non-state actors where the State is unable or unwilling to provide effective protection[531].

The linkage the Commission made with effective protection was seen to necessitate a further complementary provision, set out in Article 7 QD (recast), defining actors of protection against persecution or serious harm and specifying the required quality of protection (see Section 1.8)[532]. Articles 6 and 7 are closely interlinked. To assess whether effective protection against persecution or serious harm exists in the country of origin and, if so, by whom it can be provided is contingent on identifying the source of such persecution or serious harm. The rationale behind Articles 6 and 7, taken together, is that individuals are not deemed to be in need of international protection if they are able to obtain effective and non-temporary protection in their country of origin. As stated by the CJEU in *OA*, 'A third country national who

528 CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52. Although the judgment concerned subsidiary protection, Article 6 applies to both types of international protection. Hence, the CJEU conclusion is equally valid when it comes to refugee status. According to the ECtHR judgment in *Sufi and Elmi* interpreting Article 3 ECHR, human agency can be shown so long as it constitutes a 'predominant cause' of the ill treatment. Thus, ill treatment suffered as a result of drought may be able to qualify, if it can be shown that the predominant causes of the drought were the acts of powerful entities (e.g. warlords). See ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 282: 'If the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought, the test in *N.* v *United Kingdom* may well have been considered to be the appropriate one.' That is, the alleged future harm should emanate from the intentional acts or omission of public authorities or non-state bodies. (For modification by the Grand Chamber of the contents of the *N* v *UK* 'very exceptional circumstances' test, see ECtHR (GC), 2016, *Paposhvili*, op. cit., fn. 57, para. 183.)

529 ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 282.

530 Overall, two main approaches existed prior to the adoption of the QD: the accountability one, limiting the benefit of refugee status to those risking persecution committed by *de jure* or *de facto* state entities, and the protection one, focusing on the existence of effective protection against persecution in the country of origin rather than on the actor of persecution. (See, for example, House of Lords (United Kingdom), judgment of 6 July 2000, *Horvath v Secretary of State for the Home Department*, [2001] AC 489, [2000] UKHL 37 (hereinafter House of Lords (United Kingdom), 2000, *Horvath*), per Lord Hope of Craighead).

531 European Commission, QD proposal: explanatory memorandum, 2001, op. cit., fn. 266, p. 17, referring to what was at that stage Article 9(1). The same approach is followed by the ECtHR, which recognises risks stemming from non-state actors as raising an issue under Article 3 ECHR in cases of *non-refoulement*. See, most notably, ECtHR (GC), judgment of 29 April 1997, *HLR v France*, No 24573/94, CE:ECHR:1997:0429JUD002457394, para. 40. For more recent ECtHR case-law endorsing a similar view as regards non-state actors of ill treatment, see, for example, ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 227, para. 50.

532 High Court (Ireland), judgment of 25 June 2012, *WA [DRC] v Minister for Justice and Equality, Ireland and the Attorney General*, [2012] IEHC 251 (hereinafter High Court (Ireland), 2012, *WA [DRC] v Minister for Justice and Equality and Another*), para. 36.

is in fact protected against acts of persecution within the meaning of that provision cannot, for that reason, be regarded as having a well-founded fear of persecution'[533].

Article 6's three entities would appear able to encompass any type of actor of persecution or serious harm. This reflects the fact that it was intended to be broadly interpreted[534].

This section is concerned with the three entities that can be recognised by Member States as actors of persecution or serious harm, as listed in Article 6: the state (Section 1.7.1), parties or organisations controlling the state or a substantial part of its territory (Section 1.7.2) and non-state actors (Section 1.7.3). As will become apparent, the distinction between these actors of persecution or serious harm is sometimes not straightforward. It may be that, in a single case, there will be actors of persecution or serious harm falling under more than one of the Article 6(a)–(c) subcategories[535].

Section 1.7 has three subsections, as set out in Table 21.

Table 21: Structure of Section 1.7

Section	Title	Page
1.7.1	The state (Article 6(a))	152
1.7.2	Parties or organisations controlling the state or a substantial part of its territory (Article 6(b))	154
1.7.3	Non-state actors (Article 6(c))	156

1.7.1. The state (Article 6(a))

Article 6(a) provides that 'the State' is a potential actor of persecution or serious harm. This reflects the fact that, despite the emergence of non-state actors in the context of applications for international protection, the state is still the traditional and prime actor of persecution and serious harm, for it remains vested with sovereign functions, including the use of force.

No definition of 'state' is given in Article 6(a) or elsewhere in the QD (recast). The ordinary meaning of this term in the light of the scheme and purpose of the QD (recast) supports a broad understanding such as that used in international law on state responsibility. Table 22 summarises the International Law Commission's elaboration[536].

533 CJEU, 2021, *OA*, op. cit., fn. 197, para. 57.

534 See, in this sense, High Court (Ireland), judgment of 1 March 2012, *JTM v Minister for Justice and Equality, Ireland and the Attorney General*, [2012] IEHC 99 (hereinafter High Court (Ireland), 2012, *JTM v Minister for Justice and Equality and Another*), paras 32–34 and 46.

535 Court of Appeal (England and Wales, United Kingdom), judgment of 31 January 2002, *Rolandas Svazas v Secretary of State for the Home Department*, [2002] EWCA Civ 74 (hereinafter EWCA (United Kingdom), 2002, *Rolandas Svazas*).

536 International Law Commission (ILC), *Responsibility of States for Internationally Wrongful Acts*, UNGA Resolution 56/83, 12 December 2001 (hereinafter ILC, *Responsibility of States for Internationally Wrongful Acts*). According to Crawford, J., *Brownlie's Principles of Public International Law*, 9th edn, Oxford University Press, Oxford, 2019, p. 524, these articles have been 'much cited and have acquired increasing authority as an expression of the customary law of state responsibility'.

Table 22: The state as an actor of persecution or serious harm

***De jure* organs**	**1**	Any organ of the state exercising legislative, executive, judicial or any other functions and acting at any level
***De facto* organs**	**2**	Persons or entities empowered to exercise governmental authority
	3	Private individuals or groups acting under the control or direction of the state
	4	Organs placed at the disposal of a state by another state and exercising governmental authority

As illustrated in Table 22 above, the state as an actor of persecution or serious harm could be understood as **any act of persecution or serious harm emanating from *de jure* or *de facto* state organs**. These organs cover any officials exercising governmental functions[537], irrespective of whether they pertain to the judiciary, executive or legislative branches of a government, working at any level, thereby including local authorities[538]. Acts that can be attributed to the state can also extend in certain circumstances to include (1) acts of persons or entities empowered to exercise governmental authority[539] and (2) acts by private individuals or groups acting under the control or direction of organs or entities empowered to exercise governmental authority[540]. It is also noteworthy that governmental authority may be exercised by organs of another state placed at the disposal of the state[541].

In its judgment in *X, Y and Z*, the CJEU stated that 'the criminalisation of homosexual acts alone does not in itself constitute persecution', but if it is accompanied by 'a term of imprisonment which sanctions such acts and which is actually applied in the country of origin … must be regarded as … constituting an act of persecution'[542]. This implies that the legislative branch of a government can contribute to acts of persecution. This can indeed also be the case for the judiciary, when it applies such laws leading to disproportionate or discriminatory punishment, as the CJEU held in *X, Y and Z*[543].

Persecution or serious harm is often inflicted by actors entitled to use force, namely law enforcement officials and military personnel[544]. In a case before the Hungarian Metropolitan Court, the court decided to grant refugee status to the applicant, a pharmacist, who risked

537 See CNDA (France), judgment of 18 October 2012, *Mlle K.*, No 12015618 (English summary); and CNDA (France), judgment of 14 April 2010, *M. K.*, No 09004366 (English summary). They both concern political authorities.

538 Dörig, H., commentary on Article 6 Directive 2011/95, para. 8, in Hailbronner and Thym (eds), *EU Asylum and Immigration Law: A commentary*, op. cit., fn. 186.

539 ILC, *Responsibility of States for Internationally Wrongful Acts*, op. cit., fn. 538, Article 5.

540 ILC, *Responsibility of States for Internationally Wrongful Acts*, op. cit., fn. 538, Article 8.

541 ILC, *Responsibility of States for Internationally Wrongful Acts*, op. cit., fn. 538, Article 6.

542 CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 61.

543 Ibid. and CJEU, 2018, *Fathi*, op. cit., fn. 214, paras 93, 96 and 98. See also CNDA (France), judgment of 4 November 2013, *M. F.*, No 13007332 C, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2013*, 2014, pp. 54–55; and CNDA (France), judgment of 23 May 2013, *M. U.*, No 11010862 C+, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2013*, 2014, p. 71.

544 See, for example, Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 21 April 2009, *SH* v *Ministry of Interior*, No 2, Azs 13/2009-60 (English summary), in which the court recognised the Kosovo Liberation Army as a potential actor of persecution.

persecution by the Syrian security forces, which suspected him of providing assistance to insurgents by selling them medicines[545]. As transpires from a 2009 judgment of the Czech Supreme Administrative Court, persecution by the state may materialise even when state actors act outside the sphere of their competence[546]. Similarly to the rules of state responsibility under international law, under which acts performed ultra vires are automatically attributable to the state[547], any state actors, whether acting outside their competence, as 'rogue state actors'[548], or not, will be considered part of the state under Article 6 for the purposes of qualification for international protection. The issue will then be whether the state intervenes 'promptly and effectively' to prevent such harms in the sense of Article 7 QD (recast) (see Section 1.8 below on actors of protection)[549].

1.7.2. Parties or organisations controlling the state or a substantial part of its territory (Article 6(b))

Article 6(b) refers to 'parties or organisations controlling the State or a substantial part of the territory of the State'. Two categories can be distinguished, as illustrated in Table 23.

Table 23: Parties or organisations controlling the state or a substantial part of its territory as actors of persecution or serious harm

1	Parties or organisations amounting to ***de facto* state actors because they exercise elements of governmental authority**
2	Parties or organisations **controlling a substantial part of the state's territory in the context of an armed conflict**

The first category refers to instances in which parties or organisations amount to ***de facto* state actors** by exercising elements of governmental authority over the state territory or a substantial part thereof in the absence of a *de jure* state authority. This can, for instance, arguably be considered to be the case for the regions of Puntland and Somaliland, which

545 Metropolitan Court (Hungary), 2013, *MAA v Office of Immigration and Nationality* (English summary), op. cit., fn. 516.

546 See, in this sense, Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 22 May 2009, *AR v Ministry of the Interior*, No 5, Azs 7/2009-98 (English summary).

547 ILC, *Responsibility of States for Internationally Wrongful Acts*, op. cit., fn. 538. See also *Estate of Jean-Baptiste Caire (France) v United Mexican States* in *Reports of International Arbitral Awards*, No 5, p. 530.

548 Home Office (United Kingdom), *Asylum Policy Instruction, Assessing Credibility and Refugee Status*, 6 January 2015, p. 26.

549 EWCA (United Kingdom), 2002, *Rolandas Svazas*, op. cit., fn. 537, para. 16. See, similarly, Hathaway and Foster, *The Law of Refugee Status*, op. cit., fn. 128, p. 301. In Court of Appeal (England and Wales, United Kingdom), judgment of 6 November 2008, *PS (Sri Lanka) v Secretary of State for the Home Department*, [2008] EWCA Civ 1213 (hereinafter EWCA (United Kingdom), 2008, *PS (Sri Lanka)*), para. 8, Lord Justice Sedley noted that, the applicant having been repeatedly sexually abused by state military personnel in Jaffna, 'there was no sensible possibility of state protection from conduct bearing clear hallmarks of toleration and impunity, that is why she fled'.

have both set up their own administrations, distinct and autonomous from those of Somalia[550]. A similar conclusion could arguably be drawn with regard to the Kurdish Regional Government in northern Iraq during the period of the Saddam Hussein regime and after its fall, as in practice the Iraqi state no longer exercised power over the territory occupied by the Kurdish Regional Government.

The second category relates to **parties or organisations controlling a substantial part of the state's territory in the context of an armed conflict**. According to the French Refugee Appeals Board and the CNDA, this was, for instance, the case for the Darod clan in Somalia in 2005[551] and for rebels in Kunduz Province in northern Afghanistan in 2013[552]. The Revolutionary Armed Forces of Colombia have also been recognised as a party or organisation controlling a substantial part of the Colombian territory[553]. This was arguably also the case for the Liberation Tigers of Tamil Eelam during the conflict with the Sri Lankan government and, in recent times, for al-Shabaab in Somalia, although this would require particular consideration of the degree of control it exercises at a given point in time, as its degree of control is fluctuating[554].

It must be noted that the dividing line between parties or organisations controlling the state or a substantial part of its territory and non-state actors is not always clear. While such a distinction is not central to identifying the actor of persecution or serious harm, it nonetheless remains important for determining the existence of effective protection in the country of origin (see Section 1.8 below) and the existence of internal protection (see Section 1.9 below). The main criterion for distinguishing between such parties or organisations and non-state actors lies in the control they exercise over the state or a substantial part of its territory. Without such control, the entity falls not within Article 6(b) but under the terms of Article 6(c) as a non-state actor.

550 See, in this sense, UKIAT, judgment of 31 March 2005, *NM and Others (Lone Women – Ashraf) Somalia CG*, [2005] UKIAT 00076, paras 84 and 101. Although the case was concerned with the possibility of internal protection in Puntland and Somaliland, it is instructive as to the degree of autonomy and authority exercised by these two regions. This judgment was left unaltered by subsequent country guidance as far as the situation of Puntland and Somaliland is concerned. See, for example, Upper Tribunal (IAC) (United Kingdom), judgment of 25 November 2011, *AMM and Others (conflict; humanitarian crisis; returnees; FGM) Somalia CG*, [2011] UKUT 445 (hereinafter Upper Tribunal (IAC) (United Kingdom), 2011, *AMM and Others (conflict; humanitarian crisis; returnees; FGM) Somalia CG*); and Upper Tribunal (IAC) (United Kingdom), judgment of 3 October 2014, *MOJ and Others (Return to Mogadishu) Somalia CG*, [2014] UKUT 00442 (hereinafter Upper Tribunal (IAC) (United Kingdom), judgment of 3 October 2014, *MOJ and Others (Return to Mogadishu) Somalia CG*). See also EASO, *Country of Origin Information Report – South and Central Somalia: Country overview*, August 2014, p. 27.

551 CRR, decision of 29 July 2005, *Mlle A.*, No 487336, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Commission des recours des réfugiés, Année 2005*, 2006, pp. 65–66 (hereinafter CRR, 2005, *Mlle A.*, No 487336).

552 CNDA (France), judgment of 12 March 2013, *M. Y.K.*, No 12025577 C, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2013*, 2014, pp. 83–84.

553 See, arguably, Supreme Court (Tribunal Supremo) (Spain), judgment of 16 February 2009, No 6894/2005, p. 10.

554 Concerning al-Shabaab in Mogadishu, compare, for example, Upper Tribunal (IAC) (United Kingdom), 2014, *MOJ and Others (Return to Mogadishu) Somalia CG*, op. cit., fn. 552, para. 368, where it is noted that the armed group withdrew from Mogadishu, with Upper Tribunal (IAC) (United Kingdom), 2011, *AMM and Others (conflict; humanitarian crisis; returnees; FGM) Somalia CG*, op. cit., fn. 552, most notably paras 75 and 90–91, detailing the degree of control al-Shabaab exercised at the time. See also EASO, *Somali Actors, Country of Origin Information Report*, July 2021.

It must also be recalled that, under international law principles governing state personality, even 'failed states' continue to be considered states[555].

1.7.3. Non-state actors (Article 6(c))

Article 6 includes non-state actors in its list of actors of persecution or serious harm. Just as the term 'state' is not defined in the QD (recast), neither is the notion of a 'non-state actor'. In the light of the wording, scheme and purpose of Article 6, the term should nonetheless **be broadly interpreted**, because the aim of Article 6 is not to limit qualification as a refugee but to ensure it is granted to those with a well-founded fear of persecution. A 2010 European Commission report confirmed that a wide range of non-state entities have been identified as falling within the category of non-state actor[556]. As underlined by the German Federal Administrative Court, this notion encompasses all non-state actors without any limitation, including single persons, as long as they perform acts of persecution[557]. This broad definition is shared by courts and tribunals of other Member States. This is reflected in the range of non-state entities recognised as non-state actors of persecution or serious harm illustrated in Table 24[558].

555 'Quite strikingly, the legal personality of States that have lacked an effective government over a significant period of time – in the case of Somalia, for example, the situation has persisted for more than thirteen years – has never been questioned' (Geiss, R., 'Failed states: legal aspects and security implications', *German Yearbook of International Law*, No 48, 2004, p. 465).

556 European Commission, Report from the Commission to the European Parliament and to the Council on the application of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content thereof, COM(2010) 314 final, p. 6, Section 5.1.3, reports 'Non-State actors accepted as actors of persecution in the practice of different Member States are reported to include guerrillas and paramilitaries, terrorists, local communities and tribes, criminals, family members, members of political parties or movements'.

557 BVerwG (Germany), judgment of 18 July 2006, No 1 C 15.05, DE:BVerwG:2006:180706U1C15.05.0, para. 23. See, similarly, UNHCR, *Handbook*, op. cit., fn. 103, para. 65, which notes that non-state actors also include sections of the population or the local populace.

558 Further examples of non-state actors accepted as actors of persecution can be found in European Commission, *Evaluation of the implementation of the recast qualification directive (2011/95/EU) – Final report*, 2019, pp. 61–62.

Table 24: Illustrations of non-state entities recognised as non-state actors of persecution or serious harm

1	Clans and tribes[559]
2	Guerrillas and paramilitaries[560]
3	Warlords, extremist religious groups and terrorists[561]
4	Criminals, gangs and mafia[562]
5	Political opponents[563]
6	Family and extended-family members[564]

However, it is important to understand that Article 6(c) imposes an important limitation on when non-state actors can qualify as 'actors of persecution or serious harm'. Article 6(c) identifies non-state actors as actors of persecution or serious harm:

> if it can be demonstrated that the actors mentioned in points (a) and (b) [i.e. the state or parties or organisations controlling the state or a substantial part of its territory],

559 See, for example, Cagliari Court (Italy), judgment of 3 April 2013, No RG 8191/12 (English summary) (hereinafter Cagliari Court (Italy), 2013, No RG 8191/12 (English summary)), pp. 7–8, concerning FGM as a current practice of the tribe to which the applicant belonged.

560 See, for example, Supreme Court (Spain), judgment of 19 February 2010, No 5051/2006, which granted refugee status because of persecution by the Revolutionary Armed Forces of Colombia. For ECtHR case-law in relation to Article 3 ECHR, see, for example, ECtHR, judgment of 17 December 1996, *Ahmed v Austria*, No 25964/94, CE:ECHR:1996:1217JUD002596494, para. 22; and ECtHR, judgment of 27 June 2013, *DNM v Sweden*, No 28379/11, CE:ECHR:2013:0627JUD002837911 (hereinafter ECtHR, 2013, *DNM v Sweden*), para. 54.

561 See, for example, Administrative and Labour Court of Budapest (Hungary), judgment of 18 June 2013, *RY (Afghanistan) v Office of Immigration and Nationality*, 17.K.31893/2013/3-IV (English summary), concerning persecution by the Taliban in Afghanistan; CNDA (France), 2013, *M. C.*, No 12024083 C, op. cit., fn. 246, on persecution by Muslim fundamentalists; and CNDA (France), judgment of 29 November 2013, *M. M.*, No 13018952 C+, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2013*, 2014, pp. 63–64, concerning a real risk of serious harm by, among others, religious extremists. For ECtHR case-law in relation to Article 3 ECHR, see, for example, ECtHR, judgment of 3 April 2014, *AAM v Sweden*, No 68519/10, CE:ECHR:2014:0403JUD006851910 (hereinafter ECtHR, 2014, *AAM v Sweden*), para. 66.

562 See, for example, Refugee Board (Poland), decision of 8 September 2010, RdU-439-1/S/10 (English summary), and Upper Tribunal (IAC) (United Kingdom), judgment of 18 February 2010, *AM and BM (Trafficked women) Albania CG*, [2010] UKUT 80 (hereinafter Upper Tribunal (IAC) (United Kingdom), 2010, *AM and BM (Trafficked women) Albania CG*), paras 165 and 167–170, both concerning human trafficking networks; and RVV/CCE (Belgium), judgment of 6 November 2008, No 18.419, in the context of a vendetta.

563 See, for example, VG Berlin, judgment of 7 July 2011, 33 K 79.10 A (English summary) (hereinafter VG Berlin, 2011, 33 K 79.10 A (English summary)) concerning an Afghan couple advocating the separation of the state and Islam and equal rights for men and women, who were threatened by political opponents, over which the central government had, in practice, no influence or control.

564 See, for example, RVV/CCE (Belgium), judgment of 17 October 2012, No 89.927, para. 4.9; CNDA (France), judgment of 12 March 2013, *Mme H.K. épouse G*, No 12017176 C, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2013*, 2014, pp. 72–73; VG Augsburg, 2011, Au 6 K 11.30092 (English summary), op. cit., fn. 456; High Court (Ireland), 2012, *JTM v Minister for Justice and Equality and Another*), op. cit., fn. 536; Council for Refugees (Poland), judgment of 23 August 2012, RdU-82/8/S/10 (English summary); Migration Court of Appeal (Migrationsdomstolen) (Sweden), judgment of 21 April 2011, UM 7851-10 (English summary); Migration Court of Appeal (Migrationsdomstolen) (Sweden), judgment of 9 March 2011, UM 3363-10 and 3367-10 (English summary) (hereinafter Migration Court of Appeal (Sweden), 2011, UM 3363-10 and 3367-10 (English summary)); and Upper Tribunal (IAC) (United Kingdom), 2010, *AM and BM (Trafficked women) Albania CG*, op. cit., fn. 564, para. 171. For ECtHR case-law, see, for example, ECtHR, judgment of 19 December 2013, *BKA v Sweden*, No 11161/11, CE:ECHR:2013:1219JUD001116111, para. 42; and ECtHR, judgment of 27 June 2013, *SA v Sweden*, No 665523/10, CE:ECHR:2013:0627JUD006652310 (hereinafter ECtHR, 2013, *SA v Sweden*), para. 49.

including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7[565].

Therefore, in cases of persecution or serious harm by non-state actors, courts and tribunals of Member States must determine whether protection exists against persecution or serious harm under the terms of Article 7 QD (recast)[566]. As the CJEU ruled in *Abdulla*, the ability of actors of protection to ensure protection against persecution or serious harm 'constitutes a crucial element in the assessment' of qualification as a refugee[567]. It is even more crucial in the case of persecution or serious harm by non-state actors. By contrast, when **state** persecution or serious harm is involved (see recital 27 QD (recast) and Section 1.8.1.1 below), there is a presumption that protection is unavailable[568].

As noted by the High Court of Ireland, and advanced by the Polish Regional Administrative Court in Warsaw[569], '"non-State actors" can become "actors of [persecution or] serious harm" only where it is shown that the State of nationality is unable or unwilling to prevent the harm perpetrated by the non-State actors'[570]. As further analysed in Section 1.8.1.2 below, there is also a requirement to show that parties or organisations, including international organisations, controlling the state or a substantial part of its territory are willing and able to offer protection in accordance with Article 7(2) QD (recast) (Article 7(1)(b) QD (recast)).

565 See, in this sense, RVV/CCE (Belgium), judgment of 20 October 2010, No 49.821 (hereinafter RVV/CCE (Belgium), 2010, No 49.821), para. 4.8.1; and Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 18 December 2008, *SICh* v *Ministry of Interior*, No 1, Azs 86/2008-101 (English summary) (hereinafter Supreme Administrative Court (Czechia), 2008, *SICh* v *Ministry of Interior*, No 1, Azs 86/2008-101 (English summary)).

566 See Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 15 May 2013, *AS* v *Ministry of the Interior*, No 3, Azs 56/2012-81 (English summary).

567 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 68.

568 See recital 27. Although this concerns internal protection, it must apply a fortiori to state actors in an applicant's region of origin.

569 Regional Administrative Court in Warsaw (Wojewódzki Sąd Administracyjny w Warszawie) (Poland), judgment of 30 September 2015, IV SA/Wa 961/15.

570 High Court (Ireland), 2012, *WA [DRC]* v *Minister for Justice and Equality and Another*, op. cit., fn. 534, para. 40.

1.8. Actors of protection against persecution or serious harm (Article 7)

Article 7 QD (recast) identifies both the actors of protection and the form such protection has to take, using the following terms.

> **Article 7 QD (recast)**
>
> **Actors of protection**
>
> 1. Protection against persecution or serious harm can only be provided by:
>
> (a) the State; or
>
> (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State;
>
> provided they are willing and able to offer protection in accordance with paragraph 2.
>
> 2. Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.
>
> 3. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Union acts[571].

This is a **mandatory provision** for Member States, and it is central to qualification for international protection. As the CJEU ruled in *Abdulla* in 2010:

> … the circumstances which demonstrate the country of origin's inability or, conversely, its ability to ensure protection against acts of persecution constitute a crucial element in the assessment which leads to the granting of, or, as the case may be, by means of the opposite conclusion, to the cessation [or refusal] of refugee status[572].

In *OA*, the court confirmed that the meaning of protection under Article 7 is the same as that in the context of cessation under Article 11 QD (now Article 11 QD (recast))[573].

571 See also recital 26 QD (recast), which provides 'Protection can be provided, where they are willing and able to offer protection, either by the State or by parties or organisations, including international organisations, meeting the conditions set out in this Directive, which control a region or a larger area within the territory of the State. Such protection should be effective and of a non-temporary nature.'

572 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 68. See also CJEU, 2021, *OA*, op. cit., fn. 197, para. 36; and similarly, House of Lords (United Kingdom), 2000, *Horvath*, op. cit., fn. 532, p. 3, per Lord Hope of Craighead.

573 CJEU, 2021, *OA*, op. cit., fn. 197, paras 36–37.

Mirroring the structure of Article 7, the present section examines the issue of protection, starting with the definition of 'actors of protection' (Section 1.8.1). It then considers the qualities or standards that protection must embody in order to constitute protection (Section 1.8.2). As will become apparent, Article 7 QD (recast) has undergone significant modifications compared with the one contained in the original QD so as to codify the qualities deemed to be required by the CJEU in *Abdulla*. These modifications are highlighted below whenever relevant.

Section 1.8 has two subsections, as set out in Table 25.

Table 25: Structure of Section 1.8

Section	Title	Page
1.8.1	Actors of protection (Article 7(1) and (3))	161
1.8.2	Qualities of protection (Article 7(1) and (2))	166

1.8.1. Actors of protection (Article 7(1) and (3))

As the European Commission has recalled, Article 7(1) QD (recast) lays down an **exhaustive list of actors of protection**[574]. Thus, actors of protection, in accordance with Article 7(1)(a) and (b), are either the state itself or the parties or organisations, including international organisations, controlling the state or a substantial part of the territory of that state[575]. However, the two categories are not necessarily mutually exclusive. As the CJEU implied in its *Abdulla* judgment when referring to 'the **actor or actors of protection**'[576], there can be more than one actor of protection against persecution or serious harm in the same case. In practice, while courts and tribunals of Member States have considered the state the prime actor of protection, they have not excluded the complementary protective role played by the other actors referred to in Article 7(1)(b).

In addition to confining actors of protection to just two categories, Article 7 QD (recast) underlines that these actors can be recognised as valid actors of protection only **if they are willing and able to offer protection**[577]. This additional requirement was introduced in the QD (recast) because Article 7 QD was found to lack clarity. It had been prone to overly broad interpretations of actors of protection, 'fall[ing] short of the standards set by the [Refugee] Convention on what constitutes adequate protection'[578].

1.8.1.1. The state (Article 7(1)(a))

The **notion of the 'state'** as an actor of protection is not defined in the QD (recast). In Section 1.7.1 above, when seeking to define 'state' in the context of state actors of persecution or serious harm, the meaning of the term was derived from the international law on state responsibility (see Table 22 above). The same meaning may apply when considering the state as an actor of protection.

First and foremost, the state encompasses ***de jure* organs and officials, whether part of the judiciary, executive or legislative branches** of the government. Through its laws and policies,

574 European Commission, QD (recast) proposal: explanatory memorandum, 2009, op. cit., fn. 409, p. 7.
575 CJEU, 2021, *OA*, op. cit., fn. 197, para. 52.
576 Emphasis added. CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 74.
577 See also Section 1.8.2 concerning the quality of the protection that has to be provided.
578 European Commission, QD (recast) proposal: explanatory memorandum, 2009, op. cit., fn. 409, pp. 6–7.

the state may regulate various activities that can contribute to the existence of effective protection against persecution (see also Section 1.8.2, concerning the quality of the protection that has to be provided). Moreover, such exercise of governmental functions takes place at all levels, be it national, regional or local[579].

Second, by analogy with the theory on state responsibility, it could be suggested that 'the state' can also extend to include ***de facto* organs contracted to exercise governmental authority**[580]. Hence, in certain circumstances, rules applying to acts carried out by the state can also apply to (1) acts of persons or entities empowered to exercise governmental authority[581], and (2) acts carried out by private individuals or groups acting under the control or direction of organs or entities empowered to exercise governmental authority[582]. Governmental authority may additionally be exercised by organs of another state placed at the disposal of the state[583].

As the guarantor of law and order, the state is conceived as the **principal actor that can offer protection against persecution or serious harm**[584]. By definition, it normally has both the capacity and the duty to protect individuals under its jurisdiction. Article 7(1) nevertheless recognises that this may not always be the case and thus requires the state to be both willing and able to provide protection against persecution or serious harm if it is to be recognised as an actor of protection[585]. The concepts of ability and willingness to provide protection are dealt with in Section 1.8.2.1. These qualities are ascribed to actors of protection under Article 7(1)(a) or (b).

It should be noted that, regarding the state or agents of the state being the actors of persecution or serious harm, recital 27 QD (recast) states that 'there should be a presumption that effective protection is not available to the applicant'. Although this recital concerns internal protection, the presumption it sets out would appear to apply a fortiori in the applicant's region of origin.

1.8.1.2. Parties or organisations, including international organisations (Article 7(1)(b) and (3))

'[P]arties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State' are the second set of entities recognised by the QD (recast) as potential actors of protection. By including these actors of protection within Article 7(1)(b) QD (recast), the directive's drafters demonstrated that they did not accept the argument of UNHCR and a number of other commentators that, under the

579 See, for example, VG Stuttgart, judgment of 30 December 2011, A 11 K 2066/11 (English summary), p. 10, concerning a town registration office, albeit in this case considered not to provide effective protection.

580 See Crawford, J., Pellet, A. and Olleson, S. (eds), *The Law of International Responsibility*, Oxford University Press, Oxford, 2010.

581 ILC, *Responsibility of States for Internationally Wrongful Acts*, op. cit., fn. 538, Article 5.

582 ILC, *Responsibility of States for Internationally Wrongful Acts*, op. cit., fn. 538, Article 8.

583 ILC, *Responsibility of States for Internationally Wrongful Acts*, op. cit., fn. 538, Article 6.

584 House of Lords (United Kingdom), 2000, *Horvath*, op. cit., fn. 532, p. 8; and High Court (Ireland), 2012, *WA [DRC] v Minister for Justice and Equality and Another*, op. cit., fn. 534, para. 34. See also European Council on Refugees and Exiles (ECRE), Asylum Aid, Fluchtelingen Werk Nederland and Hungarian Helsinki Committee, *Actors of protection and the application of the internal protection alternative*, 2014 (hereinafter ECRE et al., *Actors of protection and the application of the internal protection alternative*, 2014), p. 53.

585 This is also recognised by the ECtHR. See, most notably, ECtHR, judgment of 26 July 2005, *N v Finland*, No 38885/02, CE:ECHR:2005:0726JUD003888502, para. 164.

Refugee Convention, only state actors can provide protection[586]. However, it can be seen from the terms of Article 7(2) QD (recast) that such 'parties or organisations' perform only a complementary role. That is, they represent an alternative way in which, within the territory of the state, control of it or of a substantial part of its territory may be exercised by parties or organisations, including international organisations. However, Article 7(1)(a) and (b) QD (recast) treat the 'state' in terms of legal personality in the same way.

The terms 'parties' and 'organisations' are not defined in the QD (recast), save for the simple reference to these categories, including **'international organisations'**. The fact that parties or organisations include international organisations was notably reaffirmed by the CJEU in *Abdulla*. In this 2010 judgment, the court ruled that 'Article 7(1) of the Directive does not preclude protection from being guaranteed by international organisations, **including** protection ensured through the presence of a multinational force in the territory of the third country'[587]. This means that parties or organisations as actors of protection are not limited to international organisations, provided they fulfil the requirements examined below.

First, concerning the requirement for such parties or organisations to **control the state or a substantial part of its territory**, the type of control that needs to be exercised is not defined in the QD (recast). Recital 26 refers only to 'control [over] a region or a larger area within the territory of the State'. Parties or organisations must nevertheless, in addition, be able – not only willing – to offer effective, non-temporary and accessible protection (see Section 1.8.2 below). It can therefore be assumed they have to exercise effective control. Indeed, without such effective control, the party or organisation would arguably not be in a position to offer protection as defined in Article 7(2) QD (recast).

Concerning international organisations more specifically, Article 7(3) QD (recast) further specifies that, to determine whether they control a state or a substantial part of its territory and provide protection, 'Member States shall take into account any guidance which may be provided in relevant Union acts'[588].

Thus, whenever available, Member States are obliged to take into account any guidance provided in such EU acts. If there is no such guidance and also no CJEU guidance, courts and tribunals will have to assess the matter for themselves, certainly insofar as it concerns a question of fact as to whether any particular international organisation meets the Article 7(1) and (2) criteria[589].

Second, the requirement that parties or organisations must be **willing and able to provide protection against persecution or serious harm**, as defined in Article 7(2)[590], considerably limits the scope for identifying actors that possess these qualities. As the CJEU clarified in *OA*, '... an actor of protection needs to operate, inter alia, an effective legal system for the

586 See, for example, UNHCR, UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009) 551, 21 October 2009), July 2010, p. 5; Hathaway and Foster, *The Law of Refugee Status*, op. cit., fn. 128, pp. 289–292; O'Sullivan, M., 'Acting the part: can non-state entities provide protection under international refugee law?', *International Journal of Refugee Law*, Vol. 24, No 1, 2012, pp. 85–110.

587 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 75 (emphasis added).

588 In Article 7(3) QD, the text refers to 'relevant Council acts'.

589 EASO, *Evidence and Credibility Assessment – Judicial analysis*, op. cit., fn. 23, Section 3.1.2.

590 See also Section 1.8.2.1 below.

detection, prosecution and punishment of acts constituting persecution'[591]. Hence, the scope of parties or organisations as **actors of protection** is accordingly more circumscribed than that of parties or organisations as **actors of persecution or serious harm** under Article 6(b). Indeed, the former must, in addition to being willing and able to provide protection against persecution or serious harm, be willing and able to offer effective and non-temporary protection. This more limited interpretation is in line not only with the ordinary meaning of the provision and the scheme of the directive, but also with the purpose of Article 7 and the rest of the QD (recast). This purpose is, inter alia, to grant international protection to those with a well-founded fear of being persecuted or at real risk of serious harm and not benefiting from any effective protection in their country of nationality or former habitual residence.

Against these two definitional requirements, **two main types of parties or organisations** under the terms of Article 7 have so far been discussed within the practice of courts or tribunals of Member States.

First, as the CJEU ruled in its 2010 *Abdulla* judgment, **international organisations** can qualify as actors of protection only if they control the state or a substantial part of the territory of the state. This does not mean, however, that they have to exercise sole control. For instance, in assessing sufficiency of protection against threats by al-Shabaab in Somalia, the Upper Tribunal (United Kingdom) took into account armed operations carried out not only by or at the invitation of the Somali National Army, but also by the African Union Mission in Somalia[592].

Second, some courts or tribunals of Member States have recognised **clans and tribes** as actors of protection, when such clans exercise *de facto* authority over regions, as in the case of Puntland and Somaliland. It remains possible for clans or similar entities to qualify as actors of protection if they fully meet the requirements of Article 7(1)(b), namely that they control either the state or a substantial part of the state's territory. If they do not, they will not be recognised as actors of protection. Nor will any support functions they perform be relevant in assessing whether or not the state provides effective protection under Article 7(1)(a)[593]. In *OA*, the CJEU ruled that 'any such protection in terms of security cannot, in any event, be taken into account in order to ascertain whether State protection meets the requirements that arise, in particular, from Article 7(2) of that directive'[594] (see Section 1.8.1.1 above).

In the practice of Member States, **non-governmental organisations** (NGOs) have not been considered actors of protection for the purpose of Article 7. This is because it is virtually impossible for them to fulfil the requirements of Article 7(1), whereby they have to control the state or a substantial part of the territory of the state and be willing and able to offer protection. This was confirmed by the Czech Supreme Administrative Court, which ruled that an NGO, which did not control the state or a substantial part of the territory, could not provide

591 CJEU, 2021, *OA*, op. cit., fn. 197, para. 38.

592 Upper Tribunal (IAC) (United Kingdom), 2014, *MOJ and Others (Return to Mogadishu) Somalia CG*, op. cit., fn. 552, para. 358. However, the tribunal did not explicitly identify the African Union Mission in Somalia (AMISON) as an actor of protection under Article 7(2). AMISON support for peacekeeping operations in Somalia was originally authorised by the UN Security Council in 2009 (Security Council Resolution 1744 (2007), 26 February 2007) and has been reauthorised at regular intervals since (the latest occasion at the time of writing being March 2021 (Security Council Resolution 2568 (2021)).

593 CJEU, 2021, *OA*, op. cit., fn. 197, para. 48.

594 CJEU, 2021, *OA*, op. cit., fn. 197, para. 53.

protection against FGM[595]. Similarly, the Belgian Council for Alien Law Litigation found that a human rights NGO combating slavery was not able to constitute an actor of protection[596].

1.8.2. Qualities of protection (Article 7(1) and (2))

Having exhaustively defined actors of protection in (a) and (b), Article 7(1) specifies that actors of protection can only qualify as such 'provided they are **willing** and **able** to offer protection in accordance with paragraph 2' (emphasis added). It should be recalled that, under Article 6(c) QD (recast), actors of persecution or serious harm include non-state actors only if it can be demonstrated that the state or parties or organisations controlling the state or a substantial part of the territory of the state 'are **unable or unwilling** to provide protection against persecution or serious harm as defined in Article 7' (emphasis added).

Article 7(2) then sets out two further essential qualities of protection in this context: **effectiveness** and **non-temporariness**. Article 7(2) further identifies that effective and non-temporary protection is 'generally provided' by such actors when they:

> **take reasonable steps** to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has **access** to such protection. [Emphasis added.]

The subsections that follow deal with each of these requirements in turn, as set out in Table 26.

Table 26: Essential qualities of protection (Article 7(1) and (2))

Quality of protection	
Willingness	1.8.2.1
Ability	1.8.2.1
Effectiveness	1.8.2.2
Non-temporariness	1.8.2.3
'[R]easonable steps …'	1.8.2.4
Accessibility	1.8.2.5

The text that follows refers to actors of protection so as to encompass both 'the State' (Article 7(1)(a)) and 'parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State' (Article 7(1)(b)).

1.8.2.1. Willingness and ability

Article 7 of the original QD did not refer to (un)willingness and (in)ability to provide protection. These terms were introduced by the EU legislature so as to provide greater clarity as to the requisite standard of protection[597]. To constitute protection against persecution or serious

595 Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 27 October 2011, *DK* v *Ministry of Interior*, No 6, Azs 22/2011 (English summary).

596 RVV/CCE (Belgium), judgment of 9 June 2011, No 62.867 (hereinafter RVV/CCE (Belgium), 2011, No 62.867), para. 4.8.2. See also RVV/CCE (Belgium), 2010, No 49.821, op. cit., fn. 567, concerning associations combating forced prostitution in the former Yugoslav Republic of Macedonia (now North Macedonia).

597 European Commission, QD (recast) proposal: explanatory memorandum, 2009, op. cit., fn. 409, pp. 6–7.

harm, the actors of protection must be **both** willing and able to provide such protection. As noted by the Commission in its 2009 proposal, 'The mere fact that an entity is able to provide protection is not sufficient; it should also be willing to protect the particular individual. Inversely, mere "willingness to protect" is not sufficient in the absence of the "ability to protect"'[598].

Unless a state or parties or organisations controlling the state in the sense of Article 7(1)(b) are **willing** to protect against all manner of actors of persecution or serious harm, they cannot be said to afford protection[599]. In academic literature, three state-related situations in which unwillingness can arise have been identified, with the state encouraging or tacitly supporting third-party persecution or serious harm[600]:

- where the state is directly responsible for the infliction of persecution or serious harm;
- where the state encourages or condones persecution or serious harm;
- where the state encourages or tacitly supports third-party persecution or serious harm.

Ability to protect is central to a state being able to afford protection at all. As the CJEU stated in *OA*, 'the circumstances which demonstrate the country of origin's inability or, conversely, its ability to provide protection from acts of persecution constitute a crucial element in the assessment which leads to the grant of refugee status'[601]. From Article 7(2), it is clear that the concept of ability to protect must encompass, inter alia, the existence of an effective system of laws preventing acts of persecution able to detect, prosecute and punish such acts. From the CJEU's judgment in *OA*, ability to protect also encompasses provision of physical security[602]. In both respects (system of laws and provision of physical security), such functions can only be carried out by a state (under Article 7(1)(a)) or parties or organisations controlling the state in the sense of Article 7(1)(b). In particular, they cannot be provided by private actors, such as the family or the clan of the third-country national concerned[603].

In considering (in)ability, a broad spectrum of cases has been recognised. This encompasses cases in which the inability may be confined to one aspect of the state machinery or policy or where the state itself admits its failure to protect[604], through to cases in which the state is a 'failed state' and there is no functioning government[605].

The distinction between a state's or parties' or organisations' (un)willingness and (in)ability to provide protection is not always a sharp one in the decisions of courts and tribunals of Member States. As noted by the Upper Tribunal (United Kingdom), 'It is unnecessary for us to decide to what extent this failure stems from an unwillingness to protect or an inability to

598 European Commission, QD (recast) proposal: explanatory memorandum, 2009, op. cit., fn. 409, p. 7.

599 One form of unwillingness is toleration or condonation. ee UNHCR, *Handbook*, op. cit., fn. 103, para. 65: 'Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities or if the authorities refuse, or prove unable, to offer effective protection'. Para. 100 states further 'The term "unwilling" refers to refugees who refuse to accept the protection of the Government of the country of their nationality.' See also UNHCR, Guidance note on refugee claims relating to victims of organized gangs, March 2010, para. 25.

600 Hathaway and Foster, *The Law of Refugee Status*, op. cit., fn. 128, pp. 297–299.

601 CJEU, 2021, *OA*, op. cit., fn. 197, para. 35.

602 CJEU, 2021, *OA*, op. cit., fn. 197, paras 46–47 and 52.

603 CJEU, 2021, *OA*, op. cit., fn. 197, paras 46–47 and 52–53.

604 Hathaway and Foster, *The Law of Refugee Status*, op. cit., fn. 128, p. 307, describe such cases as 'rare' and in fn. 109 cite, inter alia, Supreme Court (Canada), *Attorney General v Ward*, [1993] 2 SCR. 689.

605 See discussion in Hathaway and Foster, *The Law of Refugee Status*, op. cit., fn. 128, pp. 303–319.

protect, although it seems to us that whether it is one or the other or both depends on the particular time and place and the specific actors involved'[606].

For the purpose of this judicial analysis, four scenarios are schematically represented in Table 27 and explained in the light of relevant case-law. ('Actors of protection' encompasses both 'state' and 'parties or organisations', including international organisations 'controlling the State or a substantial part of the territory of the State'.)

Table 27: Actors of protection: (un)willingness and (in)ability to provide protection – diverse scenarios

	Able	Unable
Willing	**Scenario 1** Refusal of international protection	**Scenario 3** Granting of international protection
Unwilling	**Scenario 2** Granting of international protection	**Scenario 4** Granting of international protection

Scenario 1 refers to instances in which the actor of protection is **both willing and able to offer protection** against persecution or serious harm. In such cases, and provided that protection is effective and non-temporary (see Sections 1.8.2.2 and 1.8.2.3 below), refugee and subsidiary protection have to be denied, since the applicant cannot be considered to be in need of international protection[607].

Scenario 2 relates to instances in which, although able, the actor of protection is **unwilling to provide protection**, especially when it is itself the actor of persecution or serious harm or tolerates acts of persecution or serious harm[608]. In Belgium, for instance, the Council for Alien Law Litigation ruled that Article 7 was not applicable in the case of state persecution and that, as a result, it was for the asylum authorities to prove the contrary[609]. It has also been seen as relevant that recital 27 QD (recast) states that 'Where the State or agents of the State are the actors of persecution or serious harm, there should be a presumption that effective protection is not available to the applicant'[610].

606 Upper Tribunal (IAC) (United Kingdom), 2013, *MS (Coptic Christians) Egypt CG*, op. cit., fn. 206, para. 123; see also Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 8 February 2021, No 5, Azs 454/2019.

607 House of Lords (United Kingdom), 2000, *Horvath*, op. cit., fn. 532, per Lord Hope of Craighead.

608 Concerning persecution tolerated or condoned by the state, see, for example, Council of State (Conseil d'État) (France), judgment of 27 July 2012, *M. B.*, No 349824, FR:CESSR:2012:349824.20120727, para. 3; EWCA (United Kingdom), 2008, *PS (Sri Lanka)*, op. cit., fn. 551, para. 8; Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 30 September 2013, *IJ* v *Minister of the Interior*, No 4, Azs 24/2013-34 (English summary) (hereinafter Supreme Administrative Court (Czechia), 2013, *IJ* v *Minister of the Interior*, No 4, Azs 24/2013-34 (English summary)); CNDA (France), judgment of 29 November 2013, *M. A.*, application 13018825 C, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2013*, 2014, pp. 59–60; and Special Appeal Committee (Greece), 2011, No 95/126761 (English summary), op. cit., fn. 265.

609 RVV/CCE (Belgium), judgment of 28 January 2009, No 22.175, para. 3.3. On state persecution and state protection. See also Special Appeal Committee (Greece), decision of 20 June 2012, *HK* v *General Secretary of the (former) Ministry of Public Order*, No 95/48882 (English summary).

610 BVerwG (Germany), judgment of 18 February 2021, 1 C 4.20, DE:BVerwG:2021:180221U1C4.20.0 (hereinafter BVerwG (Germany), 2021, 1 C 4.20), para. 14.

Scenario 3 concerns situations in which the actor of protection is or might be willing to offer protection but is **unable to do so effectively**. This may be the case, for instance, because of a lack of financial or human resources or a lack of control over part of its territory due to an armed conflict, a state of emergency or a heightened security situation[611]. As underlined by the European Commission, 'mere "willingness to protect" may not be deemed sufficient in the absence of the "ability to protect"'[612].

The French Refugee Appeals Commission recognised this in a 2005 decision concerning persecution in Somalia. It found that the setting up of the transitional federal government could not lead to a presumption of ability to provide effective protection, as the transitional federal government had been struggling to effectively re-establish its authority over its territory[613]. The Commission's successor – the CNDA – concluded that the Algerian authorities were unable to protect an Algerian applicant who had converted to Christianity and was persecuted by Islamic extremists[614]. The same court also decided that the Iraqi authorities were not able to provide effective protection to a university lecturer from Iraq, who was kidnapped for ransom by the Organisation of the Islamic State because of her actions to promote women's rights[615]. The Upper Tribunal (United Kingdom) held (in respect of Egypt) that, where there is an issue with a state's ability to protect in a state of emergency, 'when assessing the adequacy of protection in a country in which there exists a valid state of emergency, at least in respect of measures taken that are strictly required by the exigencies of the situation, a State cannot be expected to secure the non-derogable rights of its citizens'[616]. The inability of the state to provide protection can also occur in, inter alia, situations of

611 See, for example, VG Berlin, 2011, 33 K 79.10 A (English summary), op. cit., fn. 565, concerning the inability of Afghanistan to offer protection from persecution because of lack of control and sanctions against human rights violations; Supreme Court (Tribunal supremo) (Spain), judgment of 16 February 2009, No 6894/2005, op. cit., fn. 555, p. 10, concerning the lack of control of the Colombian government over the Revolutionary Armed Forces of Colombia; and CNDA (France), judgment of 6 February 2012, *M. et Mme M.*, Nos 09002796 and 09002797 C, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2012*, 2013, pp. 55–56; CRR, decision of 25 June 2004, plenary session, *M. B.*, No 446177 (English summary). See, in this sense, UNHCR, Guidelines on International Protection No 4: 'Internal flight or relocation alternative' within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, 23 July 2003, UN Doc HCR/GIP/03/04 (hereinafter UNHCR, Guidelines on International Protection No 4), para. 15.

612 European Commission, QD (recast) proposal: explanatory memorandum, 2009, op. cit., fn. 409, p. 7. See also VG Karlsruhe, order of 28 May 2020, A 10 K 10734/17, DE:VGKARLS:2020:0528.A10K10734.17.00, concerning FGM in the Gambia, finding that the mere enactment of legal provisions that prohibit or sanction the action threatened by private actors is not sufficient. Rather, the willingness to effectively prevent the acts of persecution must be verifiable through empirical evidence.

613 CRR, 2005, *Mlle A.*, No 487336, op. cit., fn. 553.

614 CNDA (France), judgment of 9 March 2016, *M. N.Y.*, No 15024258, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2016*, 2017, pp. 82–83.

615 CNDA (France), judgment of 17 February 2020, *Mme A.*, No 17049253 C+ (hereinafter CNDA (France), 2020, *Mme A.*, No 17049253 C+).

616 Upper Tribunal (IAC) (United Kingdom), 2013, *MS (Coptic Christians) Egypt CG*, op. cit., fn. 206, paras 119–120.

domestic violence[617], forced marriage of applicants by their families[618], honour crimes[619] and FGM in the private circles of tribes or families[620].

Finally, **scenario 4** refers to instances in which the actor of protection **is, or might be, neither willing nor able to provide protection** against persecution or serious harm[621]. For instance, this has been the case in judgments of German administrative courts that have found that the Afghan and Iranian authorities were unwilling and unable to offer protection against forced marriage[622]. Similarly, another German administrative court ruled that Guinea would be neither able nor willing to protect the applicant against persecution on the ground of sexual orientation because of Guinean Islamic culture and laws[623]. It should be noted, however, that some of these examples concern a general inability and unwillingness on the part of the state to protect certain groups or in certain types of situations. Other examples concern a state's specific inability and unwillingness to protect in a particular case.

In practice, the willingness and ability requirements have so far been assessed by courts and tribunals of Member States by taking into consideration factors such as widespread corruption[624], indifference of state authorities, effective inability[625] and tacit or even open support by state authorities of perpetrators of persecution or serious harm[626]. The effective (in) ability of a state or 'parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State' to provide protection is moreover

617 See, for example, Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 24 July 2013, *DB v The Ministry of Interior*, No 4, Azs 13/2013-34 (English summary), in which the authorities had intervened on behalf of a woman from Mongolia, but the attacks by her husband had continued.

618 See, for example, VG Gelsenkirchen, judgment of 18 July 2013, 5a K 4418/11.A (English summary), p. 10; CNDA (France), 2020, *Mme A.*, No 19055889 (English summary), op. cit., fn. 456, para. 7; and VG Gelsenkirchen (Germany), 2013, 5a K 4418/11.A (English summary), op. cit., fn. 456.

619 See, for example, VG Braunschweig, judgment of 27 April 2021, 2 A 340/18, DE:VGBRAUN:2021:0427.2A340.18.00 (hereinafter Administrative Court Braunschweig (Germany), 2021, 2 A 340/18), para. 28, concerning a young woman who was raped at the age of 13 years and whose father had since threatened to kill her. The court found, at para. 28, that the Iranian state bodies generally viewed the father as the owner of his daughter born of his marriage and thus that the Iranian police did not provide protection against honour crimes / persecution by the father. See also VG Stuttgart (Germany), 2008, AK 10 K 13/07 (English summary), op. cit., fn. 459.

620 Cagliari Court (Italy), 2013, No RG 8191/12 (English summary), op. cit., fn. 561, pp. 7–8; CNDA (France), judgment of 23 April 2008, *Mlle N.*, No 574495, in CNDA (France), *Contentieux des réfugiés, Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile, Année 2008*, 2009, pp. 59–60.

621 See, for example, VG Berlin, 2011, 33 K 79.10 A (English summary), op. cit., fn. 565, p. 13.

622 VG Augsburg, 2011, Au 6 K 11.30092 (English summary), op. cit., fn. 456 (in relation to Afghanistan); and VG Ansbach, judgment of 16 March 2017, AN 1 K 16.32047 (in relation to Iran).

623 VG Cologne, judgment of 15 September 2011, 15 K 6103/10.A (English summary). See also Court of Rome (Italy), judgment of 20 December 2013, No RG 4627/2010; and CNDA (France), judgment of 6 April 2009, *M K*, No 616907.

624 See, for example, RVV/CCE (Belgium), 2010, No 49.821, op. cit., fn. 567, paras 4.8.3 and 4.9, concerning the link between the prostitution network and the Macedonian authorities; and Upper Tribunal (IAC) (United Kingdom), 2010, *AM and BM (Trafficked women) Albania CG*, op. cit., fn. 564, especially paras 182 and 216, concerning corruption in Albania and the inability of the state as a result to provide protection against persecution. But see, Court of Session (Scotland, United Kingdom), judgment of 24 January 2014, *SAC and MRM v Secretary of State for the Home Department*, [2014] CSOH 8, para. 52, in which the court upheld the position of the Secretary of State, noting that, despite instances of corruption within the police and judiciary in Bangladesh, 'it is not accepted that this indicates that Bangladeshi authorities are unable or unwilling to assist [the applicant]. It is considered that Bangladesh has an effective legal system for the detention, prosecution and punishment of acts constituting persecution or serious harm and that [the applicant] would have access to the system.'

625 ECRE et al., *Actors of protection and the application of the internal protection alternative*, op. cit., fn. 586, p. 49.

626 See, for example, in relation to Ahmadis from Pakistan, Supreme Administrative Court (Czechia), 2013, *IJ v Minister of the Interior*, No 4, Azs 24/2013-34 (English summary), op. cit., fn. 610; in relation to gender-related persecution in Iran, both Special Appeal Committee (Greece), 2011, No 95/126761 (English summary), op. cit., fn. 265, and Administrative Court Braunschweig (Germany), 2021, 2 A 340/18, op. cit., fn. 621.

intimately linked to the type of protection that has to be provided by virtue of Article 7(2). At all times, protection needs to be effective and non-temporary.

1.8.2.2. Effectiveness

The directive does not define 'effective', although the second sentence of Article 7(2) does indicate what it 'generally' comprises. Effective protection (and non-temporary protection) is defined by Article 7(2) as follows.

> **Article 7(2) QD (recast)**
>
> … Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.

However, the CJEU's judgment in *OA* makes it clear that the issue of effective protection is to be confined solely to an assessment of what the state or parties or organisations controlling the state or a substantial part of the territory of the state provide or fail to provide. In particular, **the provision by private actors of security or social and financial support is irrelevant to the issue of whether actors of protection provide effective protection**[627].

The assessment of effective protection (and its non-temporary nature) must be made not only in the light of the conditions in the country of nationality or former habitual residence, but also in the light of the **applicant's individual circumstances**[628]. Such a case-by-case assessment is supported by the wording of Article 7(2), which prescribes that 'protection is **generally** provided' if reasonable steps are taken[629]. As held by the UKIAT, 'It is not stated that the taking of "reasonable steps to prevent the persecution … by operating an effective legal system …" will amount to provision of adequate protection in every case, although it is said that it will in the generality of cases'[630]. The specific case of an applicant might indicate the need for additional protection for it to be effective[631].

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627 CJEU, 2021, *OA*, op. cit., fn. 197, paras 48 and 52–53. See also Section 1.8.1 above.

628 Upper Tribunal (IAC) (United Kingdom), judgment of 19 June 2015, *NA and VA (Protection: Article 7(2) Qualification Directive) India*, [2015] UKUT 432 (hereinafter Upper Tribunal (IAC) (United Kingdom), 2015, *NA and VA (Protection: Article 7(2) Qualification Directive) India*), paras 70–71. See also Court of Appeal (England and Wales, United Kingdom), judgment of 11 November 2003, *Bagdanavicius and Another, R (on the application of)* v *Secretary of State for the Home Department*, [2003] EWCA Civ 1605 (hereinafter EWCA (United Kingdom), 2003, *Bagdanavicius and Another*), para. 55, subpara. 6; Upper Tribunal (IAC) (United Kingdom), judgment of 24 January 2011, *AW (Sufficiency of Protection) Pakistan* (hereinafter Upper Tribunal (IAC) (United Kingdom), 2011, *AW (Sufficiency of Protection) Pakistan*), paras 24–33; Migration Court of Appeal (Sweden), 2011, UM 3363-10 and 3367-10 (English summary), op. cit., fn. 566; and Upper Tribunal (IAC) (United Kingdom), 2010, *AM and BM (Trafficked women) Albania CG*, op. cit., fn. 564, para. 182.

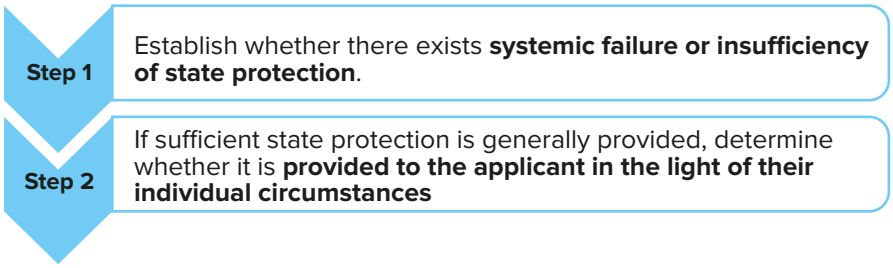
629 Emphasis added. See Upper Tribunal (IAC) (United Kingdom), 2015, *NA and VA (Protection: Article 7(2) Qualification Directive) India*, op. cit., fn. 630, para. 13.

630 AIT (United Kingdom) (predecessor of the Upper Tribunal, United Kingdom), judgment of 11 July 2007, *IM (Sufficiency of Protection) Malawi*, [2007] UKAIT 00071 (hereinafter AIT (United Kingdom), 2007, *IM (Sufficiency of Protection) Malawi*), para. 50.

631 AIT (United Kingdom), 2007, *IM (Sufficiency of Protection) Malawi*, op. cit., fn. 632, para. 45.

As further conceptualised by the Upper Tribunal (United Kingdom) and based on the decisions of the Court of Appeal (England and Wales, United Kingdom) in the cases of *Atkinson* and *Bagdanavicius*[632], determining the existence of effective protection against persecution, or conversely the non-existence of such protection, is thus a two-step process, as illustrated in Figure 2[633].

Figure 2: Two-step assessment for determining the (non-)existence of effective protection



Although framed here in the context of state protection, this two-step assessment is arguably equally valid in terms of protection provided by parties or organisations under the terms of Article 7(1)(b).

The **first step** relates to the **conditions in the country of origin**. In this respect, the CJEU recalled in *Abdulla* that, 'In accordance with Article 4(3) of the Directive, relating to the assessment of facts and circumstances, ... the laws and regulations of the country of origin and the manner in which they are applied, and the extent to which basic human rights are guaranteed in that country' may, inter alia, be taken into account[634]. According to the Irish High Court, **the mere existence of a police complaints procedure is insufficient; to constitute effective protection, it must be accompanied by an effective system for the detection, investigation, prosecution and convictions of crimes**[635]. The Court of Cagliari (Italy) found that the penalisation of certain crimes in national legislation is also not considered to be protection in the sense of Article 7(2), if this is not effectively and sufficiently enforced through prosecution[636]. Moreover, in addition to the criminal law system, consideration should also be given to civil laws '(for example, non-molestation injunctions) [which] can play a part in the overall system of protection'[637].

If there is systemic failure by the state to protect, then an applicant who faces acts of persecution or serious harm will be able to establish a well-founded fear of persecution or real risk of serious harm. If, however, there is a general sufficiency of state protection, then it will be necessary to proceed to the second step.

632 Court of Appeal (England and Wales, United Kingdom), judgment of 1 July 2004, *Michael Atkinson v Secretary of State for the Home Department*, [2004] EWCA Civ 846, para. 21; and EWCA (United Kingdom), 2003, *Bagdanavicius and Another*, op. cit., fn. 630, para. 55.

633 This figure draws on Upper Tribunal (IAC) (United Kingdom), 2011, *AW (Sufficiency of Protection) Pakistan*, op. cit., fn. 630, especially paras 34–35.

634 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 71.

635 High Court (Ireland), judgment of 9 December 2009, *ASO v Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform*, [2009] IEHC 607, para. 12.

636 Court of Cagliari (Italy), judgment of 3 April 2013, No RG 8192/2012 (English summary); and RVV/CCE (Belgium), 2011, No 62.867, op. cit., fn. 598, para. 4.8.4.

637 AIT (United Kingdom), judgment of 22 February 2007, *AB (Protection – Criminal Gangs – Internal Relocation) Jamaica CG*, [2007] UKIAT 00018 (hereinafter AIT (United Kingdom), 2007, *AB (Protection – Criminal Gangs – Internal Relocation) Jamaica CG*), para. 143.

The **second step** – concerning the **applicant's individual circumstances** – is necessary because, notwithstanding a general sufficiency of state protection, an applicant may still be able to establish a well-founded fear of persecution or real risk of suffering serious harm by virtue of such circumstances[638]. This second step overlaps to a certain extent with the determination of a well-founded fear of persecution or of a real risk of serious harm (see Sections 1.5 and 2.5), although the two remain 'two separate analytical steps'[639]. For instance, the fact that an applicant may have been subjected to past persecution or serious harm and did not receive effective protection is particularly important when determining whether an applicant would be provided with effective protection at the time of hearing[640]. Moreover, as discussed in Section 1.8.2.5 below, considering the applicant's individual circumstances also requires a determination of whether the applicant has effective access to the protection generally provided. The Swedish Migration Court of Appeal has found, for instance, that this might not be the case for minors who remain dependent on their parents and might thus be precluded from benefiting from protection against persecution or serious harm[641].

The European Commission provides an illustrative list of factors that should be considered by courts and tribunals of Member States with a view to determining whether effective protection is provided. These factors are listed in Table 28[642].

Table 28: Illustrative list of factors to assess effectiveness of protection

General conditions in the country of origin
The state's complicity with respect to the infliction of the harm at stake
The nature of the state's policies with respect to the harm at stake, including whether a criminal law is in force that makes violent attacks by persecutors punishable by sentences commensurate with the gravity of their crimes
The influence the alleged persecutors have on state officials
Whether any official action taken is meaningful or merely perfunctory, including an evaluation of the willingness of law enforcement agencies to detect, prosecute and punish offenders
Whether there is a pattern of state unresponsiveness
Whether there is denial of the state's services
Whether any steps have been taken by the state to prevent the infliction of harm

The importance of the need to show that the legal system is 'effective' is illustrated by the treatment by the Slovenian Administrative Court of the case of an applicant who was a victim of rape. The court considered that the fact that both actors who persecuted her

638 Council of State (Conseil d'État) (France), judgment of 19 June 2020, No 435000, FR:CECHS:2020:435000.20200619; and High Court (Ireland), judgment of 14 November 2019, *B and Others v International Protection Appeals Tribunal*.

639 AIT (United Kingdom), 2007, *AB (Protection – Criminal Gangs – Internal Relocation) Jamaica CG*, op. cit., fn. 639, para. 141. See also CNDA (France), 2020, *Mme A.*, No 17049253 C+, op. cit., fn. 617, identifying the incapacity of the authorities to protect the applicant 'against members of Islamist movements, like many other women targeted by fighters of the Islamic State organisation as well as by other radical movements of Islam in Iraq, due to their media visibility, their intellectual profession, their dress, their "westernised" behaviour and, more broadly, their mores, regarded as contrary to the precepts of Islam and Sharia law'; and CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, paras 71, 89 and 95.

640 Upper Tribunal (IAC) (United Kingdom), 2011, *AW (Sufficiency of Protection) Pakistan*, op. cit., fn. 630, paras 37–40. On the significance of past persecution under Article 4(4) QD (recast), see Section 1.6.1.

641 Migration Court of Appeal (Sweden), 2011, UM 3363-10 and 3367-10 (English summary), op. cit., fn. 566.

642 European Commission, QD proposal: explanatory memorandum, 2001, op. cit., fn. 266, pp. 17–18, referring to what at that time was Article 9(2).

were not punished and were still employed as local policemen in her home town was highly relevant to determining the existence of an effective legal system[643]. The Austrian Supreme Administrative Court concluded that protection was ineffective in the case of a Bengali applicant, who had been granted protection by the Bengali police against an angry homophobic mob, but who the authorities had demanded provide a 'declaration of guarantee' to refrain from homosexual behaviour in the future[644]. The Austrian Supreme Administrative Court also emphasised the need for a factual approach in the case of an appellant from Bosnia and Herzegovina. He claimed he had not been granted effective protection against persecution by private actors who regarded him as responsible for war crimes against the Bosnian population and as a 'traitor'. The court held that the decisive question was whether examination of the real situation in that country revealed that protection was ineffective[645]. The Upper Tribunal (United Kingdom) underlined the 'broad array of measures' that can be encompassed within the notion of an effective legal system. These include:

> an efficacious witness protection model ... home security; enhanced police protection; simple warnings and security advice to the person concerned; the grant of a firearms licence; or, ***in extremis***, ... a change of identity accompanied by appropriate financial and logistical support[646].

The term 'inter alia' in Article 7(2), second sentence, would appear to convey that effective protection is not limited to reasonable steps in the form of the operation of an effective legal system[647]. On the other hand, it is possible to read the CJEU judgment in *OA* as meaning that an effective legal system is a necessary requirement of effective protection[648].

1.8.2.3. Non-temporariness

Article 7(2) QD (recast) explicitly requires that the protection provided to the applicant be non-temporary (as well as effective). However, it does not give any definition of this criterion. Since Article 11(2) QD (recast) uses the same term to qualify the change of circumstances behind the cessation of refugee status, the CJEU's judgment in *Abdulla* clarified its meaning in that context as follows:

> The change of circumstances will be of a 'significant and non-temporary' nature, within the terms of Article 11(2) of the Directive, when the factors which formed the basis of the refugee's fear of persecution may be regarded as having been permanently eradicated. The assessment of the significant and non-temporary nature of the change

643 Administrative Court (Slovenia), 2015, I U 411/2015-57, op. cit., fn. 373.

644 VwGH (Austria), judgment of 23 February 2021, Ra 2020/18/0500, AT:VWGH:2021:RA2020180500.L04.

645 VwGH (Austria), judgment of 24 February 2015, Ra 2014/18/0063, AT:VWGH:2015:RA2014180063.L00.

646 Upper Tribunal (IAC) (United Kingdom), 2015, *NA and VA (Protection: Article 7(2) Qualification Directive) India*, op. cit., fn. 630, para. 17 (original emphasis).

647 See Council of State (Raad van State) (Netherlands), judgment of 5 August 2008, *AJDCoS*, 200708107/1 (English summary); and Council of State (Raad van State) (Netherlands), judgment of 29 May 2012, 201108872/1/V1 (English summary).

648 CJEU, 2021, *OA*, op. cit., fn. 197, para. 38: 'In order to arrive at the conclusion that the fear of persecution of the refugee concerned is no longer well founded, the competent authorities, in the light of Article 7(2) of Directive 2004/83, must verify, having regard to that refugee's individual situation, that the actor or actors in question who are providing protection, within the meaning of Article 7(1), have taken reasonable steps to prevent the persecution, that they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the third country national concerned will, if he or she ceases to have refugee status, have access to that protection (see, to that effect, [CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, paras 70 and 74]).'

> of circumstances thus implies that there are no well-founded fears of being exposed to acts of persecution amounting to severe violations of basic human rights within the meaning of Article 9(1) of the Directive[649].

The German Federal Administrative Court examined, again in the cessation context, whether such risk had ceased sustainably. The court came to the conclusion that the specific risk of persecution that existed under the regime of Saddam Hussein in Iraq had 'permanently ceased to exist' because the **dictator's fall from power** and the end of his regime were 'irreversible'[650]. Stricter criteria apply, however, when there is no complete change in the persecutory state but a **liberalisation within a former persecutory system**. According to the same court in a 2011 judgment involving an Algerian applicant, such a case requires a **higher standard**:

> The greater the risk of persecution, even if it remains below the threshold of a considerable probability, the more permanent, and the more accessible to forecasting as such, the stability of the change in circumstances must be. If – as in the present case – changes that are thought to result in the termination of refugee status must be assessed within a regime that still remains in power, a higher standard must likewise be required for their permanence.
>
> [...]
>
> Nevertheless, one also cannot demand a guarantee that the changed political circumstances will continue indefinitely in the future[651].

The Belgian Council for Alien Law Litigation found the protection afforded to Tibetans in India not to be temporary. It gave two main reasons for this conclusion. First, the Tibetans had access to renewable registration certificates that, although of limited duration, were 'systematically extended'. Second, it found that for more than half a century the Dalai Lama, alongside the Central Tibetan Administration and around 100 000 followers, had been settled in India. In fact, the Belgian Council for Alien Law Litigation noted that registration certificates were now being issued more easily and were no longer conditional (e.g. linked to work, pilgrimage, studies)[652].

Transposing the reasoning of such cases to Article 7(2), on the protection against persecution or serious harm, requires an assessment of likely 'permanence'.

1.8.2.4. '[R]easonable steps ...'

Article 7(2) specifies that protection against persecution or serious harm is 'generally provided' by the actors of protection taking 'reasonable steps to prevent the persecution or suffering

649 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 73. In *OA*, paras 37–38 and 43–44, the CJEU confirmed that the meaning of 'protection' is the same in both articles. See also EASO, *Ending International Protection – Judicial analysis*, op. cit., fn. 24, Section 3.1.2 'Is the change of circumstances "significant and non-temporary"? Article 11(2)'.

650 BVerwG (Germany), judgment of 24 February 2011, No 10 C 3.10, BVerwG:2011:240211U10C3.10.0 (English translation), para. 20. See, similarly, CNDA (France), judgment of 25 November 2011, *M. K.*, No 10008275 (English summary), concerning the situation in Kosovo after 1986.

651 BVerwG (Germany), judgment of 1 June 2011, No 10 C 25.10, BVerwG:2011:010611U10C25.10.0 (English translation), para. 24.

652 RVV/CCE (Belgium), judgment of 17 March 2015, No 141.198.

of serious harm'. As regards the phrase 'generally provided', regard to the different language versions suggests that it could mean either 'in most cases' or 'normally'[653] or both. Reasonable steps taken by actors of protection to prevent persecution or serious harm are thus a central element in determining whether the protection generally provided in the country of nationality or former habitual residence is both effective and non-temporary. The assessment that courts or tribunals of Member States must undertake has been set out by the CJEU in its *Abdulla* judgment as follows:

> That verification means that the competent authorities must assess, in particular, the conditions of operation of, on the one hand, the institutions, authorities and security forces and, on the other, all groups or bodies of the third country which may, by their action or inaction, be responsible for acts of persecution against the recipient of refugee status if he returns to that country[654].

From the guidance given by Advocate General Mazák and the court in *Abdulla*, the requirement in Article 7(2) is to be understood as involving assessment of both the general conditions in the country of origin and the applicant's individual circumstances. It is not an abstract test[655]. In *Abdulla*, the court specified that the competent authorities 'must' assess both sets of circumstances. The court explained that the assessment, in accordance with Article 4, had to consider facts and circumstances, taking into account, 'inter alia, the laws and regulations of the country of origin and the manner in which they are applied, and the extent to which basic human rights are guaranteed in that country'[656].

The QD (recast) does not define what is meant by 'reasonable steps' in this context. Nor has the CJEU as yet provided guidance as to its meaning. From information known by the EU legislature when drafting the QD (recast), the concept was familiar because of its adoption as a criterion in some national cases, in particular in the 2000 *Horvath* judgment of the UK House of Lords[657]. The wording of Article 7(2) QD (recast) has been observed to 'closely mirror' the *Horvath* conclusions[658]. In *Horvath*, itself drawing on the ECtHR judgment in *Osman*[659], reasonableness is defined as a 'practical standard' that recognises that complete protection against persecution or serious harm cannot be expected from actors of protection[660]. Hence,

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653 As noted by Lehmann, J., '*Protection' in European Union Asylum Law*, Brill–Nijhoff, Leiden, 2020 (hereinafter Lehmann, '*Protection' in EU Asylum Law*), p. 86, these expressions are indeed used in the Danish and Dutch language versions ('*normalt*' and '*in het algemeen*' respectively).

654 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 71.

655 '... the requirement of protection imposed pursuant to Articles 11(1)(e) and 7(2) of [the directive] does not exist in the abstract but rather in concrete, tangible and objective terms.' CJEU, Opinion of Advocate General Mazák of 15 September 2009, *Aydin Salahadin Abdulla and Others v Bundesrepublik Deutschland*, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2009:551, para. 53.

656 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, paras 68–71.

657 House of Lords (United Kingdom), 2000, *Horvath*, op. cit., fn. 532.

658 AIT (United Kingdom), 2007, *IM (Sufficiency of Protection) Malawi*, op. cit., fn. 632, para. 50; Upper Tribunal (IAC) (United Kingdom), 2011, *AW (Sufficiency of Protection) Pakistan*, op. cit., fn. 630, para. 22.

659 ECtHR (GC), judgment of 28 October 1998, *Osman v United Kingdom*, No 23452/94, CE:ECHR:1998:1028JUD002345294, paras 115–116.

660 House of Lords (United Kingdom), 2000, *Horvath*, op. cit., fn. 532, per Lord Hope of Craighead. See also AIT (United Kingdom), 2007, *IM (Sufficiency of Protection) Malawi*, op. cit., fn. 632, para. 45. See also Vreemdelingencirculaire 2000 (C) of 1 December 2017 (Netherlands); and Bundesministerium des Innern (Federal Ministry of the Interior) (Germany), Hinweise des Bundesministeriums des Innern zur Anwendung der Richtlinie 2004/83/EG des Rates vom 29. April 2004 über Mindestnormen für die Anerkennung und den Status von Drittstaatsangehörigen oder Staatenlosen als Flüchtling, Amtsblatt EU L 304, 30 September 2004.

'certain levels of ill-treatment may still occur even if steps to prevent this are taken by the state to which we look for our protection'[661]. *Horvath* also considered that 'reasonable steps' require only a 'reasonable willingness' on the part of the state to operate a system for the protection of the citizen[662].

However, in 2009 the EU legislature expressed a concern that willingness and ability to protect must be assessed 'in reality'[663]. From this perspective, 'reasonable steps' cannot be demonstrated solely by considering reasonable willingness or what is generally provided by the state actors through operation of a legal system. It must be an 'effective' legal system and its general provisions must operate so as to ensure protection not just to the population in general but to the individual applicant. Hence, whether or not the phrase 'reasonable steps' is expressed in terms of a reasonable willingness or a 'due diligence' test[664], it cannot mean that it is enough if state actors simply do their best[665]. Protection must be effective for the individual applicant[666]. In 2010, the CJEU, in *Abdulla*, made clear the importance of taking into account both general conditions and the individual's particular circumstances in the individual assessment[667].

As Article 7(2) indicates, such reasonable steps can take the form of 'operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution ...'. The wording of Article 7(2) highlights that reasonable steps must focus on **prevention** of persecution or serious harm. Furthermore, that prevention is expressly seen as requiring actors of protection to operate an effective legal system. That clearly requires actors of protection to take positive steps. For example, mere adoption of laws penalising crimes may not be preventive, if mechanisms are not in place to prevent crimes in the first place[668].

For protection to be effective, a response alone is not sufficient. As stated by the Irish High Court, it is clear that the test is not merely one of 'effort'; effort must be matched by non-temporary effectiveness, including the operation of an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm[669].

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661 House of Lords (United Kingdom), 2000, *Horvath*, op. cit., fn. 532, per Lord Hope of Craighead.

662 House of Lords (United Kingdom), 2000, *Horvath*, op. cit., fn. 532, per Lord Clyde.

663 European Commission, QD (recast) proposal: explanatory memorandum, 2009, op. cit., fn. 409, p. 7.

664 Dörig, H., in Hailbronner and Thym (eds), *EU Asylum and Immigration Law: A commentary*, op. cit., fn. 186, p. 1156.

665 A point made numerous times in the UK post-*Horvath* case-law; see, for example, Court of Appeal (England and Wales, United Kingdom), judgment of 25 May 2001, *Banomova v Secretary of State for the Home Department*, [2001] EWCA Civ 807; and Court of Appeal (England and Wales, United Kingdom), judgment of 19 December 2001, *McPherson v Secretary of State for the Home Department*, [2001] EWCA Civ 1955.

666 Addressing the interpretation of Article 7(2), Lehmann, '*Protection' in EU Asylum Law*, op. cit., fn. 655, states that assessment of effective protection requires a factual approach and that 'In such a factual approach, the human rights due diligence obligations of the state of nationality are only of evidentiary value for the willingness to protect against harm, but do not provide the benchmark for what is or is not effective'.

667 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, paras 71, 89 and 95.

668 EWCA (United Kingdom), 2003, *Bagdanavicius and Another*, op. cit., fn. 630, para. 55, subpara. 5. See also Metropolitan Court (Hungary), judgment of 5 October 2011, *KH v Office of Immigration and Nationality*, 6.K. 34.440/2010/20 (English summary).

669 High Court (Ireland), judgment of 21 December 2021, *FM and RM v International Protection Appeals Tribunal and Minster of Justice*, [2021] IEHC 817, para. 30.

1.8.2.5. Accessibility

Article 7(2) identifies a further quality required for protection to be effective and non-temporary: it must be accessible **to the applicant** ('and when the applicant has access to such [generally provided] protection'). The accessibility of protection was identified by the CJEU in *Abdulla* as a definitional element of protection[670]. This further qualitative requirement has not been an issue of contention in decisions of courts or tribunals of Member States[671].

The Austrian Supreme Administrative Court has stated that the ability and willingness of the state authorities to provide protection must, in principle, be measured by whether effective legal provisions exist in the home country for the investigation, prosecution and punishment of acts constituting persecution or serious harm and whether the person seeking protection has access to this protection. In this context, even if criminal standards and prosecution authorities exist, it must be examined on a case-by-case basis whether the parties seeking redress are able to effectively participate in this state protection, taking into account their individual circumstances[672].

According to the Belgian Council for Alien Law Litigation, accessibility has to be assessed in the light of **both legal and practical obstacles to protection**[673]. In another case, the same court found that lack of financial means to bring a case to court was 'insufficient to come to a conclusion on the impossibility for the applicant to access protection from the authorities'[674]. Conversely, access to protection against persecution or serious harm cannot be made contingent on exhaustion of domestic remedies in the country of origin.

Some cases may concern threats of a general criminal character (a threat of violent attacks as a reprisal for the alleged debts of the applicant, racketeering, etc.) by non-state actors (e.g. a local mafia). For states that generally operate a prima facie effective legal system to punish such criminal activities, the Czech Supreme Administrative Court requires that the applicant show that they have first unsuccessfully sought protection from the police or other competent authorities in the country of origin or that they provide a credible explanation of why they have not done so[675].

670 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 70.

671 See ECRE et al., *Actors of protection and the application of the internal protection alternative*, op. cit., fn. 586, p. 45, on Member State practice, which states that Austria, Belgium, Germany, Sweden and the United Kingdom assess this requirement in their decisions. See also Supreme Administrative Court (Czechia), judgment of 25 January 2011, *RS* v *Ministry of Interior*, No 6, Azs 36/2010-274 (English summary).

672 VwGH (Austria), judgment of 10 April 2020, Ra 2019/19/0415, AT:VWGH:2020:RA2019190415.L01.

673 RVV/CCE (Belgium), judgment of 14 March 2012, No 77.179, para. 7.9, which reads (unofficial translation) as follows: 'The assessment of this issue supposes that not only the legal or judicial obstacles are taken into account, but also the practical obstacles that could prevent a person from having access to effective protection ... The nature of the persecution and the way it is perceived by the surrounding society and the authorities in particular can, in certain cases, constitute such a practical obstacle. The personal situation of the applicant, especially their vulnerability, can also contribute to prevent, in practice, access ... to protection by the authorities.' See also ECRE et al., *Actors of protection and the application of the internal protection alternative*, op. cit., fn. 586, p. 9, fn. 20, referring to the same judgment.

674 RVV/CCE (Belgium), judgment of 6 March 2012, No 76.642, para. 5.3.3 (authors' translation).

675 Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 31 October 2008, *IG* v *Ministry of Interior*, No 5, Azs 50/2008-62.

Nevertheless, under no circumstances can this approach be generalised to either all cases of non-state actors or all countries of origin[676]. As the Polish Supreme Administrative Court has stressed, what matters is 'whether, in the given circumstances, [the applicant] would have obtained help from the state had she requested it' – that is, 'whether there is a genuine opportunity to seek it'[677]. There is no legal requirement for an applicant to exhaust local protection remedies before leaving their country of origin[678]. It may nevertheless be relevant in some cases for decision-makers to ascertain what steps an applicant took to access any available protection (assuming such protection was available) and to ascertain the response of state officials.

The European Commission has provided an illustrative list of factors that should be taken into consideration by courts and tribunals of Member States in assessing the accessibility of protection. These factors are provided in Table 29[679].

Table 29: Illustrative list of factors to assess accessibility of protection

Evidence by the applicant that the alleged persecutors are not subject to the state's control
The qualitative nature of the access the applicant has to whatever protection is available, bearing in mind that applicants as a class must not be exempt from protection by the law
Steps, if any, taken by the applicant to obtain protection from state officials and the state response to these attempts

676 Supreme Administrative Court (Czechia), 2008, *SICh* v *Ministry of Interior*, No 1, Azs 86/2008-101 (English summary), op. cit., fn. 567.

677 Supreme Administrative Court (Naczelny Sąd Administracyjny) (Poland), judgment of 8 May 2008, OSK 237/07 (English summary). See also VwGH (Austria), judgment of 4 March 2010, 2006/20/0832, AT:VWGH:2010:2006200832.X02, which considers that, in the case of acts of persecution by non-state actors, it cannot generally be held against the applicant that they did not seek protection from state authorities. If it was already clear from the outset that the state authorities are not able or willing to protect against persecution, it cannot be said to be necessary to make the – futile – attempt to seek protection by the state.

678 Hathaway and Foster, *The Law of Refugee Status*, op. cit., fn. 128, pp. 323–350.

679 European Commission, QD proposal: explanatory memorandum, 2001, op. cit., fn. 266, p. 18, referring to what was at that stage Article 9(2).

1.9. Internal protection from persecution or serious harm (Article 8)

Article 8 QD (recast) is an **optional provision** that may be applied by Member States.

Article 8 QD (recast)

Internal protection

1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she:

   (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or

   (b) has access to protection against persecution or serious harm as defined in Article 7;

and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.

2. In examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering serious harm, or has access to protection against persecution or serious harm in a part of the country of origin in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant in accordance with Article 4. To that end, Member States shall ensure that precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office.

If a Member State does opt to apply the concept of internal protection, then Article 8(1) and (2) apply. In addition, as stated in Article 8(1), the issue of internal protection is a '**part of the assessment** of the application for international protection' (emphasis added). Article 8 sets out common criteria applicable to both types of international protection – that is, qualification as a refugee or as a beneficiary of subsidiary protection.

The QD included the notion of internal protection in Article 8. The QD (recast) introduced detailed preconditions for the viability of internal protection (mostly deriving from the ECtHR judgment in *Salah Sheekh*[680]). It also removed Article 8(3), which allowed the concept to apply despite technical obstacles to returning to the country of origin. By virtue of the use of the word 'settle' in the QD (recast) – as distinct from 'stay' in the QD – it may be that a situation of greater stability is envisaged[681]. Furthermore, the notion of internal protection in Article 8(1)

680 ECtHR, judgment of 11 January 2007, *Salah Sheekh v the Netherlands*, No 1948/04, CE:ECHR:2007:0111JUD000194804 (hereinafter ECtHR, 2007, *Salah Sheekh*). See also ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, and Sections 1.9.1.1, 1.9.1.2 and 1.9.1.3 below.

681 EASO, *Article 15(c) QD (recast) – A judicial analysis*, op. cit., fn. 2, p. 35; see also BVerwG (Germany), 2021, 1 C 4.20, op. cit., fn. 612.

QD (recast) now refers to access to protection as an alternative precondition for relying on this concept. Finally, unlike the QD, the QD (recast) refers to the obligation of the authorities to obtain precise and up-to-date information on the general situation in the country of origin (Article 8(2)).

The CJEU has not yet had an opportunity to address Article 8 issues except in indirect references to internal protection in *Elgafaji* and *CF and DN*. In *Elgafaji*, it stated:

> in the individual assessment of an application for subsidiary protection ... the following may be taken into account ... the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned[682].

When applying Article 3 ECHR in expulsion cases, the ECtHR uses the term 'internal flight alternative' rather than 'internal protection'[683]. In this context, the court has acknowledged that:

> ... Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual's claim that a return to his country of origin would expose him to a real risk of being subjected to treatment proscribed by that provision ...[684].

The ECtHR has also identified the following preconditions for an 'internal flight alternative' to apply:

> ... the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of his ending up in a part of the country of origin where he may be subjected to ill-treatment ...[685].

The further analysis of Article 8 QD (recast) will first address the criteria governing internal protection (Section 1.9.1). It will then focus on the requirements of examination, including the stage of examination (Section 1.9.2). Section 1.9 thus has two subsections, as set out in Table 30.

Table 30: Structure of Section 1.9

Section	Title	Page
1.9.1	Criteria governing internal protection (Article 8(1))	186
1.9.2	Requirements of examination (Article 8(2))	200

1.9.1. Criteria governing internal protection (Article 8(1))

The notion of 'internal protection', as set out in Article 8, essentially provides that an applicant does not qualify as a refugee or a beneficiary of subsidiary protection **when the applicant will be protected in their country of origin**. The adjective 'internal' implies that the notion

682 CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 40; see also CJEU, judgment of 10 June 2021, *CF and DN v Bundesrepublik Deutschland*, C-901/19, EU:C:2021:472, para. 43.

683 Note that the two concepts may not necessarily be completely synonymous.

684 ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 266.

685 ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 266, referring to ECtHR, 2007, *Salah Sheekh*, op. cit., fn. 682, para. 141.

may be relied on only where it is established or assumed, in the first place, that an applicant has a well-founded fear of being persecuted or is at real risk of suffering serious harm in their 'region of origin' (i.e. the area they come from, the area in which they used to live or the area in which they were settled with some sort of permanence before leaving)[686]. Otherwise, there would be no need to consider 'internal' protection elsewhere. If it is then determined that settlement in 'a part of the country of origin' other than their region of origin fulfils the criteria provided for in Article 8, a Member State is entitled to conclude that an applicant is not in need of international protection. The notion of 'region of origin' or similar notions such as 'home area' is inevitably hard to define but the reference in Article 8 to 'a part of the country' tends to suggest an area or region of geographical significance relative to the country as a whole.

Nevertheless, the need to **clearly identify a particular geographical area or areas of the country of origin** where internal protection is available is a key precondition for the application of the concept[687]. Article 8(1) identifies the relevant focus as 'a part of the country of origin'.

According to the Austrian Constitutional Court, the risk assessment should be based on the actual destination of the applicant[688]. Likewise, Swedish case-law finds that it is necessary to identify an area where the actor of persecution cannot threaten the person[689].

UNHCR also suggests that the wording of Article 8 QD implies that, first, a well-founded fear must be established and, second, the possibility of internal protection in a particular area must be examined. As the UNHCR guidelines on the issue note, when internal protection is being examined, a particular area or particular areas must be identified by the determining authority[690]. If an applicant is to be sent to a region of their home country other than the area in which they previously lived, this new region has to be assessed according to the internal protection criteria[691]. A finding that internal protection is available in a specific area may not necessarily mean that it is the only safe area in the country. This is because, pursuant to Article 8(1) QD (recast), an applicant is not in need of international protection where 'a part of the country of origin' fulfils the relevant substantive criteria.

Article 8(1) lays down several **criteria** to determine if internal protection can be found in a part of an applicant's country of origin.

Article 8(1)(a) and (b) set out alternative criteria for assessing the safety of a part of the country of origin for the applicant. More precisely, Article 8(1)(a) requires that the applicant 'has no

686 The relevant part of the country of origin, as defined by Article 2(n) QD (recast), needs to be determined differently in cases in which the applicant has never lived in the country of origin; see last paragraph of Section 1.9.1 below and the Austrian and Finnish cases in fn. 695 referred to there.

687 Constitutional Council (Conseil constitutionnel) (France), decision of 4 December 2003, No 2003-485 DC, para. 17; Council of State (Conseil d'État) (France), judgment of 11 February 2015, *Ms S*, No 374167, FR:CESJS:2015:374167.20150211; and Migration Court of Appeal (Migrationsdomstolen) (Sweden), judgment of 14 January 2009, UM 4118-07, MIG:2009:4 (English summary) (hereinafter Migration Court of Appeal (Sweden), 2009, UM 4118-07, MIG:2009:4 (English summary)).

688 Constitutional Court (Verfassungsgerichtshof) (Austria), judgment of 12 March 2013, U1674/12, AT:VFGH:2013:U1674.2012 (English summary), para. 2.1.

689 Migration Court of Appeal (Sweden), 2009, UM 4118-07, MIG:2009:4 (English summary), op. cit., fn. 689, as quoted in ECRE et al., *Actors of protection and the application of the internal protection alternative*, op. cit., fn. 586, p. 59.

690 UNHCR, Guidelines on International Protection No 4, op. cit., fn. 613, paras 34–35.

691 Dörig, H., in Hailbronner and Thym (eds), *EU Asylum and Immigration Law: A commentary*, op. cit., fn. 186.

well-founded fear of being persecuted or is not at real risk of suffering serious harm' in that part of the country of origin (see Section 1.9.1.1.1 below). Alternatively, Article 8(1)(b) requires that the applicant 'has access to protection against persecution or serious harm as defined in Article 7' in that part of the country of origin (see Section 1.9.1.1.2 below). Therefore, Article 8(1)(b) focuses on whether an applicant has access to protection that embodies all the qualities that Article 7 requires of actors of protection, including willingness, ability, effectiveness and non-temporariness. This is of particular importance because, if an applicant has a **well-founded** fear of persecution or serious harm in their region of origin, the applicant can be considered to receive internal protection only if they have access to protection in another part of the country.

Article 8(1)(a) and (b) are expressed as **alternatives** (the text uses 'or'). This underlines the importance of understanding the final clause of Article 8(1) ('and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there') as enumerating other criteria that must be read in conjunction with Article 8(1)(a) and (b).

It is important to reiterate that the concept of internal protection is based on a distinction being made between the part of the country of origin where the applicant claims to have a well-founded fear of being persecuted or real risk of suffering serious harm (often the region of origin) and another part or parts of the country. When identifying the region of origin, the strength of the applicant's connections with this area needs to be assessed. Relevant factors in assessing this will include the circumstances that led to the applicant leaving their region of origin (where relevant)[692] and whether the applicant subsequently lived in and settled in another part or parts of the country before departure. In cases in which close connections have been established with a new area prior to departure, that area, rather than the person's area of birth and upbringing, will ordinarily be taken to be that person's region of origin.

One question that can arise is how, if at all, to apply the internal protection criteria to applicants who were born outside their country of origin and have lived abroad all their lives and for whom, accordingly, a region of origin in the country of origin cannot be identified. The Austrian Supreme Administrative Court has stated that, even though the concept of internal protection is regularly based on a distinction between an applicant's region of origin and another part of the country of origin, the criteria do not preclude a reasonableness assessment. The element of reasonableness of internal protection reflects the fact that an applicant who cannot return to their region of origin usually does not have the same financial and infrastructural resources, local knowledge and social networks in an area of proposed

692 The VwGH (Austria) has considered the original place of residence as the region of origin even in cases in which applicants lived in another part of their country of origin for a very long time but had to leave their region of origin because of internal displacement (so not by their own decision) and had no chance to return. See judgments of 28 June 2005, 2002/01/0414, AT:VWGH:2005:2002010414.X00; of 26 January 2006, 2005/01/0057, AT:VWGH:2006:2005010057.X00; and of 13 October 2006, 2006/01/0125, AT:VWGH:2006:2006010125.X00.

internal protection as they do in their region of origin. Thus, for applicants who have spent their whole lives living abroad, similar considerations may apply[693].

Figure 3 sets out the criteria that need to be met for internal protection to apply. These are examined in more detail in the subsections that follow.

Figure 3: Criteria of Article 8(1) that need to be met for internal protection to apply

1.9.1.1. Safety in a part of the country of origin

Article 8 does not refer to safety as such[694], but it is a useful shorthand to capture the gist of Article 8(1)(a) and (b).

The **existence of a safe area in the country of origin** is a central element of the notion of internal protection as set out in Article 8.

Safety within the meaning of Article 8(1)(a) relates to the condition that an applicant 'has no well-founded fear of being persecuted or is not at real risk of suffering serious harm' in that part of the country of origin (see Section 1.9.1.1.1). The second, alternative criterion (also concerned with safety) is set out in Article 8(1)(b) and concerns access to protection from persecution or serious harm (see Section 1.9.1.1.2).

1.9.1.1.1. Absence of well-founded fear of being persecuted (or suffering serious harm) (Article 8(1)(a))

Article 8(1)(a) requires that the applicant have no well-founded fear of being persecuted or not be at real risk of suffering serious harm in the part of the country suggested as offering internal protection. As a consequence, there will be no internal protection alternative if either the original well-founded fear of persecution persists there as well or there is a new form of

[693] VwGH (Austria), judgment of 23 October 2019, Ra 2019/19/0221, AT:VWGH:2019:RA2019190221.L02 (English summary). This case concerned an Afghan national born in Pakistan who had never lived in Afghanistan and had no ties to Afghanistan. As regards cases in which applicants have not lived in their region of origin for a long period, see the case of an Afghan who had fled to Pakistan at the age of 2 years and lived there until he came to Austria, in which the Constitutional Court (Verfassungsgerichtshof) (Austria), judgment of 25 February 2020, E3446/2019, AT:VFGH:2020:E3446.2019 (English summary), required the authorities to make an additional assessment of whether there were exceptional circumstances that might mean the applicant might be able to return to Afghanistan without being subjected to risk of violations of Articles 2 or 3 ECHR. In another case, concerning an Afghan family of six, the Supreme Administrative Court (Korkein hallinto-oikeus) (Finland), judgment of 7 February 2019, KHO:2019:22 (English summary), annulled the decision that the family could find internal protection in Kabul, because, inter alia, they had been living in Iran for 14 years, which meant that their return to Kabul could not be considered reasonable. The authorities were instructed to issue a residence permit on humanitarian grounds.

[694] Except in respect of travel and admittance ('and he or she can safely and legally travel to and gain admittance').

persecution or serious harm (unless access to protection is available pursuant to Article 8(1)(b)). This reading may also be further supported *mutatis mutandis* by the findings of the CJEU in *Abdulla*, which concerned the interpretation of Article 11(1)(e) QD (also Article 11(1)(e) QD (recast)) on cessation. The court concluded not only that the original circumstances that justified the person's fear of persecution should no longer exist, but also that the person should have 'no other reason to fear being "persecuted"'[695].

Member State case-law adopts a similar approach. According to the Swedish Migration Court of Appeal, it is vital to be satisfied that the applicant would not face other kinds of threats or other forms of persecution in the proposed area of internal protection[696]. In a similar vein, the CNDA (France) held, in two cases, that internal protection was not available for the female Somali applicants concerned, since women who flee violence in the southern and central regions of the country suffer from abuse or abductions when they find refuge in camps for internally displaced persons (IDPs)[697]. Likewise, UNHCR suggests that the assessment of whether the applicant is exposed to a risk of being persecuted or other serious harm upon relocation includes the original or any new form of persecution or serious harm in the area of relocation[698].

The state is assumed to have operational capacity to act across the national territory. Consequently, in cases involving the state as an actor of persecution or serious harm, the safety criterion, as set out in Article 8(1)(a), would normally not be fulfilled. Recital 27 provides that 'Where the State or agents of the State are the actors of persecution or serious harm, there should be a presumption that effective protection is not available to the applicant'. However, that presumption may be rebutted where the state is not able to carry out acts amounting to persecution or serious harm in certain areas of the country[699].

When **the actor of persecution or serious harm is a non-state actor** (see Section 1.7.3 above), the geographical scope of the risk of being persecuted or suffering serious harm should be evaluated first. In addition, the question of whether the actor of persecution or serious harm is likely to follow the applicant to the proposed area of internal protection should be answered. According to the Swedish Migration Court of Appeal, internal protection may only be considered in an area where the actor of persecution cannot threaten the person. If there is a real risk that the actor of persecution can reach the person, it is necessary to establish that state protection is available in the area[700]. When examining the ability of the actor of

695 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 76.

696 Migration Court of Appeal (Sweden), 2009, UM 4118-07, MIG:2009:4 (English summary), op. cit., fn. 689, quoted in ECRE et al., *Actors of protection and the application of the internal protection alternative*, op. cit., fn. 586, p. 59.

697 CNDA (France), judgment of 24 July 2012, No SOM08FSPVUL; and CNDA (France), judgment of 8 December 2011, No SOM09FSPVUL, quoted in ECRE et al., *Actors of protection and the application of the internal protection alternative*, op. cit., fn. 586, p. 15.

698 UNHCR, Guidelines on International Protection No 4, op. cit., fn. 613, para. 7. See also Colloquium on Challenges in International Refugee Law, 'The Michigan guidelines on the internal protection alternative', *Michigan Journal of International Law*, Vol. 21, No 131, 1999, pp. 134–141.

699 For examples of cases in which state actors were held not to have nationwide reach, see, for example, the case-law cited in fn. 552 to fn. 556 above concerning the situation in the regions of Puntland and Somaliland in Somalia, the Kurdish Regional Government in northern Iraq, and areas controlled by specific clans in Somalia or by rebel groups in Afghanistan, Colombia and Sri Lanka. See also High Court (Ireland), judgment of 16 July 2015, *KMA (Algeria)* v *Refugee Appeals Tribunal and Another*, [2015] IEHC 472.

700 Migration Court of Appeal (Sweden), 2009, UM 4118-07, MIG:2009:4 (English summary), op. cit., fn. 689, quoted in ECRE et al., *Actors of protection and the application of the internal protection alternative*, op. cit., fn. 586, p. 59.

persecution to reach a Kazakh applicant, the Dutch Council of State took into account the fact that the influence of the employer over the applicant did not extend throughout the country[701]. In Germany, in a case involving a female applicant from Afghanistan who claimed to be at risk of forced marriage, the Administrative Court of Augsburg pointed out, inter alia, that the applicant's father would know of his daughter's return to Kabul sooner or later, since this fact would circulate through tribal connections[702].

In a similar vein, in *DNM* v *Sweden* and *SA* v *Sweden*, the ECtHR examined, in the context of Article 3 ECHR, the geographical scope of the risk of ill treatment posed by family members in Iraq seeking to avenge the honour of their family. The ECtHR noted that one factor possibly making internal relocation less reasonable concerns situations in which a person is persecuted by a powerful clan or tribe with influence at governmental level. However, if the clan or tribe in question is not particularly influential, internal protection might be reasonable in many cases. The ECtHR observed the lack of evidence to support the applicants' claims that the families in question were particularly influential or powerful or had connections with the authorities in Iraq and thus would have the means and connections to find the applicant in the area of internal protection[703]. In *AAM* v *Sweden*, the ECtHR accepted that relocation to the Kurdistan Region of Iraq in early 2014 was a viable option for an applicant fearing ill treatment by Al-Qaeda in Mosul and other parts of Iraq where that organisation had a strong presence[704].

UNHCR has also emphasised the importance of assessing the 'reach' of the actor of persecution[705].

As explained earlier, Article 8(1)(a) has to be read in conjunction with the final sentence of Article 8(1) (see Sections 1.9.1.2 and 1.9.1.3 below).

1.9.1.1.2. Access to protection against persecution or serious harm (Article 8(1)(b))

The second, alternative criterion that needs to be met for internal protection to apply, which is also concerned with safety, is that set out in Article 8(1)(b). It requires the applicant to have access to protection against persecution or serious harm as defined in Article 7 QD (recast) within the proposed area of internal protection. Consequently, such internal protection must emanate from the actors of protection stipulated in Article 7(1) and be effective and non-temporary in accordance with Article 7(2). The analysis of Section 1.8 above thus equally applies when assessing protection against persecution or serious harm for the purpose of internal protection.

Effective protection should be **accessible** for the applicant within the area of internal protection, thus allowing the applicant to live without, for example, hiding their sexual

701 Council of State (Raad van State) (Netherlands), decision of 21 March 2013, No 201105922/1 (Kazakhstan), quoted in ECRE et al., *Actors of protection and the application of the internal protection alternative*, op. cit., fn. 586, p. 59.

702 Administrative Court of Augsburg (Germany), 2011, Au 6 K 11.30092 (English summary), op. cit., fn. 456.

703 ECtHR, 2013, *DNM* v *Sweden*, op. cit., fn. 562, para. 57; and ECtHR, 2013, *SA* v *Sweden*, op. cit., fn. 566, para. 56.

704 ECtHR, 2014, *AAM* v *Sweden*, op. cit., fn. 563, paras 66–74.

705 See UNHCR, Guidelines on International Protection No 4, op. cit., fn. 613, para. 18: 'It is not sufficient simply to find that the original agent of persecution has not yet established a presence in the proposed area. Rather, there must be reason to believe that the reach of the agent of persecution is likely to remain localised and outside the designated place of internal relocation.'

orientation or political or religious beliefs or restraining themselves in other important aspects of their private life or freedom of expression, of association, of religion, etc.[706].

In relation to state actors of persecution or serious harm, the same presumption as applies in the context of Article 8(1)(a) applies here (see Section 1.9.1.1.1 above).

When the ECtHR examines the appropriateness of (what it refers to as) an internal flight alternative or internal relocation (the latter in expulsion cases falling under Article 3 ECHR), it follows a similar approach. Hence, in *Chahal*, the ECtHR maintained that the applicant, of Sikh origin, was at particular risk of ill treatment within the Indian state of Punjab, but could not be considered safe elsewhere in India, as the police in other areas were also reported to be involved in serious human rights violations. The court was not persuaded, therefore, that the 'internal flight' option offered a reliable guarantee against the risk of ill treatment given 'in particular the attested involvement of the Punjab police in killings and abductions outside their State and the allegations of serious human rights violations which continue to be levelled at members of the Indian security forces elsewhere'[707]. In *Hilal*, the ECtHR similarly noted that it would not be safe for the applicant to relocate to mainland Tanzania. This was because 'the police in mainland Tanzania may be regarded as linked institutionally to the police in Zanzibar as part of the Union and cannot be relied on as a safeguard against arbitrary action' and because the situation there was 'far from satisfactory and discloses a long-term, endemic situation of human rights problems'[708].

UNHCR likewise considers that internal protection normally does not exist 'where the feared persecution emanates from, or is condoned or tolerated by State agents, including the official party in one party States'. Such actors 'are presumed to exercise authority in all parts of the country' and the local or regional bodies, organs or administrations within a state derive their authority from the state. Thus, it maintains:

> The possibility of relocating internally may be relevant only if there is clear evidence that the persecuting authority has no reach outside its own region and that there are particular circumstances to explain the national government's failure to counteract the localised harm[709].

As explained earlier, Article 8(1)(b) has to be read in conjunction with the final sentence of Article 8(1), which sets out further criteria (see Sections 1.9.1.2 and 1.9.1.3 below).

1.9.1.2. '[S]afely and legally travel to and gain admittance ...'

Even if part of the country of origin is safe for the applicant within the meaning of Article 8(1)(a) **or** protection is accessible to the applicant within the meaning of Article 8(1)(b), Article 8(1) imposes a further duty on Member States. They must establish, **in addition**, whether an applicant can 'safely and legally travel to and gain admittance to that part of the country and

[706] See, for example, Upper Tribunal (IAC) (United Kingdom), judgment of 26 January 2011, *SA (Political Activist – Internal Relocation) Pakistan*, [2011] UKUT 30, para. 15; and High Court (Ireland), judgment of 1 October 2014, *MCA v Refugee Appeals Tribunal and Others*, [2014] IEHC 504, para. 14.

[707] ECtHR (GC), 1996, *Chahal*, op. cit., fn. 369, para. 107.

[708] ECtHR, 2001, *Hilal v UK*, op. cit., fn. 227, para. 67. Hilal was from Pemba in Zanzibar, which has 'its own President, parliament and government and enjoys considerable autonomy' (para. 8).

[709] UNHCR, Guidelines on International Protection No 4, op. cit., fn. 613, paras 13–14.

can reasonably be expected to settle there'. This requirement can be split into two parts: that concerned with travel and admittance and that concerned with reasonableness.

The requirement that a person 'can safely and legally travel to and gain admittance to that part of the country' subdivides into three components, as set out in Figure 4.

Figure 4: Requirements concerning travel and admittance

With reference to the three aforementioned requirements, the Commission's proposal for the QD (recast) referred to the need to ensure the compatibility of the concept of internal protection with Article 3 ECHR, as interpreted in the ECtHR's judgment in *Salah Sheekh*[710]. The three requirements for evaluating access to internal protection have been applied by the ECtHR to a greater or lesser extent in *Salah Sheekh*, *Sufi and Elmi*, *MYH*, *KAB*, *AAM* and other cases falling under Article 3 ECHR[711]. In *Salah Sheekh*, the court observed that the authorities in three relatively safe areas of Somalia do not admit nationals who do not originate from those regions or have clan affiliations in that territory[712]. In *Sufi and Elmi*, the ECtHR concluded that a returnee could not safely travel to his region of destination within Somalia if he had to pass through an al-Shabaab-controlled area[713]. By contrast, in the case of the Kurdistan Region of northern Iraq, in 2014 the ECtHR ruled that there were direct flights from Sweden to that region and that all Iraqis, irrespective of ethnic origin or religious beliefs, were free to enter the three Kurdish governorates[714].

National courts that apply Article 8 also implement this requirement. The French Council of State finds it possible to deny protection to a person at risk of FGM if she has alternative

710 European Commission, QD (recast) proposal: explanatory memorandum, 2009, op. cit., fn. 409, p. 7.

711 ECtHR, 2007, *Salah Sheekh*, op. cit., fn. 682, paras 143–144; ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 267; ECtHR, judgment of 27 June 2013, *MYH and Others v Sweden*, No 50859/10, CE:ECHR:2013:0627JUD005085910 (hereinafter ECtHR, 2013, *MYH and Others v Sweden*), paras 64–66; ECtHR, judgment of 5 September 2013, *KAB v Sweden*, No 886/11, CE:ECHR:2013:0905JUD000088611 (hereinafter ECtHR, 2013, *KAB v Sweden*), paras 80–85; and ECtHR, 2014, *AAM v Sweden*, op. cit., fn. 563, paras 70–73.

712 ECtHR, 2007, *Salah Sheekh*, op. cit., fn. 682, para. 142.

713 ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 277.

714 ECtHR, 2014, *AAM v Sweden*, op. cit., fn. 563, paras 70 and 72.

protection in her country, which must satisfy the criteria of safe access, settlement and normal family life[715]. The German Federal Administrative Court has held that actual **accessibility** presupposes that there are viable transport connections (from the applicant's region of origin or from the host state, as appropriate) that can be used without disproportionate difficulties and also at costs that are neither impossible nor unreasonable for the applicant to bear[716]. The court clarified that a place of internal protection can be **safely** reached if a means of transport or a travel route are available and if their use does not expose the person concerned to a considerable probability of being exposed to the grasp of persecutory actors or of suffering serious harm[717]. Furthermore, a place of internal protection is **legally** accessible if it can be reached using legally usable transport connections; if the applicant is not required to behave illegally to reach the place of internal protection; and if the applicant is neither prohibited from travelling there nor subject to factually unjustified conditions (e.g. permits) that they cannot fulfil or can fulfil only under conditions that are unreasonable for them[718].

According to the Finnish Supreme Administrative Court, the assessment must examine whether potential violence and attacks in nearby regions may prevent or considerably complicate the ability to return to the proposed region of internal protection[719]. The individual can nevertheless be required to cooperate in the acquisition of transit visas[720]. Temporary non-availability of safe areas, for instance, as a result of intermittent transport links or typically surmountable difficulties in obtaining travel documents and transit visas are irrelevant[721]. The UK House of Lords requires that the applicant must be able to reach the internal protection area 'without undue hardship or undue difficulty'[722].

1.9.1.3. Reasonableness for the applicant to settle in a part of the country of origin

The remaining criterion contained in the final clause of Article 8(1) provides that internal protection will be available only if the applicant 'can reasonably be expected to settle' in the proposed area of internal protection. From the opening words of Article 8(1), it is clear that 'reasonableness' cannot be a free-standing criterion, since it is '**part of** the assessment of the application for international protection' (emphasis added). It must therefore be directly linked with the issue of whether protection against persecution exists. It is nevertheless a distinct criterion. The term 'settle' would appear to denote a stronger form of connection with an area than conveyed by the term 'stay', which was used in the original QD. Article 8(1) does not identify any further criteria for establishing what constitutes either 'can reasonably be expected' or 'to settle'.

715 Conseil d'État (France), 2012, *Ms DF*, No 332491 (English summary), op. cit., fn. 449.

716 BVerwG (Germany), 2021, No 1 C 4.20 , op. cit., fn. 683, para. 18.

717 BVerwG (Germany), 2021, No 1 C 4.20 , op. cit., fn. 683, para. 20.

718 BVerwG (Germany), 2021, No 1 C 4.20 , op. cit., fn. 683, para. 19.

719 Supreme Administrative Court (Korkein hallinto-oikeus) (Finland), judgment of 18 March 2011, KHO:2011:25 (English summary).

720 See, in this regard, Court of Appeal (England and Wales, United Kingdom), judgment of 23 October 2013, *HF (Iraq) and Others v Secretary of State for the Home Department*, [2013] EWCA Civ 1276, paras 99–104, per Lord Justice Elias.

721 BVerwG (Germany), judgment of 29 May 2008, No 10 C 11.07, DE:BVerwG:2008:290508U10C11.07.0, paras 19–20.

722 House of Lords (United Kingdom), judgment of 15 February 2006, *Januzi v Secretary of State for the Home Department*, [2006] UKHL 5 (hereinafter House of Lords (United Kingdom), 2006, *Januzi*), para. 47.

In the absence of relevant CJEU jurisprudence, ECtHR pronouncements that have applied very similar criteria, together with approaches advanced by courts and tribunals of Member States and UNHCR guidelines, offer some insight[723]. In general, all these sources tend to rely to a greater or lesser extent on a rights-based approach when performing the reasonableness test. The level to which basic human rights must be protected is nevertheless not clearly defined and remains open to debate[724].

Although the recasting of Article 8 in the 2011 directive drew heavily on the Strasbourg jurisprudence on the 'internal flight alternative', that jurisprudence is not necessarily to be equated with the criteria now set out in Article 8. Note that, at times, the ECtHR also uses the term 'internal relocation'. The *Salah Sheekh* case appears to indicate that, for the ECtHR, the key criterion is whether an issue under Article 3 ECHR arises because the applicant would be exposed to treatment at odds with Article 3 ECHR in the internal protection area[725]. This approach was further elaborated in *Sufi and Elmi*, in which the ECtHR did not recognise the proposed internal protection area because the conditions there amounted to inhuman treatment prohibited by Article 3 ECHR. It ruled:

> IDPs in the Afgooye Corridor have very limited access to food and water, and shelter appears to be an emerging problem as landlords seek to exploit their predicament for profit. Although humanitarian assistance is available in the Dadaab camps, due to extreme overcrowding access to shelter, water and sanitation facilities is extremely limited. The inhabitants of both camps are vulnerable to violent crime, exploitation, abuse and forcible recruitment.
>
> [...]
>
> The refugees in the Dadaab camps are not permitted to leave and would therefore appear to be trapped in the camps until the conflict in Somalia comes to an end. In the meantime, the camps are becoming increasingly overcrowded as refugees continue to flee the situation in Somalia[726].

In *AAM*, however, the ECtHR noted that internal relocation inevitably involves certain hardships and found no indication, based on the circumstances of the case, that the general living conditions in the relocation region for the applicant 'would be unreasonable or in any way amount to treatment prohibited by Article 3'[727]. At the same time, it would be too stringent to consider that internal protection is excluded only if an applicant faces a violation of a non-derogable right – such as that set out in Article 3 ECHR – in the alternative part of

723 UNHCR, Guidelines on International Protection No 4, op. cit., fn. 613, para. 24, states that '... it is necessary to assess the applicant's personal circumstances, the existence of past persecution, safety and security, respect for human rights, and possibility for economic survival'. See also Section 1.9.2.3.

724 As one commentator observed, 'there seems to be broad agreement that if life for the individual claimant in an [internal protection] would involve economic annihilation, utter destitution or existence below a bare subsistence level (*Existenzminimum*) or deny "decent means of subsistence" that would be unreasonable. On the other end of the spectrum, a simple lowering of living standards or worsening of economic status would not'. See Storey, H., 'The internal flight alternative test: the jurisprudence re-examined', *International Journal of Refugee Law*, Vol. 10, No 3, 1998, pp. 516 and 527, quoted in House of Lords (United Kingdom), 2006, *Januzi*, op. cit., fn. 724, para. 20.

725 ECtHR, 2007, *Salah Sheekh*, op. cit., fn. 682.

726 ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 291.

727 ECtHR, 2014, *AAM v Sweden*, op. cit., fn. 563, para. 73.

the country[728]. This is because the applicant already faces a well-founded fear of persecution in their region of origin. Hence, it is critical to ensure that the conditions in the alternative part of the country are not such as would compel the person concerned to return to the region of origin. As stated in *Sufi and Elmi*, in the absence of guarantees relating to travel to the alternative area concerned and ability to gain admittance and settle there, 'there is a possibility of his ending up in a part of the country of origin where he may be subjected to ill-treatment ...'[729].

The CJEU has yet to address the meaning of reasonableness in the context of Article 8 QD (recast). Currently, national case-law contains variations.

According to UK case-law[730], 'reasonable' means it should not be 'unduly harsh' to expect the applicant to relocate. According to the Austrian Supreme Administrative Court, the examination of reasonableness of internal protection must go further than establishing that an applicant will not face torture or inhuman or degrading treatment or punishment in a certain part of the country of origin. Rather, after possible initial difficulties, applicants must be able to establish themselves in the area of proposed internal protection and lead a life comparable to the lives of their compatriots, without undue hardship[731].

The German Federal Administrative Court has decided in several judgments that an applicant can reasonably be expected to stay in the internal protection area only if the basis for subsistence is sufficiently assured[732]. This standard for economic survival goes beyond the absence of an existential plight. The individual cannot be reasonably expected to lead a life at or close to the level of minimum subsistence and cannot be expected to ensure their economic subsistence by criminal activity[733]. However, in a 2021 decision, the same German court took a more restrictive view. It ruled:

> Settlement in a safe part of the country can be reasonably expected (reasonableness of settlement) if, in a comprehensive, evaluative overall assessment of the general and individual personal circumstances at the place of internal protection, there is a considerable probability that there are no other dangers or disadvantages which, in terms of their intensity and severity, are equivalent to an impairment of a legal interest relevant to international protection, and there is also no other threat of intolerable hardship. The securing of economic existence at the place of internal protection is to be given special importance.
>
> The economic subsistence level at the place of internal protection must only be guaranteed at a level that does not give rise to concerns of a violation of Article 3

728 See House of Lords (United Kingdom), judgment of 14 November 2007, *Secretary of State for the Home Department v AH (Sudan) and Others*, [2007] UKHL 49 (hereinafter House of Lords (United Kingdom), 2007, *AH (Sudan)*).

729 ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 266, referring to ECtHR, 2007, *Salah Sheekh*, op. cit., fn. 682, para. 141. See also ECtHR, judgment of 27 June 2013, *NMB v Sweden*, No 68335/10, CE:ECHR:2013:0627JUD006833510, para. 43.

730 See House of Lords (United Kingdom), 2006, *Januzi*, op. cit., fn. 724; and House of Lords (United Kingdom), 2007, *AH (Sudan)*, op. cit., fn. 730.

731 VwGH (Austria), judgment of 23 January 2018, Ra 2018/18/0001, AT:VWGH:2018:RA2018180001.L00.

732 BVerwG (Germany), 2013, No 10 C 15.12 (English translation), op. cit., fn. 198.

733 BVerwG (Germany), judgment of 1 February 2007, No 1 C 24.06, BVerwG:2007:010207U1C24.06.0, para. 11.

ECHR. Requirements going beyond this are not a necessary precondition for the reasonableness of settlement[734].

By contrast, a less restrictive view has been taken by the CNDA (France). It has held that the assessment of the reasonableness to settle has to take into account the effectiveness of respect for the most fundamental rights and freedoms, the economic and social conditions prevailing in the country and the personal situation of the applicant. The personal situation of the applicant includes, in particular, age; gender; possible disability or a particular situation of vulnerability; possible past or present links with the part of the territory where the applicant lives or current ties with the part of the territory in question; family ties and prospects for integration, in particular professional integration; and any previous persecution and its psychological effects. Certain factors that, in themselves, do not exclude internal protection may thus, by cumulative effect, preclude it. However, the mere standard of living or the deterioration of economic status cannot suffice to rule out any possibility of internal protection[735].

1.9.2. Requirements of examination (Article 8(2))

Article 8(2) QD (recast) details the requirements that Member States (and hence all decision-making bodies within Member States) must fulfil when determining whether internal protection is available to an applicant in a part of their country of origin.

These requirements concern the **prospective** nature of the assessment that needs to be made and the factors to be taken into consideration, that is, 'the general circumstances prevailing in that part of the country and ... the personal circumstances of the applicant'. However, before examining these in turn, it is worth first considering at what stage of assessment of an application for international protection an examination of internal protection has to take place. These requirements are set out in Table 31 and are examined in the sections that follow.

Table 31: Requirement of examination (Article 8(2))

1	Stage of examination	Section 1.9.2.1
2	Forward-looking assessment	Section 1.9.2.2
3	General circumstances in the part of the country of origin and personal circumstances of the applicant	Section 1.9.2.3

1.9.2.1. Stage of examination

The application of Article 8 QD (recast) on internal protection may be considered only where it has already been established that an applicant has a well-founded fear of being persecuted or is at risk of serious harm in their region of origin. It follows that the existence of a localised fear (risk) needs to be established **before** examining the existence of internal protection in another particular area. This approach is indispensable for an adequate assessment of the availability of internal protection in the applicant's individual circumstances. This concerns particularly the assessment of the ability or otherwise of actors of persecution or serious harm to pursue and/or locate the applicant in another part of the country, and the feasibility of safe and legal travel

[734] BVerwG (Germany), 2021, No 1 C 4.20, op. cit., fn. 683 (unofficial English translation). See also Dörig, H., commentary on Article 8 Directive 2011/95, para. 16, in Hailbronner and Thym (eds), *EU Asylum and Immigration Law: A commentary*, op. cit., fn. 186.

[735] CNDA, Grande Formation (France), judgment of 15 June 2021, *M. S.*, No 20029676 (hereinafter CNDA, Grande Formation (France), 2021, *M. S.*, No 20029676), para. 18.

to that area. This approach also means that, if an applicant has not established a well-founded fear of persecution or real risk of serious harm in their region of origin, there is no need for the national court or tribunal to go on to consider internal protection.

1.9.2.2. Forward-looking assessment

Article 8(2) QD (recast) first requires Member States to assess the availability of internal protection **'at the time of taking the decision on the application'**[736].

Second, following from the need to establish whether there is a well-founded fear or real risk of serious harm and the requirement that, in accordance with Article 7(2), protection must be effective and of a non-temporary nature, there must be a forward-looking assessment of internal protection. As a Hungarian court observed:

> [The] authority has to make sure that the applicant would not be at risk of persecution or serious harm in the proposed region ... 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 shifting front lines may render previously safe areas unsafe as the situation changes[737].

1.9.2.3. General circumstances in the part of the country of origin and personal circumstances of the applicant

Article 8(2) requires Member States, when applying Article 8(1), to 'have regard to the **general circumstances prevailing in that part of the country** and to the **personal circumstances of the applicant** in accordance with Article 4' (emphasis added). Article 4(3)(a) requires the taking into account of 'all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied'. Article 4(3)(c) obliges decision-makers to take into account 'the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm'. Article 8(2) specifies that such an assessment needs to ensure that 'precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office'.

Although in *Abdulla* the CJEU was concerned with the issue of cessation of refugee status, its guidance as regards consideration of **general circumstances** also applies to the protection aspects of Articles 7 and 8 QD (recast). The court said that assessment of general circumstances requires verification of:

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736 By virtue of Article 46(3) APD (recast), an effective remedy against a negative decision requires there to be 'a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to [the QD (recast)], at least in appeals procedures before a court or tribunal of first instance'.

737 Administrative and Labour Court of Budapest (Hungary), judgment of 11 October 2011, 6.k.34.830/2010/19 (unofficial translation), quoted in ECRE et al., *Actors of protection and the application of the internal protection alternative*, op. cit., fn. 586, p. 59. The timing of the internal protection alternative assessment is elaborated in UNHCR, Guidelines on International Protection No 4, op. cit., fn. 613, para. 8: 'the determination of whether the proposed internal flight or relocation area is an appropriate alternative in the particular case requires an assessment over time, taking into account not only the circumstances that gave rise to the persecution feared, and that prompted flight from the original area, but also whether the proposed area provides a meaningful alternative in the future'.

> the conditions of operation of, on the one hand, the institutions, authorities and security forces and, on the other, all groups or bodies of the third country which may, by their action or inaction, be responsible for acts of persecution against the recipient of refugee status if he returns to that country. In accordance with Article 4(3) of the Directive, relating to the assessment of facts and circumstances, those authorities may take into account, inter alia, the laws and regulations of the country of origin and the manner in which they are applied, and the extent to which basic human rights are guaranteed in that country[738].

In relation to unaccompanied minors, recital 27 QD (recast) states that 'the availability of appropriate care and custodial arrangements, which are in the best interests of the unaccompanied minor', must form 'part of the assessment as to whether ... protection is effectively available'.

While the CJEU has not yet pronounced on what the examination of **personal circumstances** involves in the Article 8(2) context, this requirement has been addressed by the courts and tribunals of Member States when applying the QD[739]. According to the Czech Supreme Administrative Court, when considering internal protection, it is necessary to examine whether protection is available from a legal and factual point of view with regard to the particular situation of the applicant[740]. As demonstrated by a number of judgments in different Member States, areas that, in general, might be regarded as possible internal protection areas may not be viable for a particular applicant due to their personal circumstances. For example, in Belgium, internal protection was not recognised as being a viable option for an applicant from Georgia with a significant history of psychopathological and psychological issues[741]. In a case in Czechia, the Supreme Administrative Court noted that the applicant was from the Democratic Republic of the Congo and was an unaccompanied woman and wife to a prominent political leader representing the interests of their ethnic groups. The court treated these personal characteristics as among those that were most important in showing she did not have a viable internal protection alternative[742]. In a case in Finland, it was ruled that the applicant, who for the first part of his life lived in a Hazara village in Afghanistan and later lived in Iran, could not reasonably be expected to settle in other parts of Afghanistan[743].

In Austria, the Constitutional Court considered the case of a minor (Afghan) appellant and the question of whether he had an internal protection alternative in the city of Herat or Mazar-i-Sharif. It found that it was important to take into account that he was a particularly vulnerable person (by reference to the definition of vulnerable persons in Article 21 Directive 2013/33/

738 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 71. European Commission, Proposal for a qualification regulation, op. cit., fn. 3, includes a new para. 4, which states 'When considering general circumstances prevailing in that part of the country which is the source of the protection as referred to in Article 7, the accessibility, effectiveness and durability of that protection shall be taken into account'. For concrete examples of general circumstances in this context, see EASO, *Practical guide on the application of the internal protection alternative*, May 2021, p. 17.

739 See, for example, Upper Tribunal (IAC) (United Kingdom), judgment of 31 January 2013, *CM (EM Country Guidance; Disclosure) Zimbabwe CG*, [2013] UKUT 00059.

740 Supreme Administrative Court (Czechia), 2013, *IJ* v *Minister of the Interior*, No 4, Azs 24/2013-34 (English summary), op. cit., fn. 610.

741 RVV/CCE (Belgium), judgment of 30 June 2011, No 64.233, para. 5.4.2.

742 Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 24 January 2008, *EM* v *Ministry of Interior*, No 4, Azs 99/2007-93 (English summary).

743 Supreme Administrative Court (Finland), KHO:2011:25, op. cit., fn. 470.

EU)[744]. For the Norwegian Supreme Court, it was important to take into account the fact that the applicant was a minor. It held that less evidence that internal flight is unreasonable is required for a child than for a young man[745]. In a case concerned with Afghan Sikhs, the Upper Tribunal (United Kingdom) decided that 'access to appropriate education for children in light of discrimination against Sikh and Hindu children and the shortage of adequate education facilities for them' was relevant when considering internal protection for Sikh and Hindu followers in Afghanistan[746].

In another Norwegian case, the Borgarting Court of Appeal found that it was not reasonable to expect an applicant from Somalia to settle in Puntland or Somaliland because he did not belong to a majority clan and would therefore not be able to support himself there[747]. In the United Kingdom, an applicant who was traumatised and suffering from anxiety and depression was regarded as having more vulnerable personal circumstances than women in Kampala, Uganda, in general[748]. The applicant's appeal was therefore allowed on the grounds, inter alia, that there was no internal protection in another part of the country of origin.

The ECtHR has applied similar criteria in expulsion cases under Article 3 ECHR. For example, in *MYH* it took into account the personal circumstances of the family of three applicants, including their Christian religion, the couple's old age, their bad health, the 'risk of gender-related ill-treatment' of two of the family members, their poverty and their lack of economic and social links to the Kurdistan Region. The court concluded, however, that relocation would be reasonable in all the circumstances, since neither the general situation in that region nor any of the personal circumstances taken into account indicated the existence of a real risk of ill treatment[749].

According to UNHCR, 'the personal circumstances of an individual should always be given due weight in assessing whether it would be unduly harsh and therefore unreasonable for the person to relocate in the proposed area'[750].

The EASO *Practical guide on the application of the internal protection alternative* gives examples of 'personal circumstances' in the context of Article 8(2)[751].

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744 Constitutional Court (Verfassungsgerichtshof) (Austria), judgment of 24 February 2021, E3948/2020, AT:VFGH:2021:E3948.2020.

745 Supreme Court (Høyesterett) (Norway), judgment of 18 December 2015, HR-2015-02524-P, No 2015/203 (English translation), para. 86.

746 Upper Tribunal (IAC) (United Kingdom), judgment of 3 November 2015, *TG and Others (Afghan Sikhs persecuted) Afghanistan CG*, [2015] UKUT 00595.

747 Borgarting Court of Appeal (Norway), judgment of 23 September 2011, *Abid Hassan Jama v Utlendingsnemnda*, 10-142363ASD-BORG/01 (English translation).

748 Court of Appeal (England and Wales, United Kingdom), judgment 22 May 2008, *AA (Uganda) v Secretary of State for the Home Department*, [2008] EWCA Civ 579, paras 22–33.

749 ECtHR, 2013, *MYH and Others v Sweden*, op. cit., fn. 713, paras 68–73.

750 In UNHCR's view, 'depending on individual circumstances, those factors capable of ensuring the material and psychological well-being of the person, such as the presence of family members or other close social links in the proposed area, may be more important than others [...] Psychological trauma arising out of past persecution may be relevant in determining whether it is reasonable to expect the claimant to relocate in the proposed area' (UNHCR, Guidelines on International Protection No 4, op. cit., fn. 613, paras 25–26). European Commission, Proposal for a qualification regulation, op. cit., fn. 3, includes a new subpara. 4, which states 'When considering personal circumstances of the applicant, health, age, gender, sexual orientation, gender identity and social status of whether living in the part of the country of origin regarded as safe would not impose undue hardship on the applicant.'

751 EASO, *Practical guide on the application of the internal protection alternative*, 2021, op. cit., fn. 741, p. 17.

1.10. International protection needs arising *sur place* (Article 5)

Section 1.10 concerns Article 5 QD (recast) and has four subsections, as set out in Table 32.

Table 32: Structure of Section 1.10

Section	Title	Page
1.10.1	Overview	206
1.10.2	Applications based on events occurring in the country of origin (Article 5(1))	208
1.10.3	Applications based on post-flight activities of the applicant (Article 5(2))	209
1.10.4	Subsequent applications (Article 5(3))	224

1.10.1. Overview

The concept of refugee *sur place* is a long-established feature of refugee law[752]. It was included in the 2001 Commission proposal (draft Article 8) that contained similar rules to those now set out in Article 5(1) and (2) QD (recast)[753]. Article 5(3) was introduced during Council negotiations[754]. Article 5 QD (recast) provides as follows.

Article 5 QD (recast)

International protection needs arising *sur place*

1. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.

2. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which the applicant has engaged in since he or she left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.

3. Without prejudice to the [Refugee] Convention, Member States may determine that an applicant who files a subsequent application shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin.

As is apparent in Table 33, each paragraph of Article 5 has a specific scope of application.

752 UNHCR, *Handbook*, op. cit., fn. 103, paras 94–96.

753 European Commission, QD proposal: explanatory memorandum, 2001, op. cit., fn. 266, p. 43.

754 See Dörig, H., in Hailbronner and Thym (eds), *EU Asylum and Immigration Law: A commentary*, op. cit., fn. 186, p. 1143, referring to Council Doc. 14643/02 of 26 November 2002, p. 9.

Table 33: Article 5 QD (recast): scope of application

Article	Nature of the provision	Scope of application
Article 5(1)	Mandatory	Applications for international protection (whether considered for refugee protection or for subsidiary protection)
Article 5(2)	Mandatory	Applications for international protection (whether considered for refugee protection or for subsidiary protection)
Article 5(3)	Optional	Subsequent applications for international protection (assessment for refugee protection only)

As illustrated above and implied by recital 25[755], Article 5(1) and (2) are mandatory[756], whereas Article 5(3) is optional[757]. Therefore, a Member State that rejects an application for international protection merely on the ground that it is based on events that have taken place since the applicant left the country of origin and/or based on activities that the applicant has engaged in since they left the country of origin would be in breach of the QD (recast).

It is also important to emphasise that Article 5 must be interpreted in conjunction with Article 4(3)(d) QD (recast). See Section 1.10.3.

A person who was not exposed to a risk of persecution or serious harm when they left their country of origin, but who becomes exposed to such a risk in the country of origin at a later date, may qualify as a refugee *sur place* or a subsidiary protection beneficiary *sur place*. As long as they remain outside their country of origin, a person can become a **refugee *sur place*** – or a beneficiary of subsidiary protection *sur place* – in one of two ways. This may be due to 'events which have taken place since the applicant left the country of origin' (Article 5(1)), for example significant changes in the country of origin such as a *coup d'état*. Alternatively, it can be because of 'activities which the applicant has engaged in since he or she left the country of origin' (Article 5(2)). Such activities may include actions taken by, or affecting, the applicant outside the country of origin, for example because of the individual's dissident political behaviour as perceived by the authorities in the country of origin. The analysis below refers to Article 5(2) activities as 'post-flight activities'.

There is no clear-cut distinction between applications based on events occurring in the country of origin (Article 5(1)) and applications based on post-flight activities of the applicant (Article 5(2)). Quite often the conditions in the country of origin worsen and, at the same time (or even because of this worsening), an applicant engages in post-flight activities. The relevant question in such cases is whether the change of circumstances in the country of origin and the post-flight activities of an applicant, considered together, result in a well-founded fear of being

755 Recital 25 QD (recast) stipulates 'In particular, it is necessary to introduce **common concepts** of protection needs arising *sur place* ...' (emphasis added).

756 Although Article 5(1) and (2) use the word 'may', they are not permissive, but simply intended to be illustrative of forms of well-founded fear of being persecuted and real risk of suffering serious harm, which are the mandatory conceptual elements for engaging the relevant form of international protection status. See also IARLJ, *A mll for refugee law judges relating to the European Council Qualification Directive 2004/84/EC and European Council Procedures Directive 2005/85/EC*, 2007 (hereinafter IARLJ,), p. 51; Battjes, H., *European Asylum Law and International Law*, Martinus Nijhoff, Leiden, 2006, p. 544; *contra* Hailbronner and Alt, 'Council Directive 2004/83/EC, Articles 1–10', op. cit., fn. 415, p. 1040.

757 Denial of refugee status under Article 5(3) QD (recast) may leave open the question of whether the applicant meets the conditions for subsidiary protection.

persecuted for reasons of an actual or imputed ground listed in Articles 2(d) and 10 QD (recast) or a real risk of suffering serious harm as defined in Article 15[758].

1.10.2. Applications based on events occurring in the country of origin (Article 5(1))

Article 5(1) QD (recast) is mandatory. Member States must recognise a person as a refugee or beneficiary of subsidiary protection on the basis of events that have taken place since the applicant left the country of origin if these events result in a well-founded fear of being persecuted or in a real risk of suffering serious harm in the country of origin. The systematic context of this provision indicates that Article 5(1) covers events that occur independently of any activities undertaken by the applicant since leaving the country of origin[759].

These events include situations of a **significant change of circumstances in the country of origin**, such as a change of government, at a time when the applicant is abroad for reasons wholly unrelated to a need for international protection such as for vacation, studies or business[760]. They also include **situations that involve the dramatic intensification of pre-existing factors** since the departure of the applicant from the country of origin[761]. In this scenario, the applicant may have been aware of the disturbing events in their country of origin at the moment of their departure, or their departure may even have been motivated by them, but a well-founded fear of being persecuted or a real risk of suffering serious harm upon return exists only due to the escalation of events post-departure.

The words 'events which have taken place' in Article 5(1) QD (recast) will ordinarily concern those occurring in the country of origin[762]. However, that may not necessarily always be so. For instance, assassination of a government minister in a third country or a significant change of circumstances in the states neighbouring the country of origin (e.g. a civil war) may also be relevant.

1.10.3. Applications based on post-flight activities of the applicant (Article 5(2))

Article 5(2) QD (recast) is also mandatory insofar as it specifies the following.

Article 5(2) QD (recast)

A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which the applicant has engaged in since he or she left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.

758 See, *mutatis mutandis*, ECtHR, judgment of 15 May 2012, *SF v Sweden*, No 52077/10, CE:ECHR:2012:0515JUD005207710 (hereinafter ECtHR, 2012, *SF v Sweden*), paras 67–68; the same position was taken by the Supreme Administrative Court (Poland), judgment of 14 December 2005, II OSK 1081/05.

759 Hailbronner and Alt, 'Council Directive 2004/83/EC, Articles 1–10', op. cit., fn. 415, p. 1040. In other words, Article 5(1) QD (recast) is about events and not the activities undertaken by the applicant.

760 Hailbronner and Alt, 'Council Directive 2004/83/EC, Articles 1–10', op. cit., fn. 415, p. 1041. For specific examples, see Hathaway, J. C., *The Law of Refugee Status*, Butterworths, Oxford, 1991, pp. 33–34.

761 Hailbronner and Alt, 'Council Directive 2004/83/EC, Articles 1–10', op. cit., fn. 415, p. 1041. For specific examples, see Hathaway, J. C., The Law of Refugee Status, Butterworths, Oxford, 1991, pp. 34–35.

762 Hailbronner and Alt, 'Council Directive 2004/83/EC, Articles 1–10', op. cit., fn. 415, p. 1040.

Article 5 must be interpreted in conjunction with Article 4(3)(d) QD (recast), which requires any assessment to take into account the following.

Article 4(3)(d) QD (recast)

... whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country.

Article 5(2) differentiates between **two types of post-flight activities** of the applicant, as set out in Table 34. For convenience, this judicial analysis uses the terms 'continuation' type and 'brand new' type.

Table 34: Two types of post-flight activities under Article 5(2) QD (recast)

1	**'Continuation' type**	Post-flight activities that 'constitute the expression and continuation of convictions or orientations **already held in the country of origin**'
2	**'Brand new' type**	Post-flight activities that do not constitute the expression and continuation of such convictions or orientations and that **started only after the applicant left their country of origin**

The words 'in particular' in Article 5(2) suggest that the first type of post-flight activity serves to strengthen an application for international protection. However, the use of these words leaves open the possibility that the second type may also qualify.

The first, **'continuation', type of *sur place* activities** includes situations in which the low-level activity of the applicant in the country of origin does not in itself meet the threshold for a risk of being persecuted or suffering serious harm, but does so when coupled with *sur place* activities after departure from the country of origin[763]. However, the term 'held' does not mean that the conviction or orientation had to be actually expressed in the country of origin. A political conviction or a sexual orientation may not entail any particular activity at all. It is sufficient for the person concerned to have an inner conviction or belief, provided that such conviction or belief can be substantiated[764]. It is clearly very relevant to the assessment of international protection if an applicant can show that their post-flight activities constitute the expression and continuation of convictions or orientations that they already held in the country of origin[765]. The more an activity has been engaged in, or the greater the degree to which a conviction or orientation has already been held, in the country of origin, the easier it will be for the decision-maker to establish that post-flight activities are a continuation of pre-flight activities[766].

[763] See ECtHR, 2012, *SF v Sweden*, op. cit., fn. 761, paras 67–68. The applicant's activities in Switzerland constituted an additional reason to fear persecution upon return, as he was photographed in two pro-Tamil demonstrations.

[764] Hailbronner and Alt, 'Council Directive 2004/83/EC, Articles 1–10', op. cit., fn. 415, p. 1041.

[765] Hailbronner and Alt, 'Council Directive 2004/83/EC, Articles 1–10', op. cit., fn. 415. See also, *mutatis mutandis*, ECtHR, 2012, *SF v Sweden*, op. cit., fn. 761, paras 67–68; and ECtHR, judgment of 7 January 2014, *AA v Switzerland*, No 58802/12, CE:ECHR:2014:0107JUD005880212 (hereinafter ECtHR, 2014, *AA v Switzerland*), para. 41.

[766] Hailbronner and Alt, 'Council Directive 2004/83/EC, Articles 1–10', op. cit., fn. 415, p. 1041.

The second, **'brand new', type of *sur place* activities** may also be sufficient to meet the requirement of a well-founded fear of being persecuted or a real risk of suffering serious harm. 'Brand new' post-flight activities may apply to adults who can show they have converted to another religion; those who have adopted a 'Western' lifestyle that secures their basic rights and who would not be able to return to the lifestyle they had in their country of origin; or those who have changed their political opinion or acquired an opposing political opinion[767] while abroad. This may also apply to minor applicants who are not yet able to establish convictions because of their age[768].

Article 4(3)(d) QD (recast) requires decision-makers to take into account whether:

> the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country.

The CJEU has not yet had the opportunity to clarify the interpretation of Article 4(3)(d). However, there has been some consideration of its ambit by national courts and tribunals, and the ECtHR has considered the notion of such *sur place* activities in relation to Article 3 ECHR.

Before looking at this, it is necessary to clarify terminology. In national and ECtHR decisions, the language used to describe activities that have been engaged in for the sole or main purpose of creating the necessary conditions for an application for international protection has varied. It has included terms such as 'opportunistic', 'self-serving', 'bad faith', 'manufactured' and 'bootstrap [refugees]'. While the preference in this analysis is to use the term 'opportunistic', what each of these terms seeks to identify is actions deliberately undertaken by an applicant in the knowledge that they may result in a risk of persecution or serious harm and, in that way, create the conditions that would allow them to qualify for international protection when they otherwise would not.

Considering national decisions first, the Court of Appeal (England and Wales, United Kingdom), having regard to Articles 4 and 5 QD, held that a difference exists between activities *sur place* in the country of asylum 'pursued by a political dissident against his or her own government', which 'may expose him or her to a risk of ill-treatment on return', and activities that 'are pursued with the motive not of expressing dissent, but of creating such a risk or aggravating such a risk'[769]. However, it opined that the QD should not be interpreted to prevent a priori a claim based on opportunism. Instead, the QD requires an assessment of whether the authorities in the country of origin are likely to observe and record the applicant's activities and recognises that those 'authorities [may] realise, or be able to be persuaded, that the activity was insincere' and therefore that 'the fear of consequent ill-treatment may be ill-founded'[770].

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767 For instance, due to the deteriorating situation in the country of origin or due to the exposure to new information not available in the country of origin.

768 See Hailbronner and Thym (eds), *EU Asylum and Immigration Law: A commentary*, op. cit., fn. 186, p. 1144, referring to the Joint Position of 4 March 1996 on the harmonised application of the term 'refugee', op. cit., fn. 189.

769 Court of Appeal (England and Wales, United Kingdom), judgment of 15 April 2008, *YB (Eritrea) v the Secretary of State for the Home Department*, [2008] EWCA Civ 360 (hereinafter EWCA (United Kingdom), 2008, *YB (Eritrea)*), para. 13.

770 EWCA (United Kingdom), 2008, *YB (Eritrea)*, op. cit., fn. 772, paras 14–15.

The ECtHR has dealt with the notion of *sur place* activities in the context of interpreting Article 3 ECHR. In *SF* v *Sweden*[771], *AA* v *Switzerland*[772], *HS and Others* v *Cyprus*[773], *FG* v *Sweden*[774] and *AA* c *Suisse*[775], the ECtHR has addressed both the 'continuation' type and the 'brand new' type of *sur place* activities. In *FG* v *Sweden*, the ECtHR observed:

> In respect of *sur place* activities, … it is generally very difficult to assess whether a person is genuinely interested in the activity in question, be it a political cause or a religion, or whether the person has only become involved in it in order to create post-flight grounds …[776].

The court referred to UNHCR guidelines, stating:

> So-called 'self-serving' activities do not create a well-founded fear of persecution on a Convention ground in the claimant's country of origin, if the opportunistic nature of such activities will be apparent to all, including the authorities there, and serious adverse consequences would not result if the person were returned[777].

The abovementioned five ECtHR judgments operate as persuasive arguments in interpreting the concepts of refugee *sur place* and beneficiary of subsidiary protection *sur place*. As always, use of ECtHR case-law in the context of the QD (recast) should be approached with care, since the ECtHR interprets neither the Refugee Convention nor the QD (recast). Indeed, in the aforementioned cases, the court considers whether opportunistic activities can expose an applicant to ill treatment despite Article 3 ECHR[778]. At the same time, Article 9 QD (recast) defines acts of persecution in terms of violations of human rights, and Article 9(1) clearly encompasses severe violations of basic human rights, in particular non-derogable rights such as those under Article 3 ECHR. Due to the absolute character of Article 3 ECHR, the distinction between 'good faith' and 'bad faith' is never decisive for the ECtHR. Its focus is always on whether or not there is a real risk of a violation[779].

While the CJEU has yet to rule on the issue, the wording of Article 4(3)(d) would appear to require assessment of whether *sur place* activities give rise to persecution or serious harm, **irrespective** of whether conducted in good or bad faith. It remains that applicants who have

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771 ECtHR, 2012, *SF v Sweden*, op. cit., fn. 761, paras 62–71.

772 ECtHR, 2014, *AA v Switzerland*, op. cit., fn. 768, paras 38–43.

773 ECtHR, judgment of 21 July 2015, *HS and Others v Cyprus*, No 41753/10 and 13 other applications, CE:ECHR:2015:0721JUD004175310, para. 277.

774 ECtHR (GC), judgment of 23 March 2016, *FG v Sweden*, No 43611/11, CE:ECHR:2016:0323JUD004361111 (hereinafter ECtHR (GC), 2016, *FG v Sweden*), paras 123 and 144–158.

775 ECtHR, judgment of 5 November 2019, *AA c Suisse*, No 32218/17, CE:ECHR:2019:1105JUD003221817.

776 ECtHR (GC), 2016, *FG v Sweden*, op. cit., fn. 777, para. 123 (internal references omitted).

777 ECtHR (GC), 2016, *FG v Sweden*, op. cit., fn. 777, para. 123, referring to UNHCR, Guidelines on International Protection No 6: Religion-based refugee claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees, 28 April 2004, HCR/GIP/04/06 (hereinafter UNHCR, Guidelines on International Protection No 6), para. 36. The guidelines also note 'Under all circumstances, however, consideration must be given as to the consequences of return to the country of origin and any potential harm that might justify refugee status or a complementary form of protection. In the event that the claim is found to be self-serving but the claimant nonetheless has a well-founded fear of persecution on return, international protection is required.'

778 Moreover, it is not clear that the ECtHR attaches weight to the question of whether the *sur place* activities are manufactured or not. One may argue that the ECtHR just establishes the risk and, in that context, weighs the genuineness of the applicant's activities.

779 ECtHR (GC), 2016, *FG v Sweden*, op. cit., fn. 777, para. 156.

engaged in acts for the sole or main purpose of creating the necessary conditions for applying for international protection are seen to face a substantial evidentiary burden regarding their credibility[780]. However, the 'good faith / bad faith' dichotomy is relevant under Article 5(3) QD (recast) (see Section 1.10.4 below)[781].

Articles 5(2) and 4(3)(d) QD (recast) provide only limited legal criteria for assessing protection needs *sur place*. One set of indicators relevant to considering the genuineness of activity may relate to how long before submitting their asylum application the person converted, acquired or changed their lifestyle / political opinion and/or whether, at the time of the new activity, it was foreseeable that this might help their application[782].

From national case-law and the wider literature, it is possible to identify a number of relevant factors or indicators (some overlapping) that may usefully be borne in mind in considering such cases. They are set out in Table 35[783].

780 See, for example, Supreme Administrative Court (Poland), judgment of 25 November 2015, II OSK 769/14, when deciding on the fifth application of a Russian national from Chechnya – in which the applicant raised the new ground that he had become a follower of the Church of Scientology after leaving his country of origin – the court emphasised that the applicant did not put forward this fact in his previous applications (submitted in 2008 and 2010). See also EWCA (United Kingdom), 2008, *YB (Eritrea)*, op. cit., fn. 772, para. 18, holding 'If, for example, any information [regarding the claimant] reaching the embassy is likely to be that the claimant identified in a photograph is a hanger-on with no real commitment to the oppositionist cause, that will go directly to the issue flagged up by art 4(3)(d) of the Directive'; and Court of Appeal (England and Wales, United Kingdom), judgment of 28 October 1999, *Danian* v *Secretary of State for the Home Department*, [1999] EWCA Civ 3000, rejecting the 'conclusion that a refugee *sur place* who has acted in bad faith falls outwith the [Refugee] Convention and can be deported to his home country notwithstanding that he has a genuine and well-founded fear of persecution for a Convention reason and there is a real risk that such persecution may take place. Although his credibility is likely to be low and his claim must be rigorously scrutinised, he is still entitled to the protection of the Convention ...', per Lord Justice Buxton. See also High Court (Ireland), judgment of 27 April 2012, *HM* v *Minister for Justice and Law Reform*, [2012] IEHC 176; Hathaway and Foster, *The Law of Refugee Status*, op. cit., fn. 128, pp. 88–90; Goodwin-Gill and McAdam, *The Refugee in International Law*, op. cit., fn. 25, pp. 83–86; and IARLJ, *A manual for refugee law judges relating to the QD and APD*, op. cit., fn. 759, pp. 50–51.

781 See BVerwG (Germany), judgment of 18 December 2008, No 10 C 27.07, BVerwG:2008:181208U10C27.07.0 (English translation) (hereinafter BVerwG (Germany), 2008, No 10 C 27.07 (English translation)), paras 14ff.; BVerwG (Germany), judgment of 24 September 2009, No 10 C 25.08, BVerwG:2009:240909U10C25.08.0 (hereinafter BVerwG (Germany), 2009, No 10 C 25.08), paras 22ff.; and VGH Bavaria, judgment of 13 February 2019, 8 B 18.30257. For the practice of other courts, see, for example, Council of State (Raad van State) (Netherlands), judgment of 11 February 2016, 201410123/1/V2, NL:RVS:2016:435.

782 ECtHR, 2014, *AA* v *Switzerland*, op. cit., fn. 768, para. 41.

783 For cases in which the use of social media was a particularly relevant issue, see also those at the end of Section 1.10.3.4 below.

Table 35: Indicators for assessing protection needs in ***sur place*** claims based on post-flight activities of the applicant

Matters specific to the applicant	(i) The type of *sur place* activity involved[784]
	(ii) The extent of the *sur place* activity[785]
	(iii) The extent to which the *sur place* activity is either a continuation of convictions or orientations held in the country of origin or 'brand new'[786]
	(iv) Issues of political or religious conviction, gender, gender identity, sexual orientation, etc.[787]
Matters specific to the actor of persecution or serious harm	(v) Whether the alleged actor of persecution or serious harm knows about or could learn of the *sur place* activity[788]
	(vi) Whether the alleged actor of persecution or serious harm will view the *sur place* activity adversely[789] and whether there is a well-founded fear or real risk that such an actor will, as a consequence, inflict persecution or serious harm upon the applicant[790]
Matters specific to applications with an opportunistic element	(vii) The extent to which the *sur place* activity is opportunistic[791]
	(viii) The extent to which it will be obvious to the actors of persecution or serious harm that it is opportunistic (and whether, even if it will be, that will matter)[792]

With reference to the above table of indicators, the following subsections concern matters specific to the applicant (Section 1.10.3.1); those specific to the actor of persecution or serious harm (Section 1.10.3.2); and those specific to opportunistic *sur place* applications

784 It may be helpful to, for example, distinguish between low-level members or supporters of an opposition on the one hand (since the state authorities in some countries of origin will not seek to visit harm on low-level oppositionists or those who merely attend a rally) and important opposition figures (who almost always attract the attention of state authorities in the country of origin) on the other. Such claims are nevertheless highly contextual, since the state authorities in some countries of origin may view an entire expatriate community as opponents. See also, *mutatis mutandis*, ECtHR (GC), 2016, *FG v Sweden*, op. cit., fn. 777, paras 137 and 141.

785 Upper Tribunal (IAC) (United Kingdom), judgment of 1 February 2011, *BA (Demonstrators in Britain – risk on return) Iran CG*, [2011] UKUT 36 (hereinafter Upper Tribunal (IAC) (United Kingdom), 2011, *BA (Demonstrators in Britain – risk on return) Iran CG*), para. 64; and ECtHR (GC), 2016, *FG v Sweden*, op. cit., fn. 777, para. 141.

786 RVV/CCE (Belgium), 2015, No 150.548, op. cit., fn. 793.

787 ECtHR (GC), 2016, *FG v Sweden*, op. cit., fn. 777, para. 127; and UNHCR, *Amicus curiae* of the UNHCR on the interpretation and application of 'sur place' claims within the meaning of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees, 14 February 2017 (hereinafter UNHCR, *Amicus curiae* on the interpretation and application of *'sur place'* claims), paras 20 and 28.

788 EWCA (United Kingdom), 2008, *YB (Eritrea)*, op. cit., fn. 772, paras 13 and 18; UNHCR, *Amicus curiae* on the interpretation and application of *'sur place'* claims, op. cit., fn. 790, para. 26; and UNHCR, *Handbook*, op. cit., fn. 103, para. 96.

789 Upper Tribunal (IAC) (United Kingdom), 2011, *BA (Demonstrators in Britain – risk on return) Iran CG*, op. cit., fn. 788, para. 64.

790 EWCA (United Kingdom), 2008, *YB (Eritrea)*, op. cit., fn. 772, para. 13; Upper Tribunal (IAC) (United Kingdom), 2011, *BA (Demonstrators in Britain – risk on return) Iran CG*, op. cit., fn. 788, para. 64; RVV/CCE (Belgium), judgment of 10 August 2015, No 150.548 (hereinafter RVV/CCE (Belgium), 2015, No 150.548); High Court (Ireland), judgment of 28 May 2009, *FV v Refugee Appeals Tribunal and Another*, [2009] IEHC 268 (hereinafter High Court (Ireland), 2009, *FV v Refugee Appeals Tribunal and Another*), para. 37; ECtHR (GC), 2016, *FG v Sweden*, op. cit., fn. 777, para. 123; UNHCR, *Handbook*, op. cit., fn. 103, para. 96; UNHCR, Guidelines on International Protection No 6, op. cit., fn. 780, para. 36; and UNHCR, *Amicus curiae* on the interpretation and application of *'sur place'* claims, op. cit., fn. 790, paras 26 and 29.

791 EWCA (United Kingdom), 2008, *YB (Eritrea)*, op. cit., fn. 772, para. 13; High Court (Ireland), 2009, *FV v Refugee Appeals Tribunal and Another*, op. cit., fn. 793, para. 37; and UNHCR, *Amicus curiae* on the interpretation and application of *'sur place'* claims, op. cit., fn. 790, para. 26.

792 ECtHR (GC), 2016, *FG v Sweden*, op. cit., fn. 777, para. 123.

(Section 1.10.3.3). A final subsection examines *sur place* claims involving activities on social media (Section 1.10.3.4).

1.10.3.1. Matters specific to the applicant

As regards (i) (**the type of *sur place* activity involved**) and (ii) (**the extent of the *sur place* activity**) in Table 35 above, relevant questions will include the following.

- Is the *sur place* activity in the form of demonstrations, remarks reported in the press, social media postings, etc.?
- What is the extent of the activity (frequent/occasional)?
- Is the activity high profile / low profile, etc.[793]?

If such activity is considered marginal, this may mean that it is not known of by the authorities in the country of origin. Alternatively, it may mean that the authorities know of it but will not view it adversely or, if they do, that there is no real risk that the applicant will be persecuted or suffer serious harm. As with all the factors, country of origin information (COI) is vital. For example, the COI for some countries might show that whether opponents are viewed as high profile or low profile is highly material to the assessment of risk[794]. In other countries, the COI might show that the authorities view **any** opponents adversely.

With regard to (iii) (**the extent to which the *sur place* activity is either a continuation of convictions or orientations held in the country of origin or 'brand new'**) in Table 35 above, for some regimes, whether an applicant has a sustained pattern of *sur place* activity may be critical. For other regimes, just one occurrence of *sur place* activity will be sufficiently serious[795].

As regards (iv) in Table 35 above (**issues of political or religious conviction, gender, gender identity, sexual orientation, etc.**), even if the applicant has not previously been identified by the authorities of the country of origin, the way in which the applicant has spent their time in the host country may have a major effect on whether the authorities in the country of origin will identify or have identified them and will subject them to persecution or serious harm if they return. For example, if they have converted to a different religion in the host country and it is important to their new religious identity[796] to express this in their lives and actions wherever they live from now on, that may put them at risk if they return. The Austrian Supreme Administrative Court found that, for Afghan women who have adopted a 'westernised way of life' that would be perceived as transgressing social mores in Afghanistan and has become a fundamental part of their identity, it would be persecutory for them to have to suppress it[797].

[793] ECtHR (GC), 2016, *FG v Sweden*, op. cit., fn. 777, para. 141.

[794] See, for example, RVV/CCE (Belgium), 2015, No 150.548, op. cit., fn. 793, finding that the appellant's visibility as an opposition activist in Belgium, allied with his high profile in the country of origin, made it likely that the authorities there would be informed or would discover without difficulty his political activism in Belgium. Taking into account COI indicating that highly visible persons likely to come to the attention of the authorities were liable to have a well-founded fear of persecution, the council recognised the appellant as a refugee, paras 6.5.3–6.5.4 and 6.7.

[795] RVV/CCE (Belgium), 2015, No 150.548, op. cit., fn. 793.

[796] See, for example, Upper Tribunal (IAC) (United Kingdom), judgment of 20 February 2020, *PS (Christianity – risk) Iran CG*, [2020] UKUT 46, para. 111.

[797] VwGH (Austria), judgment of 22 March 2017, Ra 2016/18/0388, AT:VWGH:2017:RA2016180388.L00.

Furthermore, even if it is considered that they will not express their conviction or orientation overtly when they return, that will not necessarily be the end of the matter. The CJEU has established that applicants cannot be expected to conceal their religious or sexual orientation[798]. On the other hand, it may not be enough for an applicant to show they have adopted, for example, a new political or religious orientation. If, for example, they have adopted such an orientation purely as a device to create the necessary conditions for applying for international protection, then it could be concluded that they will not in fact seek to express that orientation on return and no question of whether they will conceal it arises[799]. This links to the issue of opportunistic claims (see Section 1.10.3.3 below).

Applications based on post-flight activities are commonly based on the activities of the applicant, but a claim may also arise indirectly from the actions of third parties. This is so, for instance, when political actions of third parties result in the risk of an applicant being persecuted or suffering serious harm by association with these third parties on the basis of imputed political opinion[800]. This notion of attribution of an adverse political opinion by a country of nationality or of former habitual residence is relevant also for *sur place* claims when an applicant faces the risk of being persecuted or suffering serious harm for an unauthorised departure or stay abroad (*Republikflucht*)[801]. Under this practice, if the sanction attached to the illicit travel abroad constitutes an act of persecution in accordance with Article 9 QD (recast) and the country of origin treats departure or stay abroad as an implied political opinion of disloyalty or defiance, the criteria of the refugee definition are satisfied[802]. Similarly, if the country of origin imposes severe sanctions for claiming asylum abroad (due to political opinion inferred from lodging an asylum application abroad), the act of applying for international protection alone may, in specific circumstances, lead to international protection needs arising *sur place*[803].

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798 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, paras 78–80; and CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, paras 74–76. See also Section 1.5.5.

799 For example, the Austrian Supreme Administrative Court has held that, if the applicant converted to another religion only for opportunistic reasons, it would generally not be expected that they would engage in religious activities endangering them upon return to the country of origin. In addition, it could not be assumed that they would have to conceal their religious identity; see VwGH (Austria), judgment of 12 June 2020, Ra 2019/18/0440, AT:VWGH:2020:RA2019180440.L00.

800 See, for example, AIT (United Kingdom), judgment of 19 May 2008, *HS (Terrorist Suspect – Risk) Algeria CG*, [2008] UKAIT 00048, para. 126. For further details, see Zimmermann, A. and Mahler, C., in Zimmermann (ed.), *The 1951 Convention and Protocol: A commentary*, op. cit., fn. 169, pp. 325–329; and Hathaway and Foster, *The Law of Refugee Status*, op. cit., fn. 128, p. 77. See also Section 1.6 on reasons for persecution. See also Supreme Court (Tribunal Supremo) (Spain), judgment of 24 February 2010, No 429/2007 (English summary), concerning a Moroccan who deserted the armed forces and who was granted refugee status in Spain. The Supreme Court upheld his refugee status, not on the basis of a well-founded fear on account of his activity as an army officer in his country of origin, but on the basis of how the Moroccan authorities had since manipulated his image in the media in order to defend national interests and to demonstrate the current damaged political relations between Morocco and Spain. His status was upheld on the grounds of imputed political opinion, in which case the existence of an actual political activity is not required. See Supreme Court (Tribunal Supremo) (Spain), judgment of 24 February 2010, No 429/2007 (English summary).

801 Grahl-Madsen, A., 'International refugee law today and tomorrow', *Archiv des Völkerrechts*, Vol. 20, No 4, 1982, p. 421.

802 UNHCR, *Handbook*, op. cit., fn. 103, p. 77.

803 See, for example, RVV/CCE (Belgium), judgment of 28 January 2009, No 22.144; or Court of Appeal (England and Wales, United Kingdom), judgment of 13 April 2011, *RM (Zimbabwe)* v *Secretary of State for the Home Department*, [2011] EWCA Civ 428. For a different view, see, for example, AIT (United Kingdom), judgment of 7 October 2005, *AA (Involuntary returns to Zimbabwe) Zimbabwe CG*, [2005] UKAIT 144, paras 35–36. For an example of a case in which it was considered that there was **not** such a risk, see Upper Tribunal (IAC) (United Kingdom), judgment of 2 June 2015, *BM and Others (Returnees-Criminal and Non-Criminal) DRC CG*, [2015] UKUT 293. For further details, see Hathaway and Foster, *The Law of Refugee Status*, op. cit., fn. 128, pp. 77–80.

1.10.3.2. Matters specific to the actor of persecution or serious harm

When considering matters specific to actors of persecution, it must be kept in mind that actors include all those actors within the meaning of Article 6 QD (recast). Thus, in some cases, consideration will need to be paid to whether non-state actors monitor or would otherwise come to learn of the *sur place* activities of applicants from their country of origin and whether the actors mentioned in Article 6(a) and (b) are willing and able to provide protection against persecution or serious harm by non-state actors.

As regards (v) in Table 35 above, this concerns the question of **whether the alleged actor of persecution or serious harm knows about or could learn of *sur place* activity**[804]. Identification will often be a key indicator, because, if the evidence indicates that an applicant will not be identified, then it will most likely not matter what the *sur place* activity is or what its contents are. However, the situation may be different in the case of a person who has, for example, gone to a church/mosque/temple regularly in the Member State, but where this fact is not known to the authorities of the country of origin. Such conduct may be relevant in assessing:

- whether, upon return, the observance of a certain religious practice in public is of particular importance to the person concerned in order to preserve their religious identity;
- whether, upon return, they would engage in religious practices that would expose them to a real risk of persecution or suffering serious harm[805].

Identification will always be a fact-sensitive question. It may be, for example, that the authorities in an applicant's country of origin monitor *sur place* activities, but this will not necessarily mean that they will be likely to spot the activity in question. If, for example, the activity is one-off or marginal (some private social media exchanges over one day, to take an extreme example), decision-makers may reasonably conclude it will not be spotted[806].

Also relevant to identification may be the issue of whether the actors of persecution or serious harm have the capacity to identify the applicant's *sur place* activities[807]. Pertinent questions here may include the following.

- Do they have the resources?
- Does the regime conduct surveillance/monitoring?

If it is a question of monitoring of social media, other pertinent questions may include the following.

[804] UNHCR, *Handbook*, op. cit., fn. 103, para. 96.

[805] CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 70.

[806] See, for example, in relation to both these issues, AIT (United Kingdom), judgment of 28 April 2009, *TL and Others (Sur Place Activities – Risk) Burma* v *Secretary of State for the Home Department CG*, [2009] UKAIT 00017, and AIT (Immigration Appellate Authority) (United Kingdom), judgment of 1 September 2008, *LM (Risks on Return) Republic of Congo (Congo-Brazzaville* v *Secretary of State for the Home Department CG*, [2008] UKAIT 00064, finding at para. 112: 'The test of whether there is a real risk continues to depend upon the individual's background and profile including in particular the extent of his political involvement and whether he has or is likely to come to the attention of the authorities'.

[807] See, for example, Upper Tribunal (IAC) (United Kingdom), judgment of 27 May 2021, *KK and RS (Sur place activities, risk) Sri Lanka CG*, [2021] UKUT 130 (hereinafter Upper Tribunal (IAC) (United Kingdom), 2021, *KK and RS (*Sur place *activities, risk) Sri Lanka CG*), paras 406–415.

- Do they have the capacity in terms of technical expertise and human resources to do more than focus on headline materials?
- Is the regime really going to devote time and resources to combing through social media and internet accounts?
- Alternatively, will they, as has been argued in some contexts, create a return mechanism that requires returnees to provide their social media passwords, etc.?

The next indicator ((vi) in Table 35 above) – closely linked to the first – is **whether the alleged actor of persecution or serious harm will view the *sur place* activity adversely and whether there is a well-founded fear or real risk that such an actor will, as a consequence, inflict persecution or serious harm upon the applicant**[808]. Assuming it is considered likely that the actors of persecution or serious harm already know about or would come to know about an applicant's *sur place* activities, then it only really matters if they are also likely to react negatively. This is sometimes put in terms of the question 'Will the authorities of the country of origin be adversely interested in such *sur place* activities?' For example, if the country of origin is a liberal democracy with a strong belief in free speech, its authorities might not care about the *sur place* activities in the least, unless they are perceived as terrorist, etc. Under a different scenario, the authorities might tolerate those in exile voicing criticisms when abroad so long as this does not have an impact on national politics. Alternatively, the regime in question may have virtually removed its population's access to the internet[809]. If, however, the regime is known to demand, for example, computer passwords on return, that may indicate it is still concerned about what its citizens abroad are posting, even if it routinely blocks global websites[810].

Among the questions arising here may be the following.

- If the applicant would be identified, is there a well-founded fear of persecution or a real risk of suffering serious harm?
- Would the actors of persecution or serious harm tolerate such activities?
- Will the actors of persecution or serious harm view such activity adversely, if they know there is a significant level of opportunistic *sur place* activity?

Even if the decision-maker decides that the actors of persecution or serious harm **will** identify the applicant and **will** view them adversely, **it is still necessary to establish a well-founded**

808 See, for example, UNHCR, Guidelines on International Protection No 6, op. cit., fn. 780, para. 36. This guidance highlights that 'self-serving' activities may not create a well-founded fear of persecution where 'the opportunistic nature of such activities will be apparent to all, including the authorities there, and serious adverse consequences would not result if the person were returned'. However, it adds: 'Under all circumstances, however, consideration must be given as to the consequences of return to the country of origin and any potential harm that might justify refugee status'. See also Hathaway and Foster, *The Law of Refugee Status*, op. cit., fn. 128, p. 90; Goodwin-Gill and McAdam, *The Refugee in International Law*, op. cit., fn. 25, p. 84; and IARLJ, *A manual for refugee law judges relating to the QD and APD*, op. cit., fn. 759, pp. 50–51. See also, *mutatis mutandis*, ECtHR (GC), 2016, *FG v Sweden*, op. cit., fn. 777, paras 144–158.

809 See, for example, US Department of State, *Iran 2019 Human Rights Report*, which states 'The government continued to implement the National Information Network (NIN, also known as SHOMA). As described by Freedom House, SHOMA enabled the government to reduce foreign internet connection speeds during politically sensitive periods, disconnect the network from global internet content, and disrupt circumvention tools.'

810 *The Washington Post*, Iranians protested. Then, the internet was cut, in a new global pattern of digital crackdown, 21 November 2019, reports that the Iranian authorities have developed their own domestic internet known as the National Information Network, which has become the gateway through which Iranians access global networks.

fear of persecution or a real risk of serious harm. For example, the state security services may be interested in inflicting harm on return only on those they consider to be high-profile activists or major opponents. The security services may well have a filtering process – using informers and/or monitoring. They may maintain a list and inflict acts of persecution or serious harm only on those on the list (if they return).

1.10.3.3. Matters specific to applications with an opportunistic element

Indicator (vii) in Table 35 above is only relevant when it is considered that an application has an opportunistic element. If it does, then it is necessary to consider **the extent to which the *sur place* activity is opportunistic**[811].

It may be best to look at *sur place* activities as existing along a continuum running from wholly genuine at the one end through to wholly opportunistic at the other end. The text of Article 4(3)(d) suggests such a continuum, at least to the extent that it refers to activities being engaged in 'for the sole or main purpose ...'. This wording also indicates that whether the purpose is 'sole or main' may be a material matter. If someone's *sur place* activities are not wholly opportunistic, then it will be very important not to overlook the genuine aspects. As the Norwegian Supreme Court noted, it may be difficult in terms of evidence to substantiate a person's motive for engaging in activities that may trigger a risk of persecution, and applicants for international protection have a right to engage in political activities while outside the country of origin[812].

Indicator (viii) in Table 35 above concerns **the extent to which it will be obvious to the actors of persecution or serious harm that it is opportunistic (and whether, even if it will be, that will matter)**. One key question in this context may be 'Will the actors of persecution or serious harm in the country of origin be likely to care that the activity was opportunistic and insincere?'[813].

1.10.3.4. *Sur place* activities and use of social media

In the case of *sur place* cases involving the use of social media, there may be a need, within the above framework, to consider indicators that are more specific to that context[814].

Table 36 lists indicators more specific to cases involving use of social media and websites.

811 See, for example, ECtHR (GC), 2016, *FG v Sweden*, op. cit., fn. 777, para. 123; and ECtHR, 2014, *AA v Switzerland*, op. cit., fn. 768, para. 41.

812 Supreme Court (Høyesterett) (Norway), judgment of 17 March 2017, HR-2017-569-A (English summary).

813 Recognised as a relevant factor by Hailbronner and Thym (eds), *EU Asylum and Immigration Law: A commentary*, op. cit., fn. 186, p. 1145, citing EWCA (United Kingdom), 2008, *YB (Eritrea)*, op. cit., fn. 772, para. 13. See also the treatment by the Upper Tribunal (United Kingdom) of opportunistic conversions to Christianity in Iranian cases in Upper Tribunal (IAC) (United Kingdom), 2020, *PS (Christianity – risk) Iran CG*, op. cit., fn. 799, paras 112–116.

814 This subsection draws heavily from materials produced by Julian Phillips for an IARMJ virtual seminar on *sur place* claims held in May/June 2020.

Table 36: Indicators specific to ***sur place*** activity using Facebook and/or other websites and social media platforms

Durability	How long will the post last? How long was it 'live'?
Visibility	How visible will such activity be (public/private settings, friends, 'shares', 'likes')?[815]
Malleability	How easily could the account have been altered to result in what is now visible not reflecting the real account?
Reliability	How does the decision-maker know that what is provided truly comes from the applicant's established social media profile?
State enquiries	What is known about the level of state security forces' interest in social media? Do they monitor expatriate activities, use 'false friends', etc.? What is the likelihood of enquiries on return, etc. (e.g. by requiring social media passwords to be provided)?

In considering such indicators, it may be helpful to distinguish between those concerning the examination of the applicant's circumstances and those relating to the actor of persecution or serious harm.

In relation to the applicant, salient questions may include the following.

- How can decision-makers be sure the social media account is authentic in the sense of being a true historical record of what was posted by an applicant?
- Can individuals delete their accounts?
- How easily could the account have been altered?
- In relation to the actors of persecution or serious harm, it may be important to ask the following questions.
- Does the country of origin's government, or do relevant non-state actors of persecution, have the capacity to monitor social media activity?
- Will they view social media posts that are critical of their government adversely and/or strive to ill treat any of its nationals responsible for such posts?
- Which social media platforms are used in the country (Facebook, WeChat, etc.)?
- Does/will the government question returnees about their social media use?
- What language do users of these websites typically write in?

In most cases, it may be necessary to have COI and other evidence relating to social media activities.

In terms of national case-law on these issues, the CNDA (France) granted refugee status to an applicant from Mauritania who had already been a famous rapper in his country of origin. The court considered that his activities on the internet and Facebook after his departure from Mauritania had worsened his position in the eyes of Mauritanian authorities[816]. In Germany, the Administrative Court in Dresden recognised a Venezuelan couple as refugees. The court noted that they had been interrogated by the Venezuelan secret services before they fled, and found that their opposition activities in exile would in all likelihood be known to the

[815] Upper Tribunal (IAC) (United Kingdom), 2020, *PS (Christianity – risk) Iran CG*, op. cit., fn. 799, concluded that, in the context of Christian coverts on return to Iran, 'one aggravating factor identified in the sources is "very outspoken" social media activity: this would have to project the personal commitment of the individual, rather than for instance simply "liking" posts by others' (para. 116).

[816] CNDA (France), judgment of 4 February 2016, *M. S.*, No 15016079.

secret services due to their being publicised on social media[817]. Similarly, the Administrative Court in Hannover recognised an applicant from Pakistan as a refugee on account of his active engagement in demonstrations and other actions in favour of the independence of Baluchistan while in exile. It found that the activities of such persons were widely publicised on social media and monitored by the Pakistani secret services[818]. In the course of giving guidance on Facebook accounts and social media evidence generally, the UK Upper Tribunal, in a 2022 decision[819], concluded that, even though the applicant had undertaken *sur place* activities in order to fabricate the grounds for a protection claim, these were sufficient for him to have become the subject of targeted social media surveillance by the Iranian authorities. While the tribunal did not consider that the evidence established that the Iranian authorities were able to monitor social media accounts on a large scale, it did show that they were able to conduct 'more focussed, ad hoc searches' confined to individuals who are of significant adverse interest[820].

1.10.4. Subsequent applications (Article 5(3))

Article 5(3) QD (recast)

Without prejudice to the [Refugee] Convention, Member States may determine that an applicant who files a subsequent application shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin.

Unlike Article 5(1) and (2), Article 5(3) is an **optional provision**. It is concerned with only subsequent applications and concerns only refugee status. It allows Member States 'normally' not to grant refugee status to an applicant:

- who files a subsequent application[821]; **and**
- whose 'risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin'[822].

These **two conditions** must be fulfilled cumulatively.

Based on the first condition, this provision relates only to applicants who have previously applied for international protection in the same Member State and whose application has been rejected after a final decision or whose international protection status has subsequently been revoked[823].

817 VG Dresden, judgment of 19 December 2019, 13 K 2390/18.A.

818 VG Hannover, judgment of 25 April 2019, 11 A 12311/17.

819 Upper Tribunal (IAC) (United Kingdom), judgment of 20 January 2022, *XX (PJAK – sur place activities – Facebook) Iran CG*, [2022] UKUT 23.

820 Ibid., paras 118 and 121.

821 In CJEU, judgment of 20 May 2021, *LR v Bundesrepublik Deutschland*, C-8/20, EU:C:2021:404, the court held 'The concept of "subsequent application" is defined in Article 2(q) [QD (recast)] as a further application for international protection made after a final decision has been taken on a previous application' (para. 34).

822 Note that the term 'subsequent application' is defined in Article 2(q) APD (recast). See also Article 33(2)(d) APD (recast) for its meaning in the context of inadmissible applications and Article 40 APD (recast) for the procedures governing subsequent applications.

823 See Article 2(q) APD (recast); EASO, *Asylum Procedures and the Principle of* Non-refoulement *– Judicial analysis*, 2018, Section 5.2.2.4.

Based on the second condition, its scope is confined to situations in which 'the risk of persecution is based on circumstances which the applicant **has created** by his or her own decision since leaving the country of origin' (emphasis added). Accordingly, it does not apply to a change in circumstances in the country of origin between the first application and the subsequent application for international protection when such a change is unconnected to the applicant.

Interpretation of Article 5(3) in conjunction with Articles 5(2) and 4(3)(d) suggests the following: if an applicant's activities since leaving the country of origin are a continuation of their activities before leaving the country of origin (that were not deemed sufficient in the first asylum application), the application cannot be rejected on the basis of Article 5(3). In such a case, the applicant's risk of persecution was indeed not based 'solely or mainly' on circumstances that they have created by their own decision since leaving the country of origin.

The word 'normally' can be interpreted in two ways.

On the one hand, some EU Member States take the view that this provision establishes the rule that persons are not to be granted refugee status if the conditions under Article 5(3) are met[824], and have introduced a statutory presumption against refugee status in the case of subsequent 'manufactured' *sur place* applications[825].

For instance, the German Federal Administrative Court, relying heavily on the Council's Joint Position of 4 March 1996[826], held that the creation of a risk of persecution through post-flight activities, if created after the first asylum proceedings, should fall under the **suspicion of abuse**[827]. The **critical date** for applying this rule is the date of the (unsuccessful) final decision in the previous procedure. Where the applicant, post-decision, has created the necessary conditions for applying for international protection, an abuse of the claim of refugee protection is presumed as a rule. However, this statutory presumption of abuse is **rebutted** if the applicant refutes the suspicion that, after the rejection of the first application, they developed or intensified post-flight activities solely or primarily with the aim of obtaining refugee status[828]. A special rule applies for **young applicants**, who can also rebut the statutory presumption of abuse if they can demonstrate that, during their first international protection procedure, they were not yet able – due to their youth and lack of maturity – to develop a firm political or other conviction[829]. The German Federal Administrative Court regards this position as being in accordance with the Refugee Convention[830].

On the other hand, some courts have argued that interpretation of Article 5(3) QD (recast) is limited by the caveat 'Without prejudice to the [Refugee] Convention' and that the Refugee Convention affords no licence to distinguish between the needs arising in an original and

824 See Hailbronner and Alt, 'Council Directive 2004/83/EC, Articles 1–10', op. cit., fn. 415, p. 1042. See also Dörig, H., commentary on Article 5 Directive 2011/95, paras 12–18, in Hailbronner and Thym (eds), *EU Asylum and Immigration Law: A commentary*, op. cit., fn. 186.

825 BVerwG (Germany), 2008, No 10 C 27.07 (English translation), op. cit., fn. 784, para. 14. See also Übersax, P. and Rudin, B. (eds), *Ausländerrecht*, Helbing Lichtenhahn Verlag, Basel, 2009, p. 542 (regarding Switzerland).

826 Joint Position of 4 March 1996 on the harmonised application of the term 'refugee', op. cit., fn. 189, paras 59ff.

827 BVerwG (Germany), 2008, No 10 C 27.07 (English translation), op. cit., fn. 784, para. 14.

828 Ibid.

829 See, for example, BVerwG (Germany), 2009, No 10 C 25.08, op. cit., fn. 784, paras 22ff.

830 BVerwG (Germany), 2008, No 10 C 27.07 (English translation), op. cit., fn. 784, paras 17ff.

subsequent application[831]. For instance, the Court of Appeal (England and Wales) held that Article 5(3) QD 'recognise[s] that opportunistic activity *sur place* is not an automatic bar to asylum' because the applicant, whose conduct in the United Kingdom has been entirely opportunistic:

> has … already been believed about his activity and (probably) disbelieved about his motive. Whether his consequent fear of persecution or ill-treatment is well-founded is then an objective question. And if it *is* well-founded, then to disbelieve him when he says it is a fear he now entertains may verge on the perverse[832].

The ECtHR judgments in *AA* v *Switzerland* and *FG* v *Sweden* are other examples of acceptance of *sur place* claims based exclusively on activities conducted between the first and subsequent asylum applications[833]. However, it is important to approach the *AA* and *FG* judgments with caution, as they concern protection from *refoulement* under Article 3 ECHR, whereas Article 5(3) QD (recast) provides a ground for denial of refugee status (protection from *refoulement* and denial of refugee status are two different things). In addition, many applicants may legitimately change or develop their views after their first application[834]. This applies, for instance, to applicants who were minors at the moment of their first asylum application[835].

831 See EWCA (United Kingdom), 2008, *YB (Eritrea)*, op. cit., fn. 772, para. 14, describing this provision as 'odd'. See also Hathaway and Foster, *The Law of Refugee Status*, op. cit., fn. 128, p. 84; Goodwin-Gill and McAdam, *The Refugee in International Law*, op. cit., fn. 25, p. 86; Bank, 'The transposition of the qualification directive in Germany', op. cit., fn. 220, p. 125; IARLJ, *A manual for refugee law judges relating to the QD and APD*, op. cit., fn. 759, p. 52; and Storey, H., 'The EU qualification directive: a brave new world?', *International Journal of Refugee Law*, Vol. 20, No 1, 2008, p. 27.

832 EWCA (United Kingdom), 2008, *YB (Eritrea)*, op. cit., fn. 772, para. 13. See also Council of State (Raad van State) (Netherlands), No 201410123/1/V2, op. cit., fn. 784.

833 ECtHR, 2014, *AA* v *Switzerland*, op. cit., fn. 768, paras 38–43; and ECtHR (GC), 2016, *FG* v *Sweden*, op. cit., fn. 777, paras 144–158.

834 See ECtHR (GC), 2016, *FG* v *Sweden*, op. cit., fn. 777, para. 123.

835 This is accepted even by the German Federal Administrative Court. See, for example, its judgment BVerwG (Germany), 2009, No 10 C 25.08, op. cit., op. cit., fn. 784, paras 22ff.

Part 2. Qualification for subsidiary protection

Part 2 has nine sections, as set out in Table 37.

Table 37: Structure of Part 2

Section	Title	Page
2.1	Introduction	228
2.2	Who is eligible for subsidiary protection?	232
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2.6	Actors of serious harm (Article 6)	302
2.7	Actors of protection against serious harm (Article 7)	302
2.8	Internal protection from serious harm (Article 8)	302
2.9	Subsidiary protection needs arising *sur place* (Article 5)	308

The decision tree on subsidiary protection in Appendix A aims, inter alia, to summarise the ground covered in Part 2.

2.1. Introduction

Subsidiary protection derives its legal basis from EU primary law (Article 78 TFEU). Article 78(2)(a) and (b) TFEU provides for the adoption of 'measures for a common European asylum system comprising' not only a uniform status of asylum but also 'a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection'.

In the implementation of Article 78(2) TFEU, the purpose of the QD (recast) is, inter alia, to lay down standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection.

In accordance with Article 2(a) QD (recast), 'international protection' means 'refugee status and subsidiary protection status as defined in points (e) and (g)'. The definition of 'international protection' therefore incorporates 'two separate systems of protection, namely the system governing refugee status and that relating to subsidiary protection status'[836].

Unlike refugee status, subsidiary protection does not derive from the Refugee Convention. It is instead unique to EU law. The criteria for qualification for subsidiary protection, which are set out in the QD (recast), have been drawn from 'international obligations under human rights instruments and practices existing in Member States'[837].

Among the most pertinent international obligations under human rights instruments relevant to subsidiary protection are Articles 2(1) and 3 ECHR, Article 3(1) Convention against Torture and

[836] CJEU, 2014, *HN*, op. cit., fn. 29, para. 26. See also CJEU, 2018, *Shajin Ahmed*, op. cit., fn. 33, para. 38.
[837] Recital 34 QD (recast).

Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Article 7 ICCPR, as set out below[838].

Articles 2(1) and 3 ECHR

2(1). Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

[...]

3. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 3(1) CAT

No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Article 7 ICCPR

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment ...

While these instruments enshrine the principle of *non-refoulement*, they do not provide a status for those who cannot be returned. In order to comply with these international obligations, prior to the adoption of the QD, individual Member States had afforded national 'subsidiary' or 'complementary' forms of protection to such persons. This had led to varying Member State protection systems. As a result, the Commission explained that the proposal for the QD 'ha[d] drawn from the disparate Member State systems and ha[d] attempted to adopt and adapt the best ones'[839]. The standards for granting subsidiary protection status and for determining the content of the protection granted set out in the QD (recast) thus aim to clarify and codify 'existing international and [European] Community obligations and practice'[840].

838 European Commission, QD proposal: explanatory memorandum, 2001, op. cit., fn. 266, p. 5. In Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (APD), they were referred to as 'other kinds of international protection given under the circumstances defined by Article 15 of [the QD]' (Article 3(3) APD). Other relevant provisions are Protocols No 6 and No 13 to the ECHR. See Council of Europe, Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, 28 April 1983; Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in All Circumstances, 3 May 2002. The importance of ECHR case-law in the interpretation of EU law is explained in EASO, *Introduction to the CEAS – A judicial analysis*, op. cit., fn. 8, pp. 73–74.

839 European Commission, QD proposal: explanatory memorandum, 2001, op. cit., fn. 266, p. 6.

840 Ibid.

Part 2 of this judicial analysis is concerned only with the criteria used for determining whether applicants for international protection are to be recognised as being eligible for subsidiary protection.

As is apparent from the word 'subsidiary' and from recitals 6 and 33 QD (recast), 'subsidiary protection is intended to be complementary and additional to the protection of refugees enshrined in the [Refugee] Convention'[841].

Recitals 6 and 33 QD (recast)

(6) The Tampere conclusions also provide that rules regarding refugee status should be complemented by measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection.

[...]

(33) Standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the [Refugee] Convention.

That subsidiary protection is complementary and additional 'is also consistent with the objectives laid down by Article 78(2)(a) and (b) TFEU'[842].

A 'person eligible for subsidiary protection' is defined in Article 2(f) QD (recast)[843], read in conjunction with Articles 15 and 17 QD (recast)[844]. With regard to the definition, the CJEU highlighted in *HN* that Article 2(f) QD (recast) 'defines persons eligible for subsidiary protection as third country nationals or stateless persons who do not qualify as a refugee'[845]. Given this, 'the use of the term "subsidiary" and the wording of [Article 2(f) QD (recast)] indicate that subsidiary protection status is intended for third country nationals who do not qualify for refugee status'[846] but in respect of whom, as indicated in Article 2(e) QD, 'substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin ... would face a real risk of suffering serious harm'. The court continued:

> It is apparent from the foregoing considerations that an application for subsidiary protection should not, in principle, be considered before the competent authority has reached the conclusion that the person seeking international protection does not qualify for refugee status[847].

Accordingly, the APD (recast) requires a single procedure for the assessment of international protection needs 'under which an application is examined by reference to both forms of

841 CJEU, 2018, *Shajin Ahmed*, op. cit., fn. 33, para. 39. See also CJEU, judgment of 30 January 2014, *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides*, C-285/12, EU:C:2014:39 (hereinafter CJEU, 2014, *Diakité*), para. 33; CJEU, 2014, *HN*, op. cit., fn. 29, para. 32; and CJEU (GC), 2016, *Alo and Osso*, op. cit., fn. 31, para. 31.

842 CJEU, 2014, *HN*, op. cit., fn. 29, para. 33.

843 Article 2(f) QD (recast) is quoted in Section 2.2 below.

844 See also EASO, *Exclusion: Articles 12 and 17 qualification directive – Judicial analysis*, 2nd edn, 2020.

845 CJEU, 2014, *HN*, op. cit., fn. 29, para. 29.

846 CJEU, 2014, *HN*, op. cit., fn. 29, para. 30.

847 CJEU, 2014, *HN*, op. cit., fn. 29, para. 35.

international protection, namely asylum and subsidiary protection'[848]. The complementary nature of subsidiary protection is reflected in Article 10(2) APD (recast), which states 'When examining applications for international protection, the determining authority shall first determine whether the applicants qualify as refugees and, if not, determine whether the applicants are eligible for subsidiary protection' (see EASO, *Asylum Procedures and the Principle of* Non-refoulement *– Judicial analysis*, 2018, Section 4.2.1).

The decision trees in Appendix A reflect this order.

Although subsidiary protection is complementary and additional to refugee protection, the QD (recast) applies the same criteria to qualification for both refugee protection and subsidiary protection in relation to the assessment of facts and circumstances (Article 4), international protection needs arising *sur place* (Article 5(1) and (2)), actors of persecution or serious harm (Article 6), actors of protection (Article 7) and internal protection (Article 8).

Accordingly, the sections on these topics in Part 2 cross-refer to the corresponding sections in Part 1 on qualification for refugee protection to the extent that the analysis there is applicable to both forms of protection.

2.2. Who is eligible for subsidiary protection?

Article 2(f) QD (recast) defines the term 'person eligible for subsidiary protection' as follows.

Article 2(f) QD (recast)

'person eligible for subsidiary protection' means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

The key differences between a 'refugee' and a 'person eligible for subsidiary protection' are set out in Table 38.

[848] CJEU, judgment of 9 February 2017, *M. v Minister for Justice and Equality, Ireland, Attorney General*, C-560/14, EU:C:2017:101, para. 23.

Table 38: Key differences between a refugee and a person eligible for subsidiary protection

'Refugee'	'Person eligible for subsidiary protection'
Article 2(d) QD (recast)[849]	Article 2(f) QD (recast)
—	'does not qualify as a refugee'
'is outside the country of nationality'	'if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence'
'owing to a well-founded fear'	'in respect of whom substantial grounds have been shown for believing that, if returned ... would face a real risk'
'of being persecuted'	'of suffering serious harm'
'for reasons of race, religion, nationality, political opinion or membership of a particular social group'	—
'to whom Article 12 does not apply'	'to whom Article 17(1) and (2) does not apply'

Like for refugee protection, a decision on whether to grant subsidiary protection 'must be based on an individual assessment ..., which aims to determine whether, in the light of the applicant's personal circumstances, the conditions for granting such a status are satisfied' (see Article 4(3) QD (recast))[850].

2.3. Personal and territorial scope (Article 2(f))

The definition of a person eligible for subsidiary protection in Article 2(f) QD (recast) clarifies that the **personal scope** of the QD (recast) is limited to third-country nationals or stateless persons.

The identification of third-country nationals (see Section 1.3.1 above), the country of nationality (see Section 1.3.2 above), statelessness (see Section 1.3.3 above) and country/ies of former habitual residence in the case of stateless applicants (see Section 1.3.4 above) in the context of subsidiary protection status is no different from that identification in the context of qualification as a refugee.

With regard to its **territorial scope**, the phrasing 'if returned to his or her country of origin' or 'in the case of a stateless person, to his or her country of former habitual residence' implies that the person must be outside their country of nationality or former habitual residence.

Moreover, to fall within the scope of the APD (recast), an application for international protection must be made in the territory of one of the Member States (Article 3(1) APD (recast)). It does not apply to 'requests for diplomatic or territorial asylum submitted to representations of Member States' (Article 3(2) APD (recast))[851].

[849] Article 2(d) QD (recast) is quoted in full in Section 1.2 above.

[850] CJEU, 2018, *Ahmedbekova*, op. cit., fn. 68, para. 48. For further detail on the factors that must be taken into account, see EASO, *Evidence and Credibility Assessment – Judicial analysis*, op. cit., fn. 23, Section 4.

[851] See General introduction, 'Application for international protection' above.

2.4. Serious harm (Article 15)

The definition of a 'person eligible for subsidiary protection' in Article 2(f) QD (recast), which is quoted in full at the start of Section 2.2, refers to a third-country national or a stateless person who '... would face a real risk of **suffering serious harm as defined in Article 15** ...'. From the reference in Article 2(f) to '... **serious harm as defined in Article 15** ...', it follows that Article 15 contains a **definition** of serious harm. This article specifies the following.

Article 15 QD (recast)

Serious harm consists of:

(a) the death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Accordingly, to qualify as a beneficiary of subsidiary protection, one or more of the three types of harm set out in Article 15 must be established. As stated by the CJEU, Article 15 QD (recast) provides for three types of 'serious harm' that, when substantiated, entitle the person subject to them to the granting of subsidiary protection[852]. This article has the same wording as was used in the original QD.

Section 2.4 has five subsections, as shown in Table 39.

Table 39: Structure of Section 2.4

Section	Title	Page
2.4.1	Object, structure and relationship between the elements of Article 15	235
2.4.2	Death penalty or execution (Article 15(a))	237
2.4.3	Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin (Article 15(b))	242
2.4.4	Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict (Article 15(c))	266
2.4.5	Conclusion on serious harm	294

[852] CJEU, 2021, *CF and DN*, op. cit., fn. 684, para. 25.

2.4.1. Object, structure and relationship between the elements of Article 15

Article 15 QD (recast) must be interpreted in the light of 'the general scheme and objectives' of the QD (recast) to ensure that subsidiary protection status is not granted 'to third country nationals in situations which have no connection with the rationale of international protection'[853] (see 'More favourable standards (Article 3)' above).

Article 15 QD (recast) provides for three types of 'serious harm' that, when substantiated, entitle the applicant concerned to subsidiary protection[854].

In *Elgafaji*, the CJEU described the relationship between Article 15(a) and (b) QD (recast) on the one hand and Article 15(c) on the other[855]. The court noted that Article 15(a) and (b) 'cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm'[856]. By contrast, the court clarified that the harm defined in Article 15(c) 'covers a more general risk of harm' than that referred to in Article 15(a) and (b)[857]. The harm defined in Article 15(a) and (b) requires 'a clear degree of individualisation', while 'collective factors play a significant role in the application of Article 15(c)'[858]. Nevertheless, Article 15(c) 'must be subject to a coherent interpretation in relation to the other two situations referred to in [Article 15(a) and (b)] and must, therefore, be interpreted by close reference to that individualisation'[859]. The interpretation of Article 15(c) in *Elgafaji* concerned the QD. Nevertheless, as the CJEU has subsequently noted, 'the wording of Article 15(c) [QD (recast)] is strictly identical to that of Article 15(c) [QD], with the result that the case-law concerning the latter provision is relevant to the interpretation of the former'[860].

There is no hierarchy among the different types of harm described in Article 15[861]. In spite of the differences noted previously with regard to the degree of individualisation inherent in the types of serious harm, there may be overlapping claims, particularly with regard to Article 15(a) and (b). The ECtHR recognises that 'capital punishment has become an unacceptable form of punishment that is no longer permissible under Article 2 [ECHR] as amended by Protocols Nos. 6 and 13 and that it amounts to "inhuman or degrading treatment or punishment"

853 CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 44, also concerning the QD.
854 CJEU, 2021, *CF and DN*, op. cit., fn. 684, para. 25.
855 CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 38.
856 CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 32, and CJEU, 2021, *CF and DN*, op. cit., fn. 684, para. 26.
857 CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 33.
858 CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 38.
859 Ibid.
860 CJEU, 2021, *CF and DN*, op. cit., fn. 684, para. 24. The CJEU referred to CJEU, judgment of 13 January 2021, *Bundesrepublik Deutschland v XT*, C-507/19, EU:C:2021:3, para. 37, which concerned a different provision of the QD (recast), corresponding, in substance, to the provision of the QD 'with the result that the case law concerning the latter provision is relevant to the interpretation of the former'.
861 See Storey, H., in Hailbronner and Thym (eds), *EU Asylum and Immigration Law: A commentary*, op. cit., fn. 186, p. 1234.

under Article 3 [ECHR]'[862]. The imposition of the death penalty also raises issues of inhuman or degrading treatment, as the court acknowledged in *Soering*, given that it exposes the person concerned to a very long period of time spent on death row[863]. Furthermore, the court recognised that this situation 'can only be aggravated by the arbitrary nature of the proceedings which led to' the imposition of a death penalty[864].

While Article 15(c) clearly addresses situations of indiscriminate violence arising from armed conflict, it should be noted, given Article 15(b)'s correspondence – in essence – with Article 3 ECHR, that the ECtHR has stated that it 'has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 [ECHR]'[865].

Those who are not eligible for subsidiary protection under the QD (recast) may still be protected against *refoulement* under Article 4 and 19(2) EU Charter. By way of example, the CJEU has ruled that, even if the criteria of Article 15(b) are not met, 'removal of a third country national suffering from a serious illness to a country in which appropriate treatment is not available may constitute an infringement of the principle of *non-refoulement* and, therefore, an infringement of Article 5 Returns Directive, read in the light of Article 19 of the Charter'[866].

2.4.2. Death penalty or execution (Article 15(a))

Article 15(a) QD (recast) states the following.

Article 15(a) QD (recast)

Serious harm consists of:

(a) the death penalty or execution ...

[862] ECtHR, judgment of 29 October 2015, *AL (XW) v Russia*, No 44095/14, CE:ECHR:2015:1029JUD004409514 (hereinafter ECtHR, 2015, *AL (XW) v Russia*), para. 64, referring to ECtHR, judgment of 2 March 2010, *Al-Saadoon and Mufdhi v United Kingdom*, No 61498/08, CE:ECHR:2010:0302JUD00614980 (hereinafter ECtHR, 2010, *Al-Saadoon and Mufdhi*), paras 115–123. This has been confirmed in ECtHR (GC), judgment of 24 January 2017, *Khamtokhu and Aksenchik v Russia*, Nos 60367/08 and 961/11, CE:ECHR:2017:0124JUD006036708 (hereinafter ECtHR (GC), 2017, *Khamtokhu and Aksenchik*), para. 73. The ECtHR had previously examined the death penalty primarily in connection with the right to life and requirements for limiting this right and/or Protocols No 6 and No 13. See ECtHR (GC), judgment of 12 May 2005, *Öcalan v Turkey*, No 46221/99, CE:ECHR:2005:0512JUD004622199, para. 166.

[863] ECtHR (plenary), 1989, *Soering*, op. cit., fn. 282, para. 111, quoted more fully in fn. 965.

[864] ECtHR (GC), judgment of 8 July 2004, *Ilaşcu and Others v Moldova and Russia*, No 48787/99, CE:ECHR:2004:0708JUD004878799, para. 431.

[865] ECtHR, 2008, *NA v UK*, op. cit., fn. 243, para. 115. While in *NA v United Kingdom* the ECtHR based its finding of a violation of Article 3 ECHR on the fact that the applicant belonged to a group systematically exposed to a practice of ill treatment, later, in *Sufi and Elmi*, the ECtHR considered there was an extreme case of a general situation of violence in Mogadishu. ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 250.

[866] CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 44, referring to the QD and CJEU (GC), 2014, *Abdida*, op. cit., fn. 85, para. 48. See also CJEU (GC), 2019, *M, X and X*, op. cit., fn. 33, in which the court held that, while in specific circumstances Article 33(2) Refugee Convention 'denies the refugee the benefit ... of the principle of non-refoulement to a country where his life or freedom would be threatened', 'Member States may not remove, expel or extradite a foreign national where there are substantial grounds for believing that he will face a genuine risk, in the country of destination, of being subjected to treatment prohibited by Article 4 and Article 19(2) of the Charter' (para. 94).

The 'death penalty', also known as capital punishment, is the state-sanctioned practice of killing a person as a punishment for a crime[867]. It should be noted that the various language versions of Article 15(a) differ significantly with regard to the use and, therefore, meaning of the word 'execution'. For example, the German language version says 'Verhängung oder Vollstreckung der Todesstrafe' (unofficially retranslated into English as 'imposition or execution of the death penalty'), the Spanish language version says 'la condena a la pena de muerte o su ejecución' ('the death penalty sentence or its execution'), the Italian language version says 'la condanna o l'esecuzione della pena di morte' ('the sentence or the execution of the death penalty') and the Hungarian version says 'halálbüntetés kiszabása vagy végrehajtása' ('ordering or executing the death penalty'). These language versions refer to the two types of serious harm as being the sentence of the death penalty and the execution of the death penalty. By contrast, the Bulgarian, Croatian, Czech, Dutch, Estonian, French, Greek, Latvian, Portuguese, Slovak and Slovenian language versions, for example, are in line with the English language version. These language versions present the two distinct types of serious harm as being 'the death penalty' and 'execution'.

According to the settled case-law of the CJEU, 'where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part'[868]. Moreover, the court has ruled that 'the need for the uniform application of an EU measure and, accordingly, for a uniform interpretation of that measure requires that it be interpreted on the basis of both the real intention of its author and the aim which the latter seeks to achieve, in the light, in particular, of all the language versions of that measure'[869].

Thus, the interpretation of Article 15(a) cannot rely on the ambiguous wording. The two elements (death penalty and execution) in the English language version of the provision are addressed in the two subsections that follow.

2.4.2.1. Death penalty

In the context of Article 15(a) QD (recast), the death penalty is considered a serious harm entitling an applicant to subsidiary protection status. Article 2(2) EU Charter prescribes that 'No one shall be condemned to the death penalty, or executed'. Furthermore, Article 19(2) EU Charter prohibits removal to a state where there is a serious risk that a person would be subjected to the death penalty[870]. The risk of the death penalty should arise in the applicant's country of origin[871]. The CJEU has yet to rule on the interpretation of Article 15(a) QD (recast).

In addition to these obligations deriving from the EU Charter, Article 15(a) QD (recast) 'is based on the obligations of Member States flowing from Article 1 [Protocol No 6] to the ECHR and the jurisprudence of the ECtHR according to which a person may not be refouled to a country,

867 Hood, R., 'Capital punishment', *Encyclopaedia Britannica*; this may also be called the death penalty.

868 CJEU (GC), 2019, *M, X and X*, op. cit., fn. 33, para. 88.

869 CJEU, judgment of 15 April 2021, *Vogel Import Export NV v Belgische Staat*, C-62/20, EU:C:2021:288, para. 52. For more on the methods of interpretation, see EASO, *Introduction to the CEAS – A judicial analysis*, op. cit., fn. 8, Section 3.2, pp. 63–65.

870 Article 19(2) EU Charter states 'No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected **to the death penalty**, torture or other inhuman or degrading treatment or punishment' (emphasis added).

871 See also Article 2(f) QD (recast), which includes the phrase 'if returned to his or her country of origin', and Section 2.4.3.4 below.

where that person would face the death penalty'[872]. Protocol No 6 abolished the death penalty in peacetime[873]. Its scope of application was extended by Protocol No 13, which prohibits the death penalty in all circumstances and rules out any derogation even in times of war or national emergency[874].

The ECtHR states that 'the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering'[875] and that 'capital punishment … amounts to "inhuman or degrading treatment or punishment" under Article 3'[876]. If a real risk of execution cannot be excluded, the threat of the death penalty, being likely to cause fear and distress tantamount to inhuman and degrading treatment or punishment for the purposes of Article 3 ECHR, is likely to constitute serious harm as defined in Article 15(b).

The death penalty does not need to have already been imposed in the country of origin. A real risk of being subjected to the death penalty on return is sufficient to attract the protection of Article 3 ECHR. As such, it could be considered sufficient to establish a claim under Article 15(a) QD (recast)[877].

Under Article 4(3)(a) QD (recast), 'the assessment of an application for international protection is to be carried out on an individual basis and includes taking into account all relevant facts as they relate to the country of origin …, including laws and regulations of the country of origin and the manner in which they are applied'. In *Fathi*, the CJEU held that a death penalty imposed for apostasy 'is capable, in itself, of constituting an "act of persecution", … provided that such penalties are actually applied in the country of origin which adopted such legislation'[878]. By analogy, in the context of serious harm, it is necessary to examine whether the death penalty is actually implemented in practice.

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872 Article 1 Protocol No 6 to the ECHR states 'The death penalty shall be abolished. No-one shall be condemned to such penalty or executed'. See Presidency note to Strategic Committee on Immigration, Frontiers and Asylum, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need of international protection, 20 September 2002, 12148/02 LIMITE ASILE 43, p. 4. The presidency note goes on to say that 'The risk of being subjected to the death penalty was not explicitly included in the definition of subsidiary protection presented by the Commission. However, there is consensus among Member States that persons facing such a risk should be granted subsidiary protection, provided they cannot be excluded'. Since the wording has not changed between the QD (to which the presidency note refers) and the QD (recast), this also applies to the QD (recast). See ECtHR (plenary), 1989, *Soering*, op. cit., fn. 282; ECtHR, decision of 27 March 2008, *Hakizimana v Sweden*, No 37913/05, CE:ECHR:2008:0327DEC003791305; ECtHR, judgment of 8 November 2005, *Bader and Kanbor v Sweden*, No 13284/04, CE:ECHR:2005:1108JUD001328404, para. 42; ECtHR, 2010, *Al-Saadoon and Mufdhi*, op. cit., fn. 865, para. 123; ECtHR, judgment of 24 July 2014, *Al Nashiri v Poland*, No 28761/11, CE:ECHR:2014:0724JUD002876111 (hereinafter ECtHR, 2014, *Al Nashiri v Poland*), paras 456 and 578; ECtHR, 2015, *AL (XW) v Russia*, op. cit., fn. 865, para. 64; and ECtHR (GC), 2017, *Khamtokhu and Aksenchik*, op. cit., fn. 865, para. 73.

873 Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, 28 April 1983.

874 Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, 3 May 2002.

875 ECtHR, 2010, *Al-Saadoon and Mufdhi*, op. cit., fn. 865, para. 115.

876 ECtHR, 2015, *AL (XW) v Russia*, op. cit., fn. 865, para. 64, referring to ECtHR, 2010, *Al-Saadoon and Mufdhi*, op. cit., fn. 865, paras 115–123.

877 ECtHR, 2010, *Al-Saadoon and Mufdhi*, op. cit., fn. 865, para. 123: 'Article 2 [ECHR] and Article 1 of Protocol No. 13 prohibit the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there …'.

878 CJEU, 2018, *Fathi*, op. cit., fn. 214, para. 96.

The CNDA (France) granted subsidiary protection to an applicant who had been sentenced to the death penalty by an Islamic tribunal in Somalia for adultery. The CNDA noted that, according to available COI, Islamic law was applied in practice in similar cases[879].

When there is no legal possibility of carrying out a death sentence in an applicant's case due to an obligatory commutation of a death penalty to a life sentence, decision-makers would have to consider whether the applicant would in fact face a real risk of serious harm as defined in Article 15(a) QD (recast). In a case in which there was a moratorium on carrying out the death penalty in Tunisia, which had been respected without exception since 1991, the ECtHR considered that the applicant could not claim 'to have a well-founded fear of being executed entailing immense psychological suffering'[880].

2.4.2.2. Execution

The second type of serious harm in Article 15(a) is **execution** or, in some language versions, execution of the death penalty (see the discussion of the different language versions in Section 2.4.2 above). The term 'execution' refers to the intentional killing of a person by state or non-state actors exercising some kind of authority. The question as to whether **extrajudicial killings**, which are arbitrary deprivations of life in violation of Article 2 EU Charter, which corresponds to Article 2(1) ECHR and Article 1 Protocol No 6 to the ECHR, are covered or whether Article 15(a) QD (recast) is limited to a death sentence and its execution has not yet been raised before the CJEU. However, the issue of extrajudicial killings has been raised before the ECtHR with regard to the ECHR provisions[881]. The ECtHR has, for instance, considered cases in which a state agent was involved in the killing or knew of it or consented

[879] CNDA (France), judgment of 23 March 2018, *Mme S.*, No 17037345 C. See also CNDA (France), judgment of 3 November 2015, *M. B.*, No 10013998 C+, concerning an applicant facing the death penalty in Bangladesh. The CNDA reviewed statistics on the application of the death penalty in practice, although in this case the applicant was excluded on the grounds that he had committed a serious crime.

[880] ECtHR, decision of 4 September 2018, *Saidani v Germany*, No 17675/18, CE:ECHR:2018:0904DEC001767518, para. 33. Para. 38 concluded that 'it will be sufficiently foreseeable for him that the sentence will sooner or later be commuted to a life sentence, given that each and every death penalty in Tunisia is sooner or later commuted to a life sentence by presidential pardon' and that there was a possibility of subsequent release on parole under criminal law with objective and predetermined criteria.

[881] ECtHR, Guide on Article 2 of the European Convention on Human Rights: Right to life, updated 30 April 2021 (hereinafter ECtHR, Guide on Article 2 ECHR: Right to life, 2021), Section III.C.3, p. 28. The *Explanations relating to the Charter of Fundamental Rights*, [2007] OJ C 303, p. 17–35, state that the provisions of Article 2 EU Charter correspond to those of Article 2(1) ECHR and Article 1 Protocol No 6 to the ECHR.

to it[882] and ones in which the authorities failed to take reasonable measures to protect the right to life[883].

On the one hand, the recognition in Article 6 QD (recast) that there can be non-state actors of serious harm and the fact that the wording in some language versions of Article 15(a) encompasses the death penalty or execution would seem to support a wider interpretation[884]. The Czech Supreme Administrative Court has held on numerous occasions that the 'death penalty' as referred to in Article 15(a) QD (recast) can be imposed and executed only by state or quasi-state authorities, whereas 'execution' can also be undertaken by non-state actors under Article 6(c) QD (recast) and without any formalised punishment or legal proceedings[885]. On the other hand, the systematic context and legislative history of Article 15(a) suggest a distinction between the fact that 'capital punishment has become an unacceptable form of punishment'[886] and the general protection of human life. Thus, it would seem necessary to require at least an element of intentional formalised punishment by state or non-state actors rather than a mere danger of becoming a victim of extrajudicial violence[887]. Article 15(a) is therefore to be distinguished from the risks arising from 'indiscriminate violence' in an armed conflict (see Section 2.4.4 below).

Article 15(a) does not require that execution be accompanied by aggravating circumstances. Thus, any real risk of execution is sufficient to justify the granting of subsidiary protection status, even if a death sentence is passed for a heinous crime, unless one of the exclusion clauses applies.

882 See ECtHR, judgment of 10 July 2001, *Avsar v Turkey*, No 25657/94, CE:ECHR:2001:0710JUD002565794, concerning the brother of an applicant who was abducted and killed by village guards, whom the ECtHR described as 'civilian volunteers in a quasi-police function'; the court went on to find a violation of Article 2 ECHR; paras 413–414 and 416. See also the following ECtHR cases concerning extrajudicial killings in Chechnya: judgment of 24 February 2005, *Khashiyev and Akayeva v Russia*, Nos 57942/00 and 57945/00, CE:ECHR:2005:0224JUD005794200, paras 146–147; judgment of 12 October 2006, *Estamirov and Others v Russia*, No 60272/00, CE:ECHR:2006:1012JUD006027200, para. 114; judgment of 26 July 2007, *Musayeva and Others v Russia*, No 74239/01, CE:ECHR:2007:0726JUD007423901, para. 155; and judgment of 25 November 2010, *Amuyeva and Others v Russia*, No 17321/06, CE:ECHR:2010:1125JUD001732106, paras 83–84. Other cases include ECtHR, judgment of 23 May 2001, *Denizci and Others v Cyprus*, Nos 25316–25321/94, 27207/95, CE:ECHR:2001:0523JUD002531694 (hereinafter ECtHR, 2001, *Denizci and Others v Cyprus*), para. 373; and ECtHR, judgment of 8 November 2005, *Gongadze v Ukraine*, No 34056/02, CE:ECHR:2005:1108JUD003405602, para. 166.

883 ECtHR, judgment of 20 April 2004, *Buldan v Turkey*, No 28298/95, CE:ECHR:2004:0420JUD002829895, paras 81 and 86, and Turkish cases, as a result of the conflict in south-eastern Turkey in 1993 and 1994 with contra-guerrilla elements targeting persons suspected of supporting the Kurdistan Workers' Party, such as ECtHR, judgment of 30 March 2004, *Nuray Şen v Turkey (No 2)*, No 25354/94, CE:ECHR:2004:0330JUD002535494; judgment of 28 March 2000, *Mahmut Kaya v Turkey*, No 22535/93, CE:ECHR:2000:0328JUD002253593 (hereinafter ECtHR, 2000, *Mahmut Kaya v Turkey*), paras 89 and 101; judgment of 2 November 2004, *Seyhan v Turkey*, No 33384/96, CE:ECHR:2004:1102JUD003338496, para. 82; and judgment of 28 March 2000, *Kılıç v Turkey*, No 22492/93, CE:ECHR:2000:0328JUD002249293, paras 64 and 77.

884 See, in this sense, IARLJ, *A manual for refugee law judges relating to the QD and APD*, op. cit., fn. 759, p. 33.

885 See the following judgments of the Supreme Administrative Court (Nejvyšší správní soud) (Czechia): judgment of 28 July 2009, *LO* v *Ministry of Interior*, No 5, Azs 40/2009-74 (English summary); judgment of 11 February 2009, *AR* v *Ministry of Interior*, No 1, Azs 107/2008-78 (English summary); judgment of 18 March 2015, *TB* v *Ministry of Interior*, No 8, Azs 92/2014-49.

886 ECtHR, 2015, *AL (XW) v Russia*, op. cit., fn. 865, para. 64.

887 For the text of Article 1 Protocol No 6 to the ECHR, see fn. 875 above.

2.4.3. Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin (Article 15(b))

Article 15(b) QD (recast) reads as follows.

> **Article 15(b) QD (recast)**
>
> Serious harm consists of:
>
> [...]
>
> (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin;

Article 15(b) thus comprises three elements: (1) torture, or (2) inhuman or degrading treatment or punishment, which takes place (3) in the country of origin, as shown in Figure 5.

Figure 5: The different elements of Article 15(b)

Following some general remarks, Section 2.4.3 contains sections addressing each of these elements in turn, followed by a section on particular situations under Article 15(b), as indicated in Table 40.

Table 40: Structure of Section 2.4.3

Section	Title	Page
2.4.3.1	General remarks	243
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2.4.3.1. General remarks

According to the CJEU in its judgment in *MP*, Article 15(b) QD (recast):

> must be interpreted and applied in a manner that is consistent with the rights guaranteed by Article 4 of the [EU Charter], which enshrines one of the fundamental values of the Union and its Member States and is absolute in that that value is **closely linked to respect for human dignity**, the subject of Article 1 of the Charter[888].

[888] CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 36 (emphasis added).

Article 4 EU Charter provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Moreover, the court continued in its judgment in *MP*, stating that, 'in accordance with Article 52(3) of the Charter, in so far as the rights guaranteed by Article 4 thereof correspond to those guaranteed by Article 3 of the ECHR, the meaning and scope of those rights are the same as those laid down by Article 3 of the ECHR'[889]. Article 3 ECHR likewise provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Thus, the case-law of the ECtHR regarding the interpretation of the terms 'torture' and 'inhuman or degrading treatment or punishment' in Article 3 ECHR should inform the interpretation to be given to those terms in Article 15(b) QD (recast).

The wording of Article 15(b) QD (recast) nevertheless differs from the wording of Article 3 ECHR. Article 15(b) defines serious harm as the torture or inhuman or degrading treatment or punishment of an applicant **'in the country of origin'** (emphasis added). As the CJEU noted in *M'Bodj*, it is clear from Article 15(b) QD (recast) that 'it is applicable only to the inhuman or degrading treatment of an applicant in his country of origin'[890]. As such, it follows that 'the EU legislature envisaged that subsidiary protection should be granted only in those cases in which such treatment occurred in the applicant's country of origin'[891] (see also Section 2.4.3.4 below).

Moreover, the court noted that 'Certain factors specific to the context in which Article 15(b) of [the QD] occurs must, in the same way as the Directive's objectives, also be taken into account for the purpose of interpreting that provision'[892].

An act or measure must qualify as torture, or inhuman treatment or punishment, or degrading treatment or punishment to qualify as serious harm under Article 15(b). The case-law of the ECtHR accords specific meanings to the three types of ill treatment. Each may be distinguished according to the **severity of pain or suffering inflicted and the intention and motivation of the treatment**.

As the ECtHR has noted, whenever it:

> has found that a proposed removal would be in violation of Article 3 because of a real risk of ill-treatment which would be intentionally inflicted in the receiving State, it has normally refrained from considering whether the ill-treatment in question should be characterised as torture or inhuman or degrading treatment or punishment[893].

889 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 37.

890 CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 33. The CJEU noted this with respect to the QD.

891 CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 33.

892 CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 34.

893 ECtHR, judgment of 17 January 2012, *Harkins and Edwards* v *United Kingdom*, Nos 9146/07 and 32650/07, CE:ECHR:2012:0117JUD000914607 (hereinafter ECtHR, 2012, *Harkins and Edwards*), para. 123. The court found that the distinction 'between torture on the one hand and inhuman or degrading punishment on the other ... is more easily drawn in the domestic context where, in examining complaints made under Article 3, the Court is called upon to evaluate or characterise acts which have already taken place. Where, as in the extra-territorial context, a prospective assessment is required, it is not always possible to determine whether the ill-treatment which may ensue in the receiving State will be sufficiently severe to qualify as torture ...' (para. 122). However, 'the absolute nature of Article 3 does not mean that any form of ill-treatment will act as a bar to removal from a Contracting State' (para. 129).

According to the ECtHR, ill treatment, including punishment:

> must attain a minimum level of severity if it is to fall within the scope of Article 3 … The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim[894].

2.4.3.2. Torture

The CJEU has not yet addressed the interpretation of the term 'torture' in Article 15(b) QD (recast). However, in *MP* it recalled that 'the criteria for granting subsidiary protection must be drawn from international human rights instruments'[895]. The CJEU referred explicitly in *MP* to the CAT and specifically to its Article 14[896]. The case concerned an applicant who, the court noted, 'has been tortured by the authorities of his country of origin and suffers severe psychological after-effects which, in the event of him being returned to that country, could be substantially aggravated and lead to a serious risk of him committing suicide'[897] (see Section 2.4.3.5.3 below).

Given that Article 15(b) QD (recast) corresponds, in essence, to Article 3 ECHR, the case-law of the ECtHR should be taken into consideration when interpreting the meaning and scope of the term 'torture'. In order to determine 'whether a particular form of ill-treatment should be qualified as torture', the ECtHR has found that 'it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to **deliberate inhuman treatment causing very serious and cruel suffering**'[898].

The ECtHR noted that the CAT also makes such a distinction, as can be seen from its Articles 1(1) and 16(1)[899], which state the following.

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894 ECtHR (plenary), judgment of 18 January 1978, *Ireland v United Kingdom*, No 5310/71, CE:ECHR:1978:0118JUD000531071 (hereinafter ECtHR (plenary), 1978, *Ireland v UK*), para. 162. See also ECtHR (plenary), 1989, *Soering*, op. cit., fn. 282, para. 100; and ECtHR (GC), 2011, *M.S.S. v Belgium and Greece*, op. cit., fn. 229, para. 219. Note that in ECtHR (GC), judgment of 7 December 2021, *Savran v Denmark*, No 57467/15, CE:ECHR:2021:1207JUD005746715 (hereinafter ECtHR (GC), 2021, *Savran*), the ECtHR referred to the following cases: ECtHR (GC), judgment of 27 May 2008, *N v United Kingdom*, No 26565/05, CE:ECHR:2008:0527JUD002656505 (hereinafter ECtHR (GC), 2008, *N v UK*), para. 29; ECtHR (GC), judgment of 13 December 2016, *Paposhvili v Belgium*, No 41738/10, CE:ECHR:2016:1213JUD004173810 (hereinafter ECtHR (GC), 2016, *Paposhvili*), para. 174; and ECtHR (GC), judgment of 28 September 2015, *Bouyid v Belgium*, No 23380/09, CE:ECHR:2015:0928JUD00233800, para. 86.

895 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 52. See also recital 34 QD (recast).

896 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 52.

897 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 45.

898 ECtHR (GC), judgment of 28 July 1999, *Selmouni v France*, No 25803/94, CE:ECHR:1999:0728JUD002580394 (hereinafter ECtHR (GC), 1999, *Selmouni*), para. 96 (emphasis added). In ECtHR (plenary), 1978, *Ireland v UK*, op. cit., fn. 897, the court considered that five techniques (wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink), applied in combination and systematically in order to extract confessions, 'undoubtedly amounted to inhuman and degrading treatment', but 'did not occasion suffering of the particular intensity and cruelty implied by the word torture …' (para. 167). ECtHR (GC), judgment of 25 September 1997, *Aydin v Turkey*, No 23178/94, CE:ECHR:1997:0925JUD002317894 (hereinafter ECtHR (GC), 1997, *Aydin v Turkey*), para. 82, concluded at para. 86 that the 'accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected [in detention] amounted to torture'. See also ECtHR, judgment of 18 December 1996, *Aksoy v Turkey*, No 21987/93, CE:ECHR:1996:1218JUD00219879 (hereinafter ECtHR, 1996, *Aksoy v Turkey*), para. 64.

899 ECtHR (GC), 1999, *Selmouni*, op. cit., fn. 901, para. 97.

Articles 1(1) and 16(1) CAT

1(1). For the purposes of this Convention, the term 'torture' means **any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person** for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

[...]

16(1). Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment. [Emphasis added.]

It has been accepted by the UN Committee against Torture, in *Elmi* v *Australia,* that torture within the meaning of Article 1 CAT may be inflicted by public officials whether they are *de facto* or *de jure*[900]. By contrast, Article 3 ECHR does not limit the meaning of 'torture' to acts by or with the consent or acquiescence of public officials or other persons acting in an official capacity. In *Mahmut Kaya* v *Turkey, the ECtHR* held that Article 3 'requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals'[901].

So while 'torture' under the CAT is limited to cases in which 'pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity', there is no such caveat in the wording of the QD (recast). Thus, the Irish High Court has held that such a 'limitation does not apply in article 15 of the Directive'[902]. Furthermore, the International Criminal Tribunal for the former Yugoslavia has ruled that 'the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention'[903].

900 UN Committee against Torture, views of 14 May 1999, *SS Elmi v Australia*, No 120/1998, CAT/C/22/D/120/1998 (hereinafter UN Committee against Torture, 1999, *SS Elmi*, No 120/1998).

901 ECtHR, 2000, *Mahmut Kaya v Turkey*, op. cit., fn. 886, para. 115.

902 High Court (Ireland), judgment of 27 July 2007, *NH v Minister for Justice*, [2007] IEHC 277, para. 51. In any event, the UN Committee against Torture, 1999, *SS Elmi*, No 120/1998, op. cit., fn. 903, ruled that torture may be inflicted by *de facto* state agents.

903 International Criminal Tribunal for the former Yugoslavia (Appeals Chamber), judgment of 12 June 2002, *Prosecutor v Kunarac et al.*, Nos IT-96-23 and IT-96-23/1-A, para. 148.

In *Selmouni*, the ECtHR stated that the **severity of the pain or suffering**, within the meaning of Article 1 CAT, is:

> like the 'minimum severity' required for the application of Article 3 [ECHR], in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.[904].

In some cases, one act may cause severe pain or suffering (e.g. rape by an official)[905]. In others, an accumulation or combination of different acts will meet the threshold[906].

The ECtHR has not defined the precise level of severity required. In *Dikme*, the severity of the interrogation of the applicant left him 'in a permanent state of physical pain and anxiety owing to his uncertainty about his fate and to the blows repeatedly inflicted on him during the lengthy interrogation sessions'[907]. In *Menesheva*, the applicant was a 19-year-old woman 'confronted with several male policemen'[908]. In her case, 'the ill-treatment lasted for several hours during which she was twice beaten up and subjected to other forms of violent physical and moral abuse'[909]. In *Aksoy*, 'in addition to the severe pain ... at the time, the medical evidence shows that it led to a paralysis of both arms which lasted for some time'[910]. In the context of expulsion, in *MA* c *France* the ECtHR took into account the fact that in the country of origin those suspected of terrorism were placed in detention without judicial control or any communication with the outside world and 'can be submitted to ill-treatment, including torture'[911]. The ECtHR considered that practices used in prison described in COI, such as 'incessant interrogation at any time of the day or night, threats, beatings, electric shocks, forced ingestion of great quantities of dirty water, urine or chemical products and suspension

904 ECtHR (GC), 1999, *Selmouni*, op. cit., fn. 901, para. 100.

905 ECtHR (GC), 1997, *Aydin* v *Turkey*, op. cit., fn. 901, para. 83: 'Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim ... rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence ...'.

906 ECtHR (GC), 1999, *Selmouni*, op. cit., fn. 901, para. 82.

907 ECtHR, judgment of 11 July 2000, *Dikme* v *Turkey*, No 20869/92, CE:ECHR:2000:0711JUD002086992, para. 95. During interrogation, the applicant was punched and kicked repeatedly; his head was banged against the wall; he suffered blows to his genitals; he was suspended by his arms for long periods with his hands tied behind his back; electric shocks were administered to his feet, his tongue, his genitals and the area behind his ears while water was poured over his body to heighten the effect of the shocks; he had been placed in baths of ice-cold water; he had been stripped naked several times; and he had undergone a mock execution (para. 74).

908 ECtHR, judgment of 9 March 2006, *Menesheva* v *Russia*, No 59261/00, CE:ECHR:2006:0309JUD005926100, para. 61.

909 Ibid. She was strangled by a police officer and 'several other policemen started beating her. For about two hours they administered kicks and blows to her legs, threw her across the room, beat her with a baton and hit her head against the walls. While beating her they accused her of telling lies, insulted her and threatened her with rape and violence against her family' (para. 14).

910 ECtHR, 1996, *Aksoy* v *Turkey*, op. cit., fn. 901, para. 64. The appellant was subjected to 'Palestinian hanging' (meaning that 'he was stripped naked, with his arms tied together behind his back, and suspended by his arms').

911 ECtHR, judgment of 1 February 2018, *MA* c *France*, No 9373/15, CE:ECHR:2018:0201JUD000937315, para. 54 (unofficial translation).

from the ceiling by the arms', 'undoubtedly reached the intensity required by Article 3 of the Convention'[912].

As regards intention, in *Ireland* v *United Kingdom*, the ECtHR emphasised that torture is '**deliberate** inhuman treatment causing very serious and cruel suffering'[913].

All the circumstances and the **underlying purpose** behind the infliction of acts prohibited under Article 3 ECHR must be taken into account. Examples of such purpose in Article 1(1) CAT include 'obtaining from [a person] or a third person information or a confession, punishing him ..., or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind'[914].

Finally, the ECtHR held that:

> ... having regard to the fact that the Convention is a 'living instrument which must be interpreted in the light of present-day conditions' ... certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future ...[915].

2.4.3.3. Inhuman or degrading treatment or punishment

The CJEU has not yet ruled on the definition of 'inhuman or degrading treatment or punishment' in the context of Article 15(b) QD (recast).

It nevertheless noted in *Jawo* that:

> ... in order to fall within the scope of Article 4 of the Charter, which corresponds to Article 3 ECHR, and of which the meaning and scope are therefore, in accordance with Article 52(3) of the Charter, the same as those laid down by the ECHR, the [treatment] [...]

912 ECtHR, 2018, *MA c France*, op. cit., fn. 914, para. 55 (unofficial translation). See also ECtHR, judgment of 3 December 2009, *Daoudi c France*, No 19576/08, CE:ECHR:2009:1203JUD001957608, paras 37 and 71; and ECtHR, judgment of 26 January 2017, *X v Sweden*, No 16744/14, CE:ECHR:2017:0126JUD001674414, para. 64.

913 ECtHR (plenary), 1978, *Ireland v UK*, op. cit., fn. 897, para. 167 (emphasis added). Similarly, in *Aksoy*, the ECtHR found that '"Palestinian hanging" could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out'; ECtHR, 1996, *Aksoy v Turkey*, op. cit., fn. 901, para. 64. In ECtHR, 2014, *Al Nashiri v Poland*, op. cit., fn. 875, the aim of the legally sanctioned interrogation techniques was '"to psychologically 'dislocate' the detainee, maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist ... efforts to obtain critical intelligence"; "to persuade [detainees] to provide threat information and terrorist intelligence in a timely manner"; "to create a state of learned helplessness and dependence"; and their underlying concept was "using both physical and psychological pressures in a comprehensive, systematic and cumulative manner to influence ... behaviour, to overcome a detainee's resistance posture"' (para. 515).

914 The ECtHR has identified these purposes, for example in ECtHR, judgment of 19 September 2017, *Zolotorev v Russia*, No 13408/07, CE:ECHR:2017:0919JUD001340807, para. 71, referring to the aim of extracting information to gain confession; ECtHR, judgment of 30 September 2014, *Bulgaru v Moldavia*, No 35840/09, CE:ECHR:2014:0930JUD003584009, para. 20: 'intention to obtain information, inflict punishment or intimidate'; and ECtHR, judgment of 28 March 2017, *Shestopalov v Russia*, No 46248/07, CE:ECHR:2017:0328JUD004624807, para. 46: referring to the aim 'of humiliating [the appellant], driving him into submission and making him confess to the crime'. See, *a contrario*, ECtHR, 2001, *Denizci and Others v Cyprus*, op. cit., fn. 885, para. 384; ECtHR, judgment of 17 December 2009, *Denis Vasilyev v Russia*, No 32704/04, CE:ECHR:2009:1217JUD003270404, para. 114; and ECtHR, 2014, *Al Nashiri v Poland*, op. cit., fn. 875, para. 515, referring to 'measures specifically designed ... to elicit information or confessions or to obtain intelligence from captured terrorist suspects'.

915 ECtHR (GC), 1999, *Selmouni*, op. cit., fn. 901, para. 101 (references to related ECtHR case-law omitted).

must attain a particularly high level of severity, which depends on all the circumstances of the case[916].

Having regard to its interpretation of the treatment under Article 3 ECHR, the ECtHR has reiterated on numerous occasions that such treatment 'must attain a **minimum level of severity**'[917]. The court further ruled: 'The assessment of this minimum level of severity is **relative**: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the gender, age and state of health of the victim'[918]. 'Further factors' it identified include 'the purpose for which the treatment was inflicted together with the intention or motivation behind it, as well as its context, such as an atmosphere of heightened tension and emotions'[919].

The CNDA (France) considered the case of a young Afghan whose parents and brother had died and whose house was destroyed during clashes between government and Taliban forces. The Taliban had then sought to recruit him, and later accused him of treason. He fled the country in 2015 at the age of 16, had no family in Afghanistan, was vulnerable and isolated, and had physical and mental health problems. Following the Taliban victory in August 2021 and the departure of the foreign forces, the court noted that the years-long conflict had ended but that the general disorganisation in the country had ushered in more or less uncontrolled elements, including different local Taliban groups. The court considered that, given the level of violence, insecurity and arbitrariness on the part of the *de facto* authorities and given the applicant's health problems, there were substantial reasons to believe that the applicant would face a real and personal risk of being subjected to inhuman or degrading treatment if he returned to the country[920].

A situation of extreme material poverty reaching the severity of inhuman or degrading treatment may follow from the applicant's particular vulnerability[921]. In line with Article 4(3)(c) QD (recast), such an assessment must be made 'on an individual basis' and take into account the applicant's 'individual position and personal circumstances', including any vulnerability[922].

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916 CJEU (GC), judgment of 19 March 2019, *Abubacarr Jawo v Bundesrepublik Deutschland*, C-163/17, EU:C:2019:218 (hereinafter CJEU (GC), 2019, *Jawo*), para. 91.

917 Emphasis added. See, for example, cases cited in fn. 897 above and ECtHR, judgment of 18 October 2012, *Bureš v Czech Republic*, No 37679/08, CE:ECHR:2012:1018JUD003767908 (hereinafter ECtHR, 2012, *Bureš v Czech Republic*), para. 84; and ECtHR (GC), judgment of 1 June 2010, *Gäfgen v Germany*, No 22978/05, CE:ECHR:2010:0601JUD002297805 (hereinafter ECtHR (GC), 2010, *Gäfgen v Germany*), para. 88. See also CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 38.

918 Emphasis added. ECtHR, 2012, *Bureš v Czech Republic*, op. cit., fn. 920, para. 84; and ECtHR (GC), 2010, *Gäfgen v Germany*, op. cit., fn. 920, para. 88. See also cases of seriously ill persons: ECtHR (GC), 2016, *Paposhvili*, op. cit., fn. 57, para. 174, which was referred to in CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 38; and ECtHR (GC), 2021, *Savran v Denmark*, op. cit., fn. 897. See also CJEU, judgment of 15 October 2019, *Dumitru-Tudor Dorobantu*, C-128/18, EU:C:2019:857, para. 59.

919 ECtHR, 2012, *Bureš v Czech Republic*, op. cit., fn. 920, para. 84; and ECtHR (GC), 2010, *Gäfgen v Germany*, op. cit., fn. 920, para. 88.

920 CNDA (France), judgment of 21 September 2021, *M. A.*, No 18037855 C+.

921 CJEU (GC), judgment of 19 March 2019, *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov*, Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219 (hereinafter CJEU (GC), 2019, *Ibrahim*), para. 93, where the CJEU considered the admissibility of applications for international protection for beneficiaries of subsidiary protection that had been granted in another Member State.

922 See EASO, *Vulnerability – Judicial analysis*, op. cit., fn. 64, Part 6.

The ECtHR considers treatment to be **'inhuman'**, inter alia, 'where it was premeditated, was applied for hours at a stretch and caused either bodily injury or intense physical or mental suffering'[923].

In considering whether treatment or punishment is **'degrading'**, the ECtHR considers whether 'the object is to humiliate and debase the person concerned and whether ... it adversely affected his or her personality in a manner incompatible with Article 3'[924]. Degrading treatment has also been described as involving treatment 'such as to arouse in the victim feelings of fear, anguish and inferiority capable of humiliating or debasing [him or her]'[925], and as 'possibly breaking [his or her] physical or moral resistance ... or driving the victim to act against his will or conscience'[926]. Even if conducted without the intention of humiliating or debasing the appellant, it may be sufficient 'that the victim is humiliated in their own eyes, even if not in the eyes of others'[927].

As regards inhuman or degrading **punishment**, 'the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment'[928].

Prosecution and punishment for ordinary crimes generally cannot be characterised as inhuman treatment unless the sentence is 'grossly disproportionate'. The court has stated that the imposition of 'a grossly disproportionate sentence would violate Article 3 ECHR', but that 'it will only be on rare and unique occasions that this test will be met'[929]. It is, in principle, 'a State's choice to determine a specific criminal justice system, including sentence review and release arrangements'[930]. The ECtHR has nevertheless qualified a life sentence without any

923 ECtHR (GC), judgment of 26 October 2000, *Kudła v Poland*, No 30210/96, CE:ECHR:2000:1026JUD003021096 (hereinafter ECtHR (GC), 2000, *Kudła v Poland*), para. 92; ECtHR, judgment of 15 July 2002, *Kalashnikov v Russia*, No 47095/99, CE:ECHR:2002:0715JUD004709599 (hereinafter ECtHR, 2002, *Kalashnikov v Russia*), para. 95; and ECtHR (GC), 2011, *M.S.S. v Belgium and Greece*, op. cit., fn. 229, para. 220.

924 See, for example, ECtHR, judgment of 3 April 2001, *Keenan v United Kingdom*, No 272229/95, CE:ECHR:2001:0403JUD002722995 (hereinafter ECtHR, 2001, *Keenan v UK*), para. 110; ECtHR, 2002, *Kalashnikov v Russia*, op. cit., fn. 926, para. 95; ECtHR (GC), 2011, *M.S.S. v Belgium and Greece*, op. cit., fn. 229, para. 220; and ECtHR (GC), judgment of 15 December 2016, *Khlaifia and Others v Italy*, No 16483/12, CE:ECHR:2016:1215JUD001648312 (hereinafter ECtHR (GC), 2016, *Khlaifia and Others*), para. 160.

925 See, for example, ECtHR (GC), 2000, *Kudła v Poland*, op. cit., fn. 926, para. 92. See also ECtHR, judgment of 25 April 1978, *Tyrer v United Kingdom*, No 5856/72, para. 30; ECtHR, 2001, *Keenan*, op. cit., fn. 927, para. 110; ECtHR (GC), 2011, *M.S.S. v Belgium and Greece*, op. cit., fn. 229, para. 220; and ECtHR (GC), 2016, *Khlaifia and Others*, op. cit., fn. 927, para. 160.

926 See, for example, ECtHR, 2001, *Keenan v UK*, op. cit., fn. 927, para. 110.

927 See, for example, ECtHR (GC), 2011, *M.S.S. v Belgium and Greece*, op. cit., fn. 229, para. 220.

928 ECtHR (GC), 2000, *Kudła v Poland*, op. cit., fn. 926, para. 92. See also Article 1(1) CAT; and ECtHR, judgment of 29 April 2019, *AM c France*, No 12148/18, CE:ECHR:2019:0429JUD001214818, para. 125. The ECtHR reconsidered its case-law in a question concerning whether a suspected terrorist would face ill treatment in Algerian prisons. While some aspects of Algerian criminal procedure still cast doubt on whether a fair trial was guaranteed (lengthy police custody, limited access to a lawyer and a doctor), the court did not determine a real risk of ill treatment. See, by contrast, ECtHR, judgment of 9 January 2018, *X v Sweden*, No 36417/16, CE:ECHR:2018:0109JUD003641716, paras 27–30 and 57, with respect to suspected terrorists from Morocco, where 'reliable international sources ... show that arbitrary detention and torture continue to occur ...'.

929 ECtHR (GC), judgment of 9 July 2013, *Vinter and Others v United Kingdom*, Nos 66069/09, 130/10 and 3896/10, CE:ECHR:2013:0709JUD006606909, para. 102.

930 ECtHR (GC), judgment of 9 July 2013, *Vinter and Others v United Kingdom*, Nos 66069/09, 130/10 and 3896/10, CE:ECHR:2013:0709JUD006606909, para. 104.

possibility of review and reducibility as a violation of Article 3 ECHR[931]. A very long waiting period before any progress towards a review of possible release may be sufficient to conclude that the legislation does not offer *de facto* reducibility of whole-life sentences[932]. Furthermore, the ECtHR has ruled that threats of stoning (for adultery) are capable of amounting to torture or inhuman or degrading treatment or punishment[933].

Measures **depriving a person of their liberty** may involve an element of intense physical or mental suffering constituting inhuman or degrading treatment. However, the ECtHR has ruled that:

> … it cannot be said that detention on remand in itself raises an issue under Article 3 [ECHR]. Nor can that Article be interpreted as laying down a general obligation to release a detainee on health grounds …
>
> Nevertheless, under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured …[934].

The court has further noted that, when assessing 'conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by' the person concerned[935].

In cases of detention or imprisonment, the vulnerability of the detained person is a factor to be taken into account when assessing degrading treatment[936]. For example, the ECtHR has emphasised the extreme vulnerability of children[937] and of pregnant women[938] in the context of

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931 ECtHR (GC), judgment of 9 July 2013, *Vinter and Others v United Kingdom*, Nos 66069/09, 130/10 and 3896/10, CE:ECHR:2013:0709JUD006606909, paras 104–121. See also ECtHR, judgment of 4 September 2014, *Trabelsi v Belgium*, No 140/10, CE:ECHR:2014:0904JUD000014010, paras 137–139; and ECtHR (GC), judgment of 12 February 2008, *Kafkaris v Cyprus*, No 21906/04, CE:ECHR:2008:0212JUD002190604 (hereinafter ECtHR (GC), 2008, *Kafkaris*), paras 97–99.

932 In this case, review was possible after 40 years, which was coupled with the lack of sufficient procedural safeguards in the review procedure. ECtHR, judgment of 4 October 2016, *TP and AT v Hungary*, Nos 37871/14 and 73986/14, CE:ECHR:2016:1004JUD003787114, paras 49–50. See also ECtHR, judgment of 17 June 2021, *Sándor Varga and Others v Hungary*, Nos 39734/15, 35530/16 and 26804/18, CE:ECHR:2021:0617JUD003973415, paras 48–49.

933 ECtHR, judgment of 11 July 2000, *Jabari v Turkey*, No 40035/98, CE:ECHR:2000:0711JUD004003598, paras 41–42.

934 ECtHR, 2002, *Kalashnikov v Russia*, op. cit., fn. 926, para. 95.

935 Ibid. See also ECtHR (GC), judgment of 20 October 2016, *Muršić v Romania*, No 7334/13, CE:ECHR:2016:1020JUD000733413 (hereinafter ECtHR (GC), 2016, *Muršić v Romania*), para. 110; and ECtHR, judgment of 31 May 2018, *Al Nashiri v Romania*, No 33234/12, CE:ECHR:2018:0531JUD003323412 (hereinafter ECtHR, 2018, *Al Nashiri v Romania*), para. 675.

936 In *Khlaifia*, the ECtHR took several factors into account to 'determine whether the threshold of severity has been reached', including 'whether the victim is in a vulnerable situation'. See also ECtHR (GC), 2016, *Khlaifia and Others*, op. cit., fn. 927, paras 160(c) and 161–162.

937 ECtHR, judgment of 7 December 2017, *SF and Others v Bulgaria*, No 8138/16, CE:ECHR:2017:1207JUD000813816, paras 79–83, which concerned a couple and their three minor children. Given the conditions of their detention, the children had been subjected to inhuman and degrading treatment albeit for only a short time.

938 ECtHR, judgment of 2 March 2021, *RR and Others v Hungary*, No 36037/17, CE:ECHR:2021:0302JUD003603717, paras 58–65, which concerned minors and pregnant women.

migrant detention. Similarly, the court has considered persons with mental health problems[939] who would face detention or imprisonment in the country of origin as vulnerable. Depending on prison conditions, a person may also be vulnerable by virtue of their sexual orientation[940].

When assessing whether a person faces 'a real risk of inhuman or degrading treatment by virtue of general conditions of detention' under Article 4 EU Charter, the CJEU also referred to the ECtHR case-law on Article 3 ECHR regarding **prison conditions** in the context of surrenders under a European Arrest Warrant[941]. The CJEU referred to the ECtHR's conclusion that 'a strong presumption of a violation of Article 3 of the ECHR arises when the personal space available to a detainee is below 3 m^2 in multi-occupancy accommodation'[942]. The strong presumption:

> will normally be capable of being rebutted only if (i) the reductions in the required minimum personal space of 3 m^2 are short, occasional and minor, (ii) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities, and (iii) the general conditions of detention at the facility are appropriate and there are no other aggravating aspects of the conditions of the individual concerned's detention[943].

Examples of inhuman or degrading treatment in detention include 'complete sensory isolation, coupled with total social isolation', which can destroy the personality[944]; no availability of appropriate medical care for ill persons[945]; lack of psychiatric care for persons with mental health problems[946]; severe overcrowding[947]; lack of movement outside the cell[948]; lack

939 ECtHR, judgment of 10 April 2012, *Babar Ahmad and Others v United Kingdom*, Nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, CE:ECHR:2012:0410JUD002402707 (hereinafter ECtHR, 2012, *Babar Ahmad and Others*); and ECtHR, judgment of 16 April 2013, *Aswat v United Kingdom*, No 17299/12, CE:ECHR:2013:0416JUD001729912 (hereinafter ECtHR, 2013, *Aswat v UK*). The vulnerability of mentally ill people and their inability to complain about how they are being affected by particular treatment has to be considered. The elements to be considered are '(a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of health of an applicant' (para. 50).

940 ECtHR, judgment of 5 July 2016, *OM v Hungary*, No 9912/15, CE:ECHR:2016:0705JUD000991215, para. 53.

941 CJEU (GC), judgment of 5 April 2016, *Pál Aranyosi and Robert Căldăraru*, Joined Cases C-404/15 and C-659/15 PPU, EU:C:2016:198, para. 94. See EASO, *Introduction to the CEAS – A judicial analysis*, op. cit., fn. 8, Section 3.4.3, on the fact that the European Arrest Warrant, which is regulated by 'the Framework Decision, as secondary EU law, is similar to the Dublin III Regulation insofar as both systems are based on the concept of "mutual trust" between Member States'.

942 CJEU, judgment of 25 July 2018, *ML*, request for a preliminary ruling, C-220/18 PPU, EU:C:2018:589, para. 92.

943 CJEU, 2018, *ML*, op. cit., fn. 945, para. 93. See also CJEU, judgment of 15 October 2019, *Dumitru-Tudor Dorobantu*, C-128/18, EU:C:2019:857.

944 ECtHR, 2012, *Babar Ahmad and Others*, op. cit., fn. 942, para. 206.

945 See, *a contrario*, ECtHR, 2012, *Babar Ahmad and Others*, op. cit., fn. 942, para. 215; and ECtHR, judgment of 25 March 2021, *Bivolaru et Moldovan c France*, Nos 40324/16 and 12623/17, CE:ECHR:2021:0325JUD004032416 (hereinafter ECtHR, 2021, *Bivolaru et Moldovan c France*), para. 111.

946 See, *a contrario*, ECtHR, 2013, *Aswat v UK*, op. cit., fn. 942, para. 55.

947 ECtHR (GC), 2016, *Khlaifia and Others*, op. cit., fn. 927, para. 165. See also ECtHR, judgment of 10 March 2015, *Varga and Others v Hungary*, Nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, CE:ECHR:2015:0310JUD001409712, paras 69–78 (overcrowding of prisons); ECtHR (GC), 2016, *Muršić v Romania*, op. cit., fn. 938, paras 103–141 (overcrowding of prisons); ECtHR, judgment of 25 April 2017, *Rezmiveș and Others v Romania*, Nos 61467/12, 39516/13, 48231/13 and 68191/13, CE:ECHR:2017:0425JUD006146712, paras 75–79 (overcrowding, material conditions of detention, and hygiene); and ECtHR, judgment of 26 November 2009, *Nazarov v Russia*, No 13591/05, CE:ECHR:2009:1126JUD001359105, para. 83 (overcrowding).

948 ECtHR, 2021, *Bivolaru et Moldovan c France*, op. cit., fn. 948, para. 124.

of possibility of exercising or spending time outside the overcrowded cell[949]; insufficient individual space, lack of hygiene or insufficient ventilation and lighting[950]; and excessively stringent *de facto* isolation for an excessively long period in a container without the possibility of exercising outside and subsequent detention exposing the person to health risks through unnecessary placement with new arrivals in COVID-19 quarantine[951]. See also Table 41.

The ECtHR has provided an illustrative list of factors that are decisive in concluding that prisoners were subjected to inhuman or degrading treatment[952]. At the same time, it has observed that these elements 'depend closely on the facts of the case and will not be readily established prospectively in an extradition or expulsion context'[953].

Table 41: Illustrative list of prison conditions that may amount to inhuman or degrading treatment in the countries of return as derived from ECtHR case-law[954]

A highly restrictive regime with long periods of social isolation without support of family and friends for a person with a mental disorder[955]
No appropriate medical care for ill persons[956]
Severe overcrowding[957] (lack of personal space)
Lack of ventilation, lighting or sanitary facilities[958]
Lack of movement or recreation outside an overcrowded cell[959]
Complete sensory isolation, coupled with total social isolation[960]
Lack of psychiatric care for persons with mental health problems[961]

Similarly, conditions for those in detention awaiting execution of the death penalty (i.e. those on **'death row'**) have been found to constitute such treatment in *Soering*[962], 'having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the

949 See, *a contrario*, ECtHR, 2012, *Babar Ahmad and Others*, op. cit., fn. 942, paras 214 and 222.

950 ECtHR, 2021, *Bivolaru et Moldovan c France*, op. cit., fn. 948, para. 111; see also ECtHR, judgment of 7 December 2010, *Porumb v Romania*, No 19832/04, CE:ECHR:2010:1207JUD001983204, para. 72; ECtHR, judgment of 17 July 2012, *Radu Pop v Romania*, No 14337/04, CE:ECHR:2012:0717JUD001433704, para. 96.

951 ECtHR, judgment of 11 March 2021, *Feilazoo v Malta*, No 6865/19, CE:ECHR:2021:0311JUD000686519 (hereinafter ECtHR, 2021, *Feilazoo v Malta*), paras 90–92.

952 ECtHR, 2012, *Babar Ahmad and Others*, op. cit., fn. 942, para. 178. These concern presence of premeditation; that the measure may have been calculated to break the applicant's resistance or will; an intention to debase or humiliate an applicant, or, if there was no such intention, the fact that the measure was implemented in a manner that nonetheless caused feelings of fear, anguish or inferiority; the absence of any specific justification for the measure imposed; the arbitrary punitive nature of the measure; the length of time for which the measure was imposed; and the fact that there has been a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. See also ECtHR, 2012, *Harkins and Edwards*, op. cit., fn. 896, para. 130.

953 ECtHR, 2012, *Babar Ahmad and Others*, op. cit., fn. 942, para. 178.

954 See also Council of Europe, Guide on the case-law of the European Convention on Human Rights: Prisoners' rights, December 2020.

955 ECtHR, 2013, *Aswat v UK*, op. cit., fn. 942, paras 56–57.

956 ECtHR, 2012, *Babar Ahmad and Others*, op. cit., fn. 942, para. 215.

957 ECtHR, 2021, *Bivolaru et Moldovan c France*, op. cit., fn. 948, para. 123.

958 See, *a contrario*, ECtHR, 2012, *Babar Ahmad and Others*, op. cit., fn. 942, para. 219.

959 ECtHR, 2021, *Bivolaru et Moldovan c France*, op. cit., fn. 948, para. 124.

960 ECtHR, 2012, *Babar Ahmad and Others*, op. cit., fn. 942, para. 103.

961 See, *a contrario*, ECtHR, 2013, *Aswat v UK*, op. cit., fn. 942, para. 55.

962 ECtHR (plenary), 1989, *Soering*, op. cit., fn. 282.

offence'[963]. More recently, it was confirmed in *Al Nashiri* v *Romania* that 'Whatever the method of execution, the extinction of life involves some physical pain. In addition, the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering'[964].

2.4.3.4. In the country of origin of an applicant

In *M'Bodj*, the CJEU confirmed, according to the clear wording of Article 15(b), that this provision:

> is applicable only to the inhuman or degrading treatment of an applicant in his country of origin. It follows that the EU legislature envisaged that subsidiary protection should be granted only in those cases in which such treatment occurred in **the applicant's country of origin**[965].

According to Article 2(n) QD (recast), 'country of origin' means 'the country or countries of nationality or, for stateless persons, of former habitual residence'[966].

2.4.3.5. Particular situations under Article 15(b) qualification directive (recast)

This section addresses the situation of applicants for international protection who have fled particular situations and examines the possible relevance of these situations to subsidiary protection, as set out in Table 42. Some further particular situations are dealt with in Part 3, which considers both qualification for refugee protection and qualification for subsidiary protection. These concern people fleeing trafficking and modern slavery; environmental dangers; and COVID-19-related cases.

Situations of armed conflict are dealt with in detail in Section 2.4.4. They are addressed in the context of refugee status in Section 3.2.1 and in the context of Article 15(b) QD (recast) in Section 3.2.2.

Table 42: Structure of Section 2.4.3.5

Section	Title	Page
2.4.3.5.1	General economic situation in the country of origin	258
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2.4.3.5.3	Medical cases	261

2.4.3.5.1. General economic situation in the country of origin

Dire economic and humanitarian conditions in the country of origin are generally not, in themselves, capable of constituting inhuman or degrading treatment[967] and therefore do not establish eligibility for subsidiary protection. This is explicit in recital 35 QD (recast). The CJEU has not yet ruled on a case that deals with such a situation in the context of subsidiary

963 Ibid., para. 111.
964 ECtHR, 2018, *Al Nashiri v Romania*, op. cit., fn. 938, para. 727.
965 CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 33 (emphasis added). See also Section 2.3 above.
966 For the rules on determining nationality or lack of it, see Section 1.3.2 above.
967 ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 282.

protection. However, in the context of a Dublin transfer, the CJEU held that, at times, 'extreme material poverty' may be equated with inhuman or degrading treatment[968].

Even if such conditions were to reach the threshold of inhuman or degrading treatment, in order to fall within the scope of Article 15(b) QD (recast), such harm would have to take the form of conduct on the part of a third party (Article 6 QD (recast))[969].

The German Federal Administrative Court has held that inhuman or degrading treatment by reason of a poor humanitarian situation in a country of origin establishes eligibility for subsidiary protection only if such treatment is purposefully inflicted by an actor of serious harm[970]. Similarly, the Tallinn Circuit Court held that social and economic hardship are not grounds for granting subsidiary protection[971].

As regards reaching the threshold of inhuman or degrading treatment, in *M.S.S.* v *Belgium and Greece* the ECtHR considered the case of an applicant living on the streets, with no resources or access to sanitary facilities, and without any means of providing for his essential needs[972]. It held that 'such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 [ECHR]'[973].

In *Sufi and Elmi*, the ECtHR concluded that the conditions in camps for IDPs in the country of origin were sufficiently dire to amount to inhuman or degrading treatment[974]. Conditions in the camps involved limited access to food and water, limited access to shelter, overcrowding, lack of sanitary facilities and crime and exploitation, and there was little prospect of the situation improving.

2.4.3.5.2. Domestic violence and sexual violence

National case-law shows that women who are unwilling to return to their country of origin because of a fear of sexual violence, including domestic violence and forced marriage, may qualify as refugees (see Sections 1.4.4.7 and 1.6.2.4.2 above). If they do not qualify as refugees,

968 CJEU (GC), 2019, *Jawo*, op. cit., fn. 919, para. 92, considering that extreme material poverty arises if it 'does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and … undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity'. The CJEU referred to ECtHR (GC), 2011, *M.S.S.* v *Belgium and Greece*, op. cit., fn. 229, paras 252–263. See also Section 2.4.3.3 above, which refers to the CJEU's judgment in *Jawo* and CJEU (GC), 2019, *Ibrahim*, op. cit., fn. 924, paras 90 and 93.

969 CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 35.

970 BVerwG (Germany), judgment of 20 May 2020, No 1 C 11.19, DE:BVerwG:2020:200520U1C11.19.0 (hereinafter BVerwG (Germany), 2020, No 1 C 11.19). The court referred to CJEU case-law, Article 6 and recital 35 QD (recast), and stated that the CJEU's conclusions in *M'Bodj* concern not merely situations of insufficient healthcare systems, but all cases of generally inhuman living conditions in the country of origin (para. 12).

971 Tallinn Circuit Court (Ringkonnakohtud) (Estonia), judgment of 20 September 2019, No 3-19-951, concerning an applicant from Ukraine from the part of the country not affected by the conflict (English summary).

972 ECtHR (GC), 2011, *M.S.S.* v *Belgium and Greece*, op. cit., fn. 229, para. 263. Greece was bound to provide accommodation and decent material conditions to asylum seekers by standards under Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), [2013] OJ L 180/96 (para. 250).

973 ECtHR (GC), 2011, *M.S.S.* v *Belgium and Greece*, op. cit., fn. 229, para. 263. See also ECtHR (GC), judgment of 4 November 2014, *Tarakhel* v *Switzerland*, No 29217/12, CE:ECHR:2014:1104JUD002921712, para. 98.

974 ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 291–292. The ECtHR referred to its approach set out in ECtHR (GC), 2011, *M.S.S.* v *Belgium and Greece*, op. cit., fn. 229.

they may nevertheless qualify for subsidiary protection on grounds of a real risk of serious harm[975].

In Germany, for instance, one case concerned a young Sunni woman who had resisted the decision of her family council in northern Iraq by fleeing to Europe. In its judgment, the High Administrative Court of Bavaria held that the threat of a forced marriage, in this case arranged by the woman's parents, can amount to degrading treatment within the meaning of Article 15(b) QD[976]. The court stated:

> the right to marry is guaranteed in international conventions (Article 13 ECHR [sic], Article 9 EU Charter, Article 16(2) UN Declaration of Human Rights). According to unanimous opinion in the literature on aliens law, an act of coercion to force a marriage is in any case a reprehensible act violating the woman's right to self-determination[977].

In France, the CNDA has determined that, in a population in which forced marriage is so common as to be a social norm, girls and women who intend to avoid a marriage imposed against their will constitute a particular social group[978] and thus are entitled to refugee status. However, the same court granted subsidiary protection in the case of a woman of Sahrawi origin, who had been born in a refugee camp in Algeria and lived in Western Sahara, who had been subjected to domestic violence by her father-in-law and to forced marriage. The court held that it seems that domestic violence transgresses local customs and laws in Western Sahara; therefore, such women did not form a particular social group. At the same time, protection for such women was lacking, and the applicant was therefore eligible for subsidiary protection[979].

Other human rights instruments also impose positive obligations on states to protect women against sexual and gender-based violence. The Convention on the Elimination of All forms of Discrimination against Women (CEDAW) Committee expressed the view that states have:

> an obligation to protect women from being exposed to a real, personal and foreseeable risk of serious forms of discrimination against women, including gender-based violence,

975 In ECtHR, judgment of 9 June 2009, *Opuz v Turkey*, No 33401/02, CE:ECHR:2009:0609JUD003340102, para. 161, the court ruled that the domestic violence suffered by the applicant, 'in the form of physical injuries and psychological pressure, [was] sufficiently serious to amount to ill-treatment within the meaning of Article 3 of the Convention'. The case did not take place in the context of return to the country of origin. While the state authorities did not remain totally passive in combating domestic violence, the ECtHR found the violation of Article 3 ECHR 'as a result of the State authorities' failure to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her husband' (para. 169).

976 VGH Bavaria, judgment of 17 March 2016, No 13a B 15.30241 (hereinafter VGH Bavaria, 2016, No 13a B 15.30241). This case dealt with subsidiary protection only. The denial of refugee status, confirmed by the first instance court, was not challenged by the appellant. The determining authority challenged the decision to grant subsidiary protection; however, this challenge was dismissed by the High Administrative Court.

977 VGH Bavaria, 2016, No 13a B 15.30241, op. cit., fn. 979, para. 21 (unofficial translation). Instead of Article 13 ECHR (right to an effective remedy), the court presumably meant to refer to Article 12 ECHR (right to marry).

978 CNDA (France), judgment of 20 July 2018, *Mme E.*, No 15031912 R, para. 3; and CNDA (France), judgment of 20 July 2018, *Mme D.*, No 17042624 R, para. 3. See also CNDA (France), judgment of 18 May 2017, *Mme H.*, No 15013446, para. 4, concerning a woman from Djibouti at risk of forced marriage; judgment of 19 April 2017, *Mme C.*, No 16034664 C, para. 4, concerning a woman from Côte d'Ivoire at risk of forced marriage and FGM; and judgment of 27 September 2016, *Mme T.*, No 15004721, concerning a lesbian from Cameroon who had been forcibly married. For further examples of such cases, see Section 1.6.2.4.2 above, notably Table 17.

979 CNDA (France), judgment of 21 December 2016, *Mme A.*, No 15026470 C. See Malvasio, F., 'Judicial protection and vulnerable categories: how vulnerable persons are dealt with before the French National Asylum Court in relation to evidence and credibility assessment', *Catania IARMJ Conference*, 12–14 September 2018.

> irrespective of whether such consequences would take place outside the territorial boundaries of the sending State party[980].

2.4.3.5.3. Medical cases

The CJEU has dealt, more specifically, with **medical cases** in the context of Article 15(b) QD (recast).

When assessing a case in which the applicant was suffering from a serious illness and there was no appropriate treatment in the country of origin, the CJEU noted that 'certain factors specific to the context in which Article 15(b) [QD (recast)] occurs must, in the same way as the directive's objectives, also be taken into account'[981].

The CJEU emphasised that Article 6 QD (recast), concerning actors of serious harm, 'supports the view that such harm must take the form of conduct on the part of a third party and that it cannot therefore simply be the result of general shortcomings in the health system of the country of origin'[982]. The court referred to recital 26 QD (now recital 35 QD (recast)), according to which 'risks to which the population of a country or a section of the population is generally exposed do not normally in themselves create an individual threat which would qualify as serious harm'[983]. It also noted that 'the directive is intended to complement and add to, by means of subsidiary protection, the protection of refugees' and that 'its scope does not extend to persons granted leave to reside for other reasons on a discretionary basis on compassionate or humanitarian grounds'[984].

The CJEU concluded:

> It follows that the risk of deterioration in the health of a third country national suffering from a serious illness as a result of the absence of appropriate treatment in his country

980 CEDAW Committee, General Recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32, 15 November 2014, para. 22. See also CEDAW Committee, views of 15 July 2019, *RSAA et al* v *Denmark*, CEDAW/C/73/D/86/2015, para. 8.9. The case concerned a Jordanian citizen (originally a stateless Palestinian refugee who had acquired citizenships as a result of her marriage to a Jordanian). She was opposed to the forced marriage of her daughters and escaped from her husband after he had beaten her. She applied for international protection in Denmark. The committee accepted the allegation that she 'could not seek the protection of the authorities in Jordan prior to her departure and that she would not be able to do so upon her return ... taking into account the level of tolerance towards violence against women in Jordan, in particular the persistence of so-called "honour crimes", despite recent legal amendments, the pattern of failure in responding to women's complaints of abuse and the continuous recourse of the Jordanian authorities to the administrative detention or "protective custody" of women and girls at risk of becoming victims of those crimes' (para. 8.7). The committee recommended that the state refrain from her forced removal. See also CEDAW Committee, General Recommendation No 19 (1992) on violence against women, A/47/3.

981 CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 34. The applicant suffered from serious after-effects of an assault he had been subjected to in the host Member State (Belgium) (para. 17) and was granted leave to remain there on account of his state of health and the fact that there was no appropriate treatment in his country of origin (para. 24).

982 CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 35.

983 CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 36, referring to recital 26 QD, which is identical to recital 35 QD (recast).

984 CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 36 (emphasis added), referring in para. 37 to recitals 5, 6, 9 and 24 QD, which correspond to recitals 6, 12, 15 and 33 QD (recast).

> of origin is not sufficient, unless that third country national is **intentionally deprived of health care**, to warrant that person being granted subsidiary protection[985].

In *MP*, the CJEU considered the case of an applicant 'who has been tortured by the authorities of his country of origin and suffers severe psychological after-effects which, in the event of him being returned to that country, could be substantially aggravated and lead to a serious risk of him committing suicide'[986].

First of all, the CJEU noted that the fact 'that the person concerned has in the past been tortured by the authorities of his country of origin is not in itself sufficient justification for him to be eligible for subsidiary protection when there is no longer a real risk that such torture will be repeated if he is returned to that country'[987]. At the same time, the court stated that:

> the cause of the current state of health of a third country national ..., namely acts of torture inflicted by the authorities of his country of origin in the past, and the fact that, if he were to be returned to his country of origin, his mental health disorders would be substantially aggravated on account of the psychological trauma that he continues to suffer as a result of that torture, are relevant factors to be taken into account when interpreting Article 15(b) [QD][988].

The CJEU took Article 14 CAT into consideration[989], bearing in mind the different aims and protection mechanisms that the QD and CAT pursue[990]. It held that it is necessary to ascertain whether the applicant is likely, if returned:

> to face a risk of being intentionally deprived of appropriate care for the physical and mental after-effects resulting from the torture he was subjected to by the authorities of that country. That will be the case, inter alia, if ... a third country national is at risk of committing suicide because of the trauma resulting from the torture he was subjected to by the authorities of his country of origin [and] it is clear that those authorities, notwithstanding their obligation under Article 14 [CAT], are not prepared to provide for his rehabilitation. There will also be such a risk if it is apparent that the authorities of

985 CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 36 (emphasis added). This was confirmed in CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 49.

986 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 45. The applicant 'was suffering the after-effects of torture, severe post-traumatic stress disorder and serious depression, showed marked suicidal tendencies, and appeared to be particularly determined to kill himself if he had to return' to his country of origin (para. 19). The CJEU also compared the case to that of *M'Bodj*, who suffered from health problems as a victim of an assault in the host Member State (para. 47). See also Section 2.4.3.2 above.

987 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 30. For implications of Article 4(4) QD (recast) in this case and in general, see Section 2.5.2.

988 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 48.

989 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 52. It referred to recital 25 (QD) (now recital 34 QD (recast)). The CJEU noted that, under Article 14 CAT, state parties to CAT 'must ensure that, under their legal systems, a victim of torture has the right to obtain redress, including the resources necessary to achieve as full a rehabilitation as possible' (para. 52).

990 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 54. In para. 56, the CJEU stated that 'it is not possible, without disregarding the distinct areas covered by those two regimes, for a third country national in a situation such as that of MP to be eligible for subsidiary protection as a result of every violation, by his State of origin, of Article 14 [CAT]'. The aims of the QD (recast) and the CAT differ. Most of the latter's provisions focus on prohibition or prevention of torture or other acts of cruel, inhuman or degrading treatment or punishment by states parties (Articles 2 and 16 CAT). See Committee against Torture, General Comment No 2 of 24 January 2008 – Implementation of article 2 by states parties, CAT/C/GC/2, para. 3. The aim of the QD (recast), on the other hand, is to ensure application of 'common criteria for the identification of persons genuinely in need of international protection' and 'a minimum level of benefits ... for those persons' (recital 12 QD (recast)).

> that country have adopted a discriminatory policy as regards access to health care, thus making it more difficult for certain ethnic groups or certain groups of individuals … to obtain access to appropriate care for the physical and mental after-effects of the torture perpetrated by those authorities[991].

In cases in which third-country nationals are intentionally deprived of appropriate care for the after-effects of torture, for discriminatory reasons, in their country of origin, it should be examined whether the discriminatory reasons may mean the applicant qualifies as a refugee (see Section 1.6 above).

It follows from above that the scope of Article 15(b) QD (recast) differs from that of Article 3 ECHR in these cases. In medical cases, the CJEU has nevertheless referred to case-law regarding Article 3 ECHR in order to interpret inhuman treatment under Articles 4 and 19(2) EU Charter[992].

The CJEU recalled that Article 3 ECHR covers:

> the suffering caused by a naturally occurring illness, whether physical or mental, … if it is, or risks being, exacerbated by treatment, whether resulting from conditions of detention, removal or other measures, for which the authorities can be held responsible, provided that the resulting suffering attains the minimum level of severity required by that article[993].

The same threshold of severity must be met in the case of illness that is 'not naturally occurring where the lack of care that would be available to that person, once expelled, is not attributable to intentional acts or omissions of the receiving State'[994].

In *MP*, the CJEU ruled that Articles 4 and 19(2) EU Charter 'preclude a Member State from expelling a third country national where such expulsion would, in essence, result in significant and permanent deterioration of that person's mental health disorders, particularly where … such deterioration would endanger his life'[995]. However, it found that:

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991 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 57.

992 CJEU (GC), 2018, *MP*, op. cit., fn. 34, paras 36–37 and 41.

993 Ibid., referring to ECtHR (GC), 2016, *Paposhvili*, op. cit., fn. 57, paras 174–175, and CJEU, 2017, *CK and Others*, op. cit., fn. 226, para. 68. In *Paposhvili*, the appellant suffered from leukaemia, had undergone courses of chemotherapy and was at risk of severe complications that called for regular monitoring in a specialised setting. He was treated with a very expensive drug unavailable in his country of origin (Georgia) and was on a waiting list for organ donation.

994 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 39. The CJEU referred to ECtHR, judgment of 29 January 2013, *SHH v United Kingdom*, No 60367/10, CE:ECHR:2013:0129JUD006036710 (hereinafter ECtHR, 2013, *SHH v UK*), para. 89, in which the applicant, whose right leg had been amputated, distinguished his case from that of *N* v *United Kingdom* on account of the fact that he did not have a naturally occurring illness and did not require medication. The ECtHR noted that the future harm would emanate from a lack of sufficient resources to provide medical treatment or welfare provision rather than the intentional acts or omissions of the authorities of the receiving state (para. 94). In ECtHR (GC), 2021, *Savran v Denmark*, op. cit., fn. 921, the ECtHR stated that it had 'consistently applied the same principles in cases concerning the expulsion of seriously ill applicants, irrespective of what particular type of medical issue – somatic or mental – underlay their health condition' (para. 137). The case concerned an applicant suffering from schizophrenia. Medical evidence indicated that, should he interrupt his medication, it might lead to a relapse with 'serious consequences for himself and his environment' (para. 142). From some of the medical statements, the ECtHR found that, while 'a relapse was likely to result in "aggressive behaviour" and "a significantly higher risk of offences against the person of others" […] [this] could not be described as "resulting in intense suffering" for the applicant himself' (para. 143). It therefore determined that the threshold of severity according to Article 3 ECHR was not reached (para. 147).

995 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 43. See also CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 39.

> the fact that Article 3 [ECHR] … precludes, in very exceptional cases, a third country national suffering from a serious illness [from] being removed to a country in which appropriate treatment is not available does not mean that that person should be granted leave to reside in a Member State by way of subsidiary protection under [the QD][996].

The CJEU referred to the ECtHR's judgment in *Paposhvili*, which defined 'very exceptional cases' as situations involving:

> the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy[997].

In France, the CNDA found that the equivalent in national law of Article 15(b) QD (recast) does not cover a situation in which a seriously ill applicant would face inhuman or degrading treatment if returned as a result of the lack of adequate healthcare, unless the applicant were intentionally deprived of such care[998].

In a case concerning a claim under Article 3 ECHR to resist return, the UK Supreme Court considered that:

> while it is for the applicant to adduce evidence about his or her medical condition, current treatment (including the likely suitability of any other treatment) and the effect on him or her of inability to access it, the returning state is better able to collect evidence about the availability and accessibility of suitable treatment in the receiving state[999].

Insufficiency of medical care in the country of origin may also be relevant when considering the principle of *non-refoulement* under Article 15 Convention on the Rights of Persons with Disabilities (CRPD), which guarantees freedom from torture or cruel, inhuman or degrading treatment or punishment[1000]. The UN Committee on the Rights of Persons with Disabilities considered in *NL* that state authorities must assess 'whether there are substantial grounds for believing that the author would face a real risk of irreparable harm as contemplated by articles 10 [right to life] and 15' in the case of removal[1001]. In this case, the applicant had submitted several medical certificates to the domestic authorities indicating that her health condition was severe and would be life-threatening without the treatment she was receiving in the state. The UN Committee on the Rights of Persons with Disabilities determined that

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996 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 46.

997 ECtHR (GC), 2016, *Paposhvili*, op. cit., fn. 57, para. 183, referred to in CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 40. This threshold was reaffirmed in ECtHR (GC), 2021, *Savran v Denmark*, op. cit., fn. 921.

998 CNDA (France), order of 16 May 2017, *M. B.*, No 17706661 C+ (reported in CNDA (France), *Recueil contentiuex du droit d'asile, année 2017*, pp. 98–100).

999 Supreme Court (United Kingdom), judgment of 29 April 2020, *AM (Zimbabwe) v Secretary of State for the Home Department*, [2020] UKSC 17, para. 33.

1000 The UN Committee on the Rights of Persons with Disabilities has found it has extraterritorial application. See UN Committee on the Rights of Persons with Disabilities, views of 28 August 2020, *NL v Sweden*, Communication No CRPD/C/23/D/60/2019 (hereinafter UN Committee on the Rights of Persons with Disabilities, 2020, *NL*), para. 7.5. The EU has ratified the CRPD, and the consequences of that ratification are briefly described in fn. 51.

1001 UN Committee on the Rights of Persons with Disabilities, 2020, *NL*, op. cit., fn. 1003, para. 7.8.

'the failure by the domestic authorities to assess this risk facing the author in the light of the information available to them concerning the author's state of health amounted to a violation of her rights under article 15 of the Convention'[1002].

2.4.4. Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict (Article 15(c))

Article 15(c) QD (recast) states the following.

Article 15(c) QD (recast)

Serious harm consists of:

[...]

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

In *Elgafaji*, the CJEU noted that the terms used in Article 15(a) and (b) 'cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm'[1003]. By contrast, it stated that 'the harm defined in Article 15(c) of the Directive as consisting of a "serious and individual threat to [the applicant's] life or person" covers a more general risk of harm'[1004]. The court noted that Article 15(c) refers:

> more generally, to a 'threat ... to a civilian's life or person' rather than to specific acts of violence. Furthermore, that threat is inherent in a general situation of 'international or internal armed conflict'. Lastly, the violence in question which gives rise to that threat is described as 'indiscriminate', a term which implies that it may extend to people irrespective of their personal circumstances[1005].

The serious harm under Article 15(c) should arise in the applicant's country of origin[1006].

The different elements of Article 15(c), which must all be met, are set out in Figure 6. Each is addressed in the following subsections.

[1002] Ibid. See also UN Committee on the Rights of Persons with Disabilities, views of 6 September 2021, *ZH v Sweden*, CRPD/C/25/D/58/2019, paras 10.4 and 10.7, also finding a violation of Article 15 CRPD.

[1003] CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 32.

[1004] CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 33.

[1005] CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 34.

[1006] See Article 2(f) QD (recast), which refers to a person who, 'if returned to his or her country of origin ... would face a real risk of suffering serious harm as defined in Article 15'.

Figure 6: The different elements of Article 15(c)

The CJEU's approach has been described as a systemic or 'meta-teleological' one that focuses not only on the object and purpose of the relevant provisions but also on those of the EU regime as a whole, relying on the human rights standards contained in the EU Charter and the founding values of the organisation[1007].

As explained in Section 2.4.3 above, the CJEU has ruled that 'Article 15(b) of the [QD] corresponds, in essence, to Article 3 of the ECHR'[1008]. By contrast, it has stated that:

> Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR[1009].

With respect to Article 15(c) QD (recast), while the CJEU considered that its content is different from that of Article 3 ECHR, some aspects are inspired by ECHR case-law[1010].

The CJEU has not yet dealt with the issue of whether applicants falling outside the scope of Article 15(c) QD (recast) who are fleeing armed conflict may be eligible for subsidiary protection under Article 15(a) and/or (b) QD (recast).

Section 2.4.4 has five subsections, as set out in Table 43.

Table 43: Structure of Section 2.4.4

Section	Title	Page
2.4.4.1	'International or internal armed conflict'	269
2.4.4.2	'Indiscriminate violence'	270
2.4.4.3	'Serious and individual threat'	271
2.4.4.4	Nexus between 'serious and individual threat' and 'indiscriminate violence'	288
2.4.4.5	'Civilian's life or person'	289

Appendix A summarises the examination of cases in situations of armed conflict.

1007 See, for example, Moreno Lax, V., 'Of autonomy, autarky, purposiveness and fragmentation: the relationship between EU asylum law and international humanitarian law', in Cantor, D. and Durieux, J.-F. (eds), *Refuge from Inhumanity? War refugees and international humanitarian law*, Martinus Nijhoff, Leiden, 2014, p. 298.

1008 CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 28. See Sections 2.4.1 and 2.4.3.1 above and Section 2.4.4.3.2 below for further details.

1009 CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 28.

1010 Ibid.The ECtHR, on the other hand, was not persuaded that Article 3 ECHR 'does not offer comparable protection to that afforded under [Article 15(c) QD]'. See ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 226; and EASO, *Introduction to the CEAS – A judicial analysis*, op. cit., fn. 8, pp. 73–74.

2.4.4.1. 'International or internal armed conflict'

The scope of Article 15(c) QD (recast) covers 'international or internal armed conflict'.

The CJEU has not yet dealt with the meaning of international armed conflict. The meaning of **internal armed conflict** was, however, clarified by the CJEU in *Diakité*. The judgment explained:

> an internal armed conflict exists, for the purposes of applying that provision, if a State's armed forces confront one or more armed groups or if two or more armed groups confront each other. It is not necessary for that conflict to be categorised as 'armed conflict not of an international character' under international humanitarian law; nor is it necessary to carry out, in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organisation of the armed forces involved or the duration of the conflict[1011].

In reaching this conclusion, the CJEU made it clear that the subsidiary protection regime and international humanitarian law 'pursue different aims and establish quite distinct protection mechanisms'[1012]. Therefore, 'it is not possible to make eligibility for subsidiary protection conditional upon a finding that the conditions for applying international humanitarian law have been met'[1013]. Consequently, the CJEU described its conclusion on the meaning of internal armed conflict as having been 'determined by considering its usual meaning in everyday language while also taking into account the context in which it occurs and the purposes of the rules of which it is part'[1014].

Depending on the country situation, it may still be necessary for courts and tribunals to decide whether there is, in fact, an armed confrontation in the sense described by the court. The CJEU's definition appears, for instance, to exclude a situation in which there is only a single armed group confronting the general population.

2.4.4.2. 'Indiscriminate violence'

'Indiscriminate violence' refers to the source of the specific type of serious harm identified in Article 15(c) QD (recast). In *Elgafaji*, the CJEU stated that the violence that gives rise to the serious and individual threat to an applicant's life or person is described as 'indiscriminate', a 'term which implies that it may extend to people irrespective of their personal circumstances'[1015].

1011 CJEU, 2014, *Diakité*, op. cit., fn. 844, para. 35. See also CNDA (France), judgment of 28 September 2017, *Mme I.B.*, No 15030837 C (hereinafter CNDA (France), 2017, *Mme I.B.*, No 15030837 C), which considered that armed confrontations of different armed groups – the former Séléka on the one hand and the Anti-Balaka militias on the other – could be qualified as an internal armed conflict. In reaching this conclusion, the CNDA referred to, inter alia, relevant UN Security Council resolutions.

1012 CJEU, 2014, *Diakité*, op. cit., fn. 844, para. 24. See also para. 23, which states 'While international humanitarian law is designed, inter alia, to provide protection for civilian populations in a conflict zone by restricting the effects of war on persons and property, it does not – by contrast with Article 2(e) [QD], read in conjunction with Article 15(c) of that directive – provide for international protection to be granted to certain civilians who are outside both the conflict zone and the territory of the conflicting parties'.

1013 CJEU, 2014, *Diakité*, op. cit., fn. 844, para. 26.

1014 CJEU, 2014, *Diakité*, op. cit., fn. 844, para. 27.

1015 CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 34; CJEU, 2021, *CF and DN*, op. cit., fn. 684, para. 26.

For example, the Upper Tribunal (United Kingdom), referring also to *Elgafaji*, regarded indiscriminate bombings or shootings:

> as indiscriminate in the sense that, albeit they may have specific or general targets, they inevitably expose the ordinary civilian who happens to be at the scene to what has been described in argument as collateral damage. By specific targets, we refer to individuals or gatherings of individuals such as army or police officers. The means adopted may be bombs, which can affect others besides the target, or shootings, which produce a lesser but nonetheless real risk of collateral damage. By general targets we refer to more indiscriminate attacks on, for example, Sunnis or Shi'as or vice versa. Such attacks can involve explosions of bombs in crowded places such as markets or where religious processions or gatherings are taking place[1016].

With respect to the grave environmental situation, ethnic and political conflicts and poverty in 2020 in the Niger Delta, the Italian Supreme Court of Cassation upheld the conclusion of the lower court that the resulting insecurity linked to sabotage, kidnappings and attacks against the police did not reach the level of indiscriminate violence, in the context of an armed conflict or of an equivalent situation, that is required for qualification for subsidiary protection[1017].

To similar effect, UNHCR understands the term 'indiscriminate' to encompass 'acts of violence not targeted at a specific object or individual, as well as acts of violence which are targeted at a specific object or individual but the effects of which may harm others'[1018].

2.4.4.3. 'Serious and individual threat'

The harm defined in Article 15(c) QD (recast) refers to a 'serious and individual threat' to a civilian's life or person. These terms are examined in the subsections that follow.

2.4.4.3.1. The meaning of 'serious and individual threat'

In *Elgafaji*, the CJEU stated that the word 'individual' must be understood:

> as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place … reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive[1019].

1016 Upper Tribunal (IAC) (United Kingdom), judgment of 13 November 2012, *HM and Others (Article 15(c)) Iraq CG*, [2012] UKUT 00409 (hereinafter Upper Tribunal (IAC) (United Kingdom), 2012, *HM and Others (Article 15(c)) Iraq CG*), para. 42.

1017 Supreme Court of Cassation (Corte Suprema di Cassazione) (Italy), judgment of 12 November 2020, *Applicant v Ministry of Interior (Ministero dell'interno)*, No 23925/19 (English summary) (hereinafter Supreme Court of Cassation (Italy), 2020, *Applicant v Ministry of Interior (Ministero dell'interno)*, No 23925/19 (English summary)).

1018 UNHCR, *Safe at Last? Law and practice in selected EU Member States with respect to asylum-seekers fleeing indiscriminate violence*, July 2011 (hereinafter UNHCR, *Safe at Last?*), p. 103.

1019 CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 35. See also CJEU, 2021, *CF and DN*, op. cit., fn. 684, paras 27–28.

In *Elgafaji*, the court notes that interpretation 'is likely to ensure that Article 15(c) QD (recast) has its own field of application'[1020]. The CJEU referred to recital 26 QD (now recital 35 QD (recast)), according to which 'Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm'. The wording of this recital:

> nevertheless allows – by the use of the word 'normally' – for the possibility of an exceptional situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question[1021].

The CJEU noted further that the exceptional nature of that situation is confirmed by 'the fact that the relevant protection is subsidiary, and by the broad logic of Article 15 of the Directive, as the harm defined in paragraphs (a) and (b) of that article requires a clear degree of individualisation'[1022]. This allows for a 'coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive'[1023]. The court noted that 'In that regard, the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection'[1024].

The CJEU concluded:

> … Article 15(c) [QD (recast)], in conjunction with Article 2(e) thereof, must be interpreted as meaning that:
>
> – – the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;
> – – the existence of such a threat can exceptionally be considered to be established where the **degree of indiscriminate violence** characterising the armed conflict taking place … reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, **solely on account of his presence** on the territory of that country or region, face a real risk of being subject to that threat[1025].

[1020] CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 36.

[1021] CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 37. Following *Elgafaji*, the French Council of State ruled that an applicant is not required to prove specific targeting because of their personal situation when the level of indiscriminate violence reaches such a degree that there are serious and proven reasons to believe that a civilian would be at risk solely by their presence in the territory. Council of State (Conseil d'État) (France), judgment of 3 July 2009, No 320295, FR:CESSR:2009:320295.20090703 (hereinafter Conseil d'État (France), 2009, No 320295). According to the court, this was the case in Sri Lanka in mid 2009.

[1022] CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 38.

[1023] Ibid.

[1024] CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 39. See also CJEU, 2021, *CF and DN*, op. cit., fn. 684, para. 31.

[1025] CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 45 (emphasis added). See also CJEU, 2021, *CF and DN*, op. cit., fn. 684, para. 27.

2.4.4.3.2. Assessing the level of violence

The CJEU has provided guidance on the assessment of a 'serious and individual threat' in its *CF and DN* judgment[1026]. In that case, the CJEU held that a quantitative assessment of the risk of death and injury, expressed as a ratio between the number of casualties in the relevant area and the total number of individuals composing the population of that area, is relevant for the purpose of determining whether a serious and individual threat exists, but that 'it cannot constitute the only determining factor'[1027]. It further clarified:

> in order to determine whether there is a 'serious and individual threat', within the meaning of Article 15(c) [QD (recast)], a comprehensive appraisal of all the relevant circumstances of the individual case is required, in particular those which characterise the situation of the applicant's country of origin ... even if [an] application does not rely on factors specific to the applicant's situation, it follows from Article 4(3) [QD (recast)] that such an application must be subject to an individual assessment, in respect of which a whole series of factors must be taken into account. Those factors include ... 'all relevant facts as they relate to the country of origin at the time of taking a decision on the application'[1028].

More specifically, in *CF and DN*, the CJEU stated that, as the Advocate General observed, in essence, in points 56 and 59 of his opinion, the elements to be taken into account in assessing **whether there is a real risk of serious harm within the meaning of Article 15(c) QD (recast)** may include those set out in Table 44[1029].

Table 44: Non-exhaustive list of elements to be taken into account when assessing whether there is a real risk of serious harm under Article 15(c) QD (recast), as provided in the CJEU's CF and DN judgment

The intensity of the armed confrontations
The level of organisation of the armed forces involved
The duration of the conflict
The geographical scope of the situation of indiscriminate violence
The actual destination of the applicant in the event that he or she is returned to the relevant country or region
Potentially intentional attacks against civilians carried out by the parties to the conflict

The opinion of the Advocate General, in *CF and DN*, noted that national courts and tribunals take a range of factors into account when assessing the degree of violence affecting the country or region concerned[1030]. These factors are listed in Table 45.

[1026] CJEU, 2021, *CF and DN*, op. cit., fn. 684.
[1027] CJEU, 2021, *CF and DN*, op. cit., fn. 684, paras 30–31 and 33.
[1028] CJEU, 2021, *CF and DN*, op. cit., fn. 684, paras 40–42.
[1029] CJEU, 2021, *CF and DN*, op. cit., fn. 684, para. 43.
[1030] CJEU, Opinion of Advocate General Pikamäe of 11 February 2021, *CF and DN v Bundesrepublik Deutschland*, C-901/19, EU:C:2021:116 (hereinafter Opinion of Advocate General Pikamäe, 2021, *CF and DN*), para. 59.

Table 45: Factors taken into account in the case-law of Member States when assessing whether there is a real risk of serious harm under Article 15(c) QD (recast), as listed in the Advocate General's opinion in CF and DN

The number of civilians killed and injured in the relevant geographical areas
The extent of displacement resulting from the armed conflict
The methods and tactics of warfare employed and their consequences for civilians
Human rights infringements
The capacity of the state or organisations controlling the territory in question to protect civilians and assistance provided by international organisations

In *CF and DN*, the CJEU clarified the relevance of the number of casualties as a proportion of the population as a whole in the region concerned in determining whether a 'serious and individual threat' exists. It stated:

> If the actual victims of the violence perpetrated by the parties to the conflict against the lives or persons of civilians in the region concerned constitute a high proportion of the total number of civilians living in that region, this is likely to lead to the conclusion that there might be further civilian casualties in that region in the future. Such a finding thus makes it possible to establish the existence of the serious threat referred to in Article 15(c) [QD (recast]][1031].

This finding can be understood as a clarification of a possible – but not the only – way to establish whether a real risk of being subject to the threat described in Article 15(c) exists **solely on account of an applicant's presence** on the territory of that country or region.

The CJEU also held that:

> the absence of such a finding cannot, in itself, be sufficient to exclude systematically and in all circumstances the existence of a risk of such a threat, within the meaning of that provision, and, therefore, lead automatically and without exception to subsidiary protection being ruled out[1032].

There is no further guidance on what the abovementioned 'high proportion' might be in numeric terms. The CJEU was not, however, asked to clarify this. The referring court tackled the question on how to assess the level of violence from another angle and asked whether 'a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of armed conflict … can only exist where a minimum number of civilian casualties (killed and injured) has already been established'[1033].

Therefore, a large number of civilian casualties by reason of indiscriminate violence during an armed conflict is likely to establish the existence of a serious threat within the meaning of Article 15(c) QD (recast) when the number of civilian casualties constitutes a high proportion

[1031] CJEU, 2021, *CF and DN*, op. cit., fn. 684, para. 32.

[1032] CJEU, 2021, *CF and DN*, op. cit., fn. 684, para. 33. This refers to the finding that 'the actual victims of the violence perpetrated by the parties to the conflict against the lives or persons of civilians in the region concerned constitute a high proportion of the total number of civilians living in that region', as described above.

[1033] CJEU, 2021, *CF and DN*, op. cit., fn. 684, para. 20. The reference was made by VGH Baden-Württemberg, order of 29 November 2019, A 11 S 2374/19.

of all civilians living in the relevant region. The opposite conclusion, however, to rule out such a threat automatically where the number of casualties is relatively low, is not in line with the QD (recast). As the CJEU held:

> The systematic application by the competent authorities of a Member State of a single quantitative criterion, which may be of questionable reliability in view of the specific difficulty of identifying objective and independent sources of information close to areas of armed conflict, such as a minimum number of civilian casualties injured or deceased, in order to refuse the grant of subsidiary protection, is likely to lead national authorities to refuse to grant international protection in breach of the Member States' obligation to identify persons genuinely in need of that subsidiary protection[1034].

As the CJEU noted in *Elgafaji*, 'the content of [Article 15(c) QD (recast)] is different from that of Article 3 ECHR' and interpretation must be carried out independently, although with due regard for fundamental rights guaranteed under the ECHR[1035].

National case-law shows that courts have sometimes determined that there is such a high level of violence that a threat exists **solely on account of an applicant's presence**. For instance, the CNDA (France) found such a situation with respect to Juba city centre in South Sudan in 2017, when al-Shabaab militias were subjecting civilians to arbitrary executions and other violations. The militias were attacked by forces of the Somali government and the African Union Mission in Somalia and by US drone strikes, also causing numerous civilian casualties and massive displacement of the population[1036]. The same French court determined such a situation existed in Damascus, Syria, in 2018, including as a result of the bombings of schools, hospitals or residential zones, and the use of chemical weapons, with no sign of the situation calming down[1037]. In 2021, it found that such a situation existed in Tigray, Ethiopia, due to indiscriminate bombing, massacres of civilians by the Eritrean army, a catastrophic humanitarian situation and a conflict that was not subsiding[1038]. Likewise, it found in 2021 that such a threat existed in the region of Mopti in Mali, where many armed rebel groups were present, the violence had an ethnic dimension and a jihadist movement targeted the primarily civilian population[1039].

By contrast, the Federal Administrative Court of Germany found in 2020 in relation to Mogadishu, Somalia, that, at that time:

> the documented attacks ... had not thus far reached such a quantity and quality as to support the assumption that the entire civilian population in Mogadishu is in danger. In so finding, [the court] took into account that at present Mogadishu is not among the

[1034] CJEU, 2021, *CF and DN*, op. cit., fn. 684, para. 35.

[1035] CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 28.

[1036] The CNDA held that there was a situation of general risk with respect to Juba, South Sudan. CNDA (France), judgment of 13 November 2017, *M. M.A.*, No 16038980 C. See also CNDA (France), 2018, *M. M.A.*, No 16039973 C, op. cit., fn. 416, para. 8.

[1037] CNDA (France), judgment of 3 July 2018, *Mme A.*, No 17021233.

[1038] CNDA (France), judgment of 30 April 2021, *M. B.*, No 19050187 C+, para. 11.

[1039] CNDA, Grande Formation (France), 2021, *M. S.*, No 20029676, op. cit., fn. 737, para. 12. Other cases with indiscriminate violence of exceptional intensity concern the province of Tillabéri in Niger (near the border with Burkina Faso and Mali) in CNDA (France), judgment of 19 July 2021, *M. M. et Mme A.*, Nos 21008772 and 21008773 C+, and Baghlan province in Afghanistan in CNDA (France), judgment of 9 July 2021, *M. G.*, No 20015236 C (hereinafter CNDA (France), 2021, *M. G.*, No 20015236 C).

> regions of Somalia that are particularly affected by the conflict, and reports at least mention improvements in the security situation, even though that situation must still be categorised as poor[1040].

In order to analyse the degree of violence, national courts use both **qualitative and quantitative analyses**.

The High Administrative Court of Baden-Württemberg decided that the cumulative effects of armed conflicts should be taken into account. It stated further:

> The significance of the cumulative effects of protracted armed conflicts in the context of the overall assessment lies – at least also – in the fact that the increasing duration of the conflict typically and predictably leads to an increase in the number and severity of mental illnesses as a consequence of the permanent threat situation. However, such consequences are not to be taken into account in the quantitative consideration, because an appropriate statistical recording in the crisis area is simply inconceivable[1041].

The Upper Tribunal (United Kingdom) favoured an inclusive approach that:

> requires an analysis of the violence that is both qualitative and quantitative and is not to be restricted to a purely quantitative analysis of the number of civilian deaths and injuries ... The list of factors relevant to such an analysis is non-exhaustive but includes within them the conduct, and relevant strength, of the parties to the conflict ...), the number of civilian deaths and injuries, including psychological injuries caused by the conflict, the level of displacement and the geographical scope of the conflict[1042].

In the Upper Tribunal's view, 'it can never be right to attempt some simple subtraction of targeted violence from the overall sum of indiscriminate violence'[1043].

In France, the CNDA's Grand Chamber considers both quantitative and qualitative criteria[1044]. Factors it takes into account include the parties to the conflict and their military force; their methods and war tactics used; the types of weapons used; the geographical extent and duration of the conflict and its specific location; the frequency and intensity of incidents in relation to the local population; the methods used by the parties to the conflict and their targets; the geographical extent of the violence; the number of civilian victims, including those wounded on account of the conflict, with respect to the population in the relevant geographical zone, such as the city, province or region; the number of people displaced by the conflict; the number of voluntary returns; and the security of road traffic. Other factors include violations of human rights; access to basic public services, to healthcare and to

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1040 BVerwG (Germany), 2020, No 1 C 11.19, op. cit., fn. 973, para. 21 (unofficial translation).

1041 VGH Baden-Württemberg, judgment of 12 October 2018, A 11 S 316/17 (hereinafter VGH Baden-Württemberg, 2018, A 11 S 316/17), para. 99 (unofficial translation).

1042 Upper Tribunal (IAC) (United Kingdom), judgment of 30 October 2015, *AA (Article 15(c)) Iraq CG*, [2015] UKUT 00544, para. 89, referring to analysis included in previous case-law. See also Court of Appeal (England and Wales, United Kingdom), judgment of 24 June 2009, *QD (Iraq) v Secretary of State for the Home Department*, [2009] EWCA Civ 620, para. 27; Upper Tribunal (IAC) (United Kingdom), 2012, *HM and Others (Article 15(c)) Iraq CG*, op. cit., fn. 1019, paras 42 and 44; and Upper Tribunal (IAC) (United Kingdom), 2014, *MOJ and Others (Return to Mogadishu) Somalia CG*, op. cit., fn. 552.

1043 Upper Tribunal (IAC) (United Kingdom), 2012, *AK (Article 15(c)) Afghanistan CG*, op. cit., fn. 252, para. 207.

1044 CNDA, Grande Formation (France), judgment of 19 November 2020, *M. N.*, No 19009476, para. 13. See also CNDA, Grande Formation (France), judgment of 19 November 2020, *M. M.*, No 18054661 R.

education; the capacity of authorities to control the situation in the country and protect civilians and minorities; access to any aid provided by international organisations; and the situation of displaced persons on their return[1045]. The assessment requires an analysis of the regions concerned, rather than of the general nationwide situation[1046].

In Slovenia, the Administrative Court has taken into account the following factors: battle deaths and injuries among the civilian population, including possible temporal dynamics of numbers of deaths and injuries; the number of IDPs; basic humanitarian conditions in centres for displaced persons, including food supply, hygiene and safety; and the degree of 'state failure' to guarantee basic material infrastructure, order, healthcare, food supply and drinking water. It ruled that it is not only the 'survival' of applicants for international protection, but also the prohibition of inhuman treatment, that is protected under Article 15(c)[1047]. The Supreme Court subsequently ruled that these factors were 'legally relevant'[1048].

In the Netherlands, the Council of State has ruled with reference to its former case-law that:

> when assessing whether such a situation occurs, it is important, among other things, whether the parties involved in the armed conflict target civilians or fight in a way that increases the risk of random civilian casualties, the use of such means of violence is widespread, the armed conflict may or may not be confined to certain areas, the presence or absence of a security structure, as well as the number of civilians who have been victims of the violence or have been displaced as a result[1049].

The court took into account that statistics are incomplete, as they do not include data on the numbers of collateral victims, civilian victims of human rights abuses, victims of violent crimes or those living with trauma caused by violence[1050].

In Belgium, a 2019 judgment of the Council for Alien Law Litigation considered the following factors: the number of victims of violence; the number of conflict-related incidents; the intensity of these incidents; the targets chosen by the parties to the conflict; the nature of the violence used; the extent to which civilians were victims of targeted or arbitrary violence; the surface area affected; the incidence of random violence; the number of victims in relation to the total population in the area concerned; the impact of this violence on the lives of the civilians; and the extent to which this violence forced civilians to leave Baghdad[1051]. Additional factors considered particularly significant in a 2020 judgment were the nature of weapons used and the methods used (e.g. improvised explosive devices, artillery, air bombing, heavy weapons); the security of traffic routes; whether violations of human rights had become more widespread; the numbers of deaths and injuries; the circumstances in which civilians became

[1045] CNDA (France), 2020, *M. N.*, No 19009476, op. cit., fn. 1047, para. 13, emphasising the need to take into account a range of factors based on up-to-date and relevant COI.

[1046] CNDA (France), judgment of 28 March 2013, *M. M.A.,* No 12017575 C.

[1047] Administrative Court (Upravno Sodišče) (Slovenia), judgments of 25 September 2013, I U 498/2012-17, and of 29 January 2014, I U 1327/2013-10.

[1048] Supreme Court (Vrhovno sodišče) (Slovenia), judgment of 10 April 2014, I Up 117/2014, SI:VSRS:2014:I.UP.117.2014.

[1049] Council of State (Raad van State) (Netherlands), judgment of 4 January 2018, 201706705/1/V2, NL:RVS:2018:1, para. 5.1 (unofficial translation).

[1050] Council of State (Raad van State) (Netherlands), 2018, 201706705/1/V2, op. cit., fn. 1052, paras 4 and 6.

[1051] RVV/CCE (Belgium), judgment of 17 May 2019, No 221.342 (hereinafter RVV/CCE (Belgium), 2019, No 221.342), para. 2.5.2.5.

victims; the number of victims among security forces; the situation of those returning; the number of voluntary returns; freedom of movement; the impact of the violence on ordinary life; access to basic services; other socioeconomic indicators; and the capacity of the authorities to control the situation and protect civilians and minorities. The number of violent incidents and the numbers of victims are often considered as a proportion of the total number of inhabitants of the region in question[1052].

Interpretation of Article 15(c) QD (recast) must be carried out with due regard for fundamental rights guaranteed under the ECHR. In the *CF and DN* judgment, some criteria used to assess the level of violence were inspired by the criteria used by the ECtHR[1053]. The case-law of the ECtHR is therefore outlined below.

In *Sufi and Elmi*, the ECtHR used the following criteria to assess the level of violence:

> first, whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians; secondly, whether the use of such methods and/or tactics was widespread among the parties to the conflict; thirdly, whether the fighting was localised or widespread; and finally, the number of civilians killed, injured and displaced as a result of the fighting[1054].

While the ECtHR did not see these criteria as an exhaustive list to be applied in all future cases, it considered that they 'form an appropriate yardstick by which to assess the level of violence'[1055].

The ECtHR uses a notion of 'most extreme cases of general violence' in its judgment *NA* v *UK*, to which the CJEU refers in *Elgafaji*[1056]. In *NA* v *UK*, the ECtHR stated that it:

> has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 [ECHR]. Nevertheless, the Court would adopt such

[1052] RVV/CCE (Belgium), judgment of 16 January 2020, No 231.259 (hereinafter RVV/CCE (Belgium), 2020, No 231.259), para. 25.2.

[1053] CJEU, 2021, *CF and DN*, op. cit., fn. 684, para. 43; and Opinion of Advocate General Pikamäe, 2021, *CF and DN*, op. cit., fn. 1033, paras 51 and 59.

[1054] ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 241, referring to AIT (United Kingdom), judgment of 27 January 2009, *AM and AM (armed conflict: risk categories)*, Rev 1 Somalia CG, [2008] UKAIT 00091 (hereinafter AIT (United Kingdom), 2009, *AM and AM (armed conflict: risk categories)*).

[1055] ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 241. The ECtHR applied the same criteria in ECtHR, 2013, *KAB* v *Sweden*, op. cit., fn. 713, paras 77 and 86 (where it determined that the level of violence did not reach the level of generalised violence); and its judgment of 14 February 2017, *SK* v *Russia*, No 52722/15, CE:ECHR:2017:0214JUD005272215, para. 61. In ECtHR, judgment of 15 October 2015, *LM and Others* v *Russia*, Nos 40081/14, 40088/14 and 40127/14, CE:ECHR:2015:1015JUD004008114 (hereinafter ECtHR, 2015, *LM and Others* v *Russia*), para. 123, the ECtHR referred to UN reports that described the situation in Syria in 2016 as a 'humanitarian crisis', involving '"immeasurable suffering" of the civilians, massive violations of human rights and humanitarian law by all parties', resulting in displacement of almost half of the country's population.

[1056] ECtHR, 2008, *NA* v *UK*, op. cit., fn. 243, referred to in CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 44.

> an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return[1057].

The ECtHR continued, setting out that, in some cases, 'where an applicant alleges that he or she is a **member of a group systematically exposed** to a practice of ill-treatment', membership of such a group is sufficient to call Article 3 ECHR into play[1058]. Under the ECtHR case-law, the risk may flow from 'the general situation of violence, a personal characteristic of the applicant, or a combination of the two'[1059]. (For examples of personal characteristics, see Section 2.4.4.3.3 below.)

UNHCR has noted that the demands on assessment of the level of violence should not undermine the 'object and purpose of Article 15(c)'[1060]. It has recommended that states conduct a 'pragmatic, holistic and forward-looking assessment of the violence in the country of origin, including both quantitative and qualitative elements'[1061]. Furthermore, it states:

> The assessment of the level of violence and of individual risk cannot be reduced to a mathematical calculation of probability. The assessment needs to encompass not only the number of security incidents and casualties – which include, in addition to deaths and injuries, other threats to the person – but also the general security environment in the country, population displacement and the impact of the violence on the overall humanitarian situation[1062].

2.4.4.3.3. Personal circumstances that may give rise to greater risk

The CJEU in *Elgafaji* considered that 'the more the applicant is able to show that he is specifically affected by reason of factors particular to his **personal circumstances**, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection'[1063]. This concept has been described and is widely known as the sliding scale concept[1064].

1057 ECtHR, 2008, *NA v UK*, op. cit., fn. 243, para. 115. However, in *NA* the ECtHR considered that the generalised risk did not arise. A situation of generalised violence was found in ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 248, with respect to Mogadishu, Somalia. A few years later it found that the situation in Somalia no longer reached this intensity of violence (ECtHR, 2013, *KAB v Sweden*, op. cit., fn. 713; and ECtHR, judgment of 10 September 2015, *RH v Sweden*, No 4601/14, CE:ECHR:2015:0910JUD000460114 (hereinafter ECtHR, 2015, *RH v Sweden*)).

1058 ECtHR, 2008, *NA v UK*, op. cit., fn. 243, para. 116 (emphasis added). See also ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 227, paras 103 and 105. In ECtHR, 2007, *Salah Sheekh*, op. cit., fn. 682, the court found that members of the Ashraf minority established distinguishing features (para. 148). By contrast, in ECtHR, 2008, *NA v UK*, op. cit., fn. 243, it considered that 'it cannot be said that there is a generalised risk to Tamils from the [Liberation Tigers of Tamil Eelam] in a government-controlled area such as Colombo' (para. 128). In ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 227, the court ruled that 'persons who collaborated in different ways with the authorities of the occupying powers in Iraq after the war have been and continue to be targeted by al-Qaeda and other groups' (paras 17 and 117).

1059 ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 218; and ECtHR, 2015, *RH v Sweden*, op. cit., fn. 1060, para. 60.

1060 UNHCR, *Safe at Last?*, op. cit., fn. 1021, p. 104.

1061 Ibid.

1062 Ibid.

1063 CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 39 (emphasis added). See also CJEU, 2014, *Diakité*, op. cit., fn. 844, para. 31.

1064 The concept seems to have been established since the publication of UNHCR, *Safe at Last?*, op. cit., fn. 1021, p. 49.

The requirement to take personal circumstances into account follows from Article 4(3) QD (recast). That article requires that the assessment of an application for international protection be carried out on an individual basis, and includes taking into account the factors in Article 4(3)(a)–(e), inter alia:

> the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm[1065].

Individual assessment therefore requires that the **vulnerability of an applicant** be taken into account.

According to the Belgian Council for Alien Law Litigation, the CJEU in *Elgafaji* did not specify what should be the character of 'factors particular to personal circumstances of the applicant'. In order for the interpretation to be useful, the court stated that these factors cannot be of the same nature as those playing a role in the assessment of a well-founded fear of persecution. Therefore, it listed circumstances that may give rise to a greater risk for a particular person than for others of becoming a victim of indiscriminate violence, even if they are not being targeted specifically. Examples of such factors were increased vulnerability and a more exposed location or socioeconomic situation meaning that the applicant ran a higher risk than other civilians of their life or person being under serious threat from indiscriminate violence[1066].

Other national courts have considered vulnerability resulting, for instance, from disability, from being a family with young children or from being a woman without male support as factors particular to personal circumstances[1067]. In several French cases of applicants from Afghanistan, the CNDA considered the following as factors particular to their personal circumstances when granting them subsidiary protection: their young age; elements related to their young age, such as the death of their parent(s); a lack of family links; exposure to violence; and forced enlistment in one of the armed forces/groups[1068]. The same court also accorded subsidiary protection to a young person who had fled Iraq as a 16-year-old orphan, on the grounds that his isolation as an orphan would place him in a situation of particular vulnerability if he were returned to Iraq in the context of the indiscriminate violence there[1069]. In Austria, in the case of a family with minor children, the Supreme Administrative Court allowed

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1065 Article 4(3)(c) QD (recast). See also EASO, *Evidence and Credibility Assessment – Judicial analysis*, op. cit., fn. 23, Section 4.3.1.

1066 RVV/CCE (Belgium), 2020, No 231.259, op. cit., fn. 1055, para. 25.5. See text in fn. 1055 for a fuller list of criteria referred to by the RVV/CCE (Belgium) in para. 25.2 of this judgment.

1067 See also EASO, *Vulnerability in the context of applications for international protection*, 2021, Section 6.3.2 'Vulnerability, armed conflict and indiscriminate violence'.

1068 CNDA (France), judgment of 21 March 2013, *M. Y.K.*, No 12025577 C (hereinafter CNDA (France), 2013, *M. Y.K.*, No 12025577 C); judgment of 2 July 2012, *M. A.Z.*, No 12006088 C (hereinafter CNDA (France), 2012, *M. A.Z.*, No 12006088 C); judgment of 18 October 2011, *M. H.*, No 10003854 C+ (hereinafter CNDA (France), 2011, *M. H.*, No 10003854 C+).

1069 CNDA (France), judgment of 13 January 2020, *M.A.*, No 17016120 C. Similarly, subsidiary protection was granted to an applicant in a context of low-intensity generalised violence in central and northern Mali on account of his isolation from his family, young age and lack resources linked to the destruction of his shop by one of the parties to the conflict. CNDA (France), judgment of 24 July 2018, *M. K.*, No 17043779 (hereinafter CNDA (France), 2018, *M. K.*, No 17043779). See also EASO, *Vulnerability in the context of applications for international protection*, 2021, p. 147.

an appeal on the ground that the situation of the family, as particularly vulnerable persons in Kabul, had not been thoroughly examined[1070].

With respect to single women, the Belgian Council for Alien Law Litigation granted subsidiary protection to a woman with post-traumatic stress disorder who had always had male support before the death of her husband and her brothers and had personal circumstances that exposed her to enhanced risk, given also the precarious situation of women and the complex security situation in Baghdad[1071]. Similarly, the CNDA (France) granted subsidiary protection to a single young woman who had lost all contact with her family in the Central African Republic, as women in such situations without support were targets of sexual abuse by armed groups[1072].

In some cases, an applicant's profession is relevant. For example, the CNDA (France) accepted that an enhanced risk arose in the case of a man from North Kivu (Democratic Republic of the Congo) who was a trader and had to travel to and from Angola and whose wife and mother had been victims of abuse[1073]. The German Federal Administrative Court has given examples of individual circumstances increasing the threat of indiscriminate violence, for example if an applicant's profession (e.g. physician, journalist) forces that person to be close to acts of violence[1074].

The German Federal Administrative Court also noted that, unless there are reasons for granting asylum, religion or ethnicity can form personal circumstances[1075]. This is, however, dependent on the specific circumstances of the case. The High Administrative Court of Bavaria did not consider the fact that the applicant belonged to the Hazara minority (in Afghanistan) to be an individual 'risk-enhancing' circumstance[1076]. Neither did the same judgment consider the applicant's membership of the religious group of Shiites to be an individual 'risk-enhancing' circumstance in a situation in which 15 % of the Afghan population were Shiites[1077]. In *HM and Others*, the Upper Tribunal (United Kingdom) considered it:

> as a whole insufficient to establish Sunni or Shi'a identity as in itself an 'enhanced risk category' under Article 15(c), [but accepted] that depending on the individual circumstances, and in particular on their facing return to an area where their Sunni or Shi'a brethren are in a minority, a person may be able to establish a real risk of

[1070] While reports showed that Kabul was comparably safe and stable, this did not imply that the same would be the case for vulnerable persons. The court found that the numbers of minor victims and civilian victims in Afghanistan, specifically Kabul, had been enormously high in recent years. VwGH (Austria), judgment of 21 March 2018, Ra 2017/18/0474, AT:VWGH:2018:RA2017180474.L00 (hereinafter VwGH (Austria), 2018, Ra 2017/18/0474).

[1071] RVV/CCE (Belgium), 2019, No 221.342, op. cit., fn. 1054.

[1072] CNDA (France), 2017, *Mme I.B.*, No 15030837 C, op. cit., fn. 1014. See also ECtHR, 2015, *RH v Sweden*, op. cit., fn. 1060, ruling that a single woman without male support would be at particular risk in Somalia.

[1073] CNDA (France), judgment of 5 September 2013, *M. M.*, No 13001980 C (hereinafter CNDA (France), 2013, *M. M.*, No 13001980 C).

[1074] BVerwG (Germany), judgment of 27 April 2010, No 10 C 4.09, DE:BVerwG:2010:270410U10C4.09.0 (English translation) (hereinafter BVerwG (Germany), 2010, No 10 C 4.09), para. 33.

[1075] BVerwG (Germany), 2013, No 10 C 23.12 (English translation), op. cit., fn. 241, para. 33.

[1076] VGH Bavaria, judgment of 3 February 2011, 13a B 10.30394. The court's conclusion was based on information that the overall situation of the Hazaras, who had traditionally been discriminated against, had improved, even if traditional tensions persisted and reappeared from time to time. According to UNHCR, many Hazaras had returned to the provinces of Parwan and Kabul, where they had traditionally resided.

[1077] VGH Bavaria, 2011, 13a B 10.30394, op. cit., fn. 1079.

> Article 15(c). (They may, of course, also be able to establish a real risk of persecution under the Refugee Convention or of treatment contrary to Article 3 of the ECHR)[1078].

The case-law set out above identifies various personal circumstances that may, individually or together, give rise to a serious threat to a civilian's life or person in a context where the level of indiscriminate violence does not rise to a level such that mere presence on the territory exposes the person to such a risk. Table 46 provides examples of such circumstances.

[1078] Upper Tribunal (IAC) (United Kingdom), 2012, *HM and Others (Article 15(c)) Iraq CG*, op. cit., fn. 1019, para. 297. Similarly, the RVV/CCE found that the personal circumstances of Sunnis in Baghdad with no family links there were a factor that could increase their risk of becoming victims of indiscriminate violence, even though these circumstances did not single them out more than any other person. RVV/CCE (Belgium), judgment of 29 March 2018, No 201.900 (hereinafter RVV/CCE (Belgium), 2018, No 201.900).

Table 46: Examples of elements of personal circumstances that may give rise to greater risk in the context of indiscriminate violence

Vulnerability	Disability[1079]
	Young age and/or being an orphan[1080]
	Isolation and lack of family links[1081]
	Families with minor children[1082]
	Single women without male support, including where such women are targets of sexual abuse by armed groups[1083]
	Women in a precarious situation[1084]
	Persons exposed to violence and forced enlistment in one of the armed forces/groups[1085]
	Persons whose family members have been victims of abuse[1086]
	Persons suffering from post-traumatic stress disorder[1087]
Profession	Physicians working in the vicinity of the conflict[1088]
	Journalists working in the vicinity of the conflict[1089]
	Employees of foreign armed forces, including interpreters[1090]
	Traders who have to travel through conflict areas for their livelihoods[1091]
	Persons whose livelihoods have been destroyed
Other individual characteristics	Religion (unless a reason for granting asylum)[1092]
	Ethnicity (unless a reason for granting asylum)[1093]
Region	Region of origin or centre of interest[1094]
	Region through which the individual would have to travel to reach their return destination[1095]

1079 RVV/CCE (Belgium), judgment of 29 January 2020, No 231.907 (English summary). For more on the case, see fn. 1169 below.

1080 CNDA (France), 2013, *M. Y.K.*, No 12025577 C, op. cit., fn. 1071; CNDA (France), 2012, *M. A.Z.*, No 12006088 C, op. cit., fn. 1071; CNDA (France), 2011, *M. H.*, No 10003854 C+, op. cit., fn. 1071; and CNDA (France), 2018, *M. K.*, No 17043779, op. cit., fn. 1072.

1081 CNDA (France), 2013, *M. Y.K.*, No 12025577 C, op. cit., fn. 1071; CNDA (France), 2012, *M. A.Z.*, No 12006088 C, op. cit., fn. 1071; and CNDA (France), 2011, *M. H.*, No 10003854 C+, op. cit., fn. 1071.

1082 VwGH (Austria), 2018, Ra 2017/18/0474, op. cit., fn. 1073.

1083 CNDA (France), 2017, *Mme I.B.*, No 15030837 C, op. cit., fn. 1014; and ECtHR, 2015, *RH v Sweden*, op. cit., fn. 1060.

1084 RVV/CCE (Belgium), 2019, No 221.342, op. cit., fn. 1054.

1085 VwGH (Austria), judgment of 1 March 2018, Ra 2017/19/0425, AT:VWGH:2018:RA2017190425.L00 (hereinafter VwGH (Austria), 2018, Ra 2017/19/0425).

1086 CNDA (France), 2013, *M. M.*, No 13001980 C, op. cit., fn. 1076.

1087 RVV/CCE (Belgium), 2019, No 221.342, op. cit., fn. 1054.

1088 BVerwG (Germany), 2010, No 10 C 4.09, op. cit., fn. 1077.

1089 Ibid.

1090 VwGH (Austria), 2018, Ra 2017/19/0425, op. cit., fn. 1088.

1091 CNDA (France), 2013, *M. M.*, No 13001980 C, op. cit., fn. 1076.

1092 BVerwG (Germany), 2013, No 10 C 23.12 (English translation), op. cit., fn. 241; Upper Tribunal (IAC) (United Kingdom), 2012, *HM and Others (Article 15(c)) Iraq CG*, op. cit., fn. 1019; and RVV/CCE (Belgium), 2018, No 201.900, op. cit., fn. 1081.

1093 BVerwG (Germany), 2013, No 10 C 23.12 (English translation), op. cit., fn. 241; and Upper Tribunal (IAC) (United Kingdom), 2012, *HM and Others (Article 15(c)) Iraq CG*, op. cit., fn. 1019.

1094 RVV/CCE (Belgium), 2020, No 231.259, op. cit., fn. 1055.

1095 CNDA (France), 2013, *M. M.*, No 13001980 C, op. cit., fn. 1076.

2.4.4.3.4. The relevance of the region of origin

Referring also to the need for an individual assessment of an application, the CJEU, in *Elgafaji*, added that the following may be taken into account:

- the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned to the relevant country, as is clear from Article 8(1) of the Directive;
- the existence, if any, of a serious indication of real risk, such as that referred to in Article 4(4) of the Directive, an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower[1096].

Section 2.8.1 below addresses the issue of internal protection if protection is unavailable in the actual destination of the applicant in the event of return.

Having regard to **the region of origin to which an applicant would be returned**, the High Administrative Court of Baden-Württemberg (Germany) concluded that:

> The decisive reference point of Article 15(c) QD is the region of origin of the person concerned to which he or she will typically return. For the question as to which region is to be regarded as the destination of a foreigner's return, this depends neither on which region an uninvolved observer would reasonably choose, nor on which region the foreigner concerned seeks from his or her subjective point of view. The concept of the 'actual place of return' within the meaning of the case law of the CJEU is therefore not a purely empirical concept, which must be based on the actually most probable or subjectively intended region of return. Since Article 15(c) QD (recast) protects against the dangers of a – not necessarily nationwide – armed conflict in the home country, the region of origin as a classification and attribution feature is of particular importance in determining the place of (probable) actual return. A deviation from the region of origin can therefore also not be justified by the fact that the foreigner has lost the personal connection to his [or her] region of origin as a result of an armed conflict[1097].

Similarly, the French Council of State held that the examination of real risk relates not to the whole country but to the part of the country in which the person concerned had their centre of interest before their departure or where they are to settle after return, and that it should also include examination of the risks they may encounter on the way to this destination[1098]. In applying that guidance, the CNDA (France) designates the relevant region by assessing the region of origin/birth and the region where the applicant's interests were centred[1099].

2.4.4.4. Nexus between 'serious and individual threat' and 'indiscriminate violence'

It is clear from the wording of Article 15(c) that the serious and individual threat to a civilian's life or person must be 'by reason' of indiscriminate violence. The CJEU has not provided clear guidance on the nexus between serious and individual threat and indiscriminate violence.

[1096] CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 40.

[1097] VGH Baden-Württemberg, judgment of 12 December 2018, A11 S 1923/17 (unofficial translation).

[1098] Council of State (Conseil d'État) (France), judgment of 16 October 2017, *M. A.*, No 401585 B, FR:CECHR:2017:401585.20171016.

[1099] CNDA (France), 2021, *M. G.*, No 20015236 C, op. cit., fn. 1042, para. 6.

The Upper Tribunal (United Kingdom) stated that:

> the nexus between the generalised armed conflict and the indiscriminate violence posing a real risk to life and person is met when the intensity of the conflict involves means of combat (whether permissible under the laws of war or not) that seriously endanger non-combatants as well as result in such a general breakdown of law and order as to permit anarchy and criminality occasioning the serious harm referred to in the Directive. Such violence is indiscriminate in effect even if not necessarily in aim … it is not necessary for the threat to life or person to derive from protagonists in the armed conflict in question: it can simply be a product of the breakdown of law and order[1100].

The French Council of State[1101] and the Dutch Council of State[1102] have also considered the connection between the serious and individual threat and indiscriminate violence arising from internal armed conflict.

On the indirect effects of armed conflict, the German Federal Administrative Court decided that criminal violence that is not committed by one of the parties to the conflict should be taken into account only when assessing the nature of the serious and individual threat to life or person[1103]. According to the court, 'the general threats to life that are purely a consequence of an armed conflict – for example, through a resulting deterioration in supply conditions – cannot be included in the assessment of the density of danger'[1104]; therefore, the court does not consider them to constitute a threat within the meaning of Article 15(c).

In UNHCR's opinion, a breakdown of law and order as a consequence of indiscriminate violence or an armed conflict needs to be taken into account. UNHCR states further that the source from which the indiscriminate violence emanates is immaterial[1105].

2.4.4.5. 'Civilian's life or person'

Under Article 15(c) QD (recast), the serious and individual threat in the context of indiscriminate violence in situations of armed conflict should be to a 'civilian's life or person'.

The two subsections that follow examine the meaning of the terms 'civilian' and 'life or person'.

[1100] Upper Tribunal (IAC) (United Kingdom), judgment of 22 September 2010, *HM and Others (Article 15(c)) Iraq CG*, [2010] UKUT 331, para. 80. This conclusion was reaffirmed by Upper Tribunal (IAC) (United Kingdom), 2012, *HM and Others (Article 15(c)) Iraq CG*, op. cit., fn. 1019, para. 45.

[1101] Conseil d'État (France), 2009, No 320295, op. cit., fn. 1024. The court held that the indiscriminate violence in the region of origin of the applicant was characterised by attacks and abuses against the civilian population resulting in forced population displacements and noted that the parties to the conflict were guilty of serious violations of international humanitarian law against the civilian population.

[1102] Council of State (Raad van State) (Netherlands), judgment of 7 July 2008, 200802709/1, NL:RVS:2008:BD7524. The court considered whether there was a connection between the rapes taking place in the applicant's region of origin, which was not experiencing armed conflict, and the internal armed conflict that was taking place elsewhere in the country of origin.

[1103] BVerwG (Germany), judgment of 24 June 2008, No 10 C 43.07, DE:BVerwG:2008:240608U10C43.07.0, para. 35.

[1104] BVerwG (Germany), 2008, 10 C 43.07, op. cit., fn. 1106, para. 35.

[1105] UNHCR, *Safe at Last?*, op. cit., fn. 1021, pp. 60 and 103.

2.4.4.5.1. 'Civilian'

The term 'civilian' is not defined in Article 2 QD (recast) and has not yet been defined by the CJEU in the context of subsidiary protection.

As the subsidiary protection regime, on the one hand, and international humanitarian law, on the other, 'pursue different aims and establish quite distinct protection mechanisms'[1106], it cannot be assumed that the definition of 'civilian' should derive from international humanitarian law. With regard to the meaning of 'internal armed conflict', which is also not defined by the QD (recast), the CJEU stated that 'the meaning and scope of that phrase must, as the Court has consistently held, be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part'[1107].

In France, the *rapporteure publique* of the Council of State referred to the method of interpretation used in *Diakité* and reached the same conclusion with respect to the interpretation of the word 'civilian'[1108].

This decision concerned an appellant who had been a member of a local police force in Afghanistan. The French Council of State upheld the judgment of the CNDA rejecting his claim, inter alia, on the grounds that, as a policeman, he could not be considered a civilian for the purposes of the application of Article 15(c)[1109]. The conclusions of the *rapporteure publique*, related to the judgment, stated that the police were so closely linked to the forces fighting the Taliban that no distinction between the police and the official army should be made[1110]. These conclusions also stated that if, in *Diakité*, the CJEU stated that armed conflict can take place without state intervention, it seems that not only the members of official security forces, but also members of insurgent non-state groups, do not have the quality of 'civilians'. By the same logic, it seems irrelevant to make a distinction between the army and the police and whether they operate on a federal, national or local level[1111]. In the judgment, the Council of State specified that a member of the local police force in charge of the security of the village and

1106 CJEU, 2014, *Diakité*, op. cit., fn. 844, para. 24.

1107 CJEU, 2014, *Diakité*, op. cit., fn. 844, para. 27. Before *Diakité*, the AIT (United Kingdom) pointed out that, under international humanitarian law, the fact that a soldier is off duty or off sick does not necessarily result in civilian status. See AIT (United Kingdom), judgment of 2 December 2009, *ZQ (serving soldier) Iraq CG*, [2009] UKAIT 00048 (hereinafter AIT (United Kingdom), 2009, *ZQ (serving soldier) Iraq*). The tribunal cited the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, which observed that '... the specific situation of the victim at the time the crimes [war crimes or crimes against humanity] are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status'. International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, judgment of 29 July 2004, *Prosecutor* v *Blaškić*, Case No IT-95-14-A, para. 114.

1108 Council of State (Conseil d'État) (France), conclusions of the *rapporteure publique* of 11 December 2019, *BA v OFPRA*, No 424219 B.

1109 Council of State (Conseil d'État) (France), judgment of 11 December 2019, *M. M.*, No 424219 B, FR:CECHR:2019:424219.20191211.

1110 Ibid.; and *M. M... et OFPRA c/ M. A...*, Nos 424219 and 427714, 11 December 2019 (referring to the conclusions of the *rapporteure publique* on the same matter).

1111 Council of State (Conseil d'État) (France), 2019, *M. M.*, No 424219 B, op. cit., fn. 1112; and *M. M... et OFPRA c/ M. A...*, Nos 424219 and 427714, 11 December 2019 (conclusions of the *rapporteure publique* on the same matter).

fighting insurgents did not become a civilian once he had left the country, in the absence of a document proving that he had ended any connection with the police[1112].

In *HM and Others*, the Upper Tribunal (United Kingdom) concluded that:

> a civilian must mean a genuine non-combatant. Anyone who involves himself in an armed conflict is not to be regarded as a civilian and the same applies to a member of the armed forces or police in the country in question[1113].

By contrast, in a judgment dealing with different underlying facts, the CNDA (France) held that a person who did not participate in any organised armed unit and was not under the command of any authority, but who used a weapon when his village was attacked to protect his family and belongings, did not lose his civilian status[1114].

UNHCR has recommended the following approach:

> In this connection, the term 'civilian' in Article 15(c) [QD (recast)] should not serve to exclude former combatants who can demonstrate that they have renounced military activities. The fact that an individual was a combatant in the past does not necessarily exclude him or her from international protection if he or she has genuinely and permanently renounced military activities. The criteria for determining whether a person satisfies this test have been defined by the UNHCR Executive Committee[1115].

2.4.4.5.2. '[Civilian's] life or person'

It should be noted that the language versions of Article 15(c) QD (recast) differ to some extent. The Bulgarian version refers to 'срещу живота или личността на цивилно лице' ('threat to a civilian's life or person'), the Dutch version refers to 'van het leven of de persoon van een burger' ('life or person of a civilian'), the English version refers to 'threat … to a civilian's life or person', the French version refers to 'contre la vie ou la personne d'un civil' ('against a civilian's life or person'), the Greek version refers to 'απειλή κατά της ζωής ή της σωματικής ακεραιότητας' ('to a civilian's life or person') and the Italian version refers to 'alla vita o alla persona di un civile' ('to a civilian's life or person') (unofficial English translations). In the Spanish language version, the reference can be unofficially translated into English as 'a civilian's life or physical integrity' ('la vida o la integridad física de un civil'). This is similar to the Estonian version, which refers to 'elu või isikupuutumatus' ('life or integrity of the person'), the Hungarian version, which refers to 'polgári személy életének vagy testi épségének' ('civilian's life or physical integrity'), the Polish version, which refers to 'życia lub fizycznej integralności osoby cywilnej' ('civilian's life or physical integrity') and the Slovenian version, which refers to 'življenju ali telesni celovitosti civilista' ('life or physical integrity of a civilian'). The Czech and

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1112 Council of State (Conseil d'État) (France), judgment of 11 December 2019, *M. A.B.*, No 427714 B, FR:CECHR:2019:427714.20191211. See also CNDA (France), judgment of 5 July 2019, *M. O.*, No 18000865, finding that a deserter from the Afghan armed forces who did not qualify for refugee status cannot be considered a civilian due to his unauthorised departure from the military institution.

1113 Upper Tribunal (IAC) (United Kingdom), 2012, *HM and Others (Article 15(c)) Iraq CG*, op. cit., fn. 1019, para. 36, cited also in AIT (United Kingdom), 2009, *ZQ (serving soldier) Iraq*, op. cit., fn. 1110 (the 'country in question' refers to the specific context of Iraq).

1114 CNDA (France), judgment of 9 February 2017, *M. A.*, No 16005729 C+.

1115 UNHCR, Statement on subsidiary protection under the EC qualification directive for people threatened by indiscriminate violence, January 2008, p. 7. See also UNHCR Executive Committee, Conclusion No 94 on the Civilian and Humanitarian Character of Asylum (LIII), 8 October 2002, para. (c)(vii).

German versions refer to 'života nebo nedotknutelnosti civilisty' ('life or integrity of a civilian') and 'des Lebens oder der Unversehrtheit einer Zivilperson' ('to a civilian's life or integrity'). The Slovak version refers to 'života občana alebo osoby' ('life of a citizen or his person'). The Croatian version refers only to 'life' and not to 'person' ('životu'). The Swedish version refers to 'life and limb of a civilian' ('civilpersons liv eller lem')[1116]. Finally, the Latvian version refers to 'threat to civilian's life or health' ('draudi civiliedzīvotāja dzīvībai vai veselībai').

There has been no CJEU judgment dealing with the divergence between the various language versions of the legislative text. Principles of the interpretation of EU law in such cases were described in Section 2.4.2 above and in EASO, *An introduction to the Common European Asylum System for courts and tribunals – A judicial analysis*, Section 3.2, pp. 63–65.

One has to be mindful that, in *Diakité*, the CJEU distinguished between the subsidiary protection regime and the international humanitarian law regime[1117], and decided not to make eligibility for subsidiary protection conditional upon the conditions for applying international humanitarian law (see Section 2.4.4.1 above). The CJEU found that the subsidiary protection regime, on the one hand, and international humanitarian law, on the other, 'pursue different aims and establish quite distinct protection mechanisms'[1118]. As mentioned above in Section 2.4.4.5.1, with regard to the meaning of 'internal armed conflict', the CJEU therefore stated that 'the meaning and scope of that phrase must, as the Court has consistently held, be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part'[1119].

The CJEU has yet to rule on whether the same approach should be taken to the meaning of 'life or person' or whether it is appropriate to use international humanitarian law. In a case that preceded the CJEU's *Diakité* judgment, the AIT (United Kingdom) interpreted 'civilian's life or person' with regard to international humanitarian law and ascribed a broad meaning to those terms. Common Article 3 1949 Geneva Conventions uses the phrase 'life and person' (not 'life or person')[1120]. In *KH (Iraq)*, the AIT (United Kingdom) noted that this phrase is clearly not apt to cover anything to do with civilian **objects**[1121]. 'Civilian objects' is defined in international humanitarian law as including 'dwellings, shops, schools and other places of non-military business, places of recreation and worship, means of transportation, cultural property, hospitals and medical establishments and units'[1122].

1116 This expression is used in colloquial Swedish rather than written Swedish.

1117 CJEU, 2014, *Diakité*, op. cit., fn. 844, para. 24. See also para. 23, which states 'While international humanitarian law is designed, inter alia, to provide protection for civilian populations in a conflict zone by restricting the effects of war on persons and property, it does not – by contrast with Article 2(e) [QD], read in conjunction with Article 15(c) of that directive – provide for international protection to be granted to certain civilians who are outside both the conflict zone and the territory of the conflicting parties'.

1118 CJEU, 2014, *Diakité*, op. cit., fn. 844, para. 24.

1119 CJEU, 2014, *Diakité*, op. cit., fn. 844, para. 27.

1120 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949; and Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

1121 AIT (United Kingdom), judgment of 25 March 2008, *KH (Article 15(c) Qualification Directive) Iraq CG*, [2008] UKAIT 00023 (hereinafter AIT (United Kingdom), 2008, *KH (Article 15(c) QD) Iraq CG*).

1122 AIT (United Kingdom), 2008, *KH (Article 15(c) QD) Iraq CG*, op. cit., fn. 1124, para. 103.

The UK tribunal observed a differentiation within common Article 3(1) between (a) violence to 'life and person', on the one hand, and (c) 'outrages upon personal dignity, in particular humiliating and degrading treatment', on the other[1123]. This led the tribunal to doubt that the material scope of the phrase 'life and person' could extend to threats that amount to inhuman and degrading treatment. The inherent limitation of the concept of 'life or person' within international humanitarian law is further indicated by the fact that in the 1977 Additional Protocol II[1124] (by the time of which it was felt that the protection of civilians should be given a wider material scope) supplementary wording was used to make that protection more expansive. Article 4(2)(a) of this protocol proscribes 'violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment, such as torture, mutilation or any form of corporal punishment'. The UK tribunal concluded: 'Mindful, however, that "life or person" is to be given a broad meaning, we would accept that the phrase must encompass the means for a person's survival'[1125].

In a more recent case, the High Administrative Court of Baden-Württemberg in Germany took account of the cumulative effects of protracted armed conflicts, and noted that the:

> significance of the cumulative effects of protracted armed conflicts in the context of the overall assessment lies – at least also – in the fact that the increasing duration of the conflict typically and predictably leads to an increase in the number and severity of mental illnesses as a consequence of the permanent threat situation[1126].

2.4.5. Conclusion on serious harm

In sum, if the applicant fails to meet the criteria for qualification as a refugee, it must be examined whether they would face serious harm in the form of the death penalty or execution (Section 2.4.2), torture or inhuman or degrading treatment or punishment (Section 2.4.3), or a serious or individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict (Section 2.4.4).

If it is found that the applicant faces one or several types of serious harm, it is necessary to establish whether there are substantial grounds for believing they face a real risk of such harm (Section 2.5), who is the actor of serious harm (Section 2.6), whether there would be an absence of protection against such harm (Section 2.7)' and, if Article 8 QD (recast) has been transposed into national law, whether there is internal protection (Section 2.8).

Appendix A contains a decision tree summarising the ground covered in Part 2.

[1123] AIT (United Kingdom), 2008, *KH (Article 15(c) QD) Iraq CG*, op. cit., fn. 1124, para. 107.

[1124] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

[1125] AIT (United Kingdom), 2008, *KH (Article 15(c) QD) Iraq CG*, op. cit., fn. 1124, para. 104.

[1126] VGH Baden-Württemberg, 2018, A 11 S 316/17, op. cit., fn. 1044 (unofficial translation).

2.5. Substantial grounds for believing in a real risk

Section 2.5 has four subsections, as set out in Table 47.

Table 47: Structure of Section 2.5

Section	Title	Page
2.5.1	Real risk (Article 2(f))	295
2.5.2	Requirement for current risk (Article 2(f)) and significance of past serious harm (Article 4(4))	297
2.5.3	Evidence of risk to persons similarly situated	299
2.5.4	Issue of concealment	301

2.5.1. Real risk (Article 2(f))

The definition of a person eligible for subsidiary protection in Article 2(f) requires that '**substantial grounds** have been shown for believing that the person concerned … would face a **real risk** of suffering serious harm' if returned (emphasis added).

Article 2(f) QD (recast)

'person eligible for subsidiary protection' means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom **substantial grounds** have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, **would face a real risk** of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country. [Emphasis added.]

In his opinion in *CF and DN*, Advocate General Pikamäe commented:

> the relevant provisions of [the QD (recast)] concern the existence of a 'real risk' that the applicant for international protection may suffer serious harm, defined as a serious threat to a civilian's 'life or person'. The concept of a 'real risk' relates to the standard of proof applicable to the assessment of the risks, which is a factual assessment, and represents a probability criterion that cannot be reduced to a mere possibility …[1127].

To date, the CJEU has not provided a precise interpretation of the notion of 'real risk'. It could be considered that the standard of 'real risk' of serious harm does not differ from the standard used for the assessment of 'well-founded fear' of persecution in the refugee definition, which is 'reasonable fear'[1128]. This is because the CJEU uses the terms 'real risk' and 'well-founded

[1127] Opinion of Advocate General Pikamäe, 2021, *CF and DN*, op. cit., fn. 1033, para. 32. Advocate General Pikamäe goes on to remark that, when assessing serious harm under Article 15(c) QD (recast), 'a count of the number of civilian casualties in a given territory does not appear to be a speculative consideration but, on the contrary, one grounded in reality and thus capable of establishing the required risk' (para. 32).

[1128] CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 76; CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 89; and CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 72. For further details, see Section 1.5.2.

fear' interchangeably[1129]. This would appear to indicate that the same standard of proof applies to the assessment of 'real risk' and 'well-founded fear'. This **'well-founded fear / real risk' test** means that, while the mere chance or remote possibility of being persecuted or subjected to serious harm is insufficient to establish a well-founded fear of persecution or a real risk of serious harm, the applicant need not show that there is a clear probability that they will be persecuted or suffer serious harm (for further details, see Section 1.5 above).

Since 'real risk' originated in the ECtHR jurisprudence, that court's case-law is relevant. Ever since *Soering*, the ECtHR has repeatedly underlined that the specific standard of proof required in *non-refoulement* cases is that 'substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country'[1130]. It has also held:

> In order to determine whether there is a risk of ill-treatment, [it is necessary to] examine the **foreseeable consequences** of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances[1131].

According to the ECtHR in *Vilvarajah*, this forward-looking assessment of real risk means that what is important is whether there were 'distinguishing features in [the cases of those concerned] that could or ought to have enabled the [decision-maker] to foresee that they would be treated in this way [i.e. subjected to ill-treatment]'[1132].

In *Vilvarajah*, the ECtHR held that a 'mere possibility' of ill treatment does not meet the threshold of 'real risk'[1133]. By contrast, it held in *Saadi* that **the threshold is lower than 'more likely than not'**[1134]. The ECtHR also held that the same threshold applies for all applicants, irrespective of their profile. More specifically, it held in *Saadi* that **the same test of 'real risk' applies to applicants who are a threat to national security**, meaning that such applicants do not need to satisfy a higher threshold of risk than other applicants[1135].

2.5.2. Requirement for current risk (Article 2(f)) and significance of past serious harm (Article 4(4))

The Article 2(f) QD (recast) definition of a person eligible for subsidiary protection requires the applicant to face 'a real risk of suffering serious harm'.

The word 'risk' reflects the forward-looking emphasis of this definition. Advocate General Pikamäe, in *CF and DN*, noted that it 'appears that the analysis to be carried out by the competent national authority consists in an assessment of a hypothetical future situation, which necessarily involves a kind of projection'[1136].

1129 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, paras 75 and 79–80. See also Section 1.5.2.

1130 ECtHR (plenary), 1989, *Soering*, op. cit., fn. 282, para. 91.

1131 ECtHR (GC), 2008, *Saadi*, op. cit., fn. 362, para. 130 (emphasis added). See also ECtHR, judgment of 11 October 2011, *Auad v Bulgaria*, No 46390/10, CE:ECHR:2011:1011JUD004639010, para. 99(c).

1132 See ECtHR, judgment of 30 October 1991, *Vilvarajah and Others v United Kingdom*, Nos 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, CE:ECHR:1991:1030JUD001316387, para. 112.

1133 ECtHR, 1991, *Vilvarajah and Others*, op. cit., fn. 1136, para. 111.

1134 ECtHR (GC), 2008, *Saadi*, op. cit., fn. 362, para. 140 (emphasis added).

1135 Ibid.

1136 CJEU, Opinion of Advocate General Pikamäe, 2021, *CF and DN*, op. cit., fn. 1033, para. 46.

Article 46(3) APD (recast) also requires a current assessment of the case in the context of appeals procedures. It imposes a duty on Member States to afford an effective domestic remedy that provides for 'a full and *ex nunc* examination of both facts and points of law ..., at least in appeals procedures before a court or tribunal of first instance'[1137].

An important element in assessing the current risk of serious harm is whether the applicant has already been subject to serious harm or to direct threats of such harm. Article 4(4) QD (recast) is a mandatory provision. It states the following.

Article 4(4) QD (recast)

The fact that an applicant has already been subject to ... **serious harm**, or to direct threats of ... **such harm**, is a serious indication of the applicant's ... real risk of suffering serious harm, unless there are good reasons to consider that such ... serious harm will not be repeated. [Emphasis added.]

As Article 4(4) QD (recast) concerns both persecution and serious harm, it is possible to find guidance on this issue in the CJEU's case-law regarding the significance of past persecution (see Section 1.5.3 above).

Past serious harm, as defined by Article 4(4) QD (recast), includes not only acts of serious harm, but also threats of serious harm[1138]. If the applicant has already been subject to serious harm or to direct threats of serious harm, then, in accordance with Article 4(4), this is a serious indication of a real risk[1139]. In *Elgafaji*, the CJEU considered that the level of indiscriminate violence required for eligibility for subsidiary protection under Article 15(c) QD 'may be lower', where it is established that the applicant has already been subject to serious harm, since, as stipulated in Article 4(4) QD, that may itself be a serious indication of real risk[1140].

This serious indication can, however, be rebutted, in particular if the circumstances in the country of origin have changed significantly and non-temporarily (see Section 1.5.3).

This was so in the case of *MP*, which concerned an applicant who had been detained and tortured by the Sri Lankan security forces. Medical evidence that the applicant was suffering the after-effects of torture, in particular through suffering severe post-traumatic stress disorder and serious depression and having suicidal tendencies, was submitted. The CJEU stated:

> The fact that the person concerned has in the past been tortured by the authorities of his country of origin is not in itself sufficient justification for him to be eligible for subsidiary protection when there is no longer a real risk that such torture will be repeated if he is returned to that country[1141].

1137 For more, see EASO, *Asylum Procedures and the Principle of* Non-refoulement – *Judicial analysis*, 2018, Section 6.2.3.

1138 See, *mutatis mutandis*, CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, paras 94 and 96–97.

1139 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 33. See also, *mutatis mutandis*, CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 75; and CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 64, in which the court considered Article 4(4) with respect to past persecution or threats of persecution.

1140 CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 40.

1141 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 30.

Under Article 4(4) QD, past serious harm constitutes a serious indication of a real risk, but 'that does not apply where there are good reasons for believing that the serious harm previously suffered will not be repeated or continue'[1142]. Furthermore, the CJEU continued by noting that 'in accordance with Article 16 [QD (recast)] subsidiary protection ceases when the circumstances which led to the grant of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required'[1143].

2.5.3. Evidence of risk to persons similarly situated

Assessment of whether a person would face a real risk of suffering serious harm need not necessarily be based on the applicant's own experience. The CJEU has had the opportunity to address this issue only in *Elgafaji* in the specific context of Article 15(c) QD (recast)[1144]. With reference to recital 26 QD (now recital 35 QD (recast))[1145], the CJEU held:

> While that recital [26] implies that the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to establish that the conditions set out in Article 15(c) of the Directive have been met in respect of a specific person, its wording nevertheless allows – by the use of the word 'normally' – for the possibility of an exceptional situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question.
>
> While it is admittedly true that collective factors play a significant role in the application of Article 15(c) of the Directive, in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict, it is nevertheless the case that that provision must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore, be interpreted by close reference to that individualisation[1146].

The Belgian Council of State has addressed this issue in the context of Article 15(b) QD (recast). It held that, where the evidence demonstrates that a group is systematically targeted for ill treatment, mere membership of such a group can constitute substantial grounds for believing that an applicant, if returned, would face a real risk of suffering serious harm as defined in Article 15(b) QD (recast)[1147]. The Council of State explicitly rejected the view of the

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1142 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 33. The provision is the same in the QD (recast). Analysis of why there is no longer risk of repetition of the ill treatment analysis was made by the Upper Tribunal (IAC) (United Kingdom), judgment of 5 July 2013, *GJ and Others (post-civil war: returnees) Sri Lanka CG*, [2013] UKUT 00319, giving 'Country Guidance' on the risk to Tamils following the end of the Sri Lankan civil war. The ECtHR, in its case-law, also considers the fact of past ill treatment to be 'a strong indication of a future, real risk of treatment contrary to Article 3 [ECHR]', in cases in which an applicant has given a coherent and credible account of events consistent with the COI. In such circumstances, it will be for the government to dispel any doubts about that risk. See ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 227, para. 102.

1143 CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 34. The fact that a person has already been subjected to serious harm is also of relevance in cases of cessation. See EASO, *Ending International Protection – Judicial analysis*, op. cit., fn. 24, Section 6.2.4.

1144 CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 38.

1145 The recital is quoted in Section 2.4.4.3.1 above.

1146 CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, paras 37–38.

1147 Council of State (Conseil d'État/Raad van State) (Belgium), judgment of 16 February 2012, No 218.075 (hereinafter Conseil d'État (Belgium), 2012, No 218.075). See also AIT (United Kingdom), 2009, *AM and AM (armed conflict: risk categories)*, op. cit., fn. 1057.

Belgian asylum authorities that the applicant must establish **further** individual circumstances. It emphasised that *Elgafaji* equates Article 15(b) QD with Article 3 ECHR. It then went on to consider that the ECtHR, in *Saadi*, held that membership of a group systematically exposed to a practice of ill treatment can give rise to a requirement for protection under Article 3 ECHR[1148]. The Council of State concluded that the protection of Article 15(b) should be afforded to applicants belonging to a group systematically targeted even though they do not show further individual characteristics[1149].

In cases such as *Saadi*, in which membership of a group systematically exposed to a practice of ill treatment is alleged, the ECtHR has determined that the person concerned needs to establish 'that there are serious reasons to believe in the existence of the practice in question and [the person's] membership of the group concerned'[1150]. In those circumstances, the ECtHR does not 'insist that the applicant demonstrate the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3'[1151].

Referring to a similar concept of group persecution in German constitutional asylum, the High Administrative Court of Baden-Württemberg ruled:

> In order to infer from the fate of others the existence of an actual danger for an individual of being subjected to treatment contrary to Article 3 ECHR in the event of his or her return, it is at any rate necessary – similar to the concept of group persecution developed by the Federal Constitutional Court for the basic right to asylum under Article 16(2) sentence 2 GG [(basic law or constitution)]
>
> [...]
>
> which is also applied in a very similar way in international refugee law,
>
> [...]
>
> on the one hand, that the existence of a group of persons in respect of whom a violation of Article 3 ECHR can already be established and, on the other hand, that it can be established that the individual concerned shares with these persons the characteristics which were decisive for the occurrence of the circumstances leading to treatment contrary to Article 3 ECHR[1152].

The experience of family, friends and people in a similar position to the applicant may also indicate a real risk of serious harm (see also Section 1.5.4 above).

1148 ECtHR (GC), 2008, *Saadi*, op. cit., fn. 362, para. 132.

1149 Conseil d'État (Belgium), 2012, No 218.075, op. cit., fn. 1151.

1150 ECtHR (GC), 2008, *Saadi*, op. cit., fn. 362, para. 132.

1151 ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 227, para. 105, determining that 'persons who collaborated in different ways with the authorities of the occupying powers in Iraq after the war have been and continue to be targeted by al-Qaeda and other groups' (para. 117). See also ECtHR, 2008, *NA v UK*, op. cit., fn. 243, paras 114 and 116 (Tamils of certain profiles); ECtHR, 2007, *Salah Sheekh*, op. cit., fn. 682, paras 146–148 (members of Ashraf community).

1152 VGH Baden-Württemberg, judgment of 12 December 2018, No A 11 S 1923/17, paras 137–141 (unofficial translation). The judgment concerned Article 3 ECHR obligations in the case of a rejected Afghan applicant's application for international protection.

2.5.4. Issue of concealment

The issue of whether a real risk of suffering serious harm may be avoided by concealing activities sometimes arises. The issue of concealment in the context of qualification as a refugee is dealt with in Section 1.5.5 above, and analogous considerations apply to subsidiary protection.

2.6. Actors of serious harm (Article 6)

Article 6 QD (recast) provides the following.

> **Article 6 QD (recast)**
>
> **Actors of persecution or serious harm**
>
> Actors of persecution or serious harm include:
>
> (a) the State;
>
> (b) parties or organisations controlling the State or a substantial part of the territory of the State;
>
> (c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

This provision is common to both forms of international protection and thus applies to actors of serious harm for the purpose of qualification for subsidiary protection on the same basis as in the context of persecution and qualification for refugee protection. The analysis developed in Section 1.7 above on actors of persecution is thus also applicable in relation to protection against serious harm. For a detailed analysis of Article 6, please therefore refer to Section 1.7 above.

2.7. Actors of protection against serious harm (Article 7)

Article 7 QD (recast) is a **mandatory provision** common to both refugee protection and subsidiary protection. The analysis developed in Section 1.8 on actors of protection is thus also applicable in relation to protection against serious harm. For a detailed analysis of Article 7, please therefore refer to Section 1.8 above.

2.8. Internal protection from serious harm (Article 8)

It should be recalled at the outset that Article 8 is an optional provision. If transposed into domestic legislation and applied by a Member State, Article 8 QD (recast) is a provision that applies when determining **both qualification for refugee protection and qualification for subsidiary protection**. Hence, Member States may determine that an applicant is not in need of subsidiary protection if internal protection exists in a part of the country of origin. The analysis above in Section 1.9 thus applies equally to internal protection in the context of subsidiary protection. The brief analysis here addresses particular aspects of internal

protection that arise in the context of subsidiary protection, in particular in relation to Article 15(c) QD (recast). It supplements the analysis in Section 1.9, which should be referred to for a more comprehensive analysis, and provides examples of how the criteria set out in Article 8 are applied in relation to the assessment of qualification for subsidiary protection.

Section 2.8 has two subsections, as shown in Table 48.

Table 48: Structure of Section 2.8

Section	Title	Page
2.8.1	Quality of internal protection (Article 8(1))	303
2.8.2	Requirement for examination (Article 8(2))	307

Appendix A contains decision trees covering assessment of internal protection.

2.8.1. Quality of internal protection (Article 8(1))

The Upper Tribunal (United Kingdom) has confirmed that the **same substantive requirements – safety, access and reasonableness** – as are used when assessing qualification for refugee protection should be used when assessing qualification for subsidiary protection. The tribunal stated:

> It is clear from the structure of Article 8 [QD] that internal relocation is a necessary element, which is relevant not just to establishing refugee eligibility (under Articles 2 and 9) but also to establishing subsidiary ... protection eligibility under all three limbs of Article 15 – 15(a), (b) and (c)[1153].

With regard to Article 8(1)(b) QD (recast), Article 7(1) limits the actors of protection to '(a) the State; or (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State; provided they are willing and able to offer protection in accordance with paragraph 2'[1154]. This contrasts with the case-law of the ECtHR in relation to Article 3 ECHR, which has recognised that protection may be provided by non-state actors such as families and clans.

The following subsection examines the particular issues arising in situations of armed conflict.

2.8.1.1. Internal protection considerations for applicants meeting the criteria of Article 15(c)

Particular factors need to be taken into account when assessing internal protection in cases in which the applicant's region of origin is experiencing a situation of armed conflict. As stated by the CJEU in *Elgafaji*, these factors include 'the **geographical scope** of the situation

[1153] Upper Tribunal (IAC) (United Kingdom), 2012, *AK (Article 15(c)) Afghanistan CG*, op. cit., fn. 252, para. 228.

[1154] Administrative Court (Upravno Sodišče) (Slovenia), judgment of 17 December 2014, *Rahimi*, I U 925/2014 (hereinafter Administrative Court (Slovenia), 2014, *Rahimi*, I U 925/2014). The court distinguished criteria for applying internal protection under EU law and found them more stringent than under ECtHR case-law in this regard, since, according to ECtHR case-law, protection can also be provided by non-state actors, such as families or clans. It referred to ECtHR, 2007, *Salah Sheekh*, op. cit., fn. 682; ECtHR, 2013, *KAB v Sweden*, op. cit., fn. 713; ECtHR, 2015, *RH v Sweden*, op. cit., fn. 1060; and ECtHR, judgment of 28 June 2012, *AA and Others v Sweden*, No 14499/09, CE:ECHR:2012:0628JUD001449909. See also UNHCR, Guidelines on International Protection No 12, op. cit., fn. 482, para. 41, stating 'Protection must be provided by an organized and stable authority exercising full control over the territory and population in question'.

of indiscriminate violence and the **actual destination** of the applicant in the event that he is returned to the relevant country, as is clear from Article 8(1) of the Directive'[1155]. As UNHCR has remarked, situations of armed conflict and violence 'are frequently fluid, with changing frontlines and/or escalations in violence'[1156].

The Federal Administrative Court in Germany made it clear that, including in situations of armed conflict, internal protection should be examined only once the applicant is found to be at real risk of serious harm in the actual destination of the applicant in the event of return (see Sections 1.9.1 and 2.4.4.3.4). It ruled:

> the requirements under article 15(c) [QD and QD (recast)] – may also be met if the armed conflict does not extend to the entire territory of the state concerned … the point of reference for the prognosis of danger is the foreigner's actual destination in the event of a return. This, as a rule, is the foreigner's region of origin, to which he will typically return.
>
> […]
>
> If the region of origin is out of the question as a destination because of the danger threatening the foreigner there, he may be expelled to another region of the country only subject to the restrictive requirements of article 8 [QD][1157].

In a similar vein, the Upper Tribunal (United Kingdom) stated:

> So far as concerns internal relocation being a necessary consideration for Article 15(c) purposes, it has been confirmed by the CJEU ruling in *Elgafaji* that an Article 15(c) issue can arise not just in relation to the whole of a country but also part(s) of it … If a civilian's home area or region is considered to be in a state of indiscriminate violence at above the Article 15(c) threshold, he will still not be able to establish eligibility for subsidiary … protection unless able to show **either** a continuing risk of serious harm (the Article 8(1) 'safety' limb) **or** circumstances that would make it unreasonable for him to relocate to another area or region (the Article 8(1) 'reasonableness' limb)[1158].

As the Upper Tribunal (United Kingdom) has noted, in situations of armed conflict it is 'necessary to take into account (both in assessing "safety" and "reasonableness") not only the level of violence in that city but also the difficulties experienced by that city's poor and

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1155 CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 40 (emphasis added).

1156 UNHCR, Guidelines on International Protection No 12, op. cit., fn. 482, para. 40.

1157 BVerwG (Germany), 2013, No 10 C 15.12 (English translation), op. cit., fn. 198, paras 13–14. The court interpreted the concept of the 'actual destination of return' referred to in the *Elgafaji* judgment and concluded that the original place of residence may cease to be the destination if the 'foreigner has broken off his connections with that region even before leaving the country, irrespective of the circumstances that triggered flight, and settled in another region of the country with the aim of living there for the foreseeable future'. See also Upper Tribunal (IAC) (United Kingdom), judgment of 26 June 2018, *AAH (Iraqi Kurds – internal relocation) Iraq CG*, [2018] UKUT 00212, para. 149: 'If an ordinary civilian can establish a real risk of serious harm exceeding the Article 15(c) threshold in their home area, then in order to found eligibility for a grant of humanitarian (subsidiary) protection, it also has to be demonstrated that such a person cannot relocate to another region either because there is a real risk of serious harm in, or *en route* to, such a region or because circumstances exist there that would otherwise make it unreasonable or unduly harsh for such a person to relocate.'

1158 Upper Tribunal (IAC) (United Kingdom), 2012, *AK (Article 15(c)) Afghanistan CG*, op. cit., fn. 252, para. 228 (emphasis in original).

also the many IDPs living there'[1159]. This may include an assessment of whether a person has a social support network, or has 'no alternative but to live in makeshift accommodation within an IDP camp where there is a real possibility of having to live in conditions that will fall below acceptable humanitarian standards'[1160].

In Czechia, the Prague Regional Court addressed the scope of the analysis of **safety in a part of the country of origin** (see Section 1.9.1.1) in a case involving possible relocation of an applicant in a situation of armed conflict. The court found that, while the situation in some provinces of the country was not characterised by indiscriminate violence, it was also necessary to assess whether the applicant's internal relocation would resolve any individual risk of serious harm under national provisions transposing Article 15(a) and (b) QD (recast)[1161].

In the context of armed conflict, it must be carefully examined whether an applicant can **'safely and legally travel to and gain admittance'** to the part of the country of origin that is considered to offer internal protection. Factors to take into account may include the level of security around the airport/town of return, together with the safety of the route that would need to be taken to travel to the part of the country that is not affected by armed conflict. Furthermore, it is necessary to also bear in mind any personal circumstances of the applicant that may render such travel more dangerous. Moreover, in a country where internal freedom of movement is restricted, it may be that a finding will need to be made about the legality of travelling to and settling in the proposed part of the country of origin offering internal protection.

For instance, the French Council of State held that the court is obliged to examine whether an applicant would have to cross zones of generalised violence (in this case, Kabul) on the way to their region of origin, and whether there were substantial grounds for believing that the person concerned would face a real risk of suffering serious harm[1162].

In assessing whether an applicant **'can reasonably be expected to settle'** in another part of the country of origin, the Slovenian Administrative Court also specified that the quality of internal protection requires an assessment of the applicant's ability to cater for their most basic needs, such as food, hygiene and shelter, their vulnerability to ill treatment and the prospect of their situation improving within a reasonable time frame[1163].

In another case, the CNDA (France), having established that the applicants would face a real risk of suffering serious harm as defined in Article 15(c) QD (recast) if returned to the Mopti

[1159] Upper Tribunal (IAC) (United Kingdom), 2012, *AK (Article 15(c)) Afghanistan CG*, op. cit., fn. 252, para. 243.

[1160] Upper Tribunal (IAC) (United Kingdom), 2014, *MOJ and Others (Return to Mogadishu) Somalia CG*, op. cit., fn. 552, para. 425.

[1161] Prague Regional Court (Krajský soud v Praze) (Czechia), judgment of 30 August 2019, No 45, Az 23/2018 (English summary) (hereinafter Prague Regional Court (Czechia), 2019, No 45, Az 23/2018 (English summary)). The decision of the Ministry of the Interior was quashed because it failed to examine whether, in another part of the country, the applicant faced the risk of the death penalty or execution or the risk of inhuman or degrading treatment or torture from the Taliban.

[1162] Council of State (Conseil d'Etat) (France), judgment of 16 October 2017, *OFPRA* c *MS*, No 401585. See also CNDA (France), judgment of 15 April 2016, *MO*, No 15033384 C+. In this case, the CNDA found that internal protection in the place of return was accessible by direct flights to cities situated in regions under the control of Kurdish authorities, which were directly accessible from the refugee camp in Dohuc province in northern Iraq, where the applicant's family lived. Similarly, in its judgment of 24 January 2018, No 17042467 C, it was established that the applicant could access a safe part of Iraq to which international flights were cancelled by changing from an international flight to an internal flight at Baghdad International Airport.

[1163] Administrative Court (Slovenia), 2014, *Rahimi*, I U 925/2014, op. cit., fn. 1158.

region of Mali, assessed the possibility of internal protection in another part of the country of origin. The court ruled that the proposed district of Bamako did not offer the applicant internal protection (Article 8 QD (recast)). The court gave weight to the fact that there was a general failure of the Malian judicial system, in particular with regard to the right to a fair trial. The applicant did not have family ties, and it was likely that he would have to settle in a camp for displaced persons from the Mopti region. These camps had multiplied on the outskirts of Bamako, and their residents were surviving in unhealthy shanty towns and in the greatest destitution. These IDP camps were no longer transit sites, as they may have been in the beginning, but rather were termini for those fleeing the conflict in Mopti. The court concluded that it was **not reasonable** for the applicant to settle there[1164].

2.8.2. Requirement for examination (Article 8(2))

Article 8(2) QD (recast) imposes a specific duty on Member States, when deciding whether an applicant has a viable internal protection alternative, to obtain precise and up-to-date information from relevant sources about conditions in the proposed alternative part(s) of the country (see Section 1.9.2 above).

Factors particular to personal circumstances are important in the assessment of Article 8. For instance, the Belgian Council for Alien Law Litigation considered that an applicant with a hearing impairment who suffered from post-traumatic stress and had no network in the city of Kabul would find it more difficult to seek temporary protection in the event of attacks and fighting. Due to his hearing impairment, he would also find it more difficult to assess the dangers of indiscriminate violence[1165]. In a UK case, the Upper Tribunal considered that it might be unreasonable for most civilians to move to a province under Taliban control, 'although that is not to say that a person with a history of family support for the Taliban, would have difficulties; much will depend on the particular circumstances of the case'[1166].

Article 8(2) requires Member States to have regard to the circumstances prevailing in the country of origin 'at the time of taking the decision on the application'. Decision-makers must have particular regard to what is shown by the up-to-date COI as regards the geographical scope of the violence and whether there is a real risk of it shifting or spreading to an area that is currently safe[1167].

[1164] CNDA, Grande Formation (France), 2021, *M. S.*, op. cit., fn. 737, paras 21–22.

[1165] RVV/CCE (Belgium), judgment of 29 January 2020, No 231.907 (English summary).

[1166] Upper Tribunal (IAC) (United Kingdom), 2012, *AK (Article 15(c)) Afghanistan CG*, op. cit., fn. 252, para. 244.

[1167] Upper Tribunal (IAC) (United Kingdom), 2012, *AK (Article 15(c)) Afghanistan CG*, op. cit., fn. 252, para. 248, in which the court emphasised the 'forward-looking assessment of risk' and had regard to the fact that the 'current overall trend is one of rising levels of violence now over several years, even if [it has been] relatively gradual' and also to 'the planned departure of most of the NATO and international troops in 2014'.

2.9. Subsidiary protection needs arising *sur place* (Article 5)

The concept of beneficiary of subsidiary protection *sur place* is set out in Article 5 QD (recast) and concerns both refugee protection and subsidiary protection. The rules set out in Article 5(1) and (2) apply to the assessment of qualification for both refugee protection and subsidiary protection[1168] (see Sections 1.10.2 and 1.10.3 above).

By contrast, Article 5(3) applies only to the assessment of qualification for refugee protection and only to subsequent applications. It is thus irrelevant to the assessment of qualification for subsidiary protection (see Section 1.10.4 above).

[1168] Two cases decided by the RVV/CCE illustrate how events that have taken place since the applicant left the country of origin may result in qualification *sur place* for subsidiary protection. See RVV/CCE (Belgium), judgment of 26 June 2015, No 148.663, in which the asylum claim of a Kurdish woman from the Kurdish region of Iraq, who lodged a fourth asylum application, was not deemed credible. While in Belgium, however, she gave birth to a daughter (the father was unknown). Given the situation of Kurdish women with children born out of wedlock, in combination with the massive influx of IDPs in the Kurdish region, and the fact that Iraqi children born outside Iraq are not automatically given Iraqi nationality, the court granted her subsidiary protection under Article 15(b) QD (recast). See also RVV/CCE (Belgium), judgment of 29 September 2015, No 153.571, in which an older Iraqi man, an Armenian Christian from the Kurdish Autonomous Region of Iraq, was not granted refugee status as the mere fact of being an Armenian Christian from the Kurdish region was not found sufficient. However, he had a stroke after the first instance decision, which resulted in him no longer being able to speak properly and being in a wheelchair. Given the socioeconomic situation in the Kurdish Autonomous Region, the massive influx of IDPs and the fact that he belonged to a religious minority in the Kurdish region, subsidiary protection under Article 15(b) QD (recast) was granted.

Part 3. Particular situations

Part 3 has five sections, as set out in Table 49.

Table 49: Structure of Part 3

Section	Title	Page
3.1	Introduction	310
3.2	Situations of armed conflict and generalised violence	311
3.3	Trafficking	327
3.4	Environmental dangers	343
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3.1. Introduction

This judicial analysis has now addressed qualification for refugee protection (Part 1) and qualification for subsidiary protection (Part 2). This part gives more specific treatment to four particular issues: situations of armed conflict and generalised violence; trafficking; environmental dangers; and COVID-19-related situations. They have been chosen because members of courts and tribunals in EU Member States have seen them to be cross-cutting issues posing particular challenges and requiring somewhat more in-depth treatment than would have been possible if incorporated into Part 1 and Part 2.

The treatment of this quartet of topics is not intended to be exhaustive, nor is any one topic dealt with in full. Rather, the aim is to selectively highlight key aspects. In actual cases, of course, two or more of the four selected issues may well overlap.

In the case of the section on situations of armed conflict and generalised violence (Section 3.2), the treatment given takes account of the fact that Part 2 has already set out in detail how such situations engage the **subsidiary protection** provisions of Article 15. The point of the section here is therefore primarily to focus on how such situations can engage the **refugee protection** provisions and on the need for these to be addressed before the subsidiary protection provisions.

The section on trafficking (Section 3.3) draws on international and European legal standards to set out some particular issues that arise in this context, as regards both refugee protection and subsidiary protection.

In the case of the last two sections of Part 3, on environmental dangers (Section 3.4) and COVID-19-related situations (Section 3.5), the analysis is more selective in its approach and seeks to highlight key points relating to both refugee protection and subsidiary protection rather than to cover either topic fully. This is seen as more consonant with the emergent nature of the issues they raise. In the case of the final section, on COVID-19-related situations, the issues addressed are closely linked to those that arise in other health cases. At the same time, it is already apparent that, however soon the pandemic may abate, cases raising COVID-19 at least as one relevant background factor are likely to arise for a considerable time to come.

In assessing applications for international protection in each of the four particular situations analysed below, the **principle of individual assessment** set out in Article 4 QD (recast) must

be kept firmly in mind at all times. Article 4(3) QD (recast) requires examination of both **'the individual position and personal circumstances'** of an applicant and **'all relevant facts as they relate to the country of origin'**. For that reason, the treatment of each of the four situations addressed below begins by highlighting both personal and general circumstances.

3.2. Situations of armed conflict and generalised violence

In contrast with the sections below on the other three particular situations, the treatment of this first topic can be abridged. That is because, in order to properly address Article 15(c), it was necessary in Part 2 to deal in depth with many of the issues relating to armed conflict. The reader is therefore referred more generally also to that part of the judicial analysis. Furthermore, Appendix A contains a specific decision tree on assessing international protection in armed conflict cases. The primary (but not exclusive) focus of this section is on **refugee protection** in situations of armed conflict and generalised violence. Accordingly, the following considerations must take precedence.

Studies have shown that some courts and tribunals in the EU dealing with such cases have focused almost exclusively on subsidiary protection[1169]. Such practice overlooks the fact that the QD (recast) and APD (recast) require qualification for refugee protection to be dealt with first[1170]. In this context, it is especially important to underline that, by their very nature, situations of armed conflict and generalised violence can often feature acts of persecution and not just acts of serious harm. As UNHCR observes:

> Situations of armed conflict and violence frequently involve exposure to serious human rights violations or other serious harm amounting to persecution. Such persecution could include, but is not limited to, situations of genocide and ethnic cleansing; torture and other forms of inhuman or degrading treatment; rape and other forms of sexual violence; forced recruitment, including of children; arbitrary arrest and detention; hostage taking and enforced or arbitrary disappearances; and a wide range of other forms of serious harm ...[1171].

That is not to say that assessing qualification for refugee protection in armed conflict cases is unproblematic. A long-standing caution exists about treating such situations as ones that straightforwardly engage the Refugee Convention. Thus, the UNHCR *Handbook*, while accepting that people fleeing armed conflict and other situations of violence may qualify as 1951 Convention refugees, considers that the mere fact of having fled from conflict and violence does not per se suffice[1172].

As regards **individual** circumstances, account must always be taken of the different ways in which armed conflict and generalised violence can have an impact on certain individuals or categories of person[1173]. As UNHCR's guidelines note:

1169 UNHCR, *Safe at Last?*, op. cit., fn. 1021, p. 17. See also Holzer, V., *Refugees from Armed Conflict*, Intersentia, Cambridge, 2015, p. 8; Garlick, M., 'Subsidiary protection', in Türk, V., Edwards, A. and Wouters, C. (eds), *In Flight from Conflict and Violence: UNHCR's consultations on refugee status and other forms of international protection*, Cambridge University Press, Cambridge, 2017, p. 249, which states 'Predominant use of Article 15(c) for Syrian claims in some states is occurring despite the acknowledged primacy in law of refugee status and the procedural safeguards designed to ensure its grant to those who qualify, as well as clear country of origin and interpretive guidance'.

1170 CJEU, 2014, *HN*, op. cit., fn. 29, para. 35. See APD (recast), Article 10(2).

1171 UNHCR, Guidelines on International Protection No 12, op. cit., fn. 482, para. 13.

1172 UNHCR, *Handbook*, op. cit., fn. 103, paras 164–165.

1173 EASO, *Vulnerability – Judicial analysis*, op. cit., fn. 64, Section 6.3.2.

> ... Protracted situations of armed conflict and violence, for example, can have serious deleterious effects on the physical and psychological health of applicants or their personal development, which would need to be evaluated, taking into account their character, background, position in society, age, gender, and other factors[1174].

The same guidelines refer, for example, to 'Sexual and gender-based violence, including rape, human trafficking, sexual slavery and conjugal slavery/forced marriage, [as being] common forms of persecution in many situations of armed conflict and violence'[1175].

As regards **general circumstances**, it should be noted that, unlike the requirements in Article 15(c) to establish that there is a situation of international or internal armed conflict and a certain level of indiscriminate violence, there are no such requirements under the definition of a refugee. **The refugee criteria apply in both wartime and peacetime[1176].**

Relevant general circumstances that need to be taken into account in the context of armed conflict and generalised violence may include one or more of those set out in Figure 7.

Figure 7: Examples of general circumstances relevant to the consideration of applications involving situations of armed conflict and generalised violence

use of lethal force	widespread fighting	genocide	crimes against humanity
extrajudicial killings	forced disappearances	targeted and non-targeted attacks	aerial bombardments
use of cluster munitions, barrel bombs or chemical weapons	artillery or sniper fire	improvised explosive devices and landmines	car bombs or suicide bombers
siege tactics	forced recruitment, including of underage children	arbitrary deprivation of liberty	targeting of civilians
forcible transfers and arbitrary displacement	arbitrary detentions	ethnic cleansing	targeting of particular trades or professions
prevalence of organised crime (gangs, cartels, etc.)	lack of provision for people who are sick and wounded	full or partial breakdown of state administration and services, political institutions, and the police and justice system	increased crime levels
looting and corruption	food deprivation	destitution	cutting of water supplies and electricity
lack of sewerage facilities	destruction of property	militarisation or closure of hospitals and schools	high incidences of trauma in the population

[1174] UNHCR, Guidelines on International Protection No 12, op. cit., fn. 482, para. 12.
[1175] UNHCR, Guidelines on International Protection No 12, op. cit., fn. 482, para. 26.
[1176] The only exception in the QD (recast) is Article 9(2)(e) concerning refusal to perform military service in a military conflict.

3.2.1. Refugee protection

Considerations relevant to qualification as a refugee in the case of applicants who have fled armed conflict and generalised violence are set out in the following subsections.

3.2.1.1. Acts of persecution (Article 9)

In accordance with Article 9(1)(a) QD (recast), persecution must be analysed either in terms of 'severe violation[s] of basic human rights' or in accordance with Article 9(1)(b), as an accumulation of various measures, including 'violations of human rights' of equivalent sufficient severity. See Section 1.4.1 above.

It should be recalled that, according to the CJEU, the QD (recast) must be 'interpreted in a manner consistent with the rights recognised by the Charter'[1177]. Pursuant to Article 52(3) EU Charter, insofar as the charter contains rights that correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. Therefore, in seeking to interpret 'acts of persecution' within the meaning of Article 9(1) QD (recast), the CJEU draws on both EU Charter rights and their corresponding ECHR rights[1178]. Presently, the most detailed guidance for the interpretation of violations of basic rights can generally be found in ECtHR case-law. However, in relation to everyone's right to life (Article 2 EU Charter, which corresponds to Article 2(1) ECHR, and Article 1 Protocol No 6 and Article 1 Protocol No 13 to the ECHR), these interpretations will not have straightforward application in situations of armed conflict and generalised violence. Article 2(2) ECHR provides the following.

Article 2(2) ECHR

Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The effect of the three qualifications set out in Article 2(2) ECHR is that the convention's guarantee of the right to life is concerned only with arbitrary deprivation of life and coexists with the right of a state to self-defence and the right, in wartime, to require citizens to fight, so long as the use of force involved is 'no more than absolutely necessary'. In addition, Article 15(2) ECHR prohibits derogations from Article 2 'except in respect of deaths resulting from lawful acts of war'.

1177 CJEU (GC), 2016, *Alo and Osso*, op. cit., fn. 31, para. 29; and CJEU, 2018, *Ahmed*, op. cit., fn. 33. See also, in relation to the QD, CJEU (GC), judgment of 5 September 2012, *Bundesrepublik Deutschland* v *Y and Z*, Joined Cases C-71/11 and C-99/11, EU:C:2012:518 (hereinafter CJEU (GC), 2012, *Y and Z*), para. 48; and CJEU (GC), 2012, *El Kott and Others*, op. cit., fn. 31, para. 43.

1178 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 56.

By contrast, the non-derogable right under Article 3 ECHR may have particular applicability. In *NA* v *UK*, the ECtHR held that a general situation of violence in a country of destination would be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 ECHR 'only in the most extreme cases of general violence'[1179]. In this and other cases, however, the court has also applied a sliding scale approach. This approach means that, depending on the circumstances, applicants facing return to situations of generalised violence at less than extreme levels may be able to show individual characteristics giving rise to risk that crosses the threshold of ill treatment. In *JK and Others*, in assessing individual factors capable of giving rise to a real risk, the court pointed out that 'the same factors may give rise to a real risk when taken cumulatively and when considered in a situation of general violence and heightened security'[1180]. The factors it went on to identify included 'the age, gender and origin of a returnee, a previous record as a suspected or actual member of a persecuted group, and a previous asylum claim submitted abroad …'[1181]. The court had earlier noted that the requirement that 'an asylum-seeker [be] capable of distinguishing his or her situation from the general perils in the country of destination is, however, **relaxed in certain circumstances**, for example where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment'[1182].

In *LM and Others* v *Russia*, the ECtHR referred to 'UN reports' as describing the situation in Syria in 2015 'as a "humanitarian crisis" and speak[ing] of "immeasurable suffering" of the civilians, massive violations of human rights and humanitarian law by all parties and the resulting displacement of almost half of the country's population'[1183]. In the light of this general situation of violence, it concluded that the applicants could establish a violation of Article 3 ECHR by virtue of this general situation coupled with only three individual characteristics. These were that (1) they were stateless Palestinians – UNHCR stated that 'nearly all the areas hosting large numbers of Palestinian refugees are directly affected by the conflict'; (2) they originated 'from Aleppo and Damascus, where particularly heavy fighting has been raging'; and (3) they were 'young men who, in the view of the Human Rights Watch, were in particular danger of detention and ill-treatment'[1184].

In respect of violations of derogable human rights, it must be recalled that Article 15(1) ECHR permits states to derogate from such rights 'in times of war or other public emergency threatening the life of the nation'. The CJEU is yet to rule on the interpretation to be applied to acts that may be authorised under derogation clauses in time of war or in a public emergency situation. It could nevertheless be that, where a state has complied with the conditions for valid derogation as set out in Article 15(1) ECHR, an act that would otherwise be considered

[1179] ECtHR, 2008, *NA v UK*, op. cit., fn. 243, para. 115. See also ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57; and ECtHR, 2015, *LM and Others v Russia*, op. cit., fn. 1058. For ECtHR case-law dealing with armed conflict in cases in which breaches of Articles 2 and 3 ECHR are at issue, see, for example, ECtHR, judgment of 28 February 2005, *Isayeva and Others v Russia*, Nos 57947/00, 57948/00 and 57949/00, CE:ECHR:2005:0224JUD005794700, paras 168–200, building, inter alia, on ECtHR, judgment of 28 July 1998, *Ergi v Turkey*, No 23818/94, CE:ECHR:1998:0728JUD002381894.

[1180] ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 227, paras 77–105, referring to ECtHR, 2008, *NA v UK*, op. cit., fn. 243, para. 130.

[1181] ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 227, para. 95.

[1182] ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 227, para. 103 (emphasis added).

[1183] ECtHR, 2015, *LM and Others v Russia*, op. cit., fn. 1058, para. 123.

[1184] ECtHR, 2015, *LM and Others v Russia*, op. cit., fn. 1058, paras 123–124. For a more recent (different) assessment, see Refugee Board (Flygtningenævnet) (Denmark), decision of 17 February 2021, *Applicant (Syria) v Danish Immigration Service* (English summary).

a violation of a derogable right would not constitute a violation[1185]. Therefore, it would not fall within the scope of Article 9(1) QD (recast). There will not be such compliance, however, unless the Article 15(1) ECHR requirements (including that the authorities have declared a public emergency) are met in full. In determining whether a state has gone beyond what is strictly required, the court will give appropriate weight to factors such as the nature of the rights affected by the derogation and the circumstances leading to and the duration of the emergency situation[1186].

As is made explicit by Article 9(2)(a) QD (recast), acts of persecution may take the form of physical or mental violence, including acts of sexual violence. Accordingly, rape or other forms of sexual violence carried out by armed actors, even when random and/or carried out by private (non-state) actors, may constitute an act of persecution[1187].

That the acts enumerated in Article 9(2)(b)–(e) can be involved in armed conflict cases is well illustrated by the cases of *Shepherd* and *EZ*. In the latter case, the CJEU was concerned, inter alia, with the question of whether the authorities of a state engaged in a civil war might use their laws and practices governing military service to persecute a conscript for refusing to perform military service, contrary to Article 9(2)(e)[1188]. Article 9(2)(e) identifies as persecutory 'prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2)'[1189].

It is clear from the earlier case of *Shepherd* that, if Article 9(2)(e) is not engaged, it may still be necessary to consider whether either Article 9(2)(b) or (c), or both, may be engaged if measures taken by the public authorities in relation to soldiers or conscripts are of a discriminatory or disproportionate nature[1190]. In principle, there seems no reason why Article 9(2)(d), which concerns 'denial of judicial redress resulting in a disproportionate or discriminatory punishment', might not also be engaged in cases of this kind.

1185 Article 15(1) ECHR provides that 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'. See also Upper Tribunal (IAC) (United Kingdom), 2013, *MS (Coptic Christians) Egypt CG*, op. cit., fn. 206, para. 120, stating that '... when assessing the adequacy of protection in a country in which there exists a valid state of emergency, at least in respect of measures taken that are strictly required by the exigencies of the situation, a state cannot be expected to secure the non-derogable rights of its citizens'.

1186 ECtHR (plenary), judgment of 25 May 1993, *Brannigan and McBride v United Kingdom*, Nos 14553/89 and 14554/89, CE:ECHR:1993:0526JUD001455389, para. 43; ECtHR (GC), judgment of 19 February 2009, *A and Others v United Kingdom*, No 3455/05, CE:ECHR:2009:0219JUD000345505, para. 173; ECtHR, judgment of 20 March 2018, *Şahin Alpay v Turkey*, No 16538/17, CE:ECHR:2018:0320JUD001653817; and ECtHR, judgment of 20 March 2018, *Mehmet Hasan Altan v Turkey*, No 13237/17, CE:ECHR:2018:0320JUD001323717. See also ECtHR, judgment of 16 April 2019, *Alparslan Altan v Turkey*, No 12778/17, CE:ECHR:2019:0416JUD001277817; ECtHR, judgment of 10 December 2019, *Kavala v Turkey*, No 28749/18, CE:ECHR:2019:1210JUD002874918; ECtHR, judgment of 3 March 2020, *Baş v Turkey*, No 66448/17, CE:ECHR:2020:0303JUD006644817; ECtHR, judgment of 10 November 2020, *Sabuncu and Others v Turkey*, No 23199/17, CE:ECHR:2020:1110JUD002319917; ECtHR, judgment of 24 November 2020, *Şık v Turkey (No 2)*, No 36493/17, CE:ECHR:2020:1124JUD003649317; ECtHR, judgment of 19 January 2021, *Atilla Taş c Turquie*, No 72/17, CE:ECHR:2021:0119JUD000007217; ECtHR, judgment of 13 April 2021, *Ahmet Hüsrev Altan v Turkey*, No 13252/17, CE:ECHR:2021:0413JUD001325217; and ECtHR, judgment of 13 April 2021, *Murat Aksoy c Turquie*, No 80/17, CE:ECHR:2021:0413JUD000008017.

1187 See also Section 1.4.4.2 above.

1188 CJEU, 2020, *EZ*, op. cit., fn. 34, paras 47 and 60–61.

1189 CJEU, 2020, *EZ*, op. cit., fn. 34, para. 38; see also CJEU, 2015, *Shepherd*, op. cit., fn. 163, para. 48. See, generally, Section 1.4.4.6, concerning Article 9(2)(e), in which both judgments are set out in more detail.

1190 CJEU, 2015, *Shepherd*, op. cit., fn. 163, paras 47–56, especially para. 49.

3.2.1.2. Well-founded fear

As the CJEU has emphasised, to establish a well-founded fear of being persecuted an applicant must show that, 'on account of circumstances existing in his country of origin and the conduct of the actors of persecution', 'he **personally** will be subject to persecution for at least one of the five reasons listed in the [QD] and the [Refugee] Convention ...'[1191].

Equally, however, this does not mean that applicants have to show they have been singled out for persecution or serious harm[1192]. In *Elgafaji* and *Diakité*, the CJEU made it clear that, in situations in which there is a high degree of indiscriminate violence arising in a particular region beset by armed conflict, civilians can be at risk merely by virtue of their presence in the territory of that country or region[1193]. Although these cases were concerned with subsidiary protection, the point applies equally to refugee protection unless the applicant cannot establish a link to a reason for persecution (Articles 2(d) and 10 QD (recast))[1194]. For a considerable period, the Upper Tribunal (United Kingdom) has identified non-Arab Darfuris as having a well-founded fear of persecution merely by virtue of their ethnic identity[1195]. Much will depend on the latest background country information, but, in principle, situations of armed conflict or generalised violence can, at certain times, engender the phenomenon of group persecution[1196].

As regards the standard of proof to be applied when assessing 'well-founded fear' in cases involving situations of armed conflict, there is no basis for applying a different standard from that applied in other cases (see Section 1.5.2 above). To do so would disregard the wording of the refugee definition, which does not distinguish between peacetime and armed conflict situations. Hence, it would be wrong to require an applicant to show a 'differential risk' or impact over and above that normally faced in such situations[1197].

3.2.1.3. Reasons for persecution (Article 10)

As UNHCR's guidelines note:

> Situations of armed conflict and violence are regularly rooted in, or driven by, a variety of motives, or have consequences that affect various groups. Situations of armed conflict and violence regularly involve a mix of ethnic, religious, societal and political

1191 CJEU (GC), 2012, *Y and Z*, op. cit., fn. 38, para. 51 (emphasis added); CJEU, 2013, *X, Y and Z*, op. cit., fn. 31, para. 43. See also the court's earlier formulation in CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 57. See also CJEU, 2021, *OA*, op. cit., fn. 197, para. 57.

1192 'In situations of armed conflict and violence, an applicant may be at risk of being singled out or targeted for persecution. Equally, in such situations, entire groups or populations may be at risk of persecution' (UNHCR, Guidelines on International Protection No 12, op. cit., fn. 482, para. 17).

1193 CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 43; and CJEU, 2014, *Diakité*, op. cit., fn. 844, para. 30.

1194 See Section 3.2.1.3 below.

1195 AIT (United Kingdom), judgment of 18 December 2009, *AA (non-Arab Darfuris – relocation) Sudan CG*, [2009] UKAIT 00056. This judgment held that 'All non-Arab Darfuris are at risk of persecution in Darfur and cannot reasonably be expected to relocate elsewhere in Sudan'. See also Upper Tribunal (IAC) (United Kingdom), judgment of 5 January 2015, *MM (Darfuris) Sudan CG*, [2015] UKUT 00010, which reaffirmed AIT (United Kingdom), 2009, *AA (non-Arab Darfuris – relocation) Sudan CG*. However, the ECtHR has more recently concluded, in ECtHR, judgment of 2 June 2020, *SA v The Netherlands*, No 49773/15, CE:ECHR:2020:0602JUD004977315, that, in the light of more recent COI, the court 'cannot find that this situation can be regarded as so harrowing that it must be concluded that people of non-Arab ethnic origin are at risk of persecution or serious harm in Khartoum solely on the grounds of their ethnicity ...' (para. 69).

1196 UNHCR, Guidelines on International Protection No 12, op. cit., fn. 482, paras 17–20.

1197 UNHCR, Guidelines on International Protection No 12, op. cit., fn. 482, paras 12 and 22–23.

dimensions, with the parties involved operating along ethnic, religious or social lines and pursuing – or perceived to be pursuing – political and/or religious goals[1198].

During armed conflict and in other situations of violence, harm can be indiscriminate in nature, for instance if someone is caught in the crossfire. But it can also be discriminate if, for example, a group is particularly affected. This may mean that there is a risk of being persecuted for one of the five reasons for persecution specified in Article 10 QD (recast). The reasons of either the non-state actor or the state (if based on one or more of the five reasons) may suffice to establish the required nexus or connection. Article 9(3) QD (recast) states that 'there must be a connection between the reasons mentioned in Article 10 and the acts of persecution ... or the absence of protection against such acts'.

For example, the German Federal Constitutional Court has held that, when a state in a situation of civil war assumes the role of active combatant and no longer exists as a source of peacetime order, a link to a 1951 Convention ground can be deduced[1199]. The court ruled that persecution is present when the forces of the state conduct hostilities in a manner intended to physically annihilate persons who belong to, or are deemed to belong to, the opposing side, who are identified by 'asylum-relevant' characteristics, such as race or religion, and who are unwilling or unable to offer resistance or are not involved in hostilities[1200]. In the United Kingdom, the AIT held that 'when ... [the] attack [experienced by the appellant] is looked at in the context of violence in Ituri [Democratic Republic of the Congo], the appellant was not simply a victim of civil war but the attack was motivated by the ethnic conflicts in that region'[1201].

In assessing whether there is a reason for persecution under Articles 2(d) and 10 QD (recast) in armed conflict cases, it must be recalled that the reasons are not mutually exclusive; they may overlap[1202]. Armed groups may target an applicant for reasons of race, religion **and** political opinion, for example. Furthermore, any one of the five reasons need only be a contributing factor; it does not have to be the sole or main factor[1203]. Thus, for example, an applicant may be targeted by an organised gang engaged in smuggling guns for profit, but that does not exclude the possibility that among this gang's motives for targeting that person may be their race, religion, political opinion, etc.[1204].

In a situation of armed conflict, membership of a persecuted group may suffice to establish a link to a reason for persecution.

1198 UNHCR, Guidelines on International Protection No 12, op. cit., fn. 482, para. 35.

1199 Federal Constitutional Court (BVerfG) (Germany), 1989, 2 BvR 502/86 u.a. (English translation), op. cit., fn. 407, para. 4.a; Federal Constitutional Court (BVerfG) (Germany), decision of 15 February 2000, 2 BvR 752/97, DE:BVerfG:2000:rk20000215.2bvr075297, para. II.1.a.

1200 Federal Constitutional Court (BVerfG) (Germany), 1989, 2 BvR 502/86 u.a. (English translation), op. cit., fn. 407, para. 4.a.

1201 AIT (United Kingdom), judgment of 29 September 2008, *NA (risk categories – Hema) Democratic Republic of Congo CG*, [2008] UKAIT 00071, para. 37.

1202 See Section 1.6.1.1 above.

1203 Ibid.

1204 AIT (United Kingdom), judgment of 30 December 2004, *NS (Social Group – Women – Forced Marriage) Afghanistan v Secretary of State for the Home Department CG*, [2004] UKIAT 00328, paras 74–79, finding that the 'the harassment, ill-treatment, and serious harm that was meted out to the Appellant and her family [by warlords controlling the area from which she originated], was not simply common crime' and establishing a 'causal nexus of both political opinion and her status as an unprotected woman' and as a member of the particular social group of women in Afghanistan.

As regards membership of a particular social group, it cannot be excluded that some subsets of civilians could form such groups. This could be the case, for instance, for persons of draft age who left their country of origin in order to avoid being called up (their civilian character would be relevant because they had not become members of the armed forces). They could thereby show, as required by the dual conditions set out in Article 10(1)(d)[1205], both that they had a 'protected characteristic' and that they would be perceived or be visible as such a group. To constitute a particular social group, not all members of the group are necessarily required to be at risk in situations of armed conflict[1206]. More commonly, potential particular social groups will include more narrowly drawn groups, such as draft evaders or deserters (who are subject to punishment under national law)[1207], child soldiers and medical personnel.

3.2.1.4. Actors of persecution or serious harm (Article 6)

In situations of armed conflict and generalised violence, actors of persecution or serious harm may include not only the state's armed forces, its law enforcement agents and security forces, but also paramilitary groups and private military or security companies acting under government orders or in complicity with state actors[1208].

As also noted earlier, Article 6(b) QD (recast) specifies one category of actor of persecution or serious harm as 'parties or organisations controlling the State or a substantial part of its territory'[1209]. This provision may be particularly relevant in the context of armed conflict, which can involve situations in which the state and parties to the conflict hold shifting control in some parts of the territory.

Non-state actors of persecution or serious harm can include (but are not limited to) militias, insurgents, bandits, pirates, criminal gangs, terrorist organisations, neighbouring armies and other groups or individuals engaging in situations of armed conflict and violence. However, by virtue of the terms of Article 6(c), it will be necessary, in relation to non-state actors, to establish an inability or unwillingness on the part of the state, or parties or organisations controlling the state or a substantial part of the territory of the state, to provide protection within the scope of Article 7 (see Section 1.8.2 above and Section 3.2.1.5 below).

3.2.1.5. Actors of protection against persecution or serious harm (Article 7)

Article 7 identifies two categories of actors of protection: the state and parties or organisations, including international organisations, controlling the state or a substantial part of the territory of the state. In both instances, protection must be provided by an actor willing and able to provide protection that is effective and non-temporary (see Section 1.8). It should be noted that Article 7 expressly identifies the possibility that such actors of protection can include international organisations. In *Abdulla*, the CJEU stated that 'Article 7(1) of the Directive

[1205] See Section 1.6.2.4.1, which states that each of the elements of Article 10(1) is qualified by the term 'in particular', indicating that these are relevant factors but not exhaustive ones.

[1206] See Section 1.6.2.4.1 and UNHCR, Guidelines on International Protection No 2, op. cit., fn. 441, para. 17.

[1207] See CJEU, 2020, *EZ*, op. cit., fn. 34, para. 44, ruling 'Article 9(3) [QD (recast)] must be interpreted as requiring there to be a connection between the reasons mentioned in Article 10 of that directive and the prosecution and punishment referred to in Article 9(2)(e) [refusal to perform military service] of that directive'. See also Section 1.6.2.5.3, which addresses the reason of political opinion in relation to draft evasion and covers *Shepherd* and *EZ*.

[1208] See also Section 1.7 above.

[1209] See Section 1.7.2 above.

does not preclude the protection from being guaranteed by international organisations, including protection ensured through the presence of a multinational force in the territory of the third country'[1210].

Especially in situations of armed conflict and violence, the division between the two categories of actors of protection – the state and parties or organisations, including international organisations, controlling the state or a substantial part of the territory of the state – may not always be clear. There may be shifting alliances, or parties or organisations may have infiltrated or gained a hold over state institutions and/or law enforcement agencies or the state's armed forces[1211].

Furthermore, the exact identity of the state and parties or organisations involved in the fighting may not always be clear[1212]. In addition, where there is a party or organisation that controls an area, it may not have the administrative capacity to perform the role of actor of protection in such a manner as to meet the requirements of Article 7(2)[1213].

3.2.1.6. Internal protection (Article 8)

In any Member State that applies Article 8 QD (recast), considering whether there is internal protection in another part of the country (Article 8(1)) must be 'part of the assessment of an application for international protection'. As noted by the CJEU in *Elgafaji*, this requires consideration of the geographical scope of the armed conflict and violence[1214]. The geographical extent of armed conflict may vary widely, but where such situations are characterised by widespread fighting there may be more than one area of the country that is either unsafe or inaccessible. Furthermore, it must be borne in mind that, in general, it is a notable feature of such situations that fighting can shift territorially, with changing frontlines, limiting safety, accessibility and settlement possibilities[1215].

There may be particular problems with travel to any potential alternative part of the country. The only routes of travel may be rendered unsafe by landmines, improvised explosive devices, snipers, etc. It must also be borne in mind that in situations of armed conflict or generalised violence there may be particular resistance or ill will from the existing populations of other areas of the country towards outsiders, based on ethnic, political or other differences, which may mean it is unreasonable to expect outsiders to settle there.

On all such matters, Article 8(2) requires Member States to obtain and have regard to 'precise and up-to-date information … obtained from relevant sources, such as the [UNHCR] and [EUAA]'[1216].

1210 CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, para. 75.

1211 UNHCR, Guidelines on International Protection No 12, op. cit., fn. 482, para. 25.

1212 Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 8 February 2021, No 5, Azs 454/2019. See also UNHCR, Guidelines on International Protection No 12, op. cit., fn. 482, para. 40.

1213 See also Section 1.8.2.

1214 CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 40; and CJEU, 2021, *CF and DN*, op. cit., fn. 684, para. 43.

1215 UNHCR, Guidelines on International Protection No 12, op. cit., fn. 482, paras 41–43 and 60; and UNHCR, Guidelines on International Protection No 4, op. cit., fn. 613, para. 27.

1216 See also Sections 1.9 and 2.8.

3.2.1.7. International protection needs arising *sur place*

It is possible for an applicant to base a *sur place* claim on a change in the situation in their country of origin, for example if armed conflict broke out only after they left the country of origin. As UNHCR's Guidelines on International Protection No 12 note:

> … In the context of claims for refugee status related to situations of armed conflict and violence, a person may become a refugee *sur place* owing, for example, to the outbreak of a situation of armed conflict and violence, the intensification of a pre-existing but latent situation of armed conflict and violence in her or his country of origin, or because she or he has expressed objections or taken a stance against the situation of armed conflict and violence[1217].

3.2.2. Subsidiary protection

As noted at the outset, assessment of whether an applicant from a country afflicted by armed conflict or generalised violence qualifies for **subsidiary protection** can be carried out only if the decision-maker has concluded that they do not qualify for refugee protection. The most common scenario in which this will arise is when an applicant, although able to demonstrate a well-founded fear of persecution, cannot establish a reason for persecution within the meaning of Article 10 QD (recast).

Assuming an applicant from a country affected by armed conflict and generalised violence cannot show a reason for persecution pursuant to Article 10 QD (recast), their case must still be considered under Article 15 QD (recast). If there is a real risk of the death penalty or execution, it is possible that **Article 15(a)** could be engaged (see Section 2.4.2).

Article 15(b) QD (recast) might also be engaged (see Section 2.4.3)[1218]. The CJEU has ruled that 'Article 15(b) … corresponds, in essence, to Article 3 of the ECHR'[1219]. Therefore, ECHR case-law on Article 3 as applied to situations of armed conflict or generalised violence could be particularly important. In its case-law, the ECtHR has made it clear that:

- 'regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the two', the crucial issue is whether an applicant will face a real risk of ill treatment upon return[1220];
- not every situation of general violence will give rise to such risk – a 'general situation of violence would only be of sufficient intensity to create such a risk "in the most extreme cases" where there was a real risk of ill treatment simply by virtue of … being exposed to such violence on return'[1221];

[1217] UNHCR, Guidelines on International Protection No 12, op. cit., fn. 482, para. 31. See also Section 1.10 above.

[1218] This is illustrated by a case of the Regional Court in Prague, which quashed a decision in which the administrative authority failed to consider all three limbs of Article 15 in its internal protection analysis in a situation of armed conflict and dealt only with Article 15(c). See Prague Regional Court (Czechia), 2019, No 45, Az 23/2018 (English summary), op. cit., fn. 1165 (see Section 2.8.1 above). See also CNDA (France), judgment of 21 September 2021, *M. A.*, No 18037855 C+, considering that the uncertainty into which the country had been plunged since the victory of the Taliban and the permanently high level of violence, insecurity and arbitrariness meant that the applicant should be granted subsidiary protection on the basis of a risk of inhuman or degrading treatment.

[1219] CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 28.

[1220] ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 218.

[1221] Ibid., referring to ECtHR, 2008, *NA v UK*, op. cit., fn. 243, para. 115; ECtHR, 2015, *RH v Sweden*, op. cit., fn. 1060, para. 60; and ECtHR, 2015, *LM and Others v Russia*, op. cit., fn. 1058, paras 123–124.

- even when levels of violence fall below this high threshold, an applicant may be able to establish a real risk of Article 3 ill treatment if they possess individual characteristics that together reach the threshold of risk[1222].

Where the risk faced by the applicant is of deliberate ill treatment predominantly caused by the direct or indirect actions of parties to the conflict, the ECtHR applies the ordinary threshold for Article 3 ill treatment[1223].

Unlike Article 15(c), in the Article 15(b) context there is no limitation of scope to situations of armed conflict; it also covers generalised violence. Thus, the CNDA (France) held that the uncertainty into which Afghanistan had been plunged since the victory of the Taliban and the permanently high level of violence, insecurity and arbitrariness meant that the applicant should be granted subsidiary protection on the basis of a risk of inhuman or degrading treatment[1224].

The CJEU is yet to decide whether Article 15(b) QD (recast) can be invoked in situations of generalised violence that do not stem from an armed conflict within the meaning of Article 15(c) QD (recast) and where the risk of future harm does not emanate from deliberate ill treatment. In this context, it has to be noted that the ECtHR stated that, based on the CJEU's interpretation in *Elgafaji*:

> the Court is not persuaded that Article 3 of the Convention, as interpreted in *NA*, does not offer comparable protection to that afforded under the Directive. In particular, it notes that the threshold set by both provisions may, in exceptional circumstances, be attained in consequence of a situation of general violence of such intensity that any person being returned to the region in question would be at risk simply on account of their presence there[1225].

The CJEU's interpretation in *Elgafaji* was that:

> … it must be noted that the terms 'death penalty', 'execution' and 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin', used in Article 15(a) and (b) [QD], cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm. By contrast, the harm defined in Article 15(c) of the Directive as consisting of a 'serious and individual threat to [the applicant's] life or person' covers a more general risk of harm[1226].

The CJEU's analysis here would appear to suggest that in situations of armed conflict in which the applicant is specifically exposed to the **risk of a particular type of harm**, unless the case concerns the death penalty or execution, Article 15(b) may possibly be apposite. Conversely, it would appear to suggest that there is little room for an application of Article 15(b) QD (recast) in situations of generalised violence and other sorts of **general risks** of serious harm. This is even more the case when taking into account the CJEU's explanation of the relationship between Article 15(a) and (b) on the one hand and Article 15(c) on the other.

By virtue of its express reference to armed conflict and indiscriminate violence, **Article 15(c)** may also be engaged (see Section 2.4.4).

[1222] ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 227, para. 95.
[1223] ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 282.
[1224] CNDA (France), judgment of 21 September 2021, *M. A.*, No 18037855 C+.
[1225] ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 226.
[1226] CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, paras 32–33.

Appendix A contains a decision tree specifically dealing with decision-making in cases of armed conflict and generalised violence.

3.3. Trafficking

Trafficking issues arising in EU asylum law have to be considered by reference to three main instruments. There is first of all the EU directive on preventing and combating trafficking in human beings and protecting its victims, referred to as the 'EU anti-trafficking directive'[1227]. There is also a separate international treaty, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, also known as the Palermo Protocol[1228], and the Convention on Action against Trafficking in Human Beings, which is a Council of Europe instrument[1229].

As regards victims of trafficking, EU Member States are bound by all three instruments. Article 3 Palermo Protocol provides the following.

Article 3 Palermo Protocol

Use of terms

For the purposes of this Protocol:

(a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) 'Child' shall mean any person under eighteen years of age.

1227 Council Directive 2011/36 EU of 5 April 2011 on preventing and combatting trafficking in human beings and protecting its victims, [2011] OJ L 101/1 (EU anti-trafficking directive). Trafficking issues also arise in areas of EU asylum law other than qualification for international protection: see, for example, Article 20(3) QD (recast), Article 5 reception conditions directive (recast) and Article 6(3) (children) Dublin III regulation.

1228 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime, 15 November 2000 (Palermo Protocol).

1229 Council of Europe, Convention on Action against Trafficking in Human Beings, 16 May 2005 (Council of Europe Anti-Trafficking Convention).

The definition of trafficking in human beings in Article 4 Council of Europe Anti-Trafficking Convention includes the same components as Article 3 Palermo Protocol[1230].

In the EU anti-trafficking directive, the definition of trafficking set out in Article 2, insofar as is relevant, reads as follows.

Article 2 EU anti-trafficking directive

Offences concerning trafficking in human beings

1. Member States shall take the necessary measures to ensure that the following intentional acts are punishable:

The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

2. A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.

3. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.

4. The consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used…

As is made clear in recital 11 EU anti-trafficking directive, its definition of victims of trafficking is intended to reflect a broader concept of what should be considered trafficking in human beings than under Framework Decision 2002/629/JHA[1231].

[1230] In addition, Article 4 Council of Europe Anti-Trafficking Convention adds a fifth clause – '(e)' – stating '"Victim" shall mean any natural person who is subject to trafficking in human beings as defined in this article.'

[1231] Council Framework Decision of 19 July 2002 on combatting trafficking in human beings (2002/629/JHA).

Recital 11 EU anti-trafficking directive

... the exploitation of begging, including the use of a trafficked dependent person for begging, falls within the scope of the definition of trafficking in human beings only when all the elements of forced labour or services occur ... The expression 'exploitation of criminal activities' should be understood as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain. The definition also covers trafficking in human beings for the purpose of the removal of organs, which constitutes a serious violation of human dignity and physical integrity, as well as, for instance, other behaviour such as illegal adoption or forced marriage in so far as they fulfil the constitutive elements of trafficking in human beings.

All three instruments provide a framework of human rights protection. Demonstrating interconnections, the Council of Europe Anti-Trafficking Convention recognises that victims of trafficking may have international protection needs, and requires states to duly assess such protection needs[1232].

The definition of human trafficking under the Palermo Protocol, the Council of Europe Anti-Trafficking Convention and the EU anti-trafficking directive has three constituent elements, as set out in Table 50.

Table 50: Three elements of the definition of trafficking in human beings

1	An action	The recruitment, transportation, transfer, harbouring or reception of persons
2	The means	Threat or use of force or other forms of coercion; abduction; fraud; deception; abuse of power or of a position of vulnerability; or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person[1233]
3	An exploitative purpose	Including, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation; forced labour or services; slavery or practices similar to slavery; servitude; or the removal of organs[1234]

The UN Office on Drugs and Crime reported that 65 % of identified victims of human trafficking were women and girls, and they were largely trafficked for sexual exploitation[1235]. Trafficking can also involve boys and men, generally for forced labour, but also for sexual exploitation or forced adoption[1236].

The definition of trafficking in the case of a child is slightly different from that applying to adults. For example, Article 3(c) Palermo Protocol stipulates 'The recruitment, transportation,

[1232] Article 40(4) Convention on Action against Trafficking in Human Beings: 'Nothing in this Convention shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees and the principle of *non-refoulement* as contained therein.' See also UN Convention against Transnational Organized Crime, Article 14(1).

[1233] This second element does not have to be proven where the victim is a child, as children cannot consent, as stated in Article 3(c) of the Palermo Protocol, quoted above.

[1234] ECtHR (GC), 2020, *S.M. v Croatia*, op. cit., fn. 179, paras 290 and 303.

[1235] UN Office on Drugs and Crime, *Global Report on Trafficking in Persons 2020*, January 2021, p. 31.

[1236] See also Fairley Raney, R., 'Unseen victims of sex trafficking', *Monitor on Psychology*, Vol. 48, No 4, 2017, p. 22.

transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article'. Trafficked children typically become victims of sexual exploitation, forced labour, domestic servitude, forced begging, forced criminal activities and/or forced marriage[1237].

As regards the **personal circumstances** that should be taken into account in the assessment of facts and circumstances under Article 4(3) QD (recast), possible considerations that may be relevant include poor emotional health; low self-esteem; feelings of difference, shame and/or stigma as a result of sexual orientation, having been raped or having a child outside marriage; and antagonisms within, or ostracism by, the family and/or local community. Hence, it will always be important to consider whether, for such persons, the feared harms may have a more severe impact on them than on others[1238] and whether these circumstances may contribute to a heightened risk of re-trafficking. UNHCR's Guidelines on International Protection No 7 observe that even an isolated incident of trafficking may result in persecution, where the victim experiences 'ongoing traumatic psychological effects which would render return to the country of origin intolerable'[1239]. In *S.M.* v *Croatia*, the ECtHR reiterated the point made earlier in *Chowdury and Others* that 'where an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer themselves for work voluntarily' and that 'The prior consent of the victim is not sufficient to exclude the characterisation of work as forced labour …'[1240].

General circumstances likely to apply in the countries of origin of most victims of trafficking are set out in Figure 8.

Figure 8: Examples of general circumstances relevant to the consideration of applications where trafficking is involved

political instability	social upheaval	armed conflict and generalised violence	economic transition
lack of prevention mechanisms	various forms of discrimination (e.g. lack of employment opportunities, poor educational provision)	family poverty	debt bondage
housing instability	high rates of emigration	extensive criminal gang and/or smuggling networks	threats of withholding documents
rigid gender norms	high levels of domestic and sexual violence	exploitative intimate partners	psychoactive substances and drug dependency

1237 See Council of Europe, Group of Experts on Action against Trafficking in Human Beings (GRETA), 'Trafficking in children', in *6th General Report on GRETA's Activities*, May 2018, p. 5.

1238 See EASO, *Vulnerability – Judicial analysis*, op. cit., fn. 64, Sections 6.2.1, 6.3.1 and 6.3.2.

1239 UNHCR, Guidelines on International Protection No 7, op. cit., fn. 402, para. 16.

1240 ECtHR (GC), 2020, *S.M. v Croatia*, op. cit., fn. 179, para. 285; and ECtHR, judgment of 30 March 2017, *Chowdury and Others v Greece*, No 21884/15, CE:ECHR:2017:0330JUD002188415 (hereinafter ECtHR, 2017, *Chowdury and Others v Greece*).

In addition, in the context of considering the risk of **re-trafficking**, relevant circumstances may include whether or not there is:

- a lack of state provision for rehabilitation and reintegration,
- a willingness and ability to prosecute organised criminal gangs,
- complicity between the authorities and such gangs.

3.3.1. Refugee protection

Considerations relevant to the qualification of victims of trafficking as refugees are set out in the subsections that follow.

3.3.1.1. Acts of persecution (Article 9)

With regard to Article 9(1)(a) QD (recast), trafficking typically involves violations of basic human rights (Articles 3 and/or 4 ECHR), in the form of physical or sexual violence, which includes, for example, abduction, unlawful incarceration, rape, sexual enslavement, prostitution, forced labour, removal of organs, physical beatings, starvation and/or deprivation of medical treatment. As UNHCR has noted, 'a common characteristic of all forms of trafficking is that victims are treated as merchandise, "owned" by their traffickers, with scant regard for their human rights and dignity'[1241]. In relation to Article 9(2)(a) QD (recast), which covers 'physical or **mental** violence' (emphasis added), it may be pertinent that the individual circumstances often linked to trafficking cases include psychological trauma. Bearing in mind that Article 9(2)(f) specifies 'gender-specific or child-specific acts' as potential acts of persecution, the forcible or deceptive recruitment of men, women and children for the purposes of forced prostitution or sexual exploitation[1242] represents a likely form of gender- and child-specific persecution.

Even if the harms experienced by victims of trafficking in the past or likely to be experienced by them in the future are not considered violations of basic human rights, it will be necessary to consider, pursuant to Article 9(1)(b), whether their cumulative effect is sufficiently severe to constitute persecution.

The ECtHR has recognised that trafficked persons in some cases face slavery; substantial physical, sexual and/or psychological violence[1243]; domestic servitude[1244]; sexual exploitation[1245] and forced labour[1246]. The level of harm involved may be sufficiently severe in such cases to

[1241] UNHCR, Guidelines on International Protection No 7, op. cit., fn. 402, para. 3.

[1242] Even where children are being trafficked for criminal or labour exploitation, it is not unusual for rape and sexual abuse to be used as a form of control. This happens to boys and young men as well as to girls and young women. See Home Office (United Kingdom), *A typology of modern slavery offences in the UK*, 2017, pp. iii–v.

[1243] Council of Europe, GRETA, Guidance Note on the Entitlement of Victims of Trafficking, and Persons at Risk of Being Trafficked, to International Protection, June 2020 (hereinafter GRETA, Guidance Note on the Entitlement of Victims of Trafficking to International Protection), cases cited at paras 32–33.

[1244] ECtHR, judgment of 26 July 2005, *Siliadin v France*, No 73316/01, CE:ECHR:2005:0726JUD007331601; and ECtHR, judgment of 11 October 2012, *CN and V v France*, No 67724/09, CE:ECHR:2012:1011JUD006772409.

[1245] ECtHR, 2010, *Rantsev, op. cit., fn. 179;* ECtHR, judgment of 21 January 2016, *LE c Grèce*, No 71545/12, CE:ECHR:2016:0121JUD00715451; ECtHR, judgment of 19 July 2019, *TI et autres c Grèce*, No 40311/10, CE:ECHR:2019:0718JUD004031110; ECtHR, judgment of 31 July 2012, *M and Others v Italy and Bulgaria*, No 40020/03; and ECtHR (GC), 2020, *S.M. v Croatia*, op. cit., fn. 179, para. 297.

[1246] ECtHR, 2017, *Chowdury and Others v Greece*, op. cit., fn. 1244. See also ECtHR, judgment of 16 February 2021, *VCL and AN v United Kingdom*, Nos 77587/12 and 74603/12, CE:ECHR:2021:0216JUD007758712 (hereinafter ECtHR, 2021, *VCL and AN v UK*), which recognised criminal exploitation. See also Supreme Administrative Court (Czechia), 2021, No 5, Azs 317/2020-28, op. cit., fn. 402, discussed in fn. 1283 below.

amount to inhuman or degrading treatment under Article 3 ECHR and therefore to constitute a severe violation of a basic human right under Article 9(1)(a) QD (recast). Specifically, the ECtHR noted in *M and Others* v *Italy and Bulgaria* that 'human trafficking as defined in international conventions … undoubtedly also amounts to inhuman and degrading treatment under Article 3 of the Convention'[1247].

It is not necessary, from the perspective of Article 4 ECHR, which prohibits slavery and forced labour, for the human trafficking involved to be connected to organised crime[1248]. For the court, the question of whether a particular situation involves all the constituent elements of 'human trafficking' and/or gives rise to a separate issue of forced prostitution is a factual question that must be examined in the light of all the relevant circumstances of a case[1249]. When the victim of trafficking is a child, it is essential that the assessment is based on a child-specific understanding of persecution that ensures the best interests of the child are a primary consideration[1250].

It is important to recall that, as the CJEU has clarified, acts of persecution can include threats[1251].

3.3.1.2. Well-founded fear

Although 'well-founded fear' involves a forward-looking assessment of risk, Article 4(4) QD (recast) requires such an assessment to take into account that past persecution or serious harm is a 'serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated'[1252]. In the trafficking context, that obviously entails close consideration of any violence and exploitation previously suffered by the applicant[1253]. Article 4(4) QD (recast) is also relevant when assessing the risk of re-trafficking. It requires an assessment of any past persecution or serious harm and threats of such treatment (whether in a trafficking or non-trafficking context). See also Section 1.5.3 above[1254].

1247 ECtHR, 2021, *M and Others* v *Italy and Bulgaria*, op. cit., fn. 1279, para. 106. For more on this point, see Section 3.3.2 below.

1248 ECtHR (GC), 2020, *S.M.* v *Croatia*, op. cit., fn. 179, paras 296 and 303.

1249 ECtHR (GC), 2020, *S.M.* v *Croatia*, op. cit., fn. 179, paras 302–303. See also ECtHR, 2021, *VCL and AN* v *UK*, op. cit., fn. 1250.

1250 See EASO, *Vulnerability – Judicial analysis*, op. cit., fn. 64, Section 6.8.1.1; see also Sections 6.4 and 6.8.2. See, for example, UNHCR, *Prevent, Combat, Protect: Human trafficking*, November 2011, p. 70: 'A Best Interest Determination should be carried out for particularly important decisions affecting the child and as such, should be a formal process accompanied by procedural safeguards that include a written record of the assessment and the possibility to appeal. The process should involve decision-makers with relevant areas of expertise (such as child protection authorities, health experts or child psychologists) and the child's guardian, balancing relevant factors in order to assess the best option for the child victim of trafficking. The right of the child to express their views and to have them taken into account are especially important where decisions are made by a range of agencies, both in the child's country of origin and in any other country to which a child is trafficked.'

1251 CJEU, 2018, *Ahmedbekova*, op. cit., fn. 68, paras 46 and 51.

1252 See Tribunal of Lecce (Tribunale di Lecce) (Italy), judgment of 6 April 2021, No 4906/2020 (English summary), concerning a female victim of trafficking from Nigeria who had been tortured by her traffickers and forced into prostitution. The judgment referred to this provision of the QD (recast).

1253 GRETA, Guidance Note on the Entitlement of Victims of Trafficking to International Protection, op. cit., fn. 1247, para. 4.

1254 Potential risks faced by victims of trafficking have been described by GRETA as follows: 'possibility of being re-trafficked, ostracised in their country of nationality, or being subjected to acts of revenge by their traffickers or the traffickers' associates due to a lack of specialised assistance and protection available'. See GRETA, Guidance Note on the Entitlement of Victims of Trafficking to International Protection, op. cit., fn. 1247, para. 31.

As regards the risk of re-trafficking, establishing 'well-founded fear' will require an assessment of all the circumstances of the particular case, both those personal to the applicant and general circumstances. A ruling by the Ordinary Tribunal of Bologna, Italy, concerning the case of a victim of trafficking from Nigeria illustrates the issues that can arise in this context. The tribunal determined that, if she were returned, she would have a well-founded fear not only of suffering severe retaliation by those responsible for trafficking her, but also of being re-trafficked or suffering attacks on her life or physical integrity by members of the criminal organisation[1255].

It will also be salient in the context of assessing the risk of an applicant being re-trafficked to consider whether reprisals or retribution at the hands of traffickers could amount to persecution, which may threaten the applicant's family as well. As the UNHCR guidelines note:

> Reprisals by traffickers could also be inflicted on the victim's family members, which could render a fear of persecution on the part of the victim well-founded, even if she or he has not been subjected directly to such reprisals. In view of the serious human rights violations often involved ..., re-trafficking would usually amount to persecution[1256].

In some cases, persons at risk include not only victims of trafficking facing a risk of re-trafficking but also those who may face a **risk of being trafficked for the first time**, should they return to their country of origin[1257].

3.3.1.3. Reasons for persecution (Article 10)

Given that trafficking in persons is predominantly conducted for commercial gain, the issue arises as to whether victims of trafficking can establish a reason for persecution within the meaning of Article 10 QD (recast). In this regard, it is important to recall that, to establish such a reason for acts of persecution, the reason (if one or more of the five) does not need to be the sole or even the main motive. It is sufficient for it to be a substantial contributing factor (see Section 1.6.1.1). UNHCR's guidelines, among other sources, highlight that, regardless of the commercial context, victims may be targeted on the basis of their ethnicity, nationality or religious or political views[1258].

Gender may also play an important role in establishing a reason for persecution. According to Article 10(1)(d) QD (recast), 'Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group'. Given, as noted earlier, that the UN Office on Drugs and Crime reports that 65 % of identified victims of human trafficking are women and girls[1259], it may well be that women and

[1255] Ordinary Tribunal of Bologna (Tribunale ordinario di Bologna) (Italy), judgment of 3 December 2020, no case number (English summary). It also found that, if returned, she might find herself in a situation of such vulnerability that she might be exposed to the risk of becoming a victim of trafficking again.

[1256] UNHCR, Guidelines on International Protection No 7, op. cit., fn. 402, para. 17. See also GRETA, Guidance Note on the Entitlement of Victims of Trafficking to International Protection, op. cit., fn. 1247, para. 3, referring to 're-trafficking, retribution by the traffickers (for example, if the person has escaped from the traffickers and/or assisted the authorities in the prosecution of traffickers), lack of assistance or adequate care, or ostracism by the trafficked person's family or community, to the extent that their ability to re-integrate is fatally compromised'.

[1257] GRETA, Guidance Note on the Entitlement of Victims of Trafficking to International Protection, op. cit., fn. 1247, para. 15.

[1258] UN Office on Drugs and Crime, *Global Report on Trafficking in Persons 2020*, 2021, op. cit., fn. 1239, p. 31.

[1259] UN Office on Drugs and Crime, *Global Report on Trafficking in Persons 2020*, 2021, op. cit., fn. 1239, p. 31.

girls trafficked into forced prostitution will be able to establish persecution on account of their membership of a particular social group comprising women and/or girls or some subset of the same[1260]. At the same time, trafficked men and/or boys, or certain social subsets of these groups, may also qualify as a particular social group if they too are able to meet the cumulative criteria set out in Article 10(1)(d).

Some courts and tribunals have held that subcategories of victims of trafficking can fall within the scope of Article 10(1)(d) as a particular social group in themselves[1261]. In *AZ (Trafficked women) Thailand*, the Upper Tribunal (United Kingdom) established a nexus with a particular social group by considering not only the applicant's past experiences as a victim of trafficking but also her age as specific characteristics. The tribunal identified the particular social group of 'young females who have been victims of trafficking for sexual exploitation' and highlighted that the appellant was a particularly vulnerable young woman, which was why she was not in the same position as other women being returned to Thailand[1262].

As is clear from this case, **former** victims of trafficking may also constitute a social group on the basis that they share the unchangeable, common and historical characteristic of having been trafficked and are, or would be, socially perceived as a group[1263]. Similarly, the CNDA in France recognised a victim of trafficking as a refugee on the basis of her membership of the particular social group of women from the states of Edo and Delta in Nigeria who are victims of a trafficking network for sexual exploitation and who have managed to escape that network[1264].

3.3.1.4. Actors of persecution or serious harm (Article 6)

The actors of persecution or serious harm in trafficking cases will typically be non-state actors, such as traffickers / members of criminal enterprises or, in some situations, family or community members, or exploitative boyfriends[1265]. They will not, however, qualify as actors of persecution or serious harm unless 'it can be demonstrated that the actors mentioned in points (a) and (b), ['the State' and 'parties or organisations controlling the State or a substantial part of the territory of the State', respectively], including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7' (Article 6(c) QD (recast)).

1260 See, for example, AIT (United Kingdom), judgment of 27 November 2007, *SB (PSG – Protection Regulations – Reg 6) Moldova CG*, [2008] UKAIT 00002, para. 107, and Section 1.6.2.4.2 above.

1261 Upper Tribunal (IAC) (United Kingdom), 2016, *JA (child – risk of persecution) Nigeria*, op. cit., fn. 329; Upper Tribunal (IAC) (United Kingdom), judgment of 9 February 2016, *TD and AD (Trafficked women) CG*, [2016] UK 92 (hereinafter Upper Tribunal (IAC) (United Kingdom), 2016, *TD and AD (Trafficked women) CG*); and Upper Tribunal (IAC) (United Kingdom), 2010, *AM and BM (Trafficked women) Albania CG*, op. cit., fn. 564.

1262 Upper Tribunal (IAC) (United Kingdom), judgment of 8 April 2010, *AZ (Trafficked women) Thailand CG*, [2010] UKUT 118, para. 140; and Upper Tribunal (IAC) (United Kingdom), 2016, *JA (child – risk of persecution) Nigeria*, op. cit., fn. 329.

1263 See, for example, Court of Appeal (England and Wales, United Kingdom), judgment of 24 October 2007, *PO (Nigeria) v Secretary of State for the Home Department*, [2007] EWCA Civ 1183.

1264 See, for example, CNDA (France), judgment of 24 February 2020, *Mme O.*, No 19017840 C+ (English summary). The criterion of managing to escape a prostitution network is a standard criterion for many trafficking cases in France and is regularly applied in cases involving women trafficked from the Edo and Delta states of Nigeria.

1265 Refugee Board (Poland), decision of 8 September 2010 (English summary); and Upper Tribunal (IAC) (United Kingdom), 2010, *AM and BM (Trafficked women) Albania CG*, op. cit., fn. 564, paras 165 and 167–170.

3.3.1.5. Actors of protection against persecution or serious harm (Article 7)

Protection against persecution or serious harm can be provided only by the state or parties or organisations, including international organisations, controlling the state or a substantial part of the territory of the state pursuant to Article 7 QD (recast). Thus, the presence of NGOs working to combat trafficking does not mean that there is an effective actor of protection, since only the actors specified in Article 7 can provide protection. In relation to Article 6(c) QD (recast), whether the authorities in the country of origin are able to protect victims or potential victims of trafficking will depend in the first place on whether actors of protection operate an effective legal system for detection, prosecution and punishment of acts constituting persecution or serious harm, as indicated in Article 7(2) QD (recast).

In the context of trafficking, that would appear first to entail that they have effective legislative and administrative mechanisms in place to prevent and combat trafficking, to detect, prosecute and punish traffickers, and to protect and assist the victims.

Second, it will depend on whether these mechanisms are effective in practice. The mere existence of anti-trafficking laws or regulations will not suffice if they are not effectively implemented. Accordingly, when non-state actors of persecution or serious harm are involved, it will be necessary to examine whether the authorities of the country of origin are able and willing to protect the victim or potential victim upon return. In *S.M.* v *Croatia*, in finding a violation by the state authorities of the procedural obligation limb of Article 4 ECHR, the ECtHR emphasised the fact that, in relation to the authorities' handling of S.M.'s complaint of having been trafficked by T.M.:

> the prosecuting authorities did not effectively investigate all relevant circumstances of the case or follow some of the obvious lines of inquiry in order to gather the available evidence, in accordance with their procedural obligation under Article 4. Instead, they relied heavily on the applicant's statement and thus, in essence, created a situation in the subsequent court proceedings where her allegations simply had to be pitted against the denial of T.M., without much further evidence being presented[1266].

In a UK country guidance case concerning trafficked women in China, the Upper Tribunal held:

> Although the Chinese authorities are intent upon rescuing and rehabilitating women and girls trafficked for the purposes of prostitution, there are deficiencies in the measures they have taken to combat the problem of trafficking. The principal deficiencies are the lack of a determined effort to deal with the complicity of corrupt law enforcement officers and state officials and the failure to penalise as trafficking acts of forced labour, debt bondage, coercion, involuntary servitude or offences committed against male victims[1267].

Unwillingness may include situations in which state actors take the view that it is the victims' problem or where state officials are complicit with non-state actors in trafficking activities.

[1266] ECtHR (GC), 2020, *S.M.* v *Croatia*, op. cit., fn. 179, para. 343.

[1267] AIT (United Kingdom), judgment of 18 July 2009, *HC and RC (Trafficked women) China CG*, [2009] UKAIT 00027, para. 82. See also Upper Tribunal (IAC) (United Kingdom), judgment of 8 February 2008, *JFK and Secretary of State for the Home Department*, [2018] UKUT PA/06854/2016.

In assessing both ability to protect and willingness to protect, much will depend on what is set out in up-to-date COI. Among reports that may be a useful source of country information to evaluate measures taken by countries of origin to prevent re-trafficking or re-victimisation of former victims of trafficking, Group of Experts on Action against Trafficking in Human Beings (GRETA) country reports, which evaluate measures taken by parties to the Council of Europe Convention on Action against Trafficking in Human Beings, may be particularly useful[1268].

3.3.1.6. Internal protection (Article 8)

When the issue of whether an applicant would face a well-founded fear or real risk of being trafficked/re-trafficked arises, Article 8 QD (recast) may come into play for Member States that apply this provision. The question of whether the applicant could have internal protection by relocating to another part of the country may be relevant[1269]. Connected to this, further questions may need to be asked in addition to those questions regarding other criteria that need to be fulfilled for internal protection to apply[1270]. In the case of former victims of trafficking, of particular importance will be ascertaining, from reliable and up-to-date COI, in accordance with Article 8(3), the answers to the questions in Table 51.

Table 51: Illustrative questions to consider regarding possible internal protection for former victims of trafficking

	Questions on internal protection particular to former victims of trafficking
1	Will the victim's traffickers have the capacity or be likely to locate the applicant?
2	Will the applicant's vulnerability (see the paragraph on personal circumstances in Section 3.3 above) mean they are liable to come to the adverse attention of a different trafficking network?
3	Will there be adequate rehabilitation and reintegration facilities in place so as to prevent the applicant falling prey to exploitation or harm at the hands of others?
4	Is there a risk of ostracism and rejection by family, community, etc. on account of being trafficked that would endanger the victim's safety and economic survival?

In relation to general circumstances, the size of the country and/or the size of the trafficking gang may be relevant in relation to the viability of internal protection[1271].

[1268] See Council of Europe, 'Country monitoring'.

[1269] See, for example, CNDA (France), 2017, *Mme F.*, No 16015058, op. cit., fn. 1277, paras 14–15; Upper Tribunal (IAC) (United Kingdom), judgment of 17 October 2016, *HD (Trafficked women) Nigeria CG*, [2016] UKUT 000454; and Upper Tribunal (IAC) (United Kingdom), 2016, *TD and AD (Trafficked women) CG*, op. cit., fn. 1267.

[1270] See, generally, Section 1.9.

[1271] In the United Kingdom, for example, the Upper Tribunal, in assessing whether internal protection is viable, viewed the relatively small size of Albania as a relevant consideration in allowing the appeals in Upper Tribunal (IAC) (United Kingdom), 2010, *AM and BM (Trafficked women) Albania CG*, op. cit., fn. 564. By contrast, the relatively large size of Nigeria, together with the fact that trafficking gangs are usually very local or based on an extended family network, resulted in different outcomes in Immigration Appeal Tribunal (United Kingdom), judgment of 10 September 2004, *JO (internal relocation, no risk of re-trafficking) Nigeria*, [2004] UKAIT 251; and AIT (United Kingdom), judgment of 23 November 2009, *PO (Trafficked women) Nigeria CG*, [2009] UKAIT 46. However, in Italy, the Ordinary Rome Tribunal highlighted that, even if the trafficking experience was not ongoing, the risk of persecution and re-victimisation if the applicant were to be returned to Nigeria was well-founded in the light of the applicant's gender and origin. See Ordinary Rome Tribunal (Tribunale Ordinario di Roma) (Italy), judgment of 6 November 2019, No 17758/2019 (English summary). See also CNDA (France), 2015, *Mlle E. F.*, No 10012810 (English summary), op. cit., fn. 179; and CNDA (France), Grande Formation, judgment of 30 March 2017, *Mme F.*, No 16015058 (hereinafter CNDA (France), 2017, *Mme F.*, No 16015058).

3.3.1.7. International protection needs arising *sur place*

The transnational nature of trafficking has meant that applicants with no trafficking profile can fall prey to trafficking gangs while awaiting processing of their claims for international protection. For various reasons, they may as a result face risks from members of the networks of such gangs and/or ostracism by their family and/or community if returned. Potentially, their cases could engage Article 5 QD (recast). Indeed, this *sur place* trafficking aspect of their application may be the only arguable one. UNHCR's guidelines observe that 'while victims of trafficking may not have left their country owing to a well-founded fear of persecution, such a fear may arise after leaving their country of origin. In such cases, it is on this basis that the claim to refugee status should be assessed'[1272].

3.3.2. Subsidiary protection

In cases in which a connection between the reason(s) for persecution mentioned in Article 10 QD (recast) and the act(s) of persecution or the absence of protection against such acts cannot be established, the applicant may face a real risk of serious harm as set out in Article 15(b) QD (recast). The ECtHR has recognised trafficking to be capable of constituting a violation of both Article 3 and Article 4 ECHR[1273] and has ruled that it 'undoubtedly … amounts to inhuman and degrading treatment under Article 3 [ECHR]'[1274].

Some applicants have been found eligible for subsidiary protection in cases in which they were victims of trafficking or slavery and face current threats related to their past serious harm. For instance, the CNDA in France granted subsidiary protection to a young man from the Democratic Republic of the Congo who was orphaned at the age of 10 years and was forcibly enrolled in a gang of young criminals. As a gang member, he was subjected to sexual violence as a measure of control and forced to commit armed robberies under the influence of narcotics provided to him by the gang boss. He feared that he would face extrajudicial execution or torture by the police because of his past role in the gang. The court found that the applicant was ineligible for refugee status, since the harm carried out by the police was due to criminal acts he had committed, and, therefore, this harm was held not to be a reason for persecution under Articles 2(d) and 10 QD (recast). However, he was eligible for subsidiary protection under both Article 15(a) and Article 15(b) QD (recast). However, he was eligible for subsidiary protection under both Article 15(a) and Article 15(b) QD (recast), since he would face

[1272] UNHCR, Guidelines on International Protection No 7, op. cit., fn. 402, para. 25.

[1273] ECtHR, judgment of 31 July 2012, *M and Others v Italy and Bulgaria*, No 40020/03, CE:ECHR:2012:0731JUD004002003 (hereinafter ECtHR, 2021, *M and Others v Italy and Bulgaria*), paras 107–108; ECtHR, 2021, *VCL and AN v UK*, op. cit., fn. 1250, paras 152 and 161; and ECtHR (GC), 2020, *S.M. v Croatia*, op. cit., fn. 179, para. 241. In ECtHR, 2010, *Rantsev, op. cit., fn. 179,* para. 282, the ECtHR noted that 'trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention'.

[1274] ECtHR, 2021, *M and Others v Italy and Bulgaria*, op. cit., fn. 1279, para. 106. See also Section 3.3.1.1, fn. 1251 above. In two other cases, the ECtHR considered that state protection would be available to former victims of human trafficking in Nigeria and considered the complaints inadmissible with respect to Article 3 ECHR. See ECtHR, decision of 26 May 2015, *LO c France*, No 4455/14, CE:ECHR:2015:0526DEC000445514, paras 35–36 (the applicant feared harm from her former procurer, not from a trafficking network); and with respect to Article 4 ECHR in ECtHR, decision of 29 November 2011, *VF c France*, No 7196/10, CE:ECHR:2011:1129DEC000719610.

serious harm from the authorities and revenge from the population of Kinshasa on account of his past activities in the criminal gang[1275].

The CNDA (France) also considered that, while victims of trafficking from Edo and other southern states of Nigeria formed a particular social group, victims of trafficking originating from Lagos could not be regarded as belonging to this social group, since they were not excluded from society to a similar degree. Since a reason for persecution within the meaning of Article 10 QD (recast) was lacking, the applicant in that case was not eligible for refugee protection. She was nevertheless found to be eligible for subsidiary protection, since she still faced reprisals from the prostitution network she had escaped and social ostracism[1276].

In a case of forced labour imposed on Uzbek citizens by the state, the Czech Supreme Administrative Court held that forced labour is frequently conducted in conditions that expose a person to inhuman or degrading treatment or punishment[1277]. With respect to subsidiary protection under Article 15(b) QD (recast), the court held that, when the applicant refused to perform forced labour in the cotton fields and was subsequently summoned by the police, the decision-maker failed to examine the conditions under which forced labour was conducted and the fact that a lot of returnees from abroad were detained based on fabricated charges and faced torture in detention[1278]. It was necessary to examine whether the applicant would face inhuman or degrading treatment by again being forced to work or if he would refuse to conduct such labour. Significantly, the court did not exclude that the reason for the refusal to undertake the forced labour can in some cases be considered a political opinion, or that at times people subject to forced labour can form a particular social group, if they share a common characteristic that is objectively present among all members of such a group and that is distinct from the pure risk of persecution. In this case, however, the court felt that the COI on Uzbekistan lacked information about the conditions of forced labour duties and the punishment for refusal to conduct this labour.

Serious harm may consist of the threat of re-trafficking after return to the country of origin. In such a case, it is necessary to examine whether the state or parties or organisations controlling the state or a substantial part of the territory of the state is/are willing and able to provide effective and non-temporary protection and assistance to victims of trafficking[1279].

[1275] CNDA (France), judgment of 18 October 2016, *M. V.*, No 15031596 C. The applicant was also accused of witchcraft by his neighbours following the death of his parents. The court ruled out exclusion of the applicant, since he had committed crimes while he was a minor and in a state of physical suffering and psychological pressure. Similarly, a woman who was subjected to the rape and violence perpetrated by criminal gangs operating in Libya after they had killed her husband feared further violence from those gangs. In CNDA (France), judgment of 15 September 2017, *Mme AA*, No 17015488 C, the court found that, while no reason for persecution could be proven, she was eligible for subsidiary protection.

[1276] CNDA (France), 2021, No 20013918, *Mme A* (English summary), op. cit., fn. 443. For CNDA cases involving Nigerian victims of trafficking from Edo and Delta states who were recognised as refugees, see fn. 1270.

[1277] Supreme Administrative Court (Czechia), 2021, No 5, Azs 317/2020-28, op. cit., fn. 402, para. 20.

[1278] Supreme Administrative Court (Czechia), 2021, No 5, Azs 317/2020-28, op. cit., fn. 402, paras 53–54.

[1279] Supreme Administrative Court of Finland (Korkein hallinto-oikeus) (Finland), judgment of 20 March 2017, KHO:2017:42. The court referred to its own case-law, namely judgment of 26 June 2014, KHO:2014:112.

3.4. Environmental dangers

3.4.1. Introduction

The intention in this section is to highlight selected matters most likely to challenge courts and tribunals in existing and future casework. Because there is as yet very little case-law or settled learning on this subject, the approach taken in this section is primarily illustrative and the use of subheadings is limited.

Environmental dangers now affect significant parts of the world and may be a cause for people being displaced both within their country and outside it. Such cases can pose particular challenges, not least because of the wide understanding that, in general, 'environmental refugees', 'ecological refugees', 'climate change refugees' or 'persons displaced in the context of disasters and climate change' (as they are variously described), even when they are outside their own countries, do not easily fall within the terms of either refugee protection or subsidiary protection. However, environmental dangers are increasingly likely to be at least a contributory factor relied on by applicants for international protection.

The Global Compact for Migration, which was affirmed by an overwhelming majority in the United Nations General Assembly (UNGA) in December 2018, notes the connection between migration movements and 'sudden-onset and slow-onset natural disasters, the adverse effects of climate change, environmental degradation, as well as other precarious situations'[1280]. The Global Compact on Refugees, also adopted in 2018, observes that 'While not in themselves causes of refugee movements, climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements'[1281]. Coinciding with Earth Day 2021, on 22 April of that year, UNHCR published data showing how 'disasters linked to climate change likely worsen poverty, hunger and access to natural resources, stoking instability and violence'[1282].

In Europe, the Council of Europe Parliamentary Assembly adopted a resolution in September 2021 expressing alarm at 'the dramatic effects of climate change', referring to the 'human right to a safe, clean, healthy, and sustainable environment', and calling for 'Adequate solutions to help meet the challenges related to migration caused by climate change' and 'a legal status for people displaced or migrating for climate-related reasons'[1283]. Similarly, in October 2021,

[1280] UNGA, *Global Compact for Safe, Orderly and Regular Migration*, 19 December 2018, A/RES/73/195, para. 18(h); UNHCR, *UNHCR's Strategic Directions 2017–2021*, 2017; and Internal Displacement Monitoring Centre, *GRID 2019: Global report on internal displacement*, 2019.

[1281] UNGA, Global Compact on Refugees, 19 December 2018, A/RES/73/151, para. 8.

[1282] UN News, 'Climate change link to displacement of most vulnerable is clear: UNHCR', 22 April 2021; and UNHCR, *Displaced on the Frontlines of the Climate Emergency*. See also UNGA, Global Compact for Safe, Orderly and Regular Migration, op. cit., fn. 1286, para. 18(h), (i) and (l); and Weerasinghe, S., 'In harm's way', *UNHCR Legal and Protection Policy Research Series*, No 39, December 2018 (hereinafter Weerasinghe, 'In harm's way', 2018). See also the acknowledgment in the 2018 Global Compact for Safe, Orderly and Regular Migration of the connection between migration movements and 'sudden-onset and slow-onset natural disasters, the adverse effects of climate change, environmental degradation, as well as other precarious situations' (para. 18(h)).

[1283] Council of Europe, Parliamentary Assembly, Resolution 2401 (2021): Climate change and migration, 29 September 2021.

the UN Human Rights Council recognised 'the right to a safe, clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights'[1284].

As explained in Section 3.1 above, it is necessary to consider both the personal circumstances and the general circumstances that must be taken into account in the assessment of facts and circumstances under Article 4(3) QD (recast).

In relation to **personal circumstances**, the ways in which environmental factors affect an individual will obviously vary considerably from one person to another. For example, children, the elderly, people with disabilities, people from ethnic, religious or other minorities, or people who are disadvantaged and living at the margins of society may be more endangered by the disruption caused to their lives by natural disasters, such as earthquakes, floods, heatwaves and fires. As the UN Human Rights Council noted in October 2021:

> the consequences [of the human rights implications of environmental damage] are felt most acutely by those segments of the population that are already in vulnerable situations, including indigenous peoples, older persons, persons with disabilities, and women and girls[1285].

With regard to children, in September 2021, the Committee on the Rights of the Child decided in a series of cases brought by minors from various countries (the 'authors') that they could claim victim status (in the context of the admissibility of the case) based on Articles 6 and 24 Convention on the Rights of the Child[1286]. The committee noted:

> as children, the authors are particularly affected by climate change, both in terms of the manner in which they experience its effects and the potential of climate change to have an impact on them throughout their lifetimes, particularly if immediate action is not taken. Due to the particular impact on children, and the recognition by States parties to the Convention that children are entitled to special safeguards, including appropriate legal protection, States have heightened obligations to protect children from foreseeable harm[1287].

The **general circumstances** likely to feature in such cases include those listed in Figure 9.

1284 UN Human Rights Council, Human Right to a Safe, Clean, Healthy and Sustainable Environment, Resolution A/HRC/48/L.23/Rev.1, 8 October 2021.

1285 UN Human Rights Council, Resolution A/HRC/48/L.23/Rev.1, 2021, op. cit., fn. 1289. Further examples of persons who are vulnerable to, or at particular risk from, environmental harm are provided in UN Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Resolution A/HRC/37/59, 24 January 2018, para. 42(a)–(h).

1286 See Committee on the Rights of the Child, views of 22 September 2021, in the cases of *Sacchi et al v Argentina*, CRC/C/88/D/104/2019; *Sacchi et al v Brazil*, CRC/C/88/D/105/2019; *Sacchi et al v France*, CRC/C/88/D/106/2019; *Sacchi et al v Germany*, CRC/C/88/D/107/2019; *Sacchi et al v Turkey*, CRC/C/88/D/108/2019; and *AM c Suisse*, CRC/C/88/D/95/2019. Each case contains similar language and was ultimately declared inadmissible. The cases nevertheless analyse issues including that of jurisdiction in the context of transboundary environmental harm related to climate change; the requirement that the harm suffered by the victims needs to have been 'reasonably foreseeable' and 'significant'; and that to justify their victim status the authors must establish prima facie that they have personally experienced a real and significant harm. The analysis and standards set out by the committee may also be relevant in the context of the assessment of applications for international protection where children and human rights violations as a result of climate change are involved.

1287 Committee on the Rights of the Child, *Sacchi et al v France*, CRC/C/88/D/106/2019, para. 10.13, op. cit., fn. 1292; the other cases use similar language.

Figure 9: Examples of general circumstances relevant to the consideration of applications involving environmental dangers

forced displacement within the country before departure	reduced opportunities for movement elsewhere within the country	poverty and food deprivation
being cut off from traditional food sources and livelihoods	degradation of living areas	increased pressure on urban areas
overpopulation and overcrowding	limited or no access to health services or education	increased risk of illness as a result of pollution or environmental degradation

As UNHCR notes:

> The adverse effects of climate change and disasters are often exacerbated by other factors such as poor governance, undermining public order; scarce natural resources, fragile ecosystems, demographic changes, socioeconomic inequality, xenophobia, and political and religious tensions, in some cases leading to violence. As a result of these negative impacts of climate change and disasters, combined with social vulnerabilities, people may be compelled to leave their country and seek international protection[1288].

In relation to such general circumstances, up-to-date and reliable COI will be essential.

3.4.2. Refugee protection

As regards **'acts of persecution'** within the meaning of Article 9(1), there are at least two key points of particular importance in cases in which environmental dangers are a consideration. One is that such acts must emanate from human conduct (see Sections 1.4 and 1.7 above, and the analysis on actors of persecution later in this subsection). Hence, for environmental harms to qualify as acts of persecution, it has to be established that they result from human agency[1289].

In *Sufi and Elmi*, the ECtHR took note of the *Report of the independent expert on the situation of human rights in Somalia, Shamsul Bari* (16 September 2010), which observed that the forced movement of people in Somalia on account of the conflict 'limited access to clean water and basic health services'. It further noted another report that, in summary, stated that, 'in addition to the indiscriminate warfare including war crimes, the abusive application of Sharia law and forced conscription of civilians', the humanitarian crisis in Somalia was 'fuelled by years of drought and insecurity that had often prevented the effective delivery of aid'[1290]. The court stated:

> If the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally

[1288] UNHCR, Legal Considerations Regarding Claims for International Protection made in the Context of the Adverse Effects of Climate Change and Disasters, 1 October 2020 (hereinafter UNHCR, Legal Considerations: Claims for International Protection, Climate Change and Disasters), para. 2.

[1289] CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 35. See also Sections 1.4.1 and 1.7 above.

[1290] ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, paras 132 and 170.

> occurring phenomenon, such as a drought, the test in *N.* v *the United Kingdom* may well have been considered to be the appropriate one[1291].

However, it was satisfied – based on several reports – that, 'while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict'[1292]. Accordingly, it preferred:

> the approach adopted in *M.S.S.* v *Belgium and Greece*, which requires it to have regard to an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame[1293].

Taking into account the actions of al-Shabaab and other circumstances, the court stated:

> Where it is reasonably likely that a returnee would find himself in an IDP camp, such as those in the Afgooye Corridor, or in a refugee camp, such as the Dadaab camps in Kenya, the Court considers that there would be a real risk that he would be exposed to treatment in breach of Article 3 on account of the humanitarian conditions there[1294].

Another key point is that (even assuming there is human agency) 'acts' cannot be understood in a narrow sense, for example confined to a single event. As was noted in Section 1.4, Article 9(2) reflects a broad conception of 'acts'. This is illustrated by the range of 'measures' that Article 9(2) identifies as potential acts of persecution, which include, for example, legal measures[1295]. It must also be recalled that 'acts' include intentional omissions, deprivations or failures to act[1296]. This point is relevant to cases concerning environmental dangers because sometimes such dangers are not the result of a single event but are rather more complex processes that are often prolonged or 'slow-onset', for example land degradation.

Furthermore, as regards the concept of persecution, Article 9(1) establishes a threshold of sufficient severity. That climate change events such as rising sea levels, soil salinisation and extreme weather events (storms, cyclones, floods and fires) cause harm may often be self-evident. However, given that such events often affect some individuals, for example those living closest to flood plains, more than others, an individual applicant may have difficulty establishing that the risk they face from such events – where human agency is involved – crosses the requisite threshold of **sufficient severity**.

Article 9(1) applies a human rights approach to the definition of persecution. One of the basic rights is the non-derogable right to life protected by law, as guaranteed in Article 2 ECHR.

1291 ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 282. See also para. 259, referring to ECtHR (GC), 2008, *N v UK*, paras 42–45, referred to in ECtHR, 2011, *Sufi and Elmi*, para. 259.

1292 ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 282; and ECtHR, 2013, *SHH v UK*, op. cit., fn. 997.

1293 ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 283, referring to ECtHR (GC), 2011, *M.S.S. v Belgium and Greece*, op. cit., fn. 229, para. 254.

1294 ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 296.

1295 See the beginning of Sections 1.4.4 and Section 1.4.4.3 above.

1296 See CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 57, read together with CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 35. The CJEU's analysis accords with the ILC, *Responsibility of States for Internationally Wrongful Acts*, op. cit., fn. 538, which conceives 'acts' as 'conduct consisting of an action or omission …'; see Section 1.7.1 above.

In *Öneryıldız* v *Turkey*[1297], the ECtHR found a violation of the right to life in a case brought by applicants whose houses had been engulfed following a methane gas explosion at a nearby rubbish tip. The court held that there had been, inter alia, a violation of Article 2 ECHR under its substantive limb, on account of the lack of appropriate steps to prevent the accidental death of nine of the applicant's close relatives. The court also found a violation of Article 2 under its procedural limb, on account of the lack of adequate protection by law safeguarding the right to life. In this regard, the court observed that the Turkish authorities had not provided the slum inhabitants with information about the risks they ran by living there nor had the authorities taken the necessary practical regulatory measures to avoid the risks to people's lives.

In *Budayeva and Others* v *Russia*, the ECtHR held that the Russian authorities had violated the right to life of the applicants by failing to take reasonable steps to prevent foreseeable harm in the form of a mudslide that had devastated their town, killing eight people, including the first applicant's husband[1298].

In *Teitiota* v *New Zealand*[1299], which concerned the right to life under Article 6 ICCPR[1300], the UN Human Rights Committee (HRC) recalled that 'environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life'[1301]. The committee further stated in this landmark decision:

> ... Both sudden-onset events, such as intense storms and flooding, and slow-onset processes, such as sea level rise, salinization, and land degradation, can propel cross-border movement of individuals seeking protection from climate change-related harm. The Committee is of the view that without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending States. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such

1297 ECtHR (GC), judgment of 30 November 2004, *Öneryıldız v Turkey*, No 48939/99, CE:ECHR:2004:1130JUD004893999 (hereinafter ECtHR (GC), 2004, *Öneryıldız v Turkey*), paras 89–108 and 117–118. At para. 93, the court noted that, in its view, Article 2 considerations were 'indisputably valid in the context of dangerous activities, when lives have been lost as a result of events occurring under the responsibility of the public authorities, which are often the only entities to have sufficient relevant knowledge to identify and establish the complex phenomena that might have caused such incidents'.

1298 ECtHR, judgment of 20 March 2008, *Budayeva and Others v Russia*, Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, CE:ECHR:2008:0320JUD001533902 (hereinafter ECtHR, 2008, *Budayeva and Others v Russia*), paras 158–159. In para. 137, the court observed that, 'In the sphere of emergency relief, where the State is directly involved in the protection of human lives through the mitigation of natural hazards, these considerations should apply in so far as the circumstances of a particular case point to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use ... The scope of the positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation.' See also ECtHR, judgment of 17 November 2015, *Özel and Others v Turkey*, Nos 14350/05, 15245/05 and 16051/05, CE:ECHR:2015:1117JUD001435005. For cases concerned with environmental dangers in which the ECtHR has found violations of the right to respect for private life under Article 8 ECHR, see fn. 1311 below.

1299 HRC, views of 24 October 2019, *Ioane Teitiota v New Zealand*, Communication No 2728/2016, CCPR/C/127/D/2728/2016 (hereinafter HRC, 2019, *Teitiota*).

1300 ICCPR, Article 6(1) states 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

1301 HRC, 2019, *Teitiota*, op. cit., fn. 1305, para. 9.4.

> a country may become incompatible with the right to life with dignity before the risk is realized[1302].

Furthermore, there is growing recognition in the wider literature[1303] that climate change scenarios may sometimes feature discriminatory denial of human rights, such as when marginalised groups are differentially exposed and vulnerable to disaster-related harm. In addition to the possibility of such harm violating basic rights such as the right to life, such harm may comprise measures falling within the scope of Article 9(1)(b) QD (recast) by virtue of their cumulative effect. Actors of persecution can use environmental acts or measures that constitute a severe violation of basic human rights in the sense of Article 9(1)(a) or are sufficiently severe in their cumulative effect to affect an individual in a similar manner. There seems no reason, in principle, why adverse effects caused by environmental harm to education, healthcare, adequate shelter, work, property, food, information, participation in public life, etc. could not affect individuals in a similar way to violations of basic human rights (and so reaching the persecution threshold). Insofar as the human rights engaged by the facts of the case are qualified rights, such as the right to respect for private and family life, a significant body of case-law has seen violations of such rights arise in environmental contexts. For example, there is important ECtHR jurisprudence on environmental damage, as in *López Ostra* v *Spain*[1304], in which serious environmental damage and accompanying health problems were found to violate Article 8 ECHR[1305].

Applications involving climate-change-related issues based on either Article 9(1)(a) violations or an accumulation thereof under Article 9(1)(b) may also intersect with more traditional types of harm. As UNHCR notes in the context of climate change and disaster displacement:

> … there may be situations where the refugee criteria of the 1951 Convention or the broader refugee criteria of regional refugee law frameworks could apply. People may have a valid claim for refugee status, for example, where the adverse effects of climate change interact with armed conflict and violence[1306].

1302 HRC, 2019, *Teitiota*, op. cit., fn. 1305, para. 9.11 (footnote omitted). See also HRC, General Comment No 36, Article 6 (right to life), 3 September 2019, CCPR/C/GC/36, para. 26.

1303 See, for example, Scott, M., *Climate Change, Disasters, and the Refugee Convention*, Cambridge University Press, Cambridge, 2020 (hereinafter Scott, *Climate Change, Disasters, and the Refugee Convention*), pp. 57–63, citing, inter alia, Upper Tribunal (United Kingdom), judgment of 19 November 2008, *RN (Returnees) Zimbabwe CG*, [2008] UKAIT 83 (hereinafter Upper Tribunal (United Kingdom), 2008, *RN (Returnees) Zimbabwe CG*), para. 249.

1304 ECtHR, judgment of 9 December 1994, *López Ostra* v *Spain*, No 16798/90, CE:ECHR:1994:1209JUD001679890 (hereinafter ECtHR, 1994, *López Ostra* v *Spain*).

1305 For cases concerned with environmental dangers in which the ECtHR has found violations of the right to respect for private life under Article 8 ECHR, see, for example, emissions from a water treatment plant (ECtHR, 1994, *López Ostra* v *Spain*, op. cit., fn. 1310, para. 58), exposure to pollution from fertiliser production (ECtHR (GC), judgment of 19 February 1998, *Guerra* v *Italy*, No 14967/89, CE:ECHR:1998:0219JUD00149678, para. 60), emissions from a privately owned gold mine (ECtHR, judgment of 10 November 2004, *Taskin and Others* v *Turkey*, No 46117/99, CE:ECHR:2004:1110JUD004611799, paras 108ff.), emissions from a former steel plant (ECtHR, judgment of 9 June 2005, *Fadeyeva* v *Russia*, No 55723/00, CE:ECHR:2005:0609JUD005572300), and emissions from an installation for storing and treating hazardous waste (ECtHR, judgment of 2 November 2006, *Giacomelli* v *Italy*, No 59909/00, CE:ECHR:2006:1102JUD005990900).

1306 See UNHCR, 'Climate change and disaster displacement'.

> Building on its study 'In harm's way'[1307], UNHCR issued legal considerations in 2020 to guide interpretation and steer international discussion on such claims[1308]. UNHCR nevertheless noted 'Regardless, the term "climate refugee" is not endorsed by UNHCR, and it is more accurate to refer to "persons displaced in the context of disasters and climate change"'[1309].

Thus, as with socioeconomic harms[1310], environmental harms are acts capable of having the quality of acts of persecution. However, that capability remains highly context-specific.

To establish a **well-founded fear** of being persecuted, it is necessary to establish a risk personal to the applicant[1311], but it is not necessary to establish a risk of persecution over and above that of others similarly situated[1312]. Nor is it necessary for an environmental case to arise in a situation of armed conflict[1313]. It is not clear from the jurisprudence on the QD (recast), the EU Charter or the ECHR how imminent the risk of persecution or serious harm must be[1314].

From a risk assessment point of view, the slow-onset nature of some climate change events may very well be capable of giving rise to reasonably foreseeable threats to the right to life. The Intergovernmental Panel on Climate Change (IPCC) has, for instance, predicted significant impacts of such events as heatwaves, droughts, floods, cyclones, wildfires, landslides, air pollution, sea level rises and storm surges with 'very high confidence'[1315]. Nevertheless, the HRC concluded that the risk must be '**personal**, … it **cannot derive merely from the general conditions** in the receiving State, except in the most extreme cases, and … there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists'[1316].

Moreover, in the context of an assessment of an application for international protection, such events would most probably not constitute an act of persecution if it could not be established that they were carried out by an actor for one of the reasons for persecution.

1307 Weerasinghe, 'In harm's way', 2018, op. cit., fn. 1288.

1308 UNHCR, Legal Considerations: Claims for International Protection, Climate Change and Disasters, op. cit., fn. 1294.

1309 See UNHCR, 'Climate change and disaster displacement'.

1310 See Sections 1.4.2.1 and 1.4.3.

1311 CJEU, 2018, *Ahmedbekova*, op. cit., fn. 68, para. 49.

1312 UNHCR, Legal Considerations: Claims for International Protection, Climate Change and Disasters, op. cit., fn. 1294, para. 8.

1313 Supreme Court of Cassation (Italy), 2020, *Applicant* v *Ministry of Interior (Ministero dell'interno)*, No 23925/19 (English summary), op. cit., fn. 1020. The court concluded that judges in civil courts should apply the standard of the requirement of respect for the right to life and the right to life with dignity not only when dealing with situations of armed conflict, but also when dealing with situations of social, environmental or climate degradation and in contexts where natural resources are exploited, to the extent that this poses a concrete threat to the survival of an individual and his or her family and risks an individual's right to enjoy life with dignity.

1314 Despite the International Protection Tribunal (New Zealand), judgment of 25 June 2013, *AF (Kiribati)*, [2013] NZIPT 800413, applying such a criterion, HRC, 2019, *Teitiota* v *New Zealand*, op. cit., fn. 1305, contains no endorsement of it. For a critique of reliance on an imminence test, see Anderson et al., 'Imminence in refugee and human rights law', op. cit., fn. 370, pp. 111–140.

1315 IPCC, *Climate Change 2014: Synthesis report*, 2014, 12; and IPCC, *Climate Change 2021: The physical science*, Annexes 3.1–3.5. The IPCC is the expert UN body for assessing the science related to climate change. See also Anderson, A., Foster, M., Lambert, H. and McAdam, J., 'A well-founded fear of being persecuted … but when?', *Sydney Law Review*, Vol. 42, No 2, 2020, p. 155.

1316 HRC, 2019, *Teitiota*, op. cit., fn. 1305, para. 9.3 (emphasis added).

As regards **reasons for persecution** (Article 10 QD (recast)), establishing one or more such reasons may pose an insuperable problem for applications based on human conduct negatively affecting the environment, for example deforestation and responses to earthquakes and other disasters. This is because such impacts may be largely indiscriminate and not evidently linked to particular characteristics such as race, religion, nationality, membership of a particular social group or political opinion[1317]. It would need to be established that an applicant was differentially exposed and vulnerable to intentional acts or omissions by an actor of persecution for one of the reasons stated in Article 10 QD (recast). However, discrimination may sometimes be involved in environmental harm scenarios, such as when marginalised groups are differentially exposed and vulnerable to disaster-related harm. Measures resulting in environmental degradation, such as deforestation or withdrawal of natural water sources, may be considered to be wholly or in part for reasons of race, religion, etc.

People may also be deprived of disaster relief for reasons of race, religion, nationality, membership of a particular social group or political opinion[1318]. The mere fact of being a victim of an environmental disaster may not suffice to establish that a group both is socially visible and shares a protected characteristic (and is not defined in circular fashion)[1319]. The situation may nevertheless be different if, for example, victims are identified in state laws or policies (as being required in a discriminatory fashion to, for example, live in resettlement camps following forced relocation to avoid or due to an environmental disaster).

As regards **actors of persecution**, the CJEU highlighted in *M'Bodj* that Article 6 QD lists those actors deemed responsible for inflicting persecution or serious harm. It stated that this 'supports the view that such harm must take the form of conduct on the part of a third party and that it cannot therefore simply be the result of general shortcomings in the health system of the country of origin'[1320]. In a 2020 judgment, the German Federal Administrative Court concluded with regard to the humanitarian situation in Somalia that the applicant could not qualify for international protection merely because of 'general shortcomings' in his country of origin[1321]. This case illustrates the difficulty of being able to identify an actor of persecution or serious harm that arises in applications for international protection seeking to rely on environmental harms from natural disasters or climate change[1322].

However, it would be wrong to think that there is a lack of human agency solely because certain easily identifiable actors are not involved. Assuming that ECtHR case-law is to be seen as relevant to determining the meaning of acts and actors of persecution, then it may be of relevance that the human rights case-law and wider literature on disasters and environmental degradation have underlined the need to place such events in a social and historical context

1317 See, for example, Refugee Review Tribunal of Australia, judgment of 10 December 2009, 09073346, [2009] RRTA 1168, para. 51, a case brought by a national of Kiribati, cited by McAdam, J., *Climate Change, Forced Migration, and International Law*, Oxford University Press, Oxford, 2012, pp. 45–46.

1318 Upper Tribunal (United Kingdom), 2008, *RN (Returnees) Zimbabwe CG*, op. cit., fn. 1309, [249]. See also Refugee Status Appeals Authority (New Zealand), decision of 28 October 2009, No 76374, granting refugee status to a person who assisted in relief work following Cyclone Nargis in Myanmar in May 2008 on the basis that this work would be perceived as the expression of an anti-regime political opinion.

1319 UNHCR, Guidelines on International Protection No 2, op. cit., fn. 441, para. 14; see also Section 1.6.2.4.1.

1320 CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 35.

1321 BVerwG (Germany), 2020, No 1 C 11.19, op. cit., fn. 973, para. 12. See also Schloss, C., 'Climate migrants – how German courts take the environment into account when considering *non-refoulement*', *Völkerrechtsblog*, 3 March 2021.

1322 McAdam, *Climate Change, Forced Migration and International Law*, op. cit., fn. 1323, p. 45.

within which policy choices made by governments and other actors may have played an instrumental role[1323]. As was noted in Section 3.4.1, the ECtHR has dealt with a number of cases in which environmental dangers have been seen to engage the positive obligation of the state to protect its population from them. Furthermore, as noted in Section 1.4.1, it is not necessary, in order to establish the 'being persecuted' element of the refugee definition, to show persecutory intent.

The CJEU has yet to consider whether, in order to fall within the scope of Article 6 QD (recast) (taken together with Article 9(1) or Article 15), applications based on environmental harm should be required to show, as a straightforward application of ECHR norms would suggest, that human actors are a 'sole or predominant cause' of environmental harm such as drought[1324].

It may be useful to differentiate between two main types of situations in which issues may arise in terms of whether there is clearly human agency sufficient to give rise to acts of persecution. On the one hand, there will be cases in which actors of persecution are clearly and deliberately using environmental harm as a means of persecution. For example, environmental degradation was used as a direct instrument of oppression by the Saddam Hussein regime against the Marsh Arabs in the Gulf War[1325].

On the other hand, there will be environmental-harm-related situations marked by state unwillingness[1326] or inaction[1327]. Thus, as was noted above, 'the requirements of persecution might be fulfilled when authorities in charge fail to adequately help a particular group of people to cope with environmental disasters'[1328]. However, the mere fact of a disaster or of a state's general incapacity to respond to it will not be enough to establish the state as an actor of persecution.

In *Budayeva and Others*, the ECtHR held that victims of a mudslide had suffered violations of the right to life under Article 2 ECHR[1329]. It was pertinent to the court that the state authorities had failed to implement land-planning and emergency relief policies in the hazardous area of Tyrnauz[1330] in relation to the foreseeable risk to the lives of its residents, including all the applicants. The Russian authorities were held to have failed in their duty to establish a legislative and administrative framework with which to provide effective protection from a threat to the right to life, in violation of Article 2.

1323 Scott, *Climate Change, Disasters, and the Refugee Convention*, op. cit., fn. 1309, pp. 7–8 and 15–31.

1324 ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 282; and ECtHR, 2013, *SHH v UK*, op. cit., fn. 997.

1325 See International Protection Tribunal (New Zealand), judgment of 25 June 2013, *AF (Kiribati)*, [2013] NZIPT 800413, para. 59.

1326 In a 2012 paper for UNHCR, the authors noted that 'the country of origin normally does not turn against such affected people but remains willing to assist and protect them'; see Kalin, W. and Schrepfer, N., 'Protecting people crossing borders in the context of climate change: normative gaps and possible approaches', *UNHCR Legal and Protection Policy Research Series*, PPLA/2012//01, 2012. See also Scott, *Climate Change, Disasters, and the Refugee Convention*, op. cit., fn. 1333, p 5.

1327 Scott, *Climate Change, Disasters, and the Refugee Convention*, op. cit., fn. 1309, pp. 63–88.

1328 Zimmerman and Mahler, in Zimmermann (ed.), *The 1951 Convention and Protocol: A commentary*, op. cit., fn. 169, p. 440. See also Immigration and Protection Tribunal (New Zealand), judgment of 20 January 2012, *BG (Fiji)*, [2012] NZIPT 8000091, para. 84, noting that, if a state were to withhold post-disaster assistance on a discriminatory basis or arbitrarily withhold access to available foreign assistance when domestic capacity was lacking, this could potentially constitute ill treatment of the disaster-affected population.

1329 ECtHR, 2008, *Budayeva and Others v Russia*, op. cit., fn. 1304.

1330 This spelling is used in the aforementioned ECtHR judgment, although some other sources use 'Tyrnyauz'.

Where the state, through its action or its failure to act to help a particular group of people to cope with environmental disasters, is the actor of persecution, there should be a presumption that effective protection is not available to the applicant and that there is, consequently, **no actor of protection**. However, if the actor of persecution is a non-state actor, it must be determined if the state or parties or organisations controlling the state or a substantial part of the territory of the state are willing and able to offer protection in accordance with Article 7(2) QD (recast).

In relation to **internal protection** (Article 8 QD (recast)), environmental harm may severely limit options that might otherwise be available to applicants to find protection in an alternative part of the country. Environmental calamity or degradation may also make it unsafe for a person to safely travel to an unaffected area[1331].

On all such matters, Article 8(2) requires Member States to have regard to 'precise and up-to-date information … obtained from relevant sources, such as [UNHCR] and [EASO]'.

In relation to **international protection needs arising *sur place***, factors relating to environmental harm may sometimes materialise or significantly worsen after an applicant has left their country of origin. Such a situation can bring an applicant within the scope of Article 5(1).

3.4.3. Subsidiary protection

When considering points in relation to arguments raised by those fleeing environmental dangers based on Article 15(b), decision-makers encounter many of the same difficulties that confront those dealing with claims based on Article 9 QD (recast).

Article 15(b) is confined by its terms to ill treatment of an applicant 'in the country of origin'. As with acts of persecution under Article 9 QD (recast), acts of serious harm under Article 15(b) QD (recast) must take the form of conduct on the part of a third party (see Section 2.4). Therefore, in order to constitute torture or inhuman or degrading treatment or punishment under Article 15(b) QD (recast), the risk of such treatment should be based on deliberate action[1332].

Furthermore, it may be, if the CJEU decides to draw directly on ECtHR case-law regarding Article 3 ECHR, that it would have to be established, for Article 15(b) purposes, that the environmental harm is the sole or predominant cause of the ill treatment. Thus, in *Sufi and Elmi*, the ECtHR reasoned that, in order to fall within the compass of Article 3, it was necessary to establish that 'the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as drought'. In that case, the court was satisfied that, 'while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict'[1333]. In order to decide whether Article 3 ECHR applies in such cases, the ECtHR considers the applicant's 'ability to cater for his most

[1331] UNHCR, Legal Considerations: Claims for International Protection, Climate Change and Disasters, op. cit., fn. 1294, para. 12.
[1332] CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 41, requiring intent.
[1333] ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 282.

basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame'[1334].

At the same time, applications for international protection based on environmental dangers face at least one less difficulty under the subsidiary protection provisions (than those on refugee protection) of the QD (recast). This is because there is no requirement to establish a reason for persecution under Article 10 QD (recast). The ECtHR's Article 2 case-law dealing with environmental dangers has already been referred to in Section 3.4.2 above. In relation to climate change and disaster displacement, the HRC decision in *Teitiota* has also been referred to. This concerned *non-refoulement* obligations arising under Articles 6 and 7 ICCPR (concerning the right to life and the prohibition of torture and cruel, inhuman or degrading treatment or punishment)[1335]. The committee observed that states are obliged not to remove a person from their territory 'where there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated in articles 6 and 7 of the Covenant'[1336]. The risk must be '**personal**, ... it **cannot derive merely from the general conditions** in the receiving State, except in the most extreme cases, and ... there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists'[1337].

In this context, a 2020 judgment of the Italian Supreme Court of Cassation referred to the *Teitiota* ruling in the case of an applicant from Nigeria who had fled the ongoing environmental situation in the Niger Delta[1338]. The court held that the situation of insecurity (sabotage, kidnappings and attacks against the police), which resulted from the grave environmental situation, conflicts and poverty, did not reach the level of indiscriminate violence required for qualification for subsidiary protection under Article 15(c) QD (recast)[1339].

As regards Article 15(c) QD (recast), even though it is concerned solely with indiscriminate violence in situations of armed conflict, an assessment of whether environmental factors are involved may still be required. For instance, situations of armed conflict may arise in part because of environmental factors and climate change. Environmental factors may also play a part, for example, in limiting the capacity of the state or organisation(s) as defined in Article 7 QD (recast) to provide assistance and protection to civilians. Such capacity of the state or organisation(s) may play a role in the existence or not of substantial grounds for believing there is a real risk of serious harm under this subparagraph. Furthermore, it is in the context of this subparagraph that the CJEU has emphasised the importance of the consideration of 'a more general risk of harm' (which it contrasted with the 'particular types of harm' addressed in Article 15(a) and (b) QD (recast))[1340]. Some armed conflicts may feature limited access to

[1334] ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, para. 283.

[1335] HRC, 2019, *Teitiota v New Zealand*, op. cit., fn. 1305.

[1336] Ibid., para. 9.3.

[1337] Ibid. (emphasis added).

[1338] Supreme Court of Cassation (Italy), 2020, *Applicant v Ministry of Interior (Ministero dell'interno)*, No 23925/19 (English summary), op. cit., fn. 1020.

[1339] See also Section 2.4.4.2 above. For the purposes of humanitarian protection, the court considered that there is a violation of the right to a life with dignity whenever the socioenvironmental context is so degraded as to expose the individual to a risk of having their fundamental rights to life, freedom and self-determination reduced to zero or, in any case, reduced below the threshold of their essential and inescapable 'core constituent of the status of personal dignity'. The court nevertheless returned the case to the tribunal for consideration with respect to humanitarian protection.

[1340] CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 33.

resources caused by environmental factors such as drought (as the ECtHR viewed to be a key matter in *Sufi and Elmi* in the Article 3 ECHR context[1341]). Nevertheless, these factors on their own are not sufficient to fulfil the requirements of Article 15(c) QD (recast) (see Section 2.4.4 above). The focus of Article 15(c) is on indiscriminate violence and whether, in the particular circumstances of the case, it crosses the threshold of serious harm.

3.5. COVID-19-related situations

3.5.1. Introduction

Because there is as yet very little case-law or settled learning on COVID-19-related situations, the approach taken in this section is primarily illustrative and the use of subheadings is limited. Given the unprecedented global sweep of the COVID-19 pandemic since 2020, COVID-19 is likely to feature in some shape or form as a factor in a significant number of applications for international protection for some time to come. The current UN Secretary-General, António Guterres, wrote in February 2021:

> There has been a global crackdown on opposition activists and human rights defenders, increased attacks on journalists and moves to curb free speech, censor the media, roll out invasive tracking apps and put in place extreme surveillance measures, many of which are likely to far outlast the virus[1342].

His article also documented a World Bank assessment that, after years of progress on eradicating poverty, in 2020 the pandemic pushed up to 124 million more people below the poverty line, defined as living on less than USD 1.90 (GBP 1.36) a day[1343]. As regards education, he noted that, according to the UN, the impact on education has been 'catastrophic', with school closures affecting around 1.6 billion children. 'Girls in particular', he wrote, 'are likely to drop out, leaving them vulnerable to child marriage, early pregnancy and domestic violence'. In October 2021, the UNHCR Executive Committee issued a conclusion making very similar observations[1344].

1341 ECtHR, 2011, *Sufi and Elmi*, op. cit., fn. 57, paras 132 and 170. In this case, 'while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict' (para. 282). See also Tribunal of Bari (Tribunale di Bari) (Italy), judgment of 19 March 2021, No 778/20 (English summary), concerning an applicant from Burkina Faso granted subsidiary protection on the basis of COI indicating growing insecurity as a result not only of armed conflict but also of worsening climate change and other natural disasters.

1342 Kelly, A. and Pattisson, P., '"A pandemic of abuses": human rights under attack during Covid, says UN head', *The Guardian*, 22 February 2021 (hereinafter Kelly and Pattisson, 'A pandemic of abuses'). See also Bonavero Institute of Human Rights, *A preliminary human rights assessment of legislative and regulatory responses to the COVID-19 pandemic across 11 jurisdictions*, Bonavero Report No 3/2020, 6 May 2020; Human Rights Watch, *Human Rights Dimensions of Covid-19 Response*, 19 March 2020; Aleinikoff et al., 'Human mobility and human rights in the Covid-19 pandemic: principles of protection for migrants, refugees and other displaced persons', *International Journal of Refugee Law*, Vol. 32, No 3, 2020, pp. 549–558; van Waas, L. and Spearman, O., 'The life or death cost of being stateless in a global pandemic', *International Journal of Refugee Law*, Vol. 32, No 3, 2020, pp. 498–501; and Alio, M. et al., 'By refugees, for refugees: refugee leadership during COVID-19, and beyond', *International Journal of Refugee Law*, Vol. 32, No 2, 2020, pp. 370–373.

1343 Kelly and Pattisson, 'A pandemic of abuses', op. cit., fn. 1347.

1344 UNHCR, Executive Committee, Conclusion on International Protection and Durable Solutions in the Context of a Public Health Emergency, October 2021.

At the same time, the COVID-19 pandemic alone does not engage international protection needs, but it becomes a relevant factor when it forms part of the context in which acts of persecution or serious harm arise. Furthermore, it is likely to be at best a relevant factor (and hardly ever a determinative factor) in assessing the risk of such acts occurring.

Given the fact that there is little existing case-law dealing with pandemics, it is considered that more scope should be afforded to this topic here than would normally be the case for consideration of possible scenarios. While it is felt most useful to confine coverage here to COVID-19, the principal points made are likely to apply, more or less, to any pandemic.

The requirement to take into account the individual position and **personal circumstances** of the applicant will need to take account of, for example, specific vulnerabilities that may mean the applicant is more affected by such issues. For example, the potential return of an applicant with underlying health conditions and/or of an advanced age[1345] may be more problematic, given the COVID-19 situation in their country of origin, than it would be for a young, able-bodied person.

In the light of the obligation imposed by Article 4(3)(a) QD (recast) to take account of **general circumstances**, looking in particular at relevant up-to-date COI that identifies circumstances that may have an impact on risk on return, particularly those relating to health, will assist courts and tribunals. COVID-19-related factors may give rise to numerous difficulties. Or they may compound existing difficulties. As the UN reported in March 2020, many countries affected by COVID-19 'were already facing humanitarian crisis because of conflict, natural disasters and climate change'[1346].

Examples of such COVID-19-related difficulties, in the context of general circumstances, concerning the conditions in a country of origin that may feature one or more of the following circumstances are set out in Figure 10.

[1345] UN, *Policy Brief: The impact of Covid-19 on older persons*, May 2020.

[1346] UN, *COVID-19 Global Humanitarian Response Plan*, 25 March 2020. See also UN, *Global Humanitarian Response Plan – COVID-19: UN Coordinated Appeal, April–December 2020*, which at p. 13 states that many of the countries covered by the appeal 'are already dealing with multiple crises, hosting refugees, migrants, and internally displaced people (IDPs), facing food insecurity, and being exposed to climate, socioeconomic and political shocks'.

Figure 10: General circumstances relevant to the consideration of applications in which COVID-19 is an issue

humanitarian crises because of armed conflict or generalised violence	a collapsed or overburdened health system	lack of access to food, medicine, potable water and sanitation	being forced to live in crowded conditions
disruption of the informal economy	shutdown of the economy	economic decline	scapegoating of certain communities for being virus spreaders
use by state actors of emergency measures, which may include banning of protests and public assemblies	arbitrary detention in appalling conditions	disproportionate quarantining of particular sections of the population	crackdown on political opponents using breaches of COVID-19 restrictions as a pretext
online censorship	invasive surveillance	arrest of COVID-19 whistle-blowers	school closures
restricted freedom of movement (which may reduce the possibility of moving internally to avoid persecution or serious harm)	inability to obtain civil registration documents necessary for access to certain rights and benefits	increased femicide	increased domestic violence
targeting of migrant workers as a result of racial discrimination	wage theft	denial of emergency relief or economic support packages to stateless persons	deliberate exposure of detained political opponents to places of detention affected by COVID-19 outbreaks

Depending on the particular circumstances of the case, such factors may increase the overall level of risk of an applicant facing persecution or serious harm.

3.5.2. Refugee protection

Assuming there is human agency, COVID-19-related **acts of persecution** or serious harm could take many forms, as will be clear from the above summary of personal and general circumstances. COVID-19-related factors may also compound existing forms of harm. To take the example of gender-specific acts of persecution, the UN Secretary-General stated that 'The crisis has a woman's face ... Violence against women and girls in all forms has skyrocketed, from online abuse to domestic violence, trafficking, sexual exploitation and child marriage'[1347].

Measures taken by a government, such as those noted by UN Secretary-General Guterres in Section 3.5.1 above, may give rise to violations of basic human rights that fall within Article 9(1)(a) or (b). Such measures may, for example, include crackdowns on opposition activists and human rights defenders, increased attacks on journalists and moves to curb free speech and censor the media and to use invasive tracking apps as public order surveillance measures.

[1347] Kelly and Pattisson, 'A pandemic of abuses', op. cit., fn. 1347.

Such acts may involve violations of human rights such as the right to freedom of expression[1348], the right to health[1349] and the right to an adequate standard of living[1350]. They may (even if not considered to fall under Article 9(1)(a)), taken cumulatively, cross the threshold of sufficient severity so as to constitute an act of persecution, as envisaged by Article 9(1)(b).

To fall within the scope of Article 9 QD (recast), it is not enough to identify that the circumstances of a particular case engage one or more human rights. What must also be established is that there is, or would be, a violation. Interference with a human right will amount to a violation only if it is not a permitted limitation of that right in accordance with Article 52(1) EU Charter[1351]. Article 52(1) states that any limitation on the exercise of charter rights and freedoms must be 'provided for by law and respect the essence of those rights and freedoms', and, subject to 'the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

ECHR rights may be relevant to the interpretation of the fundamental rights set out in the EU Charter if the rights of the EU Charter correspond to those guaranteed by any of the articles of the ECHR[1352]. As the CJEU recalled in *MP*, 'in accordance with Article 52(3) of the Charter, in so far as the rights guaranteed by Article 4 thereof correspond to those guaranteed by Article 3 of the ECHR, the meaning and scope of those rights are the same as those laid down by Article 3 of the ECHR'[1353]. Similarly, the CJEU has made it clear that the right to liberty and security in Article 6 EU Charter corresponds to Article 5 ECHR and that the limitations that may legitimately be imposed on the exercise of the rights laid down in Article 6 EU Charter may not exceed those permitted by the ECHR in the wording of Article 5 ECHR[1354].

It should be noted that Article 5(1)(e) ECHR authorises 'the lawful detention of persons for the prevention of the spreading of infectious diseases …', providing that this is carried out in 'accordance with a procedure prescribed by law'[1355]. However, according to the ECtHR, the 'lawfulness' of the detention of a person 'for the prevention of the spreading of infectious diseases' depends on it being established that (1) the spreading of the infectious disease is dangerous to public health or safety, and (2) detention of the infected person is the last

[1348] See, for example, Article 11 EU Charter and Article 10 ECHR.

[1349] Article 12(1) ICESCR: 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.' See also UNHRC, views of 24 July 2018, *Nell Toussaint* v *Canada*, No 2348/2014, CCPR/C/123/D/2348/2014, para. 11. Under Article 12(2)(c) ICESCR, governments are obliged to take effective steps for the 'prevention, treatment and control of epidemic, endemic, occupational and other diseases'. See also ICESCR Committee, General Comment No 14 (2000) – The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 11 August 2000, E/C.12/2000/4, para. 16 (which refers specifically to epidemics, etc.) and paras 28–45 (which refer to the obligations of states in the context of the right to health).

[1350] UNGA, Universal Declaration of Human Rights, 10 December 1948, Article 25(1); and Article 11 ICESCR.

[1351] See judicial analysis, Section 4.1.2.2 on severe violation.

[1352] Article 52(3) EU Charter; and CJEU (GC), 2009, *Elgafaji*, op. cit., fn. 52, para. 28.

[1353] CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 37. Article 4 EU Charter: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. This is the same wording as in Article 3 ECHR, quoted in fn. 56 above.

[1354] CJEU (GC), judgment of 15 February 2016, *JN* v *Staatssecretaris van Veiligheid en Justitie*, C-601/15 PPU, EU:C:2016:84, para. 47. The CJEU further noted that Article 52(3) EU Charter 'is intended to ensure the necessary consistency between the Charter and the ECHR, without thereby adversely affecting the autonomy of Union law and … that of the Court of Justice of the European Union'.

[1355] Whether or not Article 5 ECHR and Article 6 EU Charter might possibly be considered to constitute a basic right, the ultimate test set out in Article 9 is one of sufficient severity of a violation.

resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest. Unless these criteria are fulfilled, there is no lawful basis for the deprivation of liberty[1356]. Furthermore, the ECtHR has held that prison authorities have a positive obligation to take effective measures to prevent the transmission of transmissible diseases[1357].

The CJEU has yet to rule on the interpretation to be applied for Article 9(1)(a) QD (recast) purposes for cases in which the country of origin has declared a public emergency. However, it is worth noting that Article 15(1) ECHR requires that derogations comprising restrictions on rights for reasons of public health or national emergency be lawful, necessary and proportionate. This requires restrictions, such as mandatory quarantine or isolation of symptomatic people, at a minimum, to be carried out in accordance with the law. Any such emergency measures must be 'strictly required by the exigencies of the situation provided that such measures are not inconsistent with its other obligations under international law' (Article 15(1) ECHR). In addition, they must achieve a legitimate objective, be based on scientific evidence, be proportionate to achieve that objective, be neither arbitrary nor discriminatory in application, be of limited duration, be respectful of human dignity and be subject to review[1358]. See Section 1.4 above.

As with cases concerning environmental dangers, one important question that may arise in pandemic-related cases is whether there can be said to be an **actor of persecution or serious harm** within the meaning of Article 6 QD (recast). As noted by the CJEU in *M'Bodj*, to establish the existence of an actor of serious harm, it must be shown that 'such harm … take[s] the form of conduct on the part of a third party and that it cannot therefore simply be the result of general shortcomings in the health system of the country of origin'[1359].

On this basis, the Belgian Council for Alien Law Litigation has, for instance, refused applications for international protection based on the outbreak of the Ebola virus in Guinea and Liberia[1360]. The COVID-19 pandemic has been seen by some as akin to a disaster not attributable to the action of actors as described in Article 6 QD (recast)[1361]. However, as will be

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1356 ECtHR, judgment of 25 January 2005, *Enhorn v Sweden*, No 56529/00, CE:ECHR:2005:0125JUD005652900, para. 44.

1357 ECtHR, judgment of 5 January 2016, *Cătălin Eugen Micu v Romania*, No 55104/13, CE:ECHR:2016:0105JUD005510413, referring in para. 56 to ECtHR, *Jeladze v Georgia*, judgment of 18 December 2012, No 1871/08, CE:ECHR:2012:1218JUD000187108, para. 44, and stating that 'a three-year delay before submitting the applicant to screening for hepatitis C amounted to negligence on the part of the State in respect of its general obligations to take effective measures to prevent the transmission of hepatitis C or other transmissible diseases in prison'. See also ECtHR, 2021, *Feilazoo v Malta*, op. cit., fn. 954, paras 92–93. In a case pending before the ECtHR, *Hafeez v United Kingdom*, communicated 24 March 2020, the court is to consider whether the applicant, if extradited to the United States, would risk the imposition of a life sentence without parole in violation of Article 3 ECHR and, having regard to the ongoing COVID-19 pandemic, whether there would be a real risk of a breach of Article 3 ECHR on account of the conditions of detention he would face on arrival.

1358 See UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, Annex; ECtHR, Guide on Article 15 ECHR: Derogation in Time of Emergency, op. cit., fn. 206; UNHRC, General Comment No 29, States of emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001; and and/or OHCHR, Emergency Measures and Covid-19: Guidance, 27 April 2020.

1359 CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 35.

1360 RVV/CCE (Belgium), judgment of 14 April 2015, No 143.271; and RVV/CCE (Belgium), judgment of 19 March 2015, No 141.258.

1361 For background discussion, see, for example, Ritchie, L. and Duane, G., 'Considering COVID-19 through the lens of hazard and disaster research', *Social Sciences*, Vol. 10, No 7, 2021, p. 248.

clear from the examples given earlier in Figure 10 above, state or non-state actors may use the pandemic as a pretext for targeting political opponents. State actors may deliberately expose political opponents to highly infectious environments, for example in certain prisons, including in detention facilities reserved for COVID-19 quarantine[1362]. They may deliberately withhold vaccines and/or medicines needed for treating COVID-19 sufferers from certain communities or ethnic groups.

Non-state actors may constitute actors of persecution or serious harm if the state is unwilling or unable to protect individuals against acts such as illegal theft of vaccines intended for distribution to a community at high risk of COVID-19 hospitalisation.

The assessment of **well-founded fear** will require consideration of the up-to-date situation, *ex nunc*. The forward-looking assessment of risk must not, however, be based on undue speculation. In a case concerning a stateless Palestinian from Gaza, the Belgian Council for Alien Law Litigation overturned the decision and granted refugee status, holding that UN Relief and Works Agency for Palestine Refugees in the Near East assistance had ceased to be effective in Gaza and that the COVID-19 pandemic was adding more difficulties. The decision-making authority stated that an international conference was due to be held in April, that the United States would resume its financial support and that the end of the pandemic would improve the situation in the future. The court stated, however, that these events had no impact on the assessment of the case, which had to be made based on the actual and current situation in that area, not on future improbable events[1363].

The Belgian Council for Alien Law Litigation has also dealt with the case of an Afghan national who, in his second application for international protection, claimed that there was a real risk he would catch COVID-19 on return to his home country[1364]. The court considered this risk to be only hypothetical, as the information provided by the applicant did not contain any relevant personal circumstances and, moreover, did not specify how he would individually be exposed to serious harm as a result of the pandemic.

In relation to **reasons for persecution** (Article 10 QD (recast)), the pandemic may be a factor in actions by a state or by non-state actors to target individuals for discrimination based on race, religion, nationality, membership of a particular social group or political opinion. Existing fault lines of racism, stigmatisation, xenophobia, scapegoating, marginalisation, etc. may be deepened by the pandemic's impact in the country of origin, especially in situations in which certain groups may be seen as primarily responsible for spreading the virus or introducing it in the first place. As regards membership of a particular social group, it could be that a group of persons that, for example, is thought to have been the source of the virus is considered to be a particular social group.

With regard to **internal protection** (Article 8 QD (recast)), the COVID-19 pandemic may be a significant factor in assessing whether or not an applicant can safely and legally travel to and reasonably be expected to settle in another part of the country in order to obtain protection against persecution or serious harm facing them in their region of origin. The pandemic has

[1362] Although not an asylum case, see ECtHR, 2021, *Feilazoo v Malta*, op. cit., fn. 954, in which the applicant's detention was found not lawful under Article 5(1) ECHR, one factor being his unnecessary placement in a part of the detention facility that was reserved for COVID-19 quarantine, which exposed him to a health risk.

[1363] RVV/CCE (Belgium), judgment of 25 February 2021, No 249.930 (English summary).

[1364] RVV/CCE (Belgium), judgment of 15 July 2020, No 238.596 (English summary).

seen many countries impose restrictions on freedom of movement, and there may, as a result of the pandemic, be greater reluctance in alternative parts of the country to provide refuge to a person fleeing harm in their region of origin[1365]. Crises of this kind can often further limit the ability of women and girls, in particular, to escape abusive situations, such as domestic violence and/or of trafficking. They may place victims in an environment without appropriate access to services such as those providing safe shelter away from abusers.

An obvious scenario in which COVID-19-related factors might have an impact on an application based in whole or part on **international protection needs arising *sur place*** (Article 5 QD (recast)) concerns applicants whose country of origin was not particularly affected by COVID-19 when they left but is now hard hit by it.

3.5.3. Subsidiary protection

If an applicant for international protection who has raised COVID-19-related issues among other issues is unable to establish that they have a well-founded fear of persecution for an Article 10 QD (recast) reason, consideration must still be given to whether they qualify for subsidiary protection.

Medical cases in which applicants are eligible for subsidiary protection have been dealt with in detail in Section 2.4.3.5.3. Serious harm under Article 15(b) QD (recast) 'must take the form of conduct on the part of a third party and it cannot therefore simply be the result of general shortcomings in the health system of the country of origin'. Recital 35 QD (recast) states that 'Risks to which the population of a country or a section of the population is generally exposed do not normally in themselves create an individual threat which would qualify as serious harm'. Furthermore, as the CJEU ruled in *M'Bodj*, Article 3 QD (recast):

> precludes a Member State from introducing or retaining provisions granting the subsidiary protection status provided for in the directive to a third country national suffering from a serious illness on the ground that there is a risk that that person's health will deteriorate as a result of the fact that adequate treatment is not available in his country of origin, as such provisions are incompatible with the directive[1366].

The claim by an applicant for international protection that their health has deteriorated, or that there is a risk of their health deteriorating as a result of the absence of appropriate treatment in their country of origin, will not be sufficient unless what is involved amounts to a serious illness and 'unless that third country national is intentionally deprived of health care, to warrant that person being granted subsidiary protection'[1367].

In line with CJEU guidance, Czech regional courts, referring to *M'Bodj*, have taken the view that international protection is not a legal instrument to give full effect to Article 3 ECHR,

[1365] Suceava County Court (Romania), judgment of 14 October 2020, No 39/2020 (English summary). The court noted that, in response to the COVID-19 pandemic, the Iraqi government had imposed the closure of some governorates, including the governorate in which the appellants' home town was situated, and caused travel difficulties for flights from Erbil and Sulaymaniyah international airports.

[1366] CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, paras 35–36 and 42–43.

[1367] CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 36.

unless the risk of inhuman or degrading treatment as a result of insufficient healthcare in the country of origin is the result of systematic refusal of such treatment to the applicant[1368].

COVID-19 factors may also be relevant to sets of circumstances other than health. For example, in Romania, Suceava County Court ruled that a family with minor children from Iraq should be granted subsidiary protection. The court held that the appellants' fear could not be categorised as persecution, but found that there was a situation of general risk in the Kurdish part of Iraq. Among the factors seen as relevant to its decision under Article 15(c) QD (recast) was the pandemic. The court referred to UNHCR, which had urged states to refrain from forcibly returning persons to their areas of origin in Iraq where these areas were previously controlled by the Islamic State of Iraq and Syria (ISIS) or had a continued ISIS presence in the context of widespread destruction and damage to homes, basic infrastructure and agricultural land; limited access to livelihoods and basic services; contamination of homes and land with explosive remnants of war; ongoing community tensions, including retaliatory acts against civilians suspected of supporting ISIS; and localised insecurity. It also referred to UNHCR's advice not to forcibly return such persons to other parts of Iraq if there was a risk that they would not be able to access and/or reside in those areas or would end up in a situation in which they had no option but to return to their area of origin[1369]. The court noted that, in response to the COVID-19 pandemic, the Iraqi government had imposed the closure of some governorates, including the governorate in which the appellants' home town was situated, and caused travel difficulties for flights from Erbil and Sulaymaniyah international airports. In addition to the state of general insecurity and the level of displacement, the personal circumstances of the applicants were taken into account. These concerned the fact that they were an entire family, the special situation of children, the fact that they were vulnerable persons, information about the consequences of the COVID-19 pandemic and the risks associated with it[1370].

In August 2021, the Austrian Federal Administrative Court decided to grant subsidiary protection to an Afghan applicant in view of the deteriorating security situation in Afghanistan and the unstable and poor living conditions, coupled with the COVID-19 situation in the country and the associated health risks and limited access to medical care[1371].

As noted earlier, those seeking to rely on health circumstances will not be able to establish eligibility for subsidiary protection under the QD (recast) unless they are able to show that they were 'intentionally deprived of health care' by actors of serious harm[1372]. However, in exceptional cases, they may still be protected against removal, expulsion or extradition (outside the scope of international protection) where there are substantial grounds for believing that they will face a genuine risk, in the country of destination, of being subjected

[1368] Regional Court in Prague (Krajský soud v Praze) (Czechia), judgment of 13 March 2020, No 53, Az 2/2019; Regional Court in Prague (Krajský soud v Praze) (Czechia), judgment of 26 October 2020, No 53, Az 13/2019; and Municipal Court in Prague (Městský soud v Praze) (Czechia), judgment of 6 April 2020, No 2, Az 20/2018. This was held with respect to applications in which the applicants claimed they would face inhuman or degrading treatment in their countries of origin as a consequence of the COVID-19 pandemic.

[1369] Suceava County Court (Romania), judgment of 14 October 2020, No 39/2020 (English summary).

[1370] Ibid.

[1371] Federal Administrative Court (Austria), judgment of 18 August 2021, No W228 2241306-1, AT:BVWG:2021:W228.2241306.1.00 (English summary). See also CNDA, Grande Formation (France), 2021, *M. S.*, No 20029676, op. cit., fn. 737, in which the deteriorating COVID-19 situation was one of the factors leading to the CNDA decision that an applicant from Mali would be exposed to indiscriminate violence if returned.

[1372] CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 51.

to treatment prohibited by Article 3 ECHR and Articles 4 and 19(2) EU Charter[1373]. As the CJEU noted in *M'Bodj*:

> a decision to remove a foreign national suffering from a serious physical or mental illness to a country where the facilities for the treatment of the illness are inferior to those available in that State may raise an issue under Article 3 ECHR in very exceptional cases, where the humanitarian grounds against removal are compelling[1374].

The case-law of the ECtHR relevant for the assessment of the principle of *non-refoulement* is mentioned in Section 2.4.3.5.3 above.

Where the conditions for neither refugee protection nor subsidiary protection are found to apply, some Member States nevertheless provide for the granting of a different humanitarian status to applicants facing a range of risks, which may include a serious COVID-19 situation in the country of origin if returned[1375].

[1373] CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 44.
[1374] CJEU (GC), 2014, *M'Bodj*, op. cit., fn. 52, para. 39. See also CJEU (GC), 2018, *MP*, op. cit., fn. 34, para. 43.
[1375] See also 'More favourable standards (Article 3)' above.

Part 4. Refugee status and subsidiary protection status

This part addresses questions concerning refugee status and subsidiary protection status, the interrelationship between these two statuses and the situation of accompanying family members. Although there are differences in content between refugee status and subsidiary protection status, there are also commonalities.

Part 4 has three sections, as shown in Table 52.

Table 52: Structure of Part 4

Section	Title	Page
4.1	Refugee status	370
4.2	Subsidiary protection status	385
4.3	Relationship between refugee status and subsidiary protection status	391

4.1. Refugee status

This section focuses specifically on the notion of refugee status, including the rights and benefits granted to refugees (Section 4.1.1) and the situation of family members of a refugee who do not qualify for refugee status in their own right (Section 4.1.2). It has two subsections, as set out in Table 53.

Table 53: Structure of Section 4.1

Section	Title	Page
4.1.1	Refugee status (Article 13)	370
4.1.2	Family members of a refugee who do not qualify for refugee status in their own right (Articles 2(j) and 23)	377

4.1.1. Refugee status (Article 13)

Section 4.1.1 addresses three issues, as set out in Table 54.

Table 54: Structure of Section 4.1.1

Section	Title	Page
Section 4.1.1.1	Definition of refugee status	371
Section 4.1.1.2	Declaratory nature of refugee status	374
Section 4.1.1.3	Refugee status, residence permit and international protection	374

4.1.1.1. Definition of refugee status

Article 13 QD (recast) stipulates that 'Member States shall grant refugee status to a third-country national or a stateless person who qualifies as a refugee in accordance with

Chapters II and III'. As confirmed by the CJEU in its *HT* judgment[1376], this is a **mandatory provision** of the QD (recast). It provides for an enforceable right for the person and must be implemented in line with Chapters II (assessment of applications for international protection) and III (qualification as a refugee) QD (recast). In addition, the drafting history of Article 13 and Chapter IV QD shows that refugee status confers certain rights and benefits. The granting of refugee status was intended to be authoritative for all public authorities of the particular Member State and to avoid contradictory decisions about that issue[1377].

Article 2 QD (recast) distinguishes between **being a 'refugee'** (which is defined in Article 2(d)) and **'refugee status'** (which is defined in Article 2(e))[1378]. As regards Article 2(d), the CJEU in *M, X and X* stated that, 'within the system introduced by [the QD (recast)], a third-country national or a stateless person who satisfies the material conditions set out in Chapter III of that directive is, on that basis alone, a refugee for the purposes of Article 2(d) thereof and Article 1(A) of the [Refugee] Convention'[1379].

'Refugee status' as defined in Article 2(e), by contrast, is concerned not with what constitutes being a refugee but with recognition[1380]. It provides the following.

Article 2(e) QD (recast)

'refugee status' means the recognition by a Member State of a third-country national or stateless person as a refugee;

The term thus refers to the status granted through formal recognition by a Member State in the light of the criteria set out in the QD (recast). As a result, the person concerned is 'entitled to all the rights and benefits laid down in Chapter VII of that directive'[1381].

The QD (recast) also distinguishes between the criteria for **being a 'refugee'** (which are set out in its Chapter III) and the entitlements that flow from **being granted 'refugee status'**, which are set out in its Chapter VII[1382].

Article 14 QD (recast) sets out provisions on the revocation of, ending of or refusal to renew refugee status. Member States shall revoke, end or refuse to renew the refugee status of third-country nationals or stateless persons when they can demonstrate, on an individual basis, that such persons have ceased to be or have never been a refugee in accordance with Article 11

1376 CJEU, judgment of 24 June 2015, *HT v Land Baden-Württemberg*, C-373/13, EU:C:2015:413 (hereinafter CJEU, 2015, *HT*), para. 63.

1377 Hailbronner and Thym (eds), *EU Asylum and Immigration Law: A commentary*, op. cit., fn. 186, p. 7.

1378 The drafting history of the QD confirms that the term 'refugee status' referred to a status granted by a Member State to a person who is a refugee and is admitted as such to the territory of this Member State. See European Commission, QD proposal: explanatory memorandum, 2001, op. cit., fn. 266, Article 2(d).

1379 CJEU (GC), 2019, *M, X and X*, op. cit., fn. 33, para. 86.

1380 CJEU (GC), 2019, *M, X and X*, op. cit., fn. 33, para. 85.

1381 CJEU (GC), 2019, *M, X and X*, op. cit., fn. 33, paras 79–92, especially para. 91.

1382 CJEU (GC), 2019, *M, X and X*, op. cit., fn. 33, paras 84, 86 and 91–92. The CJEU states, in para. 91, 'The result of formal recognition as a refugee, which the granting of refugee status constitutes, is that the refugee concerned is, under Article 2(b) [QD (recast)], the beneficiary of international protection for the purposes of that directive, so that he is entitled … to all the rights and benefits laid down in Chapter VII of that directive which contains both rights equivalent to those set out in the [Refugee] Convention and … rights providing greater protection which have no equivalent in that convention, such as those referred to in Article 24(1) and Articles 28 and 34 [QD (recast)]'.

(Article 14(1) and (2)) and where the following are established subsequent to the granting of refugee status.

Article 14(3)(a) and (b) QD (recast)

(a) the third-country national should have been or is excluded from being a refugee in accordance with Article 12;

(b) his or her misrepresentation or omission of facts, including the use of false documents, was decisive for the granting of refugee status (Article 14(3)).

In contrast to Article 14(1), (2) and (3), which are mandatory provisions, Article 14(4) and (5) are discretionary provisions. They permit Member States to revoke, end or refuse to renew the status granted to a refugee, or decide not to grant refugee status where such a decision has not yet been taken, when the following apply.

Article 14(4)(a) and (b) QD (recast)

(a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;

(b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State[1383].

Article 14(4) is worded in the same terms as the exception to the prohibition of *refoulement* contained in Article 33(2) Refugee Convention except that it (Article 14(4)) refers to a 'status granted to a refugee' rather than 'refugee status'. Recital 32 QD (recast) states that 'status' as referred to in Article 14 can include refugee status. Thus, it is implied that the term 'status granted to a refugee' may have a broader meaning than refugee status.

In *M, X and X*, the court specifically considered the meaning of Article 14(4) and (5) in the context of three joined cases. Each concerned a person who had been granted refugee status but who had then been convicted and sentenced for the commission of serious crimes. The Member State had responded by ending their refugee status under Article 14(4) and (5). The court concluded that even such persons 'are, or continue to be entitled to a certain number of rights laid down in the [Refugee] Convention', which confirms that they are or continue to be refugees for the purposes of, inter alia, Article 1A Refugee Convention, in spite of that revocation or refusal[1384]. The persons to whom Article 14(4) or (5) apply are thus nevertheless entitled to certain rights set out in the Refugee Convention according to Article 14(6) QD (recast).

For an in-depth analysis of Article 14 QD (recast), see EASO, *Ending International Protection – Judicial analysis*, 2nd edition, 2021[1385].

[1383] CJEU (GC), 2019, *M, X and X*, op. cit., fn. 33.
[1384] CJEU (GC), 2019, *M, X and X*, op. cit., fn. 33, para. 99.
[1385] See EASO, *Ending International Protection – Judicial analysis*, op. cit., fn. 24.

4.1.1.2. Declaratory nature of refugee status

As noted in Section 1.2, recital 21 QD (recast) specifies that the recognition of refugee status is a **declaratory act**. The declaratory nature of refugee status is also implied in Article 21(2) QD (recast), which suggests that protection from *refoulement*, in accordance with international obligations, applies whether a refugee has been formally recognised or not. As UNHCR states:

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee[1386].

Therefore, there are procedural guarantees of access to certain limited rights in advance of any formal recognition of status. The APD (recast), in its Article 9 and recital 25, provides for a right to stay pending a decision by the determining authority. Article 46(5) APD (recast) stipulates that Member States shall allow applicants to remain in the territory until the outcome of the remedy[1387]. Finally, the recast reception conditions directive provides for social rights for applicants for international protection[1388]. One situation in which recital 21 QD (recast) may have practical relevance is when refugee status or a residence permit is revoked.

4.1.1.3. Refugee status, residence permit and international protection

Persons granted refugee status benefit from international protection as set out in Chapter VII QD (recast) (content of international protection). Under the terms of Article 14(6) QD (recast), persons who are recognised as refugees but who are denied refugee status on the grounds stated in Article 14(4) or (5) QD (recast) do not benefit from international protection but are entitled to the 'rights set out in or similar to those in Articles 3, 4, 16, 22, 31, 32 and 33 of the [Refugee] Convention in so far as they are present in the Member State'. Thus, in the case of revocation of the status granted to a refugee under Article 14(4) or (5), the QD (recast) provides explicitly for enjoyment of certain refugee rights only. In its *HT* judgment, the CJEU stated:

> in the event that a Member State, pursuant to Article 14(4) [QD], revokes, ends or refuses to renew the refugee status granted to a person, that person is entitled, in accordance with Article 14(6) of that directive, to rights set out inter alia in Articles 32 and 33 of the [Refugee] Convention[1389].

Article 24(1) QD (recast) provides that Member States shall issue to beneficiaries of refugee status a residence permit 'as soon as possible … after international protection has been

[1386] UNHCR, *Handbook*, op. cit., fn. 103, para. 28. See also Supreme Court (United Kingdom), judgment of 19 March 2021, *G (Appellant) v G (Respondent)*, [2021] UKSC 9, para. 81.

[1387] The right to suspensive effect is not, however, absolute. There is, for instance, no requirement of suspensive effect in the case of an appeal brought against a decision not to examine a subsequent application for asylum. See CJEU, judgment of 17 December 2015, *Abdoulaye Amadou Tall v Centre public d'action sociale de Huy*, C-239/14, EU:C:2015:824. See also EASO, *Asylum Procedures – Judicial analysis*, op. cit., fn. 65, Section 6.4.

[1388] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), [2013] OJ L 180/96.

[1389] CJEU, 2015, *HT*, op. cit., fn. 1381, para. 71. See also CJEU (GC), 2019, *M, X and X*, op. cit., fn. 33, para. 99; and EASO, *Ending International Protection – Judicial analysis*, op. cit., fn. 24, Part 5.

granted, unless compelling reasons of national security or public order otherwise require and without prejudice to Article 21(3) [QD (recast)]'[1390].

Even though Member States have an **obligation to issue a residence permit** as a consequence of granting refugee status, refugee status and the corresponding enjoyment of international protection is nevertheless not dependent on the existence of a residence permit as demonstrated by the CJEU case-law. The link between refugee status, a residence permit and enjoyment of international protection was clarified by the CJEU in *HT*[1391]. The refugee retains refugee status – as defined by Article 2(e) QD (recast) – even if a residence permit is revoked, and international protection shall be provided. More specifically, the court emphasised:

> the refugee whose residence permit is revoked pursuant to Article 24(1) [QD] retains his refugee status, at least until that status is actually ended. Therefore, **even without his residence permit, the person concerned remains a refugee** and as such remains entitled to the benefits guaranteed by Chapter VII of that directive to every refugee, including protection from refoulement, maintenance of family unity, the right to travel documents, access to employment, education, social welfare, healthcare and accommodation, freedom of movement within the Member State and access to integration facilities. In other words, a Member State has no discretion as to whether to continue to grant or to refuse to that refugee the substantive benefits guaranteed by the directive[1392].

Furthermore, the CJEU went on to consider that Article 24(1) QD pertains only to the refusal to issue a residence permit to a refugee and to the revocation of that residence permit and not to the *refoulement* of that refugee[1393]. Revocation of a residence permit pursuant to Article 24(1) QD does not have the effect of revoking refugee status[1394].

Although there is no obligation under the QD (recast) to require a residence permit for the enjoyment of international protection, the QD (recast) allows Member States to require that a residence permit may be necessary to access certain benefits. Recital 40 QD (recast) stipulates the following.

[1390] Article 21(3) QD (recast) states that Member States may refuse to grant a residence permit to a refugee to whom Article 21(2) QD (recast) applies (danger to the security of that Member State or conviction by a final judgment of a particularly serious crime and constituting a danger to the community of that Member State).

[1391] CJEU, 2015, *HT*, op. cit., fn. 1381, paras 71–72.

[1392] CJEU, 2015, *HT*, op. cit., fn. 1381, para. 95 (emphasis added).

[1393] As noted above, Article 24(1) QD (recast) refers to Article 21(3) QD (recast), the key provisions of which are set out in fn. 1395 above.

[1394] CJEU, 2015, *HT*, op. cit., fn. 1381, paras 73–74. See also CJEU (GC), 2019, *M, X and X*, op. cit., fn. 33, paras 96–99.

Recital 40 QD (recast)

Within the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, healthcare and access to integration facilities requires the prior issue of a residence permit[1395].

Some Member States use this discretion and provide that, regardless of its declaratory nature, the recognition of a person as a refugee has no automatic effect on the exercise of all rights derived from refugee status[1396].

4.1.2. Family members of a refugee who do not qualify for refugee status in their own right (Articles 2(j) and 23)

This section addresses two issues: the question of a derivative status for family members of a refugee who do not qualify for refugee status in their own right and the concept of family unity. Articles 2(j) and 23 are two key relevant provisions of the QD (recast).

Article 2(j) QD (recast) defines who should be considered **family members of a refugee** as follows.

Article 2(j) QD (recast)

'family members' means, in so far as the family already existed in the country of origin, the following members of the family of the beneficiary of international protection who are present in the same Member State in relation to the application for international protection:

- the spouse of the beneficiary of international protection or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,
- the minor children of the couples referred to in the first indent or of the beneficiary of international protection, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,
- the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried;

[1395] In its comments on the QD, ECRE expressed concern about this provision. It noted that a residence permit is essentially only an identity document establishing that an individual has been recognised as a refugee or as a beneficiary of subsidiary protection and that any attached rights should accrue from the decision to grant the status rather than be dependent on the issuing of a residence permit. ECRE, ECRE information note on the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, October 2004, pp. 14–15.

[1396] BVerwG (Germany), judgment of 13 February 2014, No 1 C 4.13, BVerwG:2014:130214U1C4.13.0, para. 15.

Article 23 provides the following.

Article 23 QD (recast)

Maintaining family unity

1. Member States shall ensure that family unity can be maintained.

2. Member States shall ensure that family members of the beneficiary of international protection who do not individually qualify for such protection are entitled to claim the benefits referred to in Articles 24 to 35, in accordance with national procedures and as far as is compatible with the personal legal status of the family member.

3. Paragraphs 1 and 2 are not applicable where the family member is or would be excluded from international protection pursuant to Chapters III and V.

4. Notwithstanding paragraphs 1 and 2, Member States may refuse, reduce or withdraw the benefits referred to therein for reasons of national security or public order.

5. Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of international protection at that time.

4.1.2.1. Derivative status

When someone is recognised as a refugee, this has consequences for family members who are present in the same Member State within the meaning of Article 2(j) QD (recast).

The QD (recast) does not provide for an automatic derivative status (the same status as the principal applicant), as the Commission proposed in respect of the original QD. The drafting history of the QD shows that the Commission's proposal included a different provision in draft Article 6. This guaranteed the extension of international protection to accompanying family members by ensuring that they were entitled to the same status as the applicant for international protection, except for those excluded from protection. This draft provision made 'clear that dependent family members were entitled to a status equal to that of the main applicant for asylum and that such entitlement is derived simply from the fact that they are family members'[1397]. However, that proposal was not accepted. In practice, several EU Member States nevertheless provide for a status for family members of refugees[1398].

[1397] European Commission, QD proposal: explanatory memorandum, 2001, op. cit., fn. 266, Article 6(1) (emphasis added).

[1398] For instance, Czechia grants family members of a refugee 'asylum for family reasons', although on a discretionary basis (Act 325/1999, Article 13); Slovakia grants, under specific conditions, derivative refugee status (asylum) for family members of those granted refugee status on the Refugee Convention grounds (Slovak Law on Asylum (Act 480/2002, Article 10)).

That the QD (recast) does not provide for an automatic derivative status was confirmed by the CJEU in *Ahmedbekova*[1399]. The case concerned a family with children who applied for international protection and the question of whether international protection could be extended to the family members of a recognised refugee. The court ruled that to qualify as a refugee an applicant has to have 'a well-founded fear of being personally persecuted', and, accordingly, 'an application for international protection cannot be granted as such on the ground that one of the applicant's family members has a well-founded fear of being persecuted or faces a real risk of suffering serious harm'. Nevertheless, the CJEU concluded in *Ahmedbekova* that under Article 3 QD (recast) a Member State may:

> when granting international protection to a family member … provide for an extension of the scope of that protection to other family members, provided that they do not fall within the scope of a ground for exclusion … and that their situation is, due to the need to maintain family unity, consistent with the rationale of international protection[1400].

More recently, in *LW*, the CJEU held that the QD (recast) does not provide for an automatic derivative status, but it ruled that Article 3 read together with Article 23(2) QD (recast) permits Member States to grant, under more favourable national provisions, as a derived right, refugee status to the minor child of a third-country national who has been recognised as having that status under the system established by that directive. Such provisions could cover the situation of a:

> child that was born in the territory of that Member State and, through that child's other parent, has the nationality of another third country in which he or she would not be at risk of persecution, provided that the child is not caught by a ground for exclusion … and that the child is not, through his or her nationality or any other element characterising his or her personal legal status, entitled to better treatment in that Member State than that resulting from the grant of refugee status[1401].

The court added that it was 'not relevant in that regard to ascertain whether it is possible and reasonably acceptable for the child and the child's parents to move to that other third country'[1402].

Although the QD (recast) obliges Member States to ensure that **family unity** is maintained (Article 23(1)), it permits the granting of a different status to family members of a refugee who do not individually qualify for international protection. But, according to Article 23(2), they nevertheless shall be entitled to claim the benefits referred to in Articles 24–35 of Chapter VII QD (recast)[1403]. These benefits concern travel documents, residence permit and freedom of movement within the Member State; specific measures for unaccompanied minors; access to employment; education; recognition of professional qualifications; social welfare; healthcare; access to accommodation; and integration. The granting of those benefits:

1399 CJEU, 2018, *Ahmedbekova*, op. cit., fn. 68, para. 68.

1400 CJEU, 2018, *Ahmedbekova*, op. cit., fn. 68, para. 74.

1401 CJEU (GC), 2021, *LW*, op. cit., fn. 88, para. 62.

1402 Ibid.

1403 See CJEU (GC), judgment of 22 February 2022, *XXXX v Commissaire général aux réfugiés et aux apatrides*, C-483/20, EU:C:2022:103 (hereinafter CJEU (GC), 2022, *XXXX v CGRA*), referring in para. 39 to CJEU (GC), 2021, *LW*, op. cit., fn. 88, para. 36, and the case-law cited.

requires three conditions to be satisfied, namely, first, that the person is a family member within the meaning of Article 2(j) [QD (recast)], second, that that family member does not individually qualify for international protection and, third, that it is compatible with the personal legal status of the family member concerned[1404].

Article 23(2) requires the claim to such benefits to:

- be made 'in accordance with national procedures';
- be 'compatible with the personal legal status of the family member'[1405].

For instance, the Belgian Council for Alien Law Litigation considered the condition of compatibility of personal legal status in a case of extension of refugee status to children. It held in the case of children whose parents had two different types of status and in which the nationality of the children could not be established that 'the child should be given the status that is most beneficial to him or her'[1406]. In this case, it was decided that the most beneficial status was that of their refugee father, so they were granted refugee status.

Article 23(3) QD (recast) provides that Article 23(1) and (2) are not applicable 'where the family member is or would be excluded from international protection ...'.

The claim to or enjoyment of benefits, according to Article 23(4) QD (recast), is not absolute. Member States may refuse, reduce or withdraw the benefits referred to in Articles 24–35 QD (recast) for reasons of national security or public order. Furthermore, some national courts have judged that the right to maintain family unity under Article 23 QD (recast), which is not absolutely protected, can be limited also based on other reasons, provided that this is in accordance with the principle of proportionality (Article 7 in conjunction with Article 52(1) EU Charter)[1407].

[1404] CJEU (GC), 2022, *XXXX v CGRA*, para. 39.

[1405] CJEU (GC), 2022, *XXXX v CGRA*, paras 42–43, referring to CJEU (GC), 2021, *LW*, op. cit., fn. 88, para. 54.

[1406] RVV/CCE (Belgium), judgments of 18 June 2010, Nos 45.096 and 45.098, para. 4.7 of each judgment.

[1407] For example, in Administrative Court (Upravno Sodišče) (Slovenia), judgment of 15 April 2015, *Hassan*, I U 362/2015-7, which was upheld by the Supreme Court in the appellate procedure, the Administrative Court rejected a claim that was examined under the 2003 family reunification directive by using the principle of proportionality and in observance of the case-law of the ECtHR (ECtHR, judgment of 30 July 2013, *Berisha v Switzerland*, No 948/12, CE:ECHR:2013:0730JUD000094812, para. 61; and ECtHR (GC), judgment of 3 October 2014, *Jeunesse v The Netherlands*, No 12738/10, CE:ECHR:2014:1003JUD001273810, para. 121), and regarding the standards of 'additional element of dependence' (*Berisha v Switzerland*, para. 45) and 'real existence of close personal ties' (ECtHR, judgment of 20 December 2011, *AH Khan v United Kingdom*, No 6222/10, CE:ECHR:2011:1220JUD000622210, para. 150) taken from the case-law of the ECtHR.

4.1.2.2. Concept of family unity (Article 2(j))

The directive identifies three categories of 'family members', as set out in Table 55.

Table 55: The notion of family members under Article 2(j) QD (recast)

1	A spouse or unmarried partner in a stable relationship (where the law or practice of the Member State concerned treats unmarried couples in a comparable way to married couples under its law on third-country nationals)
2	Minor unmarried children of the couple above or of the beneficiary of international protection
3	The father, mother or another adult responsible for an unmarried minor beneficiary of international protection (a minor being a third-country national or stateless person below the age of 18 years)[1408]

According to this definition (expanded from that in the original QD), a minor's father, mother or another adult responsible for the child are treated as 'family members'. Minor unmarried children are family members regardless of whether they were born in or out of wedlock and regardless of whether they were adopted as defined under national law[1409]. Member States may also apply Article 23 QD (recast) on maintaining family unity to '**other close relatives** who lived together as part of the family at the time of leaving the country of origin and who were wholly or mainly dependent on the beneficiary of international protection at that time' (Article 23(5) QD (recast))[1410].

There are **two limitations to the notion of family** in Article 2(j) QD (recast), as illustrated in Table 56.

Table 56: Two limitations to the notion of family in Article 2(j) QD (recast)

1	The family needs to have already existed in the country of origin[1411].
2	The family has to be present in the same Member State in relation to the application for international protection.

1408 Article 2(k) QD (recast).

1409 Article 2(j), second indent, QD (recast).

1410 The Administrative Court (Upravno Sodišče) (Slovenia), in a judgment of 15 May 2013 (*Musse*, I U 576/2013-7) (emphasis added) and in several other disputes on the same subject, used Article 23(5) QD (recast) in order to reconcile the case-law of the ECtHR and Article 2(j) QD (recast). The latter defines who can form a family, and the former is not based on a specific definition of which relatives can form a family. (See ECtHR, judgment of 13 June 1979, *Marckx v Belgium*, No 6833/74, CE:ECHR:1979:0613JUD000683374 (hereinafter ECtHR, 1979, *Marckx v Belgium*); ECtHR, judgment of 27 October 1994, *Kroon and Others v The Netherlands*, No 18535/91, CE:ECHR:1994:1027JUD0018535 (hereinafter ECtHR, 1994, *Kroon and Others*); and ECtHR, judgment of 1 June 2004, *Lebbink v The Netherlands*, No 45582/99, CE:ECHR:2004:0601JUD00455829). By relying on the principle of effective and loyal application of EU law, the Slovenian Administrative Court ignored the national provision, which defined family members without transposing the option from Article 23(5) QD (recast), and applied Article 23(5) directly. In a later case on the same subject, the Constitutional Court (judgment of 21 November 2013, Up-1056/11-15) confirmed the solution of the Administrative Court by deciding that the national legal provision, which does not allow family reunification to those relatives who are not explicitly mentioned in the International Protection Act, contradicted the constitution and Article 8 ECHR.

1411 The text of the QD (recast) differs from the proposals of UNHCR and NGOs that advocated for elimination of the restriction that the family must have already existed in the country of origin. See ECRE, ECRE information note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), October 2013, p. 4.

With regard to point 2 in the table above, the CJEU clarified in *XXXX* v *Commissaire général aux réfugiés et aux apatrides* that:

> … the fact that a parent and his or her minor child have had different migration paths before reuniting in the Member State in which the child has international protection does not prevent the parent from being regarded as a member of the family of that beneficiary within the meaning of Article 2(j) [QD (recast)], provided that that parent was present in the territory of that Member State before a decision was taken on the application for international protection of his or her child …[1412].

Article 23(2) thus does not apply to family members who are not present in the same Member State as the beneficiary of international protection. If family members are in another state, the **2003 family reunification directive**[1413] may enable the family members of a refugee – but not family members of a beneficiary of subsidiary protection (as set out in Article 3(2)(c) family reunification directive) – present in other states to join the refugee in the Member State of recognition.

Two additional conditions apply to family members who are not in a marital relationship:

- their relationship has to be stable;
- the law or practice of the Member State must treat unmarried couples in a comparable way to married couples under its law relating to third-country nationals.

Equal treatment of married and unmarried couples in a stable relationship is currently established in Belgium, Bulgaria, Finland, France, Greece, the Netherlands, Portugal, Spain, Sweden and the United Kingdom, among others, but not in Austria, Estonia, Germany, Italy, Poland, Romania or Slovakia[1414].

Any differences that may arise between notions of family under EU secondary legislation and under the ECHR may be effectively accommodated by using the discretionary clause of Article 23(5) QD (recast). It provides the following.

Article 23(5) QD (recast)

Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of international protection at that time.

1412 CJEU (GC), 2022, *XXXX v CGRA*, op. cit., fn. 1408, para. 40, referring to CJEU, judgment of 9 September 2021, *Bundesrepublik Deutschland (Family member)*, C-768/19, EU:C:2021:709, paras 15–16, 51 and 54.

1413 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [2003] OJ L 251/12.

1414 Dörig, H., in Hailbronner and Thym (eds), *EU Asylum and Immigration Law: A commentary*, op. cit., fn. 186; and Nicholson, F., *The 'essential right' to family unity of refugees and others in need of international protection in the context of family reunification*, UNHCR research paper, January 2018, pp. 164–165. See also Choudhry, C., 'A commentary on Article 7 of the Charter of Fundamental Rights and Freedoms', in Peers, S., Hervey, T., Kenner, J. and Ward, A. (eds), *The EU Charter of Fundamental Rights: A commentary*, Hart, Oxford, 2014, pp. 209–210, noting that marriage is still accorded a privileged status by the EU.

For instance, the ECtHR recognises different types of relationship as constituting family life[1415], as illustrated in Table 57.

Table 57: Examples of relationships also recognised as constituting family life by the ECtHR

1	Divorced parents and their child(ren), despite the fact they were residing separately[1416]
2	Parents and children born out of wedlock[1417]
3	Same-sex couples in a stable partnership relationship[1418]
4	A minor child and their caregiver[1419]
5	Unmarried couples and couples whose marriage is not recognised[1420]
6	Adopted and foster children, where *de facto* family life is found to exist[1421]
7	Parents and adult children where additional elements of dependence can be demonstrated[1422]

The evidentiary requirements to demonstrate family links are not addressed in this judicial analysis. They are dealt with in EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial analysis*, Section 5.4[1423].

1415 See Nicholson, F., *The right to family life and family unity of refugees and others in need of international protection and the family definition applied*, UNHCR research paper, January 2018, Section 3, for an analysis of the case-law of the ECtHR (and other regional courts) on relations that have been recognised as able to constitute family life.

1416 ECtHR, judgment of 21 June 1988, *Berrehab v the Netherlands*, No 10730/84, CE:ECHR:1988:0621JUD001073084.

1417 ECtHR, 1979, *Marckx v Belgium*, op. cit., fn. 1415. Article 2(j) QD (recast) already includes within its definition of 'family members' unmarried minor children 'regardless of whether they were born in or out of wedlock or adopted as defined under national law'.

1418 ECtHR (GC), judgment of 22 April 1997, *X, Y and Z v United Kingdom*, No 21830/93, CE:ECHR:1997:0422JUD002183093 (hereinafter ECtHR (GC), 1997, *X, Y and Z v United Kingdom*); ECtHR, judgment of 24 June 2010, *Schalk and Kopf v Austria*, No 30141/04, CE:ECHR:2010:0624JUD003014104, paras 92–94; ECtHR, judgment of 22 July 2010, *PB and JS v Austria*, No 18984/02, CE:ECHR:2010:0722JUD001898402, para. 30; and ECtHR (GC), judgment of 19 February 2013, *X and Others v Austria*, No 19010/07, CE:ECHR:2013:0219JUD001901007, para. 9.

1419 ECtHR (GC), judgment of 12 July 2001, *K and T v Finland*, No 25702/94, CE:ECHR:2001:0712JUD002570294.

1420 See, for example, ECtHR, *Marckx v Belgium*, op. cit., fn. 1415, para. 31; ECtHR, judgment of 26 May 1994, *Keegan v Ireland*, No 16969/90, CE:ECHR:1994:0526JUD001696990, para. 44; ECtHR, 1994, *Kroon and Others*, op. cit., fn. 1415, para. 30; ECtHR (GC), 1997, *X, Y and Z v United Kingdom*, op. cit., fn. 1423, para. 36; and ECtHR, judgment of 8 December 2015, *ZH and RH v Switzerland*, No 60119/12, CE:ECHR:2015:1208JUD006011912 (hereinafter ECtHR, 2015, *ZH and RH v Switzerland*), para. 42.

1421 ECtHR, judgment of 27 April 2010, *Moretti et Benedetti c Italy*, No 16318/07, CE:ECHR:2010:0427JUD001631807, para. 48; ECtHR, judgment of 17 January 2012, *Kopf and Liberda v Austria*, No 1598/06, CE:ECHR:2012:0117JUD000159806, para. 37; ECtHR, judgment of 22 June 2004, *Pini and Others v Romania*, Nos 78028/01 and 78030/01, CE:ECHR:2004:0622JUD007802801, paras 143–148; and ECtHR, judgment of 14 November 2013, *Topčić-Rosenberg v Croatia*, No 19391/11, CE:ECHR:2013:1114JUD001939111, para. 38.

1422 ECtHR, judgment of 20 September 2011, *AA v United Kingdom*, No 8000/08, CE:ECHR:2011:0920JUD000800008; ECtHR (GC), judgment of 23 June 2008, *Maslov v Austria*, No 1638/03, CE:ECHR:2008:0623JUD000163803; ECtHR, decision of 7 November 2000, *Kwakye-Nti et Dufie c Pays Bas*, No 31519/96, CE:ECHR:2000:1107DEC003151996; ECtHR, judgment of 13 February 2001, *Ezzouhdi c France*, No 47160/99, CE:ECHR:2001:0213JUD004716099, para. 34; ECtHR (GC), judgment of 9 October 2003, *Slivenko v Latvia*, No 48321/99, CE:ECHR:2003:1009JUD004832199, para. 97; ECtHR, judgment of 12 May 2000, *AW Khan v United Kingdom*, No 35394/97, CE:ECHR:2000:0512JUD003539497, para. 32; ECtHR, judgment of 30 June 2015, *AS v Switzerland*, No 39350/13, CE:ECHR:2015:0630JUD003935013; and ECtHR, 2015, *ZH and RH v Switzerland*, op. cit., fn. 1425. Such relations may, however, fall under 'private life' for the purposes of Article 8 ECHR.

1423 EASO, *Evidence and Credibility Assessment – Judicial analysis*, op. cit., fn. 23.

4.2. Subsidiary protection status

Section 4.2 has two subsections, as shown in Table 58.

Table 58: Structure of Section 4.2

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4.2.1	Subsidiary protection status (Article 18)	385
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4.2.1. Subsidiary protection status (Article 18)

Article 18 QD (recast) states the following.

Article 18 QD (recast)

Granting of subsidiary protection status

Member States shall grant subsidiary protection status to a third-country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V.

Section 4.2.1 has two subsections, as shown in Table 59.

Table 59: Structure of Section 4.2.1

Section	Title	Page
4.2.1.1	Definition of subsidiary protection status	386
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4.2.1.1. Definition of subsidiary protection status

Article 18 QD (recast) establishes the **obligation of Member States to grant subsidiary protection status to a third-country national or a stateless person eligible for subsidiary protection** in accordance with Chapters II and V QD (recast).

The CJEU has recalled that 'since [the QD (recast)] was adopted on the basis, in particular, of Article 78(2)(b) TFEU, it seeks, inter alia, to establish a uniform subsidiary protection system'[1424].

In *Torubarov*, the CJEU confirmed that, where a person qualifies for refugee or subsidiary protection status, Member States 'are required, subject to the grounds for exclusion provided for by that directive, **to grant** the international status sought, since those Member States have no discretion in that respect'[1425]. The CJEU also held in *Bilali* that it would be 'contrary to the general scheme and objectives of [the QD (recast)] to grant refugee status and subsidiary

[1424] CJEU, 2019, *Bilali*, op. cit., fn. 117, para. 35.

[1425] CJEU (GC), judgment of 29 July 2019, *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal*, C-556/17, EU:C:2019:626, paras 49–50. See also CJEU, 2019, *Bilali*, op. cit., fn. 117, para. 36.

protection status to third-country nationals in situations which have no connection with the rationale of international protection'[1426].

Advocate General Hogan notes that 'recital 21 [QD (recast)] states that recognition of refugee status is a declaratory act' but that there is 'no equivalent recital in [the QD (recast)] in respect of subsidiary protection'[1427].

In accordance with Article 46(2) APD (recast), 'persons recognised by the determining authority as eligible for subsidiary protection have the right to an effective remedy pursuant to paragraph 1 against a decision considering an application unfounded in relation to refugee status'. The only exception to this rule is when 'the subsidiary protection status granted by a Member State offers the same rights and benefits as those offered by the refugee status under Union and national law'[1428]. The derogation from the right to an effective remedy 'must be interpreted as applying only if the rights and benefits offered by subsidiary protection status, granted by the Member State concerned, are genuinely identical to those offered by refugee status under Union law and the applicable national law'[1429].

Like refugee status, subsidiary protection status is granted only for as long as the person is eligible for subsidiary protection. More details can be found in EASO, *Ending International Protection – Judicial analysis*, 2nd edition, 2021, Part 6.

4.2.1.2. Subsidiary protection status, residence permit and international protection

Persons granted subsidiary protection status benefit from international protection as provided for in Chapter VII QD (recast) (content of international protection).

Article 24(2) QD (recast) provides the following.

> **Article 24(2) QD (recast)**
>
> As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of subsidiary protection status and their family members a renewable residence permit which must be valid for at least 1 year and, in case of renewal, for at least 2 years, unless compelling reasons of national security or public order otherwise require.

Although there is no obligation under the QD (recast) to require a residence permit for the enjoyment of international protection, Member States have discretion to make the granting of benefits with regard to access to employment, social welfare, healthcare and access to integration facilities conditional on the prior issue of a residence permit. This is confirmed by recital 40 and relevant articles of the QD (recast)[1430]. Recital 40 provides the following.

[1426] CJEU, 2019, *Bilali*, op. cit., fn. 117, para. 44.

[1427] CJEU, Opinion of Advocate General Hogan of 25 March 2021, *Bundesrepublik Deutschland v SE; joined parties: Vertreter des Bundesinteresses beim Bundesverwaltungsgericht*, C-768/19, EU:C:2021:247, para. 66. This case concerns the right under national law of an adult to subsidiary protection status as the parent of an unmarried minor who is a beneficiary of subsidiary protection. See also paras 69 and 78.

[1428] CJEU, 2019, *Bilali*, op. cit., fn. 117, para. 55.

[1429] CJEU, judgment of 18 October 2018, *EG v Slovenia*, C-662/17, EU:C:2018:847, para. 50.

[1430] See Articles 24(2) (residence permits), 25(2) (travel documents) and 29(2) (social welfare) QD (recast).

Recital 40 QD (recast)

Within the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, healthcare and access to integration facilities requires the prior issue of a residence permit.

The CJEU has not yet pronounced on the relationship between subsidiary protection status, residence permits and the rights of beneficiaries of subsidiary protection. With regard to refugee status, the CJEU held in *HT* that 'the refugee whose residence permit is revoked pursuant to Article 24(1) [QD] retains his refugee status, at least until that status is actually ended' and remains entitled to the benefits of Chapter VII. However, this obligation derives from Article 14(6) QD (recast), under which a refugee whose status was revoked for specific reasons is entitled to rights set out in, inter alia, Articles 32 and 33 Refugee Convention[1431]. There is no comparable provision in the QD (recast) with respect to beneficiaries of subsidiary protection[1432].

4.2.2. Family members of beneficiaries of subsidiary protection not qualifying for subsidiary protection in their own right (Articles 23 and 2(j))

As for refugees, the QD (recast) does not guarantee the same status for family members of a beneficiary of subsidiary protection who do not individually qualify for such protection[1433]. Article 23(2) QD (recast) nevertheless ensures that family members, within the meaning of Article 2(j) QD (recast), of subsidiary protection beneficiaries, who do not individually qualify for international protection, receive the benefits referred to in Articles 24–35 of Chapter VII QD (recast). The full text of Article 23 is set out in Section 4.1.2 above.

The **definition of family members** in Article 2(j) QD (recast) (set out in full in Section 4.1.2 above) is the same for persons granted refugee status and for persons granted subsidiary protection status.

As with refugees, the benefits enjoyed by family members of the beneficiary of subsidiary protection accrue only to those who are already present in the same Member State as the beneficiary. Family members who are outside the Member State of the beneficiary of subsidiary protection, unlike in the case of refugees, do not as such benefit from a right

[1431] CJEU, 2015, *HT*, op. cit., fn. 1381, para. 71. See, generally, Section 4.1.1.3.

[1432] CJEU, 2015, *HT*, op. cit., fn. 1381, para. 95.

[1433] CJEU, 2018, *Ahmedbekova*, op. cit., fn. 68, para. 68 states 'It should be noted that Directive 2011/95 does not provide for the extension of refugee or subsidiary protection status to the family members of a person granted that status'.

to family reunification under the family reunification directive[1434], unless the Member State concerned accords beneficiaries of subsidiary protection the same rights as refugees.

The QD allowed Member States to attach conditions to the enjoyment of benefits insofar as family members of beneficiaries of subsidiary protection already in the Member State are concerned (no such conditions were applicable for family members of persons granted refugee status). The QD (recast), by contrast, has removed this limitation[1435]. Article 24(2) QD (recast) has extended the benefit of residence permits to family members of subsidiary protection beneficiaries. Under the QD (recast), family members are entitled to residence permits under the same conditions as the family member who has been granted subsidiary protection status[1436].

As noted earlier, the CJEU ruled in *Ahmedbekova*[1437] that the QD (recast) does not provide for the extension of refugee or subsidiary protection status to the family members of a person granted that status. However, the court went on to note that the effect of Article 3 QD (recast) was that granting international protection to family members of a beneficiary of international protection is **not a priori without connection to the rationale of international protection**[1438].

The CJEU concluded in *Ahmedbekova* that under Article 3 QD (recast) a Member State may:

> when granting international protection to a family member … provide for an extension of the scope of that protection to other family members, provided that they do not fall within the scope of a ground for exclusion … and that their situation is, due to the need to maintain family unity, consistent with the rationale of international protection[1439].

In *LW*[1440], the Grand Chamber of the CJEU noted two provisos to any such grants. The CJEU ruled that Articles 3 and 23(2) QD (recast) must be interpreted as not precluding a Member State from granting refugee status to the minor child of a refugee provided, first, that 'the child is not caught by a ground for exclusion referred to in Article 12(2) of that directive' and, second:

> the child is not, through his or her nationality or any other element characterising his or her personal legal status, [be] entitled to better treatment in that Member State than that resulting from the grant of refugee status. It is not relevant in that regard to ascertain

1434 Article 3(2)(c) family reunification directive. See also CJEU, judgment of 7 November 2018, *K and B v Staatssecretaris van Veiligheid en Justitie*, C-380/17, EU:C:2018:877, para. 33. See, nevertheless, also ECtHR (GC), judgment of 9 July 2021, *MA v Denmark*, No 6697/18, CE:ECHR:2021:0709JUD000669718. The case concerned the situation of beneficiaries of subsidiary or temporary protection who were required to wait 3 years before being able to apply for family reunification. The ECtHR determined that the requirement that a beneficiary of subsidiary or temporary protection should wait 3 years before being able to apply for family reunification without there being a possibility to make an individualised assessment of the beneficiary's situation had not struck a fair balance between the interests of the state and the interests of the individuals concerned and that there had thus been a violation of Article 8 ECHR (paras 193–195).

1435 UNHCR, *The Case Law of the European Regional Courts: The Court of Justice of the European Union and the European Court of Human Rights – Refugees, asylum-seekers, and stateless persons*, June 2015, p. 80.

1436 See Section 4.2.1.2, which quotes Article 24(2) in full.

1437 CJEU, 2018, *Ahmedbekova*, op. cit., fn. 68, para. 68.

1438 CJEU, 2018, *Ahmedbekova*, op. cit., fn. 68, paras 72–73.

1439 CJEU, 2018, *Ahmedbekova*, op. cit., fn. 68, para. 74.

1440 CJEU (GC), 2021, *LW*, op. cit., fn. 88.

> whether it is possible and reasonably acceptable for the child and the child's parents to move to that other third country[1441].

In *Bundesrepublik Deutschland* v *SE*, the CJEU has addressed, among other issues, the issue of whether a father can derive rights attaching to subsidiary protection status from a son who had applied for international protection as a minor and had been granted subsidiary protection in Germany. The father arrived in Germany after his son had been granted subsidiary protection and sought international protection on the basis that he was the father of an unmarried minor who had subsidiary protection status. The CJEU concluded, inter alia, that:

> the rights that the family members of a beneficiary of subsidiary protection derive from the subsidiary protection status obtained by their child, in particular the advantages referred to in Articles 24 to 35 of that directive, persist after that beneficiary reaches the age of majority for the duration of the period of validity of the residence permit granted to them in accordance with Article 24(2) of that directive[1442].

4.3. Relationship between refugee status, subsidiary protection status and asylum

The refugee status and subsidiary protection status provided for in Articles 13 and 18 QD (recast) respectively are separate, but closely interrelated[1443]. The QD (recast) establishes the primacy of refugee status, since subsidiary protection status may be granted only to a third-country national or a stateless person who does not qualify for refugee status. Advocate General Bot notes that:

> by introducing a subsidiary form of protection ..., the Union legislature does not intend to offer the possibility of choosing between one form of international protection or the other. Its objective is to guarantee the 'primacy' of the [Refugee] Convention, by making sure that the subsidiary forms of protection established in the Union do not erode the importance of that Convention. That purpose is apparent from the *travaux préparatoires* for [the QD][1444].

The **subsidiary** nature of subsidiary protection status in relation to the nature of refugee status has also been repeatedly emphasised in the CJEU's case-law. The court has made plain that 'an application for subsidiary protection should not, in principle, be considered before the competent authority has reached the conclusion that the person seeking international protection does not qualify for refugee status'[1445]. The CJEU has also confirmed that it is the

[1441] Ibid., concluding ruling.

[1442] CJEU, judgment of 9 September 2021, *Bundesrepublik Deutschland* v *SE*, C-768/19, EU/C/2021:709, paras 51–52.

[1443] CJEU, 2014, *Diakité*, op. cit., fn. 844, para. 33; CJEU (GC), 2010, *Abdulla*, op. cit., fn. 32, paras 78–79; and CJEU (GC), 2016, *Alo and Osso*, op. cit., fn. 31, paras 32–33. See also CJEU, Opinion of Advocate General Mengozzi of 18 July 2013, *Aboubacar Diakité* v *Commissaire général aux réfugiés et aux apatrides*, C-285/12, EU:C:2013:500, para. 60 (original emphasis); and CJEU, Opinion of Advocate General Mazák, 2009, *Abdulla*, op. cit., fn. 657, para. 51.

[1444] CJEU, Opinion of Advocate General Bot of 7 November 2013, *HN* v *Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-604/12, EU:C:2013:714, para. 43, referring to European Commission, QD proposal: explanatory memorandum, 2001, op. cit., fn. 266. See also paras 41 and 44 of the opinion.

[1445] CJEU, 2014, *Diakité*, op. cit., fn. 844, para. 33; and CJEU, 2014, *HN*, op. cit., fn. 29, paras 31 and 35 (see also para. 42). See also Section 4.2.1.

obligation 'in principle' of the 'competent authorities to determine the status that is most appropriate to the applicant's situation'[1446].

In the proposal for the QD (recast), the European Commission noted that, in response to the Hague programme, which called for the creation of a uniform status of protection, it would simplify the procedures aiming to **approximate the rights granted to both categories of beneficiaries of protection** and would reduce administrative costs[1447]. This was a response to the criticism that beneficiaries of subsidiary protection were afforded a lower level of rights in certain respects[1448]. The approximation was also intended to address the integration challenges faced by beneficiaries of subsidiary protection[1449]. The approximation of rules on the recognition and content of refugee and subsidiary protection status aimed to help 'limit the secondary movement of applicants for international protection between Member States …' (recital 13 QD (recast)).

This is reflected in recital 39 QD (recast), as follows.

Recital 39 QD (recast)

While responding to the call of the Stockholm programme for the establishment of a uniform status for refugees or for persons eligible for subsidiary protection, and with the exception of **derogations which are necessary and objectively justified**, beneficiaries of subsidiary protection status should be granted the same rights and benefits as those enjoyed by refugees under this Directive, and should be subject to the same conditions of eligibility[1450].

[1446] CJEU, 2014, *HN*, op. cit., fn. 29, para. 34; and Opinion of Advocate General Bot, *HN*, op. cit., fn. 1449, para. 48. In situations in which the applicant clearly does not qualify as a refugee and is understood to be asking for subsidiary protection, the Member State may accelerate the examination of qualification for refugee status under Article 23(4)(b) APD, but the Union legislature does not in any circumstances relieve it of the duty to carry out that prior examination.

[1447] European Commission, QD (recast) proposal: explanatory memorandum, 2009, op. cit., fn. 409, pp. 6–7.

[1448] This proposal was subsequently criticised for continuing to afford a lower level of rights to beneficiaries of subsidiary protection. See UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the case of *M.A.* v. *Denmark* (Application no. 6697/18) before the European Court of Human Rights, 21 January 2019, in which it expressed concerns about the waiting periods for family reunification for subsidiary protection beneficiaries, and UNHCR comments on the European Commission proposal for a qualification regulation – COM (2016) 466, February 2018, p. 33: 'distinctions between beneficiaries of international protection are often neither necessary nor objectively justified in terms of flight experience and protection needs'. For instance, some Member States 'regularly grant refugee status to people from a particular country of origin, while other Member States grant subsidiary protection status to people with similar profiles from the same country of origin'.

[1449] The proposal stated the following integration challenges, in particular: recognition of qualifications; access to vocational training and employment; access to integration facilities; access to accommodation; possibilities for reduction of benefits; and family reunification. European Commission, QD (recast) proposal: explanatory memorandum, 2009, op. cit., fn. 409, pp. 8–9.

[1450] Emphasis added. The Stockholm programme was adopted by the European Council in December 2009 in the course of the legislative procedure of the QD (recast), building on the Tampere and Hague programmes and retaining the aim of the establishment of a uniform status.

While confirming that the system of subsidiary protection was intended to 'complement and add to the protection of refugees enshrined in the [Refugee] convention', the CJEU highlighted in *Alo and Osso*[1451]:

> Nevertheless, recitals 8, 9 and 39 [QD (recast)] state that the EU legislature intended, in responding to the call of the Stockholm Programme, to establish a uniform status for all beneficiaries of international protection and that it accordingly chose to afford beneficiaries of subsidiary protection **the same rights and benefits** as those enjoyed by refugees**,** with the **exception of derogations** which are **necessary and objectively justified**[1452].

Under Article 20(2) QD (recast), refugees and persons eligible for subsidiary protection have the same rights 'unless otherwise indicated'.

Article 29 (social welfare) is an example of a right that permits Member States to afford differential treatment, whereas Article 32 (access to accommodation), for instance, provides the same rights[1453].

The resultant commonalities and differences are best conveyed in the form of the following two tables.

The rights that are provided to **all beneficiaries of international protection without distinction** are set out in Table 60.

Table 60: Rights under the QD (recast) that are provided to all beneficiaries of international protection

Rights provided to all beneficiaries of international protection without distinction	QD (recast)
Protection from *refoulement* (except for the possibility to withdraw the right from refugees in situations covered by Article 21(2))	Article 21
Right to information on the rights and obligations relating to the status	Article 22
Right to maintain family unity[1454]	Article 23
Access to employment	Article 26
Access to education	Article 27
Access to procedures for recognition of qualifications	Article 28
Healthcare	Article 30
Measures for unaccompanied minors	Article 31
Access to accommodation	Article 32
Freedom of movement within the Member State	Article 33
Assistance with repatriation	Article 35

1451 CJEU (GC), 2016, *Alo and Osso*, op. cit., fn. 31. The matter concerned the question of whether a place-of-residence condition imposed on beneficiaries of subsidiary protection is compatible with the QD (recast), where it is based on the objective of achieving an appropriate distribution of social assistance burdens among the relevant institutions within the territory of the state or where it is based on grounds of migration or integration policy.

1452 CJEU (GC), 2016, *Alo and Osso*, op. cit., fn. 31, para. 32 (emphasis added).

1453 Article 29(2) QD (recast) specifies 'By exception to the general rule laid down in paragraph 1, Member States may limit social assistance granted to beneficiaries of subsidiary protection status to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals'. Article 32(1) specifies 'Member States shall ensure that beneficiaries of international protection have access to accommodation under equivalent conditions as other third-country nationals legally resident in their territories.'

1454 However, Directive 2003/86/EC on the right to family reunification provides more favourable conditions for the exercise of the right to family reunification for refugees than for other third-country nationals residing lawfully in a Member State.

The only CJEU case to address any of these provisions to date is *Alo and Osso*. In its judgment, the court held that Article 33 QD (recast):

> must be interpreted as meaning that it requires the Member States to allow beneficiaries of international protection both to move freely within the territory of the Member State that has granted such protection and to choose their place of residence within that territory[1455].

The CJEU reasoned that 'Article 26 of the [Refugee] Convention [...] expressly provides that that freedom includes not only the right to move freely in the territory of the State that has granted refugee status, but also the right of refugees to choose their place of residence in that territory'[1456]. The CJEU considered that the EU legislature intended to achieve the same result in Article 33 QD (recast).

The rights provided that are different for refugees and beneficiaries of subsidiary protection are set out in Table 61.

Table 61: Differentiated treatment for refugees and beneficiaries of subsidiary protection

Right	Difference	QD (recast)
Residence permits	Duration can be longer for refugees	Article 24
Travel documents[1457]	Travel documents are issued to beneficiaries of subsidiary protection who are unable to obtain a national passport	Article 25
Social welfare	Social assistance granted to beneficiaries of subsidiary protection may be limited to core benefits, but these are provided at the same level and under the same eligibility conditions as for nationals[1458]	Article 29

Despite the above differences, it must not be forgotten that subsidiary protection is a specific status. Unlike persons who cannot be refouled under Article 3 ECHR, those who qualify for subsidiary protection enjoy a status with specified rights and benefits; there is no status under

[1455] CJEU (GC), 2016, *Alo and Osso*, op. cit., fn. 31, para. 37.

[1456] CJEU (GC), 2016, *Alo and Osso*, op. cit., fn. 31, para. 35.

[1457] With respect to travel documents, it should be noted that, where beneficiaries of subsidiary protection do not have a national passport, Article 25(2) QD (recast) provides that 'Member States shall issue to beneficiaries of subsidiary protection status who are unable to obtain a national passport, documents which enable them to travel outside their territory, unless compelling reasons of national security or public order otherwise require'.

[1458] As regards social welfare, the CJEU interpreted Article 29(2) in *Alo and Oso* as to whether the situation of beneficiaries of subsidiary protection is objectively comparable with the situation of third-country nationals legally resident in the Member State. The CJEU ruled that it is for the national court to also examine 'whether the fact that a third-country national in receipt of welfare benefits is a beneficiary of international protection — in this case subsidiary protection — means that he will face greater difficulties relating to integration than another third-country national who is legally resident in Germany and in receipt of such benefits' (CJEU (GC), 2016, *Alo and Osso*, op. cit., fn. 31, para. 62). In CJEU, judgment of 21 November 2018, *Ahmad Shah Ayubi v Bezirkshauptmannschaft Linz-Land*, C-713/17, EU:C:2018:929, para. 42, the CJEU held that 'Article 29 [QD (recast)] must be interpreted as meaning that it precludes national legislation, such as that at issue in the main proceedings, which provides that refugees with a temporary right of residence in a Member State are to be granted social security benefits which are less than those received by nationals of that Member State and refugees who have a permanent right of residence in that Member State'. See also CJEU, judgment of 28 October 2021, *Associazione per gli Studi Giuridici sull'Immigrazione (ASGI), Avvocati per niente onlus (APN), Associazione NAGA – Organizzazione di volontariato per l'Assistenza Socio-Sanitaria e per i Diritti di Cittadini Stranieri, Rom e Sinti v Presidenza del Consiglio dei Ministri – Dipartimento per le politiche della famiglia, Ministero dell'Economia e delle Finanze*, C-462/20, EU:C:2021:894, confirming the CJEU's provisions in *Ayubi* in paras 33–34.

EU law for the former[1459]. Nevertheless, the fact that third-country nationals who cannot be refouled do not enjoy a specific status regulated by EU law does not affect their other rights under the EU Charter, such as the right to human dignity (Article 1) and respect for private and family life (Article 7).

[1459] This difference is also reflected in Article 9(1) returns directive and the fact that a return decision shall be issued even if a removal is impossible due to the *non-refoulement* principle. See CJEU, judgment of 3 June 2021, *BZ v Westerwaldkreis*, C-546/19, EU:C:2021:432 (no English translation available), paras 55–59. See also CJEU, judgment of 5 June 2014, *Bashir Mohamed Ali Mahdi*, C-146/14 PPU, EU:C:2014:1320, para. 89.

Appendix A: Decision trees

Refugee protection

Does the applicant qualify as a refugee under Article 2(d) QD (recast)?

Is the applicant a third-country national or a stateless person?

→ **No** → **The applicant does not qualify as a refugee**

↓ **Yes**

Does/do the feared act(s) qualify as an act of persecution according to the criteria in Article 9(1) QD (recast)?

(a) Is the act sufficiently serious by its nature or repetition to constitute a severe violation of basic human rights?

or

(b) Is the act an accumulation of various measures, including violations of human rights, that is sufficiently severe to affect the individual in a similar manner to that set out in Article 9(1)(a)?

→ **No** → **The applicant does not qualify as a refugee**

↓ **Yes**

Is there an actor of persecution as defined in Article 6 QD (recast)?

(a) The state.

(b) Parties or organisations controlling the state or a substantial part of its territory.

(c) A non-state actor.

→ **No** → **The applicant does not qualify as a refugee**

↓ **Yes**

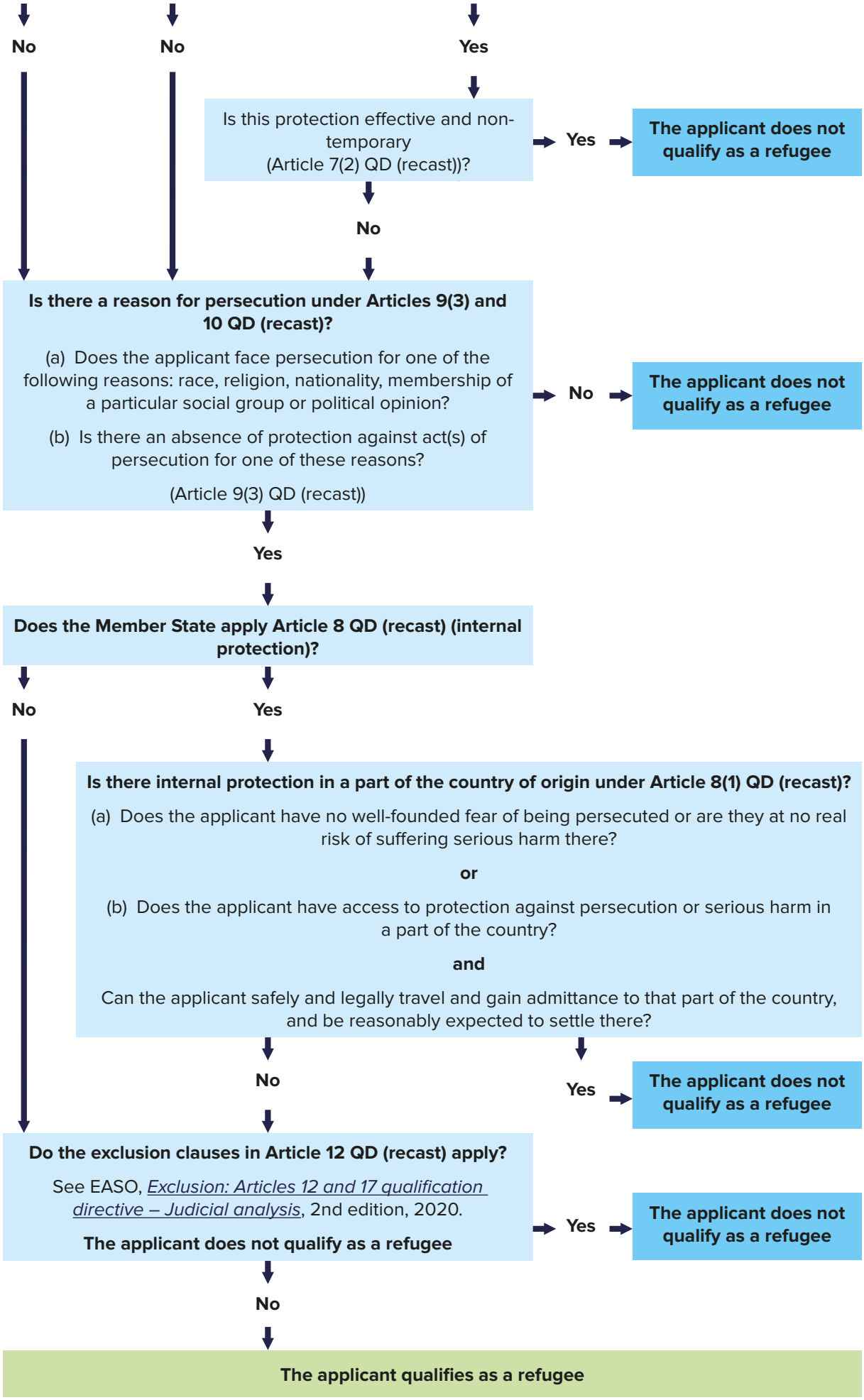
Is there an actor of protection as defined in Article 7 QD (recast)?

(a) The state.

(b) Parties or organisations, including international organisations, controlling the state or a substantial part of its territory.

↓ **Yes**

Is the actor of protection willing and able to provide protection against persecution (Article 7(1) QD (recast))?


No
No
Yes
Is this protection effective and non-temporary (Article 7(2) QD (recast))?
Yes
The applicant does not qualify as a refugee
No
Is there a reason for persecution under Articles 9(3) and 10 QD (recast)?
(a) Does the applicant face persecution for one of the following reasons: race, religion, nationality, membership of a particular social group or political opinion?
(b) Is there an absence of protection against act(s) of persecution for one of these reasons?
(Article 9(3) QD (recast))
No
The applicant does not qualify as a refugee
Yes
Does the Member State apply Article 8 QD (recast) (internal protection)?
No
Yes
Is there internal protection in a part of the country of origin under Article 8(1) QD (recast)?
(a) Does the applicant have no well-founded fear of being persecuted or are they at no real risk of suffering serious harm there?
or
(b) Does the applicant have access to protection against persecution or serious harm in a part of the country?
and
Can the applicant safely and legally travel and gain admittance to that part of the country, and be reasonably expected to settle there?
No
Yes
The applicant does not qualify as a refugee
Do the exclusion clauses in Article 12 QD (recast) apply?
See EASO, Exclusion: Articles 12 and 17 qualification directive – Judicial analysis, 2nd edition, 2020.
The applicant does not qualify as a refugee
Yes
The applicant does not qualify as a refugee
No
The applicant qualifies as a refugee

Subsidiary protection

If the applicant does not qualify as a refugee, are they eligible for subsidiary protection under Article 2(f) QD (recast)?

Is the applicant a third-country national or a stateless person?

→ **No** → **The applicant is not eligible for subsidiary protection**

↓ **YES**

↓

Does the applicant face a real risk of suffering serious harm if returned to their country of origin under Article 15 QD (recast)?

(a) Does the applicant face a real risk of suffering the death penalty or execution?

or

(b) Does the applicant face a real risk of suffering torture or inhuman or degrading treatment or punishment in their country of origin?

or

(c) Is the applicant a civilian who faces a real risk of suffering a serious and individual threat to their life or person from indiscriminate violence in situations of international or internal armed conflict?

— Is there an international or internal armed conflict in the applicant's region of origin?

— Is there a situation of indiscriminate violence?

— Is the indiscriminate violence of such a high level that, solely based on their presence in the territory of the country of origin, the applicant would face a serious and individual threat **or** do the applicant's personal circumstances (e.g. background, gender, age, profession, region of origin) give rise to a greater risk in a situation with a lower level of violence?

— Is there a nexus between the serious and individual threat and the indiscriminate violence?

— Is the applicant a civilian?

— Is the threat to the applicant's life or person?

→ **No** → **The applicant is not eligible for subsidiary protection**

↓ **Yes**

↓

Is there an actor of serious harm under Article 6 QD (recast)?

(a) The state.

(b) Parties or organisations controlling the state or a substantial part of its territory.

(c) A non-state actor.

(Article 6 QD (recast))

→ **No** → **The applicant is not eligible for subsidiary protection**

↓ **Yes**

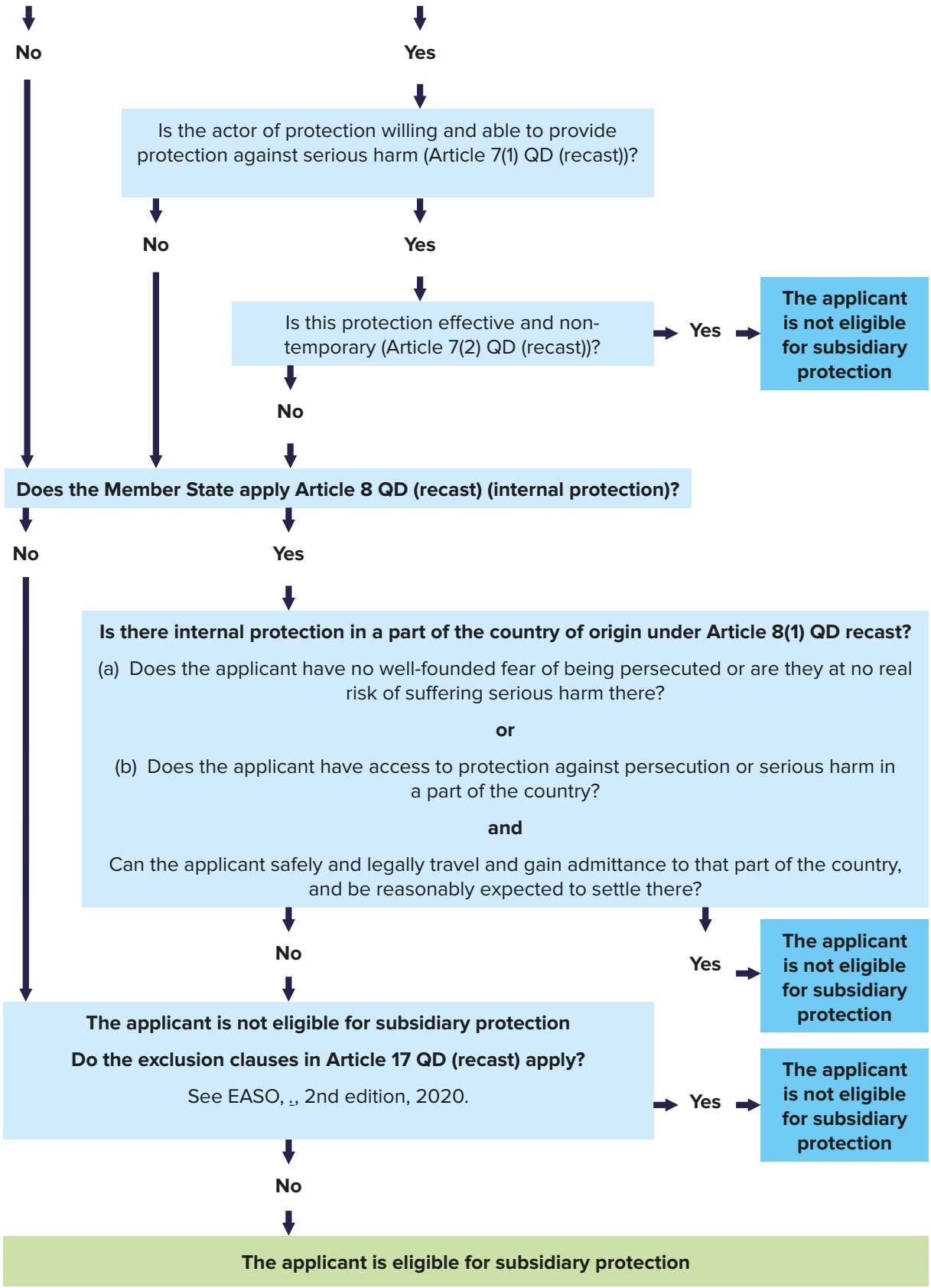
↓

Is there an actor of protection under Article 7 QD (recast)?

(a) The state.

(b) Parties or organisations, including international organisations, controlling the state or a substantial part of its territory.

↓ ↓



Protection outside the scope of the QD (recast)

If the applicant does not qualify for either refugee protection or subsidiary protection, could they be considered to qualify for any forms of protection under national law but outside the scope of the QD (recast), for example on compassionate or humanitarian grounds (recital 15 QD (recast))?

Appendix B: Primary sources

1. European Union law

1.1. European Union primary law

Treaty on the Functioning of the European Union (consolidated version as amended by the Lisbon Treaty 1 December 2009), [2012] OJ C 326/47.

Charter of Fundamental Rights of the European Union (as amended on 12 December 2007).

Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TFEU in [2012] OJ C 326/295.

Protocol No 22 on the position of Denmark, annexed to the TFEU in [2012] OJ C 326/299.

Protocol No 24 on asylum for nationals of Member States of the European Union, OJ 115, 9 May 2008.

1.2. European Union secondary legislation

Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, [2021] OJ L 468/1.

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), [2013] OJ L 180/31 (Dublin III regulation).

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), [2013] OJ L 180/60 (APD (recast)).

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), [2013] OJ L 180/96.

Council Directive 2011/36 EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, [2011] OJ L 101/1 (EU anti-trafficking directive).

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9 (QD (recast)).

Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, [2010] OJ L 132/11.

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L 348/98.

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L 304/12 (QD).

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [2003] OJ L 251/12.

Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L 50/1 (Dublin II regulation).

Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA).

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, [2001] OJ L 212.

Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 Relating to the Status of Refugees (96/196/JHA), [1996] OJ L 63/2.

2. International treaties of universal and regional scope

2.1. United Nations

International Convention for the Protection of All Persons from Enforced Disappearance, 23 December 2010.

Convention on the Rights of Persons with Disabilities, 13 December 2006.

Convention against Transnational Organized Crime, 15 November 2000.

Protocol against Smuggling of Migrants by Land, Sea and Air, 15 November 2000.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime, 15 November 2000.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000.

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 25 May 2000.

Rome Statute of the International Criminal Court, 17 July 1998.

United Nations Convention on the Rights of the Child, 20 November 1989.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.

Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979.

Convention on the Reduction of Statelessness, 30 August 1967.

Protocol Relating to the Status of Refugees, 31 January 1967.

International Covenant on Civil and Political Rights, 16 December 1966.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966.

International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966.

Convention Relating to the Status of Stateless Persons, 28 September 1954.

Convention Relating to the Status of Refugees, 28 July 1951.

Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951.

Universal Declaration of Human Rights, UNGA, 10 December 1948.

Charter of the United Nations, 26 June 1945.

2.2. Council of Europe

Convention on Action against Trafficking in Human Beings, 16 May 2005.

Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in All Circumstances, 3 May 2002.

European Convention on Nationality, 6 November 1997.

Revised European Social Charter, 3 May 1996.

Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, 28 April 1983.

Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, 6 May 1963.

European Social Charter, 18 October 1961.

European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

2.3. Other international instruments

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949.

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949.

Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949.

Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

League of Nations, Protocol relating to a Certain Case of Statelessness, 12 April 1930.

2.4. United Nations Security Council, United Nations General Assembly and United Nations Human Rights Council Resolutions

UN Security Council, Resolution 1820(2008), S/Res/1820(2008), 19 June 2008.

UNGA, Global Compact on Refugees, A/RES/73/151, 19 December 2018.

UNGA, Global Compact for Safe, Orderly and Regular Migration, A/RES/73/195, 19 December 2018.

UN Human Rights Council, Human Right to a Safe, Clean, Healthy and Sustainable Environment, Resolution, A/HRC/48/L.23/Rev.1, 8 October 2021.

Appendix C: Case-law

The list of cases in Appendix C follows the structure and sections of this judicial analysis, so that the reader can find cases relevant to the same themes together.

Within each section, the cases are listed in date order from the most recent to the oldest and, within that list, cases are categorised by jurisprudence from:

- European courts – that is, first the CJEU, followed by the ECtHR, with court judgments preceding opinions of Advocates General in the case of the CJEU and court judgments preceding decisions in the case of the ECtHR;
- national jurisprudence of EU Member States (cases are ordered alphabetically by country and then according to their national hierarchy);
- national jurisprudence of non-EU Member States (cases are ordered alphabetically by country and then according to their national hierarchy);
- international jurisprudence[1460].

General introduction

CJEU (Grand Chamber (GC)), judgment of 9 November 2021, *LW* v *Bundesrepublik Deutschland*, C-91/20, EU:C:2021:898.

CJEU, judgment of 19 November 2020, *EZ* v *Bundesrepublik Deutschland*, C-238/19, EU:C:2020:945, paras 40 and 42.

CJEU (GC), judgment of 14 May 2019, *M* v *Ministerstvo vnitra and X, X* v *Commissaire général aux réfugiés et aux apatrides*, Joined Cases C-391/16, C-77/17 and C-78/17, EU:C:2019:403, para. 74.

CJEU, judgment of 4 October 2018, *Ahmedbekova* v *Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, C-652/16, EU:C:2018:801, paras 43 and 72–74.

CJEU, judgment of 13 September 2018, *Shajin Ahmed* v *Bevándorlási és Menekültügyi Hivatal*, C-369/17, EU:C:2018:713, para. 40.

CJEU (GC), judgment of 24 April 2018, *MP* v *Secretary of State for Home Department*, C-353/16, EU:C:2018:276, paras 36–38.

CJEU, judgment of 9 March 2017, *Petya Mikova* v *Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*, C-406/15, EU:C:2017:198.

CJEU (GC), judgment of 7 March 2017, *X and X* v *Etat belge*, C-638/16 PPU, EU:C:2017:173, paras 49 and 51.

CJEU judgment of 1 December 2016, *Mohamed Daouidi* v *Bootes Plus SL and Others*, C-395/15, EU:C:2016:917, paras 40–41.

CJEU (GC), judgment of 7 June 2016, *Mehrdad Ghezelbash* v *Staatssecretaris van Veiligheid en Justitie*, C-63/15, EU:C:2016:409, para. 60.

CJEU (GC), judgment of 1 March 2016, *Kreis Warendorf* v *Ibrahim Alo and Amira Osso* v *Region Hannover*, Joined Cases C-443/14 and C-444/14, EU:C:2016:127, para. 29.

[1460] ICJ sources are listed after international court judgments.

CJEU (GC), judgment of 18 December 2014, *Mohamed M'Bodj* v *Etat belge*, C-542/13, EU:C:2014:2452, paras 38, 40 and 43–46.

CJEU (GC), judgment of 18 December 2014, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve* v *Moussa Abdida*, C-562/13, EU:C:2014:2453.

CJEU, judgment of 8 May 2014, *HN* v *Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-604/12, EU:C:2014:302, paras 29–35.

CJEU, judgment of 7 November 2013, *Minister voor Immigratie en Asiel* v *X, Y and Z* v *Minister voor Immigratie en Asiel*, Joined Cases C-199/12 to C-201/12, EU:C:2013:720, para. 40.

CJEU, judgment of 6 June 2013, *MA, BT and DA* v *Secretary of State for the Home Department*, C-648/11, EU:C:2013:367.

CJEU (GC), judgment of 19 December 2012, *El Kott and Others* v *Bevándorlási és Állampolgársági Hivatal*, C-364/11, EU:C:2012:826, para. 43.

CJEU (GC), judgment of 5 September 2012, *Bundesrepublik Deutschland* v *Y and Z*, Joined Cases C-71/11 and C-99/11, EU:C:2012:518, para. 48.

CJEU (GC), judgment of 9 November 2010, *Bundesrepublik Deutschland* v *B and D*, Joined Cases C-57/09 and C-101/09, EU:C:2010:661, paras 113–121.

CJEU (GC), judgment of 2 March 2010, *Aydin Salahadin Abdulla and Others* v *Bundesrepublik Deutschland*, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105, para. 28.

CJEU (GC), judgment of 17 February 2009, *Meki Elgafaji and Noor Elgafaji* v *Staatssecretaris van Justitie*, C-465/07, EU:C:2009:94, paras 28 and 44.

CJEU (GC), judgment of 27 June 2006, *European Parliament* v *Council of the European Union*, C-540/03, EU:C:2006:429, para. 37.

CJEU, judgment of 17 February 1998, *Lisa Jacqueline Grant* v *South-West Trains Ltd*, C-249/96, EU:C:1998:63, para. 44.

CJEU, judgment of 18 October 1990, *Massam Dzodzi* v *État belge*, Joined Cases C-297/88 and C-197/89, EU:C:1990:360, para. 68.

CJEU, judgment of 18 October 1989, *Orkem* v *Commission*, C-374/87, EU:C:1989:387, para. 31.

CJEU, Opinion of Advocate General de la Tour of 12 May 2021, *LW* v *Bundesrepublik Deutschland*, C-91/20, para. 104.

ECtHR (GC), judgment of 13 December 2016, *Paposhvili* v *Belgium*, No 41738/10, CE:ECHR:2016:1213JUD004173810, paras 174–175.

ECtHR, judgment of 28 June 2011, *Sufi and Elmi* v *United Kingdom*, Nos 8319/07 and 11449/07, CE:ECHR:2011:0628JUD000831907, paras 225–226.

Supreme Court (Vrhovno sodišče) (Slovenia), judgment of 6 March 2014, I Up 79/2014.

Administrative Court (Upravno Sodišče) (Slovenia), judgment of 8 January 2014, *Berisha and Pireva*, I U 766/2013, SI:UPRS:2014:I.U.766.2013, para. 42.

Part 1: Qualification for refugee protection

1.1. Introduction

CJEU (GC), judgment of 1 March 2016, *Kreis Warendorf* v *Ibrahim Alo and Amira Osso* v *Region Hannover*, Joined Cases C-443/14 and C-444/14, EU:C:2016:127, para. 28.

CJEU, judgment of 7 November 2013, *Minister voor Immigratie en Asiel* v *X, Y and Z* v *Minister voor Immigratie en Asiel*, Joined Cases C-199/12 to C-201/12, EU:C:2013:720, para. 39.

CJEU, judgment of 30 May 2013, *Zuheyr Freyeh Halaf* v *Darzhavna agentsia za bezhantsite pri Ministerski savet*, C-528/11, EU:C:2013:342, para. 44.

CJEU (GC), judgment of 5 September 2012, *Bundesrepublik Deutschland* v *Y and Z*, Joined Cases C-71/11 and C-99/11, EU:C:2012:518, para. 47.

CJEU (GC), judgment of 17 June 2010, *Nawras Bolbol* v *Bevándorlási és Állampolgársági Hivatal*, C-31/09, EU:C:2010:351, para. 37.

CJEU (GC), judgment of 2 March 2010, *Aydin Salahadin Abdulla and Others* v *Bundesrepublik Deutschland*, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105, para. 52.

1.2. Who is a refugee?

CJEU (GC), judgment of 14 May 2019, *M* v *Ministerstvo vnitra and X, X* v *Commissaire général aux réfugiés et aux apatrides*, Joined Cases C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paras 76, 79–92, 97, 99, 106 and 109–110.

1.3. Personal and territorial scope

CJEU (GC), judgment of 9 November 2021, *LW* v *Bundesrepublik Deutschland*, C-91/20, EU:C:2021:898.

CJEU, judgment of 23 May 2019, *Mohammed Bilali* v *Bundesamt für Fremdenwesen und Asyl*, C-720/17, EU:C:2019:448.

CJEU (GC), judgment of 14 May 2019, *M* v *Ministerstvo vnitra and X, X* v *Commissaire général aux réfugiés et aux apatrides*, Joined Cases C-391/16, C-77/17 and C-78/17, EU:C:2019:403, para. 74.

CJEU, judgment of 12 March 2019, *M.G. Tjebbes et al* v *Minister van Buitenlandse Zaken*, C-221/17, EU:C:2019:189, paras 2–6 and 30–31.

CJEU (GC), judgment of 7 March 2017, *X and X* v *Etat belge*, C-638/16 PPU, EU:C:2017:173.

CJEU, judgment of 22 December 2010, *Barbara Mercredi* v *Richard Chaffe*, C-497/10 PPU, EU:C:2010:829, para. 56.

CJEU, judgment of 2 March 2010, *Janko Rottmann* v *Freistaat Bayern*, C-135/08, EU:C:2010:104, paras 14–21 and 48–58, especially paras 48 and 50–54.

CJEU, judgment of 2 April 2009, *A reference for a preliminary ruling: Korkein hallinto-oikeus – Finland*, C-523/07, EU:C:2009:225, paras 37–41.

CJEU, judgment of 11 November 2004, *Adanez-Vega* v *Bundesanstalt für Arbeit*, C-372/02, EU:C:2004:705, para. 37.

CJEU, judgment of 4 December 1974, *Van Duyn* v *Home Office*, C-41/74, para. 22.

CJEU, Opinion of Advocate General Mengozzi of 12 July 2018, *M.G. Tjebbes et al* v *Minister van Buitenlandse Zaken*, C-221/17, EU:C:2018:572, paras 55 and 122.

CJEU, Opinion of Advocate General Maduro of 30 September 2009, *Janko Rottmann* v *Freistaat Bayern*, C-135/08, EU:C:2009:588, paras 17, 23 and 29–34.

Supreme Administrative Court (Verwaltungsgerichtshof (VwGH)) (Austria), judgment of 30 September 2004, 2001/20/0410, AT:VWGH:2004:2001200410.X00.

Council for Alien Law Litigation (Raad voor Vreemdelingenbetwistingen / Conseil du contentieux des étrangers (RVV/CCE)) (Belgium), judgment of 26 April 2016, No 166.543, para. 3.8.

RVV/CCE (Belgium), judgment of 24 June 2014, No 126.144, para. 2.8.

RVV/CCE (Belgium), judgment of 19 May 2011, No 61.832 (English summary).

RVV/CCE (Belgium), judgmentof 24 June 2010, No 45.396 (English summary).

RVV/CCE (Belgium), judgment of 21 September 2010, No 48.327, para. 4.2.

Supreme Administrative Court (Nejvyšší správní soud) (Czechia), judgment of 25 November 2010, *VS* v *Ministry of Interior*, No 6, Azs 29/2010-85 (English summary).

Council of State (Conseil d'État) (France), judgment of 18 June 2014, No 362703, FR:CESJS:2014:362703.20140618, pp. 61–62.

Council of State (France), judgment of 30 December 2009, *OFPRA* c *M. C.*, No 305226, FR:CESSR:2009:305226.20091230, pp. 32–33.

CNDA (France), decision of 13 February 2012, *M. D.M.L.*, No 11026661C+, quoted in CNDA, *Année 2021: Contentieux des réfugiés: jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile*, pp. 32–33.

CNDA (France), judgment of 16 November 2011, *M. D.*, No 10018108 R, reported in CNDA, *Année 2011, Contentieux des réfugiés, Jurisprudence du Conseil d'état et de la Cour nationale de droit d'asile*, p. 118.

CNDA (France), judgment of 30 March 2011, *M. L.*, No 10013804, in *Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2011*, 2012, pp. 17–18.

CNDA (France), judgment of 23 December 2010, *M. D.*, No 09002572 C+, reported in CNDA, *Année 2010, Contentieux des réfugiés, Jurisprudence du Conseil d'état et de la Cour nationale de droit d'asile*, pp. 33–36 and 59–61.

Federal Administrative Court (Bundesverwaltungsgericht (BVerwG)) (Germany), judgment of 26 February 2009, No 10 C 50.07, BVerwG:2009:260209U10C50.07.0 (English translation), paras 29–30, 34 and 36.

Administrative Court (Verwaltungsgericht (VG)) Düsseldorf (Germany), judgment of 26 February 2018, 5 K 11138/17.A, DE:VGD:2018:0226.5K11138.17A.00.

Supreme Court (Ireland), judgment of 14 June 2017, *DT v Refugee Appeals Tribunal and Another*, [2017] IESC 45.

High Court of Ireland, judgment of 21 December 2012, *DT (No 2) v Refugee Appeal Tribunal and Others*, [2012] IEHC 562.

High Court (Ireland), judgment of 17 July 2009, *AD v Refugee Appeals Tribunal and another*, [2009] IEHC 326.

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Supreme Court (United Kingdom), judgment of 21 December 2017, *R (Hysaj and Others) v Secretary of State for the Home Department; Bakijasi v Secretary of State for the Home Department*, [2017] UKSC 82.

Supreme Court (United Kingdom), judgment of 25 March 2015, *Pham v Secretary of State for the Home Department*, [2015] UKSC 19, para. 25.

Supreme Court (United Kingdom), judgment of 3 October 2013, *Secretary of State for the Home Department v Al-Jedda*, [2013] UKSC 62, para. 34.

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Court of Appeal (England and Wales, United Kingdom), judgment of 30 July 2021, *ZV (Lithuania) v Secretary of State for the Home Department*, [2021] Court of Appeal of England and Wales (EWCA) Civ 1196.

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Court of Appeal (England and Wales, United Kingdom), judgment of 31 July 2000, *Revenko v Secretary of State for the Home Department*, [2000] EWCA Civ 500.

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Permanent Court of International Justice, Advisory Opinion No 4 of 7 February 1923, *Nationality Decrees issued in Tunis and Morocco*, 24.

1.4. Acts of persecution (Article 9(1) and (2))

CJEU, judgment of 20 January 2021, *Secretary of State for the Home Department v OA*, C-255/19, EU:C:2021:36, para. 49.

CJEU, judgment of 19 November 2020, *EZ* v *Bundesrepublik Deutschland*, C-238/19, EU:C:2020:945, paras 21–22, 27–28, 38, 41, 46, 57 and 61.

CJEU, judgment of 4 October 2018, *Ahmedbekova* v *Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, C-652/16, EU:C:2018:801, paras 49 and 57–58.

CJEU, judgment of 4 October 2018, *Bahtiyar Fathi* v *Predsedatel na Darzhavna agentsia za bezhantsite*, C-56/17, EU:C:2018:803, paras 81–83, 94, 96–98 and 101.

CJEU, judgment of 16 Feburary 2017, *CK and Others* v *Republika Slovenija*, C-578/16 PPU, EU:C:2017:127, para. 67.

CJEU, judgment of 26 February 2015, *Andre Lawrence Shepherd* v *Bundesrepublik Deutschland*, C-472/13, EU:C:2015:117, paras 21–22, 24–25, 33, 35, 38, 44, 46, 49 and 52–53.

CJEU (GC), judgment of 18 December 2014, *Mohamed M'Bodj* v *Etat belge*, C-542/13, EU:C:2014:2452, para. 35.

CJEU, judgment of 7 November 2013, *Minister voor Immigratie en Asiel* v *X, Y and Z* v *Minister voor Immigratie en Asiel*, Joined Cases C-199/12 to C-201/12, EU:C:2013:720, paras 39, 51, 55–59 and 68.

CJEU, judgment of 6 June 2013, *MA, BT and DA* v *Secretary of State for the Home Department*, C-648/11, EU:C:2013:367, paras 58–59.

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CJEU (GC), judgment of 27 June 2006, *European Parliament* v *Council of the European Union*, C-540/03, EU:C:2006:429, para. 38.

CJEU, Opinion of Advocate General Sharpston of 17 July 2014, *A, B and C* v *Staatssecretaris van Veiligheid en Justitie*, Joined Cases C-148/13 to C-150/13, EU:C:2014:2111, para. 37.

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2.4. Serious harm (Article 15)

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2.7. Actors of protection against serious harm (Article 7)

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2.8. Internal protection from serious harm (Article 8)

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Appendix D: Methodology

The first edition of Article 15(c) Qualification Directive (2011/95/EU) – A judicial analysis was published in December 2014, while the first edition of Qualification for International Protection (Directive 2011/95/EU) – A judicial analysis was published in December 2016. In 2018 and 2020, under specific contracts implementing framework contract for services EASO/2017/589, IARMJ-Europe undertook a review of the first edition of each judicial analysis. Based on feedback from users and an analysis of the content of the first editions, and taking into account findings regarding key legislative and jurisprudential developments since their publication, the IARMJ produced a review report on each publication, setting out recommendations to EASO with regard to the need to update the materials. On 10 December 2020, IARMJ-Europe and EASO concluded a specific contract under which IARMJ-Europe was to update *Qualification for International Protection (Directive 2011/95/EU) – A judicial analysis*. This judicial analysis was to incorporate updated analysis on Article 15(c) QD (recast), so as to produce an all-in-one judicial analysis on qualification for international protection on the basis of the recommendations in the review reports. The judicial analysis was also to include new analysis of the issues of qualification for international protection in cases related to armed conflict and generalised violence, trafficking, environmental dangers and COVID-19-related situations, and a reformatted appendix of case-law.

IARMJ-Europe's editorial team – which comprises exclusively serving and recently retired judges and tribunal members with expertise in asylum law and/or the training of members of courts and tribunals from across the EU+ countries – selected and appointed two researchers to undertake the update. Experts provided editorial support and didactic content. The researchers' work was undertaken under the supervision and guidance of the editorial team. The editorial team was established to ensure the integrity of the principle of judicial independence and to guarantee that judicial training materials for members of courts and tribunals are prepared and delivered in line with judicial guidance. The editorial team provided guidance on the update of the material and took all decisions pertaining to the structure, format, style and content.

The role of the commissioned researchers was to undertake research in line with a 'research methodology' provided by the editorial team and to produce an updated new edition of the judicial analysis with appendices in accordance with the instructions set out in terms of reference. Each researcher and expert adhered to a schedule of work and was required to produce drafts to publication standard in line with the EUAA writing guide. They were required to keep in mind at all times that the materials being produced were intended for use by judges and tribunal members. In particular, they were required to take into account that judicial independence is a cardinal principle in the professional development of judges and tribunal members and that for them there is an abiding concern with interpreting the relevant legal provisions in accordance with EU law and with identifying trends in jurisprudence.

The editorial team shared the draft materials with a judge and legal secretary of the CJEU in their personal capacity, and with UNHCR. The feedback received was taken into consideration by the editorial team in the finalisation of the materials. The update of the materials was completed in March 2022.

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Appendix F: Text of the qualification directive (recast)

DIRECTIVES

DIRECTIVE 2011/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 13 December 2011

on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted

(recast)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular points (a) and (b) of Article 78(2) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee[1461],

Acting in accordance with the ordinary legislative procedure[1462],

Whereas:

1. A number of substantive changes are to be made to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted[1463]. In the interests of clarity, that Directive should be recast.

2. A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Union.

3. The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention of 28 July 1951 relating to the Status of Refugees ('the Geneva Convention'), as supplemented by the New York Protocol of 31 January 1967 ('the Protocol'), thus affirming the principle of *non-refoulement* and ensuring that nobody is sent back to persecution. The Geneva Convention and the Protocol provide the cornerstone of the international legal regime for the protection of refugees.

[1461] OJ C 18, 19.1.2011, p. 80.

[1462] Position of the European Parliament of 27 October 2011 (not yet published in the Official Journal) and decision of the Council of 24 November 2011.

[1463] OJ L 304, 30.9.2004, p. 12.

4. The Tampere conclusions provide that a Common European Asylum System should include, in the short term, the approximation of rules on the recognition of refugees and the content of refugee status.

5. The Tampere conclusions also provide that rules regarding refugee status should be complemented by measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection.

6. The first phase in the creation of a Common European Asylum System has now been achieved. The European Council of 4 November 2004 adopted the Hague Programme, which sets the objectives to be implemented in the area of freedom, security and justice in the period 2005–2010. In this respect, the Hague Programme invited the European Commission to conclude the evaluation of the first-phase legal instruments and to submit the second-phase instruments and measures to the European Parliament and the Council, with a view to their adoption before the end of 2010.

7. In the European Pact on Immigration and Asylum, adopted on 15 and 16 October 2008, the European Council noted that considerable disparities remain between one Member State and another concerning the grant of protection and the forms that protection takes and called for new initiatives to complete the establishment of a Common European Asylum System, provided for in the Hague Programme, and thus to offer a higher degree of protection.

8. In the Stockholm Programme, the European Council reiterated its commitment to the objective of establishing a common area of protection and solidarity, based on a common asylum procedure and a uniform status, in accordance with Article 78 of the Treaty on the Functioning of the European Union (TFEU), for those granted international protection, by 2012 at the latest.

9. In the light of the results of the evaluations undertaken, it is appropriate, at this stage, to confirm the principles underlying Directive 2004/83/EC as well as to seek to achieve a higher level of approximation of the rules on the recognition and content of international protection on the basis of higher standards.

10. The resources of the European Refugee Fund and of the European Asylum Support Office should be mobilised to provide adequate support to Member States' efforts in implementing the standards set in the second phase of the Common European Asylum System, in particular to those Member States which are faced with specific and disproportionate pressure on their asylum systems, due in particular to their geographical or demographic situation.

11. The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for those persons in all Member States.

12. The approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movement of applicants for

international protection between Member States, where such movement is purely caused by differences in legal frameworks.

13. Member States should have the power to introduce or maintain more favourable provisions than the standards laid down in this Directive for third-country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention, or a person eligible for subsidiary protection.

14. Those third-country nationals or stateless persons who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds fall outside the scope of this Directive.

15. This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members and to promote the application of Articles 1, 7, 11, 14, 15, 16, 18, 21, 24, 34 and 35 of that Charter, and should therefore be implemented accordingly.

16. With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party, including in particular those that prohibit discrimination.

17. The 'best interests of the child' should be a primary consideration of Member States when implementing this Directive, in line with the 1989 United Nations Convention on the Rights of the Child. In assessing the best interests of the child, Member States should in particular take due account of the principle of family unity, the minor's well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity.

18. It is necessary to broaden the notion of family members, taking into account the different particular circumstances of dependency and the special attention to be paid to the best interests of the child.

19. This Directive is without prejudice to the Protocol on asylum for nationals of Member States of the European Union as annexed to the Treaty on European Union (TEU) and the TFEU.

20. The recognition of refugee status is a declaratory act.

21. Consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention.

22. Standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.

23. It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.

24. In particular, it is necessary to introduce common concepts of protection needs arising *sur place*, sources of harm and protection, internal protection and persecution, including the reasons for persecution.

25. Protection can be provided, where they are willing and able to offer protection, either by the State or by parties or organisations, including international organisations, meeting the conditions set out in this Directive, which control a region or a larger area within the territory of the State. Such protection should be effective and of a non-temporary nature.

26. Internal protection against persecution or serious harm should be effectively available to the applicant in a part of the country of origin where he or she can safely and legally travel to, gain admittance to and can reasonably be expected to settle. Where the State or agents of the State are the actors of persecution or serious harm, there should be a presumption that effective protection is not available to the applicant. When the applicant is an unaccompanied minor, the availability of appropriate care and custodial arrangements, which are in the best interest of the unaccompanied minor, should form part of the assessment as to whether that protection is effectively available.

27. It is necessary, when assessing applications from minors for international protection, that Member States should have regard to child-specific forms of persecution.

28. One of the conditions for qualification for refugee status within the meaning of Article 1(A) of the Geneva Convention is the existence of a causal link between the reasons for persecution, namely race, religion, nationality, political opinion or membership of a particular social group, and the acts of persecution or the absence of protection against such acts.

29. It is equally necessary to introduce a common concept of the persecution ground 'membership of a particular social group'. For the purposes of defining a particular social group, issues arising from an applicant's gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant's well-founded fear of persecution.

30. Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations resolutions relating to measures combating terrorism, which declare that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations' and that 'knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations'.

31. As referred to in Article 14, 'status' can also include refugee status.

32. Standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention.

33. It is necessary to introduce common criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.

34. Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.

35. Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status.

36. The notion of national security and public order also covers cases in which a third-country national belongs to an association which supports international terrorism or supports such an association.

37. When deciding on entitlements to the benefits included in this Directive, Member States should take due account of the best interests of the child, as well as of the particular circumstances of the dependency on the beneficiary of international protection of close relatives who are already present in the Member State and who are not family members of that beneficiary. In exceptional circumstances, where the close relative of the beneficiary of international protection is a married minor but not accompanied by his or her spouse, the best interests of the minor may be seen to lie with his or her original family.

38. While responding to the call of the Stockholm Programme for the establishment of a uniform status for refugees or for persons eligible for subsidiary protection, and with the exception of derogations which are necessary and objectively justified, beneficiaries of subsidiary protection status should be granted the same rights and benefits as those enjoyed by refugees under this Directive, and should be subject to the same conditions of eligibility.

39. Within the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, healthcare and access to integration facilities requires the prior issue of a residence permit.

40. In order to enhance the effective exercise of the rights and benefits laid down in this Directive by beneficiaries of international protection, it is necessary to take into account their specific needs and the particular integration challenges with which they are confronted. Such taking into account should normally not result in a more favourable treatment than that provided to their own nationals, without prejudice to the possibility for Member States to introduce or retain more favourable standards.

41. In that context, efforts should be made in particular to address the problems which prevent beneficiaries of international protection from having effective access to employment-related educational opportunities and vocational training, inter alia, relating to financial constraints.

42. This Directive does not apply to financial benefits from the Member States which are granted to promote education.

43. Special measures need to be considered with a view to effectively addressing the practical difficulties encountered by beneficiaries of international protection concerning the authentication of their foreign diplomas, certificates or other evidence of formal qualifications, in particular due to the lack of documentary evidence and their inability to meet the costs related to the recognition procedures.

44. Especially to avoid social hardship, it is appropriate to provide beneficiaries of international protection with adequate social welfare and means of subsistence, without discrimination in the context of social assistance. With regard to social assistance, the modalities and detail of the provision of core benefits to beneficiaries of subsidiary protection status should be determined by national law. The possibility of limiting such assistance to core benefits is to be understood as covering at least minimum income support, assistance in the case of illness, or pregnancy, and parental assistance, in so far as those benefits are granted to nationals under national law.

45. Access to healthcare, including both physical and mental healthcare, should be ensured to beneficiaries of international protection.

46. The specific needs and particularities of the situation of beneficiaries of refugee status and of subsidiary protection status should be taken into account, as far as possible, in the integration programmes provided to them including, where appropriate, language training and the provision of information concerning individual rights and obligations relating to their protection status in the Member State concerned.

47. The implementation of this Directive should be evaluated at regular intervals, taking into consideration in particular the evolution of the international obligations of Member States regarding *non-refoulement*, the evolution of the labour markets in the Member States as well as the development of common basic principles for integration.

48. Since the objectives of this Directive, namely to establish standards for the granting of international protection to third-country nationals and stateless persons by Member States, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

49. In accordance with Articles 1, 2 and Article 4a(1) of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and

Justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, the United Kingdom and Ireland are not taking part in the adoption of this Directive and are not bound by it or subject to its application.

50. In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.

51. The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with Directive 2004/83/EC. The obligation to transpose the provisions which are unchanged arises under that Directive.

52. This Directive should be without prejudice to the obligations of the Member States relating to the time limit for transposition into national law of Directive 2004/83/EC set out in Annex I, Part B,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to lay down standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection-granted.

Article 2

Definitions

For the purposes of this Directive the following definitions shall apply:

(a) 'international protection' means refugee status and subsidiary protection status as defined in points (e) and (g);

(b) 'beneficiary of international protection' means a person who has been granted refugee status or subsidiary protection status as defined in points (e) and (g);

(c) 'Geneva Convention' means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the New York Protocol of 31 January 1967;

(d) 'refugee' means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or

a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(e) 'refugee status' means the recognition by a Member State of a third-country national or a stateless person as a refugee;

(f) 'person eligible for subsidiary protection' means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

(g) 'subsidiary protection status' means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection;

(h) 'application for international protection' means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;

(i) 'applicant' means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;

(j) 'family members' means, in so far as the family already existed in the country of origin, the following members of the family of the beneficiary of international protection who are present in the same Member State in relation to the application for international protection:

- the spouse of the beneficiary of international protection or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,
- the minor children of the couples referred to in the first indent or of the beneficiary of international protection, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,
- the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried;

(k) 'minor' means a third-country national or stateless person below the age of 18 years;

(l) 'unaccompanied minor' means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice

of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States;

(m) 'residence permit' means any permit or authorisation issued by the authorities of a Member State, in the form provided for under that State's law, allowing a third-country national or stateless person to reside on its territory;

(n) 'country of origin' means the country or countries of nationality or, for stateless persons, of former habitual residence.

Article 3

More favourable standards

Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.

CHAPTER II

ASSESSMENT OF APPLICATIONS FOR INTERNATIONAL PROTECTION

Article 4

Assessment of facts and circumstances

1. Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.

2. The elements referred to in paragraph 1 consist of the applicant's statements and all the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.

3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship.

4. The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met:

(a) the applicant has made a genuine effort to substantiate his application;

(b) all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements;

(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;

(d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and

(e) the general credibility of the applicant has been established.

Article 5

International protection needs arising sur place

1. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.

2. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which the applicant has engaged in since he or she left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.

3. Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin.

Article 6

Actors of persecution or serious harm

Actors of persecution or serious harm include:

(a) the State;

(b) parties or organisations controlling the State or a substantial part of the territory of the State;

(c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

Article 7

Actors of protection

1. Protection against persecution or serious harm can only be provided by:

(a) the State; or

(b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State;

provided they are willing and able to offer protection in accordance with paragraph 2.

2. Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.

3. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Union acts.

Article 8

Internal protection

1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she:

(a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or

(b) has access to protection against persecution or serious harm as defined in Article 7;

and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.

2. In examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering serious harm, or has access to protection against persecution or serious harm in a part of the country of origin in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant in accordance with Article 4. To that end, Member States shall ensure that precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office.

CHAPTER III

QUALIFICATION FOR BEING A REFUGEE

Article 9

Acts of persecution

1. In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must:

(a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).

2. Acts of persecution as qualified in paragraph 1 can, inter alia, take the form of:

(a) acts of physical or mental violence, including acts of sexual violence;

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

(c) prosecution or punishment which is disproportionate or discriminatory;

(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2);

(f) acts of a gender-specific or child-specific nature.

3. In accordance with point (d) of Article 2, there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1 of this Article or the absence of protection against such acts.

Article 10

Reasons for persecution

1. Member States shall take the following elements into account when assessing the reasons for persecution:

(a) the concept of race shall, in particular, include considerations of colour, descent, or membership of a particular ethnic group;

(b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

(c) the concept of nationality shall not be confined to citizenship or lack thereof but shall, in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

(d) a group shall be considered to form a particular social group where in particular:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group;

(e) the concept of political opinion shall, in particular, include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.

2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.

Article 11

Cessation

1. A third-country national or a stateless person shall cease to be a refugee if he or she:

(a) has voluntarily re-availed himself or herself of the protection of the country of nationality; or

(b) having lost his or her nationality, has voluntarily re-acquired it; or

(c) has acquired a new nationality, and enjoys the protection of the country of his or her new nationality; or

(d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution; or

(e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality; or

(f) being a stateless person, he or she is able, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, to return to the country of former habitual residence.

2. In considering points (e) and (f) of paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.

3. Points (e) and (f) of paragraph 1 shall not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of nationality or, being a stateless person, of the country of former habitual residence.

Article 12

Exclusion

1. A third-country national or a stateless person is excluded from being a refugee if:

(a) he or she falls within the scope of Article 1(D) of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, those persons shall *ipso facto* be entitled to the benefits of this Directive;

(b) he or she is recognised by the competent authorities of the country in which he or she has taken up residence as having the rights and obligations which are

attached to the possession of the nationality of that country, or rights and obligations equivalent to those.

2. A third-country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee, which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

3. Paragraph 2 applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein.

CHAPTER IV

REFUGEE STATUS

Article 13

Granting of refugee status

Member States shall grant refugee status to a third-country national or a stateless person who qualifies as a refugee in accordance with Chapters II and III.

Article 14

Revocation of, ending of or refusal to renew refugee status

1. Concerning applications for international protection filed after the entry into force of Directive 2004/83/EC, Member States shall revoke, end or refuse to renew the refugee status of a third-country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body if he or she has ceased to be a refugee in accordance with Article 11.

2. Without prejudice to the duty of the refugee in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his or her disposal, the Member State which has granted refugee status shall, on an individual basis, demonstrate that the person concerned has ceased to be or has never been a refugee in accordance with paragraph 1 of this Article.

3. Member States shall revoke, end or refuse to renew the refugee status of a third-country national or a stateless person if, after he or she has been granted refugee status, it is established by the Member State concerned that:

(a) he or she should have been or is excluded from being a refugee in accordance with Article 12;

(b) his or her misrepresentation or omission of facts, including the use of false documents, was decisive for the granting of refugee status.

4. Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:

(a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;

(b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

5. In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.

6. Persons to whom paragraphs 4 or 5 apply are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31, 32 and 33 of the Geneva Convention in so far as they are present in the Member State.

CHAPTER V

QUALIFICATION FOR SUBSIDIARY PROTECTION

Article 15

Serious harm

Serious harm consists of:

(a) the death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Article 16

Cessation

1. A third-country national or a stateless person shall cease to be eligible for subsidiary protection when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.

2. In applying paragraph 1, Member States shall have regard to whether the change in circumstances is of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm.

3. Paragraph 1 shall not apply to a beneficiary of subsidiary protection status who is able to invoke compelling reasons arising out of previous serious harm for refusing to avail himself or herself of the protection of the country of nationality or, being a stateless person, of the country of former habitual residence.

Article 17

Exclusion

1. A third-country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:

(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he or she has committed a serious crime;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;

(d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.

2. Paragraph 1 applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein.

3. Member States may exclude a third-country national or a stateless person from being eligible for subsidiary protection if he or she, prior to his or her admission to the Member State concerned, has committed one or more crimes outside the scope of paragraph 1 which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from those crimes.

CHAPTER VI

SUBSIDIARY PROTECTION STATUS

Article 18

Granting of subsidiary protection status

Member States shall grant subsidiary protection status to a third-country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V.

Article 19

Revocation of, ending of or refusal to renew subsidiary protection status

1. Concerning applications for international protection filed after the entry into force of Directive 2004/83/EC, Member States shall revoke, end or refuse to renew the subsidiary protection status of a third-country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body if he or she has ceased to be eligible for subsidiary protection in accordance with Article 16.

2. Member States may revoke, end or refuse to renew the subsidiary protection status of a third-country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if after having been granted subsidiary protection status, he or she should have been excluded from being eligible for subsidiary protection in accordance with Article 17(3).

3. Member States shall revoke, end or refuse to renew the subsidiary protection status of a third-country national or a stateless person, if:

   (a) he or she, after having been granted subsidiary protection status, should have been or is excluded from being eligible for subsidiary protection in accordance with Article 17(1) and (2);

   (b) his or her misrepresentation or omission of facts, including the use of false documents, was decisive for the granting of subsidiary protection status.

4. Without prejudice to the duty of the third-country national or stateless person in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his or her disposal, the Member State which has granted the subsidiary protection status shall, on an individual basis, demonstrate that the person concerned has ceased to be or is not eligible for subsidiary protection in accordance with paragraphs 1, 2 and 3 of this Article.

CHAPTER VII

CONTENT OF INTERNATIONAL PROTECTION

Article 20

General rules

1. This Chapter shall be without prejudice to the rights laid down in the Geneva Convention.

2. This Chapter shall apply both to refugees and persons eligible for subsidiary protection unless otherwise indicated.

3. When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of

human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

4. Paragraph 3 shall apply only to persons found to have special needs after an individual evaluation of their situation.

5. The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors.

Article 21

Protection from refoulement

1. Member States shall respect the principle of *non-refoulement* in accordance with their international obligations.

2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may *refoule* a refugee, whether formally recognised or not, when:

(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or

(b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

3. Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee to whom paragraph 2 applies.

Article 22

Information

Member States shall provide beneficiaries of international protection, as soon as possible after refugee status or subsidiary protection status has been granted, with access to information, in a language that they understand or are reasonably supposed to understand, on the rights and obligations relating to that status.

Article 23

Maintaining family unity

1. Member States shall ensure that family unity can be maintained.

2. Member States shall ensure that family members of the beneficiary of international protection who do not individually qualify for such protection are entitled to claim the benefits referred to in Articles 24 to 35, in accordance with national procedures and as far as is compatible with the personal legal status of the family member.

3. Paragraphs 1 and 2 are not applicable where the family member is or would be excluded from international protection pursuant to Chapters III and V.

4. Notwithstanding paragraphs 1 and 2, Member States may refuse, reduce or withdraw the benefits referred to therein for reasons of national security or public order.

5. Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of international protection at that time.

Article 24

Residence permits

1. As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least 3 years and renewable, unless compelling reasons of national security or public order otherwise require, and without prejudice to Article 21(3).

Without prejudice to Article 23(1), the residence permit to be issued to the family members of the beneficiaries of refugee status may be valid for less than 3 years and renewable.

2. As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of subsidiary protection status and their family members a renewable residence permit which must be valid for at least 1 year and, in case of renewal, for at least 2 years, unless compelling reasons of national security or public order otherwise require.

Article 25

Travel document

1. Member States shall issue to beneficiaries of refugee status travel documents, in the form set out in the Schedule to the Geneva Convention, for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require.

2. Member States shall issue to beneficiaries of subsidiary protection status who are unable to obtain a national passport, documents which enable them to travel outside their territory, unless compelling reasons of national security or public order otherwise require.

Article 26

Access to employment

1. Member States shall authorise beneficiaries of international protection to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service, immediately after protection has been granted.

2. Member States shall ensure that activities such as employment-related education opportunities for adults, vocational training, including training courses for upgrading skills, practical workplace experience and counselling services afforded by employment

offices, are offered to beneficiaries of international protection, under equivalent conditions as nationals.

3. Member States shall endeavour to facilitate full access for beneficiaries of international protection to the activities referred to in paragraph 2.

4. The law in force in the Member States applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply.

Article 27

Access to education

1. Member States shall grant full access to the education system to all minors granted international protection, under the same conditions as nationals.

2. Member States shall allow adults granted international protection access to the general education system, further training or retraining, under the same conditions as third-country nationals legally resident.

Article 28

Access to procedures for recognition of qualifications

1. Member States shall ensure equal treatment between beneficiaries of international protection and nationals in the context of the existing recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications.

2. Member States shall endeavour to facilitate full access for beneficiaries of international protection who cannot provide documentary evidence of their qualifications to appropriate schemes for the assessment, validation and accreditation of their prior learning. Any such measures shall comply with Articles 2(2) and 3(3) of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications[1464].

Article 29

Social welfare

1. Member States shall ensure that beneficiaries of international protection receive, in the Member State that has granted such protection, the necessary social assistance as provided to nationals of that Member State.

2. By way of derogation from the general rule laid down in paragraph 1, Member States may limit social assistance granted to beneficiaries of subsidiary protection status to core benefits which will then be provided at the same level and under the same eligibility conditions as nationals.

[1464] OJ L 255, 30.9.2005, p. 22.

Article 30

Healthcare

1. Member States shall ensure that beneficiaries of international protection have access to healthcare under the same eligibility conditions as nationals of the Member State that has granted such protection.

2. Member States shall provide, under the same eligibility conditions as nationals of the Member State that has granted protection, adequate healthcare, including treatment of mental disorders when needed, to beneficiaries of international protection who have special needs, such as pregnant women, disabled people, persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence or minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict.

Article 31

Unaccompanied minors

1. As soon as possible after the granting of international protection Member States shall take the necessary measures to ensure the representation of unaccompanied minors by a legal guardian or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order.

2. Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.

3. Member States shall ensure that unaccompanied minors are placed either:

(a)with adult relatives; or

(b) with a foster family; or

(c) in centres specialised in accommodation for minors; or (d) in other accommodation suitable for minors.

In this context, the views of the child shall be taken into account in accordance with his or her age and degree of maturity.

4. As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

5. If an unaccompanied minor is granted international protection and the tracing of his or her family members has not already started, Member States shall start tracing them as soon as possible after the granting of international protection, whilst protecting the

minor's best interests. If the tracing has already started, Member States shall continue the tracing process where appropriate. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis.

6. Those working with unaccompanied minors shall have had and continue to receive appropriate training concerning their needs.

Article 32

Access to accommodation

1. Member States shall ensure that beneficiaries of international protection have access to accommodation under equivalent conditions as other third-country nationals legally resident in their territories.

2. While allowing for national practice of dispersal of beneficiaries of international protection, Member States shall endeavour to implement policies aimed at preventing discrimination of beneficiaries of international protection and at ensuring equal opportunities regarding access to accommodation.

Article 33

Freedom of movement within the Member State

Member States shall allow freedom of movement within their territory to beneficiaries of international protection, under the same conditions and restrictions as those provided for other third-country nationals legally resident in their territories.

Article 34

Access to integration facilities

In order to facilitate the integration of beneficiaries of international protection into society, Member States shall ensure access to integration programmes which they consider to be appropriate so as to take into account the specific needs of beneficiaries of refugee status or of subsidiary protection status, or create pre-conditions which guarantee access to such programmes.

Article 35

Repatriation

Member States may provide assistance to beneficiaries of international protection who wish to be repatriated.

CHAPTER VIII

ADMINISTRATIVE COOPERATION

Article 36

Cooperation

Member States shall each appoint a national contact point and communicate its address to the Commission. The Commission shall communicate that information to the other Member States.

Member States shall, in liaison with the Commission, take all appropriate measures to establish direct cooperation and an exchange of information between the competent authorities.

Article 37

Staff

Member States shall ensure that authorities and other organisations implementing this Directive have received the necessary training and shall be bound by the confidentiality principle, as defined in the national law, in relation to any information they obtain in the course of their work.

CHAPTER IX

FINAL PROVISIONS

Article 38

Reports

1. By 21 June 2015, the Commission shall report to the European Parliament and the Council on the application of this Directive and shall propose any amendments that are necessary. Those proposals for amendment shall be made by way of priority in Articles 2 and 7. Member States shall send the Commission all the information that is appropriate for drawing up that report by 21 December 2014.

2. After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive at least every 5 years.

Article 39

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1, 2, 4, 7, 8, 9, 10, 11, 16, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35 by 21 December 2013. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the directive repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law covered by this Directive.

Article 40

Repeal

Directive 2004/83/EC is repealed for the Member States bound by this Directive with effect from 21 December 2013, without prejudice to the obligations of the Member States relating to the time limit for transposition into national law of the Directive set out in Annex I, Part B.

For the Member States bound by this Directive, references to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

Article 41

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Articles 1, 2, 4, 7, 8, 9, 10, 11, 16, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35 shall apply from 22 December 2013.

Article 42

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Strasbourg, 13 December 2011.

For the European Parliament *For the Council*

The President J. BUZEK *The President* M. SZPUNAR

[Annexes omitted]

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