7. Qualifying for international protection in the EU

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1. INTRODUCTION: THE PLACE OF THE QUALIFICATION DIRECTIVE

The 1951 Geneva Convention relating to the Status of Refugees contains the 'mother of all refugee definitions' applicable after its entry into force in 1954.[1] The definition of the Geneva Convention was gradually augmented in different regions. In 1969 the Organization of African States (now the African Union) adopted a regional convention[2] extending the term to those who had to seek refuge in another country 'owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of [the] country'. Latin America also gradually adopted a broader definition, based on the 1984 Cartagena Declaration[3] that recognised the necessity 'to consider enlarging the concept of a refugee' and therefore included as a ground of refugee status not only generalised violence, foreign aggression, internal conflicts and other events which have seriously disturbed public order but also 'massive violation of human rights'.

This is the trend which the subregional asylum law developed by the European Union continues. The Qualification Directive was first adopted in 2004[4] and recast in 2011.[5] It comprises two statuses of protection, refugee and beneficiary of subsidiary protection. Refugee status as defined in the Qualification Directive and articulated by the jurisprudence of the Court of Justice of the European Union (CJEU) constitutes a present day interpretation of the 1951 Geneva Convention concept. This is stressed by the Treaty on the Functioning of the European Union (TFEU), the preamble of the Directive and several CJEU judgments. Subsidiary protection status is not derived from the 1951 Geneva Convention, it is novel. Essentially it is not subsidiary (to refugee status) but complementary – it broadens the category

[1] The1951 Geneva Convention recognised everyone who qualified as a refugee in the interwar era under the League of Nations arrangements and agreements as a refugee under the Convention (art 1 A(1)).

[2] Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government of the Organization of African Unity on 10 September 1969.

[3] Cartagena Declaration on Refugees. Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama Cartagena De Indias, Colombia 22 November 1984.

[4] Council Directive 2004/83/EC 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 L304/12.

[5] Directive 2011/95/EU 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 [2011] OJ L337/9.

of protected persons by incorporating ideas of the preceding regional arrangements.[6] The 2004 directive was the first EU legislative document on qualification for international protection. Nevertheless, it has to be mentioned briefly that in 1996 the European Community adopted an essentially non-binding text in the intergovernmental co-cooperation created by the Maastricht treaty of 1992 concerning the definition of the refugee.[7] That joint position was limited to the interpretation of Article 1(A) of the Geneva Convention, remained silent on the rights of those who had been recognised, and did not yet introduce the concept of subsidiary or complementary protection.

The following analysis is limited in two ways. First, it does not aim to be a comparative scrutiny of the original 2004 version and the 2011 recast of the Qualification Directive – it limits itself to the recast, only occasionally indicating a trend of change. The second limitation is that the contribution does not cover the rights of those recognised to be in need of protection (Articles 20–35 in Chapter VII).

Twenty-five Member States are bound by the recast. Ireland is still bound by the 2004 directive. Denmark was not subject to either of them. In light of the crisis of EU asylum law caused by large-scale arrivals of asylum seekers and others starting in 2015, the Commission proposed yet another recast, this time in the form of a regulation, leaving no room for national idiosyncrasies.[8] As of late 2021 the proposal is still pending.[9] The New Pact on Migration and Asylum of 2020[10] did not include any specific proposal related to the Qualification Directive and the pending regulation.

The directive in force can be seen as a twin-house. The first section is devoted to the interpretation and occasional amendment of the 1951 Geneva Convention, determining who qualifies as a refugee, who is excluded and how the status ends. The other section of the construction incorporates the newly created category of subsidiary protection, again with definition, exclusion and termination. Both share the attic that describes the mostly identical rights

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[6] The EU has adopted a directive on temporary protection as well, but that did not establish a new protection category: it simply permits the Member States to suspend the individual refugee status determination in cases of 'mass influx' as the directive has it. See Council Directive 2001/55/EC 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 L212/12.

[7] 96/196/JHA: Joint Position defined by the Council on the basis of art K.3 of the Treaty on European Union on the harmonized application of the definition of the term 'refugee' in art 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees [1996] OJ L63/2.

[8] 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 concerning the status of third-country nationals who are long-term residents (COM(2016) 466 final, 13 July 2016).

[9] See the presidency's account of the state of play of the recasts proposed in 2016: 'A provisional agreement on the whole text was reached with the European Parliament on 14 June 2018 and the text was presented in Coreper on 19 June 2018. However, this provisional agreement was not approved by Coreper and negotiations have not resumed since'. Council of the European Union, 'Information from the Presidency on current legislative proposals' (4 October 2021) 6.

[10] For the New Pact proposal see European Commission, 'Migration and Asylum Package: New Pact on Migration and Asylum documents adopted on 23 September 2020' (European Commission website, September 2020) <https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en> accessed 7 January 2022.

of those enjoying international protection of either refugee status or beneficiary of subsidiary protection status. The focus of this chapter is on the key constitutive elements of the definitions. As to refugee status, the mainstream interpretation of the Geneva Convention definition will not be rehearsed here, only the details added and the changes made by the Qualification Directive of 2011 (QD). The concept of subsidiary protection deserves a more elaborate treatment as it is a specific EU category, with antecedents in other regional and national systems, but not in the Geneva Convention.[11]

The QD includes a serious narrowing regarding its personal scope: it is only applicable to third-country nationals and stateless persons. If an EU citizen applies for asylum in another EU country then the national law applies, but Member States are also bound by Protocol 24 attached to the treaties, 'On asylum for nationals of member states of the European Union' which declares that Member States constitute safe countries of origin in respect of each other. Therefore, applications ought to be considered 'manifestly unfounded', unless the country of origin is hit by war or other public emergency threatening the life of the nation or a clear risk of a serious breach by a Member State of the values enshrined in Article 2 TEU (respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including rights of persons belonging to minorities) has emerged and the state is subject to the procedure envisaged for such situations in Article 7 of the TEU. Doubts as to the permissibility of this restriction have emerged in light of Article 3 of the Geneva Convention which prohibits discrimination among refugees (and asylum seekers) based on their country of origin.[12]

2. REFUGEE STATUS IN THE QD

The purpose of the QD is to comply with Article 78 TFEU, according to which the asylum policy of the EU must be in accordance with the Geneva Convention. The European Council, at its October 1999 special meeting in Tampere, called for the full and inclusive application of the Geneva Convention. The CJEU repeatedly recalls that

> it is apparent from recitals 4, 23 and 24 of Directive 2011/95 that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of that directive for determining who qualifies for refugee status and the content thereof 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.[13]

The following sections review salient points of the definition, bearing in mind this guidance and the centrality of the 1951 Geneva Convention.

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[11] For a history of protection beyond the Geneva Convention see: Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 19–52.

[12] Steve Peers, *EU Justice and Home Affairs Law:* Volume I: *EU Immigration and Asylum Law* (Oxford Scholarship Online 2016); Jane McAdam, 'The Qualification Directive: An Overview', in Karin Zwaan (ed), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers 2007) 10.

[13] CJEU, *Shajin Ahmed v. Bevándorlási és Menekültügyi Hivatal*, C-369/17, ECLI:EU:C:2018:713, para 40 with reference to earlier case-law.

2.1 Definition

The refugee definition of the QD largely coincides with that of the Geneva Convention. According to Article 2(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.

Beyond purely stylistic refinements there is one substantive difference to the 1951 Geneva Convention: the reference to Article 12 on exclusion. The Geneva Convention kept the exclusion grounds[14] that are reflected in Article 12 of the QD separate from the inclusion grounds (the definition). States could decide if they wished to exclude persons who otherwise qualify as refugees. According to the QD's formulation that is no longer possible. The incorporation of the exclusion grounds into the definition is seen by several commentators as an unfortunate deviation from the Geneva Convention, as it may encourage determining states to reject the application on exclusion grounds without considering the factors calling for recognition (inclusion).[15]

Whoever meets the criteria must be recognised as a refugee and endowed with refugee status, which entails the right to stay in the territory of the recognising state.[16] The only exception is when the state that started the refugee status determination procedure finds that another state is responsible for conducting the procedure relating to the merits. This may be another Member State under the Dublin regime[17] or a safe third country.[18] Here, the person who may well be a refugee according to the definition is nevertheless not recognised as such in the state where the application was submitted but in another state within or outside the European Union.[19]

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[14] See later in Section 2.3.

[15] For a complex analysis concluding that the QD does not entail exclusion before inclusion see David Kosar, 'Inclusion before Exclusion or Vice Versa: What the Qualification Directive and the Court of Justice Do (Not) Say' [2013] IJRL 87, 108–12. For a forcefully argued view endorsing exclusion before inclusion (in the GC context) see James C. Hathaway and Colin J. Harvey, 'Framing Refugee Protection in the New World Disorder' (2001) 34 (2) Cornell International Law Journal 257.

[16] QD, arts 13, 24. Recognition is national. Refugees recognised in one Member State do not enjoy that status in other Member States. There they are regularly or irregularly staying foreigners. The promise of the TFEU, art 78 according to which 'a uniform status of asylum for nationals of third countries, valid throughout the Union' ought to be established is still unfulfilled.

[17] See the chapter of Francesco Maiani in this volume.

[18] See the chapter of Jens Vedsted-Hansen in this volume.

[19] Regrettably the language of the QD contradicts the firm position of the doctrine and of UNHCR, according to which refugeehood is not constituted by the authority of refuge ('grant status'), but by the facts of the refugee's life and the authorities only recognise this correspondence between the definition and the particular circumstances. The QD uses the 'grant' language (art 13 and others).

2.1.1 Well-founded fear

The concept is not specifically further elaborated in the QD. Well-founded fear essentially reflects the chance of persecution in cases where the person is returned to the country of origin. It is an 'objective apprehension of risk'.[20] The QD takes as granted that 'well-found fear' has an established meaning and uses the term in several articles. The Directive uses it as established in the context of the Geneva Convention: it reflects the level of probability of persecution actually occurring after return. That threshold was subject to much reflection and jurisprudence, but now may be seen as settled in the formula 'reasonable possibility'. Anderson et al. summarise the state of affairs in 2019:

> That the well-founded fear test requires only 'a reasonable possibility' of persecution, rather than the likelihood of harm, is an approach that has been widely replicated, with a variety of interchangeable tests effectively amounting to one of 'real chance'. While excluding risks that amount to 'sheer speculation', situations where there is only a 'bare possibility' of harm, or where the risk is 'so slight that it could be discounted', it is an appropriately liberal test that reflects the protective objective of the refugee definition and the inherent challenges in establishing a future risk of persecution with any certainty. [footnotes omitted][21]

The establishment of the well-foundedness of fear frequently entails procedural and evidentiary questions: it requires the assessment of future events, based on country of origin information and the expectations shared between the applicant and the authority as to what would happen if the person was to return. Increasingly, it also turns into scrutiny of the credibility of the asylum seeker.

In the context of the assessment of the risk the CJEU stated in *A, B, C* that

> assessment must be made on an individual basis and must take account of the individual situation and personal circumstances of the applicant, including factors such as background, gender and age, in order for it to be determined 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.[22]

According to Article 4 of the QD on 'assessment of facts and circumstances,' the applicant must make a 'genuine effort' to 'substantiate' the application with 'coherent and plausible' statements that 'do not run counter to available specific and general information'. These (and other elements appearing in that article) constitute minimum standards of procedure in a condensed form.

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[20] James Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014) 105–10.

[21] Adrienne Anderson, Michelle Foster, Hélène Lambert and Jane McAdam, 'Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection' (2019) 68 (1) ICLQ 111, 119.

[22] CJEU, *A, B, C*, Joined Cases C-148/13 to C-150/13, ECLI:EU:C:2014:2406, para 57.

2.1.2 Persecution: the acts

The 1951 Geneva Convention does not define 'persecution'.[23] The QD does, incorporating the jurisprudence that emerged up until its adoption.[24] Article 9 differentiates between two forms of persecution. Severe violations of basic human rights taking the form of 'sufficiently serious' acts by their nature or repetition constitute the first. The second incorporates measures which may in themselves not entail human rights violations but due to their accumulation they affect the individual in the same way as the first.

Two observations relating to the violation of basic human rights are due here. First, not all human rights violations amount to persecution. In order to qualify as a persecutory act, the right breached ought to be a basic right. Debates emerged whether the basic right may be limited to non-derogable rights.[25] The prevailing (and right) view is that it may not, as the interpretative frame must be the Geneva Convention and the state practice it engendered, according to which the oppression of the freedom of expression and other political rights may amount to persecution even if they are derogable rights.[26] This is corroborated by the pure textual interpretation as Article 9(1) of the QD states that non-derogable rights are 'in particular' basic human rights, which makes it clear that other rights can also be basic rights. That was confirmed by the CJEU, when it declared that '[f]reedom of religion is one of the foundations of a democratic society and is a basic human right. Interference with the right to religious freedom may be so serious as to be treated in the same way as' interference with non-derogable rights.[27] Second, the act interfering with the basic right must achieve a certain measure of severity, either by its nature or by its recurring occurrence.

Under Article 9(2) minor human rights violations and other measures, like discrimination or negative administrative treatment, if accumulated, may also constitute persecution due to the circumstances of the case and their impact on the applicant.

The QD offers a non-exhaustive list of acts of persecution. Among them are acts of physical or mental violence, including acts of sexual violence; legal, administrative, police or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; prosecution or punishment which is disproportionate or discriminatory; denial of judicial redress resulting in a disproportionate or discriminatory punishment; prosecution

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[23] Hugo Storey, 'What Constitutes Persecution? Towards a Working Definition' [2014] International Journal of Refugee Law 272–85; Jonas Dörschner, Felix Machts and Andreas Zimmermann, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (Oxford University Press 2011) 346–50; Hathaway and Foster, *The Law of Refugee Status* (n 20), 182–287.

[24] Hemme Battjes, *European Asylum Law and International Law* (Martinus Nijhoff /Immigration and asylum law and policy in Europe 2006) 233.

[25] Luc Leboeuf and Evangelia (Lilian) Tsourdi, 'Towards a Re-definition of Persecution? Assessing the Potential Impact of Y and Z' (2013) 13 Human Rights Law Review 402–15, 411. See also Storey, 'What Constitutes Persecution?' (n 23), 280. Francesco Maiani, 'The Concept of "Persecution" in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach', *Les Dossiers du Grihl* [En ligne], Les dossiers de Jean-Pierre Cavaillé, De la persécution, http://journals.openedition.org/dossiersgrihl/3896.

[26] Battjes, *European Asylum Law and International Law* (n 24). Similarly: Raza Husein, 'International Human Rights and Refugee Law: The United Kingdom', in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill 2016), 152–3; Harald Dörig, 'Asylum Qualification Directive, Articles 1–10', in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law. A Commentary. 2nd Edition* (Beck/Hart 2016), 1169–74.

[27] CJEU, *Y and Z*, Joined Cases C-71/11 and 99/11, ECLI:EU:C:2012:558, para 57.

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); and acts of a gender-specific or child-specific nature.[28]

From a theoretical point of view the most important question is whether the notion of persecution is universal or relative, the latter allowing for differences in treatment justified by cultural or historic differences or necessities. One child policies, female genital mutilation, arranged marriage, separation of state and church, permitted limits on freedom of speech or the punishment of homosexuality are all fields (among many others) where societal reaction codified in laws of general application in the given country raise this problem once its national seeks asylum to escape the application of these laws. The CJEU delivered several judgments contributing to the clarification of the freedom of the 'rest of the world' to differ from the preferred values of the EU.

In *X, Y, and Z*[29] the Dutch Raad van State requested a preliminary ruling in the case of three homosexual men, coming from countries where homosexuality was sanctioned by severe imprisonment.[30] When does the criminalisation of homosexuality amount to persecution? That was the essence of the case, together with the issue of whether persons may be expected to hide their homosexuality in order to avoid persecution. Relying on Article 10(d) of the QD, the Court gave a Eurocentric response. It stated that criminalising those homosexual acts in the country of origin which are also criminalised in the Member States, is permitted.[31] However, threatened imprisonment for homosexual acts that are allowed in the Member States but not in the countries of origin amounts to persecution if the sanctions are actually applied.[32] That is a clear effort to universalise present European values. A concession to relativism in the judgment is that 'the criminalization of homosexual acts [not criminalized in the Member States] per se does not constitute an act of persecution', if the punishment is less than imprisonment.

The Court also expressly rejected the idea that the applicants ought to be discreet about their sexual orientation and conceal it to avoid persecution.[33]

In terms of limiting the right to religious freedom the CJEU in *Y and Z*[34] took a fairly protective position, when it insisted that people threatened on the ground of their religion (in this case two members of the Ahmadiyya community in Pakistan) cannot be expected to abstain from the religious practices which expose them to harm in order to avoid persecution. But the Court rejected the view that any interference with the right to freedom of religion which infringes Article 10(1) of the Charter of Fundamental Rights of the European Union qualifies as persecution. That is only the case when there is a genuine risk of being prosecuted or subjected to inhuman or degrading treatment or of other acts which by their nature or repetition are sufficiently severe as to amount to persecution.

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[28] QD, art 9(2).

[29] CJEU, *X, Y and Z*, Joined Cases C-199/12, C-200/12 and C-201/12, ECLI:EU:C:2013:720.

[30] See *X, Y and Z* (n 29), para 26: Sierra Leone: 10 years to life; Uganda: maximum: life; Senegal: 1–5 years.

[31] Ibid, para 76.

[32] Ibid, paras 56–7.

[33] Ibid, para 78. For a review of some Member States' practice on discretion see: European Commission, 'Evaluation of the application of the recast Qualification Directive (2011/95/EU) Final report (2019)', 91–4.

[34] *Y and Z* (n 27).

> 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 … 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.[35]

This is a clear incorporation of subjective elements into the whole construction of the refugee definition. Whereas assessing the well-foundedness of the fear is purely objective, that is, independent from the actual anxiety or lack of it of the applicant, the concept of persecution entails a 'tailor-made, personal element', when the importance to the person of the right threatened has to be factored into the qualification of an act as persecution or not.

2.1.3 Persecution: the actors

The QD resolved a long-standing debate[36] about the question of whether non-state actors, such as paramilitary units, radical groups, clan or family members, or gangsters can also qualify as persecutors. The text is unequivocal: if the state (or other actor of protection) is 'unable or unwilling' to provide protection then the actions of non-state agents qualify as persecution if they meet the threshold of persecution. That was a transition from the 'accountability' approach, in which the state must have been implicated by action or inaction in the persecution, to the 'protection' approach which focuses on the lack of protection.[37]

Whereas on the surface this statement suggests a fairly simple constellation – persecution committed or threatened by any actor is persecution – in reality the scheme is refined by three intervening factors:

- persecution only leads to refugee status if it threatens on account of the grounds recognised in the 1951 Geneva Convention, namely race, religion, nationality, political opinion or belonging to a particular social group;
- if there is effective protection from persecution (including acts that by definition only follow the persecutory act, like the punishment of the perpetrator) then refugee status does not arise;
- if persecution (and the lack of an effective protection) only threatens in one part of the country, but the person can find safety in another part of the same country, the application may be rejected as unfounded.

Later sections analyse all three intervening factors.

The QD in Article 6 also names 'parties or organizations controlling the State or a substantial part of the territory of the State' among potential persecutors. These entities either *de facto* control the whole or part of the territory of a state and exercise governmental authority, or

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[35] Ibid, para 70.

[36] Hathaway and Foster, *The Law of Refugee Status* (n 20), 303–8. A turning point was the decision of the House of Lords on 19 December 2000: *Secretary of State for The Home Department, Ex Parte Adan R v. Secretary of State For The Home Department Ex Parte Aitseguer, R v.* [2000] UKHL 67; [2001] 2 WLR 143; [2001] 1 All ER 593, in which the lords clearly refused the German and French practice of not accepting threats by clans in Somalia and radical rebels in Algeria respectively, as forms of persecution.

[37] European Commission, 'Evaluation of the Application of the Recast Qualification (n 33), 58. For a succinct theoretical background see Battjes, *European Asylum Law and International Law* (n 24) 243–4.

are insurgent forces controlling certain parts of the state. The difference to 'simple' non-state actors is that, according to the QD, parties and organisations may at the same time be actors of protection, which other non-state actors may not be.[38]

2.1.4 Persecution: the grounds

The QD enumerates the same five grounds as the 1951 Geneva Convention and offers interpretations relying heavily on the Handbook on Procedures produced by the United Nations High Commissioner for Refugees (UNHCR).[39] At the same time it takes an important step forward, by acknowledging that the five grounds may not only serve as the reason for persecution, but may be the reason for the absence of protection. The consequence is that persecutory acts committed for other than Geneva Convention reasons may lead to refugee status if the lack of protection is for reasons of the five grounds. In other words, the 'nexus' may be between the persecutory act and the grounds, or between the lack of protection and the grounds.[40]

2.1.4.1 Race

Race is perceived as a social construct not as a biological given. According to Article 10 it includes, 'in particular', colour, descent, ethnicity and in practice frequently overlaps with a broad understanding of nationality or cultural distinctiveness.

2.1.4.2 Religion

The concept of religion in the QD is an amalgam of elements derived from the International Covenant on Civil and Political Rights, from CCPR General Comment No. 22 concerning Article 18 of the Covenant,[41] from the UNHCR Guidelines[42] and from the Handbook. Theistic, non-theistic and atheistic beliefs are equally protected, as is the freedom to participate or abstain from participation in private or public worship. Finally, acts, views and conduct 'based on or mandated' by any religious belief also belong to the prohibited target of persecution.[43]

According to the UNHCR Guidelines, claims based on 'religion' may involve one or more of the three elements: religion as belief (including non-belief), religion as identity and, finally, religion as a way of life.[44] As with the other grounds, if the religion is imputed (without the person actually holding it), and leads to persecution, refugee status must be recognised. Religion therefore extends far beyond established churches and traditional belief systems. At

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[38] EASO, 'Qualification for international protection (Directive 2011/95/EU)' (EASO, December 2016) <www.easo.europa.eu/sites/default/files/QIP%20-%20JA.pdf> accessed 7 January 2022.

[39] UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (UNHCR, first publication 1979) <www.unhcr.org/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> accessed 7 January 2022.

[40] Hathaway and Foster, *The Law of Refugee Status* (n 20), 295, citing *Horvath* (Eng CA, 1999) at 246 per Hale L.J.

[41] CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion) 30 July 1993, CCPR/C/21/Rev.1/Add.4.

[42] 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' (UNHCR, April 2004)

[43] QD, art 10(1)(b).

[44] UNHCR, 'Guidelines on International Protection No. 6' (n 42), 3.

its periphery are phenomena like Falun Gong that may qualify as a religion but also as a particular social group.

Religion as the reason for persecution became central in a few CJEU judgments. In *Y and Z*, the Court rejected the proposition that religion can be divided into 'core areas', essentially the belief and the private practice (*forum internum*) and 'non-core elements', meaning public acts, including worship (*forum externum*). It rejected the proposal that only interference affecting the core elements would constitute persecution. Instead, it concluded that acts constituting persecution must be identified on the basis of the nature of the repression inflicted on the individual and its consequences. It is '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 [freedom of religion] constitutes persecution'.[45]

In 2018, in *Fathi*,[46] an Iranian man claimed to have converted to Christianity and therefore to be threatened with persecution as Iranian law punishes apostasy with a death sentence. The Court established that 'belief' is a broad category and does not necessarily entail membership in a religious community.[47] As in *Y and Z* the Court refused to split religion into *forum internum* and *externum* and concluded that applicants claiming religious persecution need not produce evidence concerning their external, public activities or statements.[48] However, the mere declaration of being Christian and therefore threatened may not be enough – the Court requires substantiation at least in the form of revealing how the person's belief relates to the doctrinal, ritual and prescriptive aspects of the given religion. Dissipating the fears of the Bulgarian referring court, according to which questions into these fields may be incompatible with the right to privacy, the Court noted that in its judgment in *A and Others*,[49] warning against detailed questioning as to sexual practices would not by analogy prevent inquiry into religious practices. Finally, the Court confirmed that a law of general application, if it severely curtails religious freedom and threatens with disproportionate or discriminatory punishment, as in this case (death penalty or custodial sentence), amounts to a threat of persecution, even if it may be justified in the country of origin as necessary for public order.

2.1.4.3 *Nationality*

In line with the prevailing views the QD offers a broad understanding of nationality. Beyond citizenship of a state and statelessness it encompasses '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'.[50] In the twenty-first century statelessness emerged as a trigger (together with religion) in the persecution of Rohingya from Myanmar.[51] National or ethnic minorities – frequently part of a group living in neighbouring countries – also fall under this heading as may resident foreigners, targets of xenophobia or an *ad hoc* political campaign, who cannot return to their country of nationality.

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45 *Y and Z* (n 27), para 66.
46 CJEU, *Fathi*, C-56/17, ECLI:EU:C:2018:803.
47 Ibid, para 80.
48 Ibid, para 82.
49 *A, B, C* (n 22).
50 QD, art 10(1)(c).
51 Still as the – then – IARLJ remarked: '[t]here appears to be very little exploration of this reason for persecution in decisions of the courts or tribunals of Member States and the subject is untouched at CJEU level' (footnote omitted). EASO, 'Qualification for international protection' (n 38), 48.

2.1.4.4 Membership of a particular social group

Of the five grounds this is the most versatile. It is a mirror of how societal norms determine the power relations between the state and its citizens, and of how the standards of 'normalcy' transform. That is well illustrated by the only substantive change concerning the reasons for persecution between the first QD of 2004 and the recast. Whereas the first version declared that 'gender related aspects might be considered, without by themselves alone creating' a reason for persecution, the recast commands that '[g]ender 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'. That is a clear reflection of the increased role of gender identity and the entitlement not to hide it even if it is not tolerated in the surrounding society.[52]

UNHCR and the EU disagree on whether an alternative or a cumulative approach is justified. UNHCR advocates the alternative approach,[53] the Directive adopts the cumulative. Article 10(d) requires 'an innate characteristic, or a 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', and that the 'group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society'.[54] At the same time, it is generally accepted – albeit not stated expressly in the QD – that neither cohesion within the group, nor knowledge of the members or a formal organisation of the group is expected, that is, the sociological notion of a 'group' does not apply.

In *X, Y and Z*,[55] the CJEU adopted the cumulative approach and found that 'it is common ground that a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it' and 'in the country of origin concerned, the group whose members share the same sexual orientation has a distinct identity because it is perceived by the surrounding society as being different' which is the case if there are 'criminal laws ... which specifically target homosexuals'.[56] In *A, B and C*,[57] also related to persecution of homosexuals, the Court also adopted the cumulative approach.[58] In 2018, in the *F* case the Court confirmed that 'sexual orientation is a characteristic which is capable of proving an applicant's membership of a particular social group', where 'the group of persons whose members share the same sexual orientation is perceived by the surrounding society as being different'.[59]

In *Ahmedbekova*[60] the Court was asked to specify if being involved in a claim before the European Court of Human Rights that is perceived by the affected government as an act of political dissent and may lead to retaliatory action amounts to an expression of political

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[52] See the chapter of Thomas Spijkerboer in this volume.

[53] 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 final, 21 October 2009)' (UNHCR, July 2010) 8.

[54] Dörschner, Machts and Zimmermann, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (n 23), 395.

[55] See above (n 32).

[56] *X, Y and Z* (n 29), paras 46–48.

[57] *A, B, C* (n 22).

[58] See the chapter of Thomas Spijkerboer for analysis.

[59] CJEU, *F*, C-473/16, ECLI:EU:C:2018:36.

[60] CJEU, *Ahmedbekova*, C-652/16, ECLI:EU:C:2018:80.

opinion and belonging to a particular social group according to Article 10 of the QD. The Court accepted that involvement as an expression of political opinion, but again relying on the cumulative approach, denied that those who sue their country or are involved in such a case as a family member constitute a particular social group. Regrettably the Court refrained from explaining why the cumulative conditions did 'not appear to be satisfied in the case'.[61]

2.1.4.5 Political opinion

There is agreement that this ground is to be interpreted widely.[62] The QD speaks of any 'opinion, thought or belief on a matter that is related to the potential actors of persecution' (Article 10(1)(e)). There are five notable elements:

- acts are not required, opinions are enough;
- the opinion need not be directed at the state, it may relate to a non-state actor;
- opinions, thoughts and beliefs of a political nature must be expressed or become known (e.g. by intercepting communication or through informers) to the persecutor who would not tolerate them;
- opinions need not be genuinely held: if the persecutor imputes them, they constitute a valid ground;
- perfectly mundane views or acts (like wearing an orange scarf) may become political if the persecutor ascribes political meaning to it.

At the heart of this ground lies the original contest between East and West at the inception of the 1951 Geneva Convention, right after the outbreak of the Cold War. Freedom of thought, conscience and expression were political values of parliamentary democracies, core human rights that the East brutally curtailed. Protecting the right to be publicly critical was demanded by liberal democracies in their conflict with the Soviet Union and its satellites, encouraging resistance from the inside. Receiving refugees persecuted for their political opinion was and is an expression of political superiority, even if providing asylum doctrinally is a non-political humanitarian gesture.[63]

The Court has not determined the perimeters of political opinion, nor did the long evaluation of the QD published in 2019[64] deal with state practice concerning political opinion. In *Ahmedbekova* the Court accepted that being involved in a case against one's own state at the European Court of Human Rights (ECtHR) is or may be perceived by the authorities as an expression of political opinion leading to well-founded fear of being persecuted if the state does not tolerate such an application and threatens retaliation. In another case, the US deserter Andre Lawrence Shepherd refused a return to action in the US army in Iraq in 2007, 'believing that he must no longer play any part in a war in Iraq he considered illegal, and in

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[61] Ibid, para 89.

[62] Hathaway and Foster, *The Law of Refugee Status* (n 20), 405–7; Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 87; Dörschner, Machts and Zimmermann, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (n 23), 398–9.

[63] Executive Committee of the High Commissioner's Programme, 'Note on International Protection', EC/62/SC/CRP.12 (UNHCR, May 2011) 2.

[64] European Commission, 'Evaluation of the application of the recast Qualification (n 33).

the war crimes that were, in his view, committed there'.[65] He applied for refugee status in Germany in 2008 and was repeatedly rejected. Albeit the move of Shepherd may be seen as a political act par excellence the case was more narrowly framed and turned on how the Court would interpret Article 9(2)(e) of the QD, according to which '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)' is a form of persecution. The Court concluded that the provision could apply to a soldier performing supportive functions and not directly involved in the war crimes or other exclusion grounds. Even a situation that makes it credible that war crimes would be committed is enough to justify desertion (potentially turning prosecution for desertion into persecution). However, that likelihood is diminished if the intervention occurs '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'.[66] Shepherd's claim essentially was refused as the US intervention in Iraq was perceived as not entailing the real risks listed in Article 9(2)(e). Moreover, Shepherd did not avail himself of conscientious objector status and that alone excluded him from the protection of the invoked Article.

Had the case been treated as a simple political act – inducing prosecution as state reaction – the claim would have nevertheless been declared unfounded, as the punishment for desertion envisaged by the US law (maximum of five years' imprisonment) was seen as neither disproportionate nor discriminatory, as such punishment could be necessary 'for the State concerned to exercise its legitimate right to maintain an armed force'.[67]

In a 2020 judgment[68] the Court accepted that a Syrian man who resisted conscription by the government army and participation on that side in the civil war may qualify as a refugee even if the person could not exactly foresee his role in the military in an armed conflict in which war crimes were committed. The Court still required a link to one of the five grounds of persecution but assumed it was highly likely that refusal to serve in the army would be interpreted by the authority as an expression of political opinion and so a presumption could be established between the threat of persecution and at least one of the five grounds, the plausibility of which ought to be ascertained by the competent national authorities of the Member State.

2.2 Cessation of Being a Refugee

The directive separates 'being a refugee' and benefitting from 'refugee status'. Article 11 deals with cessation of the refugee quality, whereas Article 14 addresses the end of the status.

The QD faithfully reproduces the cessation grounds of the 1951 Geneva Convention. These may be described as re-acquiring the nationality of the country of origin, acquiring a new nationality, re-establishment in or re-availment of the protection of the country of origin, and the end of circumstances that gave rise to a well-founded fear of being persecuted. This last ground establishes that the refugee can no longer refuse the protection of her or his country if the circumstances in connection with which he or she was recognised as a refugee cease to exist.

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[65] CJEU, *Andre Lawrence Shepherd*, C-472/13, ECLI:EU:C:2015:117, para 17.
[66] Ibid, dispositif.
[67] Ibid, para 52.
[68] CJEU, *EZ*, C-238/19, ECLI:EU:C:2020:945.

The QD adds two important new elements. First, it includes an interpretative paragraph reflecting state practice and the position of UNHCR according to which the change in circumstances removing the basis of well-founded fear must be significant and non-temporary. When is the change significant and lasting?

Interpretation came in *Abdulla and others*, in which recognised refugees from Iraq were confronted with revocation of refugee status in Germany, once Saddam Hussein's regime had ended.[69] The CJEU declared that '[t]he 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'.[70]

OA[71] was not about the permanency of the protection, but about its nature. It asked if clan and family protection becoming available were enough to apply the cessation clause due to changed circumstances.[72] The Court found that 'the requirements to be met by the "protection" to which [Article 11(1)(e)] refers in relation to the cessation of refugee status must be the same as those which arise, in relation to the granting of that status'.[73] The Court rejected the proposal that financial and social support by family and clan could qualify as protection. They were 'inherently incapable of either preventing acts of persecution or of detecting, prosecuting and punishing such acts and, therefore, cannot be regarded as providing the protection'.[74]

The other innovation of the QD appears in Article 11(3), according to which the ceased circumstances ground is not to be applied 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'. That clause is wider than its counterpart in the 1951 Geneva Convention which only applied to refugees – including holocaust survivors – who had qualified as refugees under the interwar arrangements and conventions and the International Refugee Organisation statute.

2.3 Exclusion from Being a Refugee

Exclusion may have three main grounds, reflecting the text of the 1951 Geneva Convention. These are: (1) protection by another UN agency; (2) benefitting from the rights and being subject to the obligations which are attached to the possession of nationality in the country of residence; and (3) acts making the applicant undeserving of refugee status.

There are three important textual and normative differences in the QD, compared to Articles 1 D–F of the 1951 Geneva Convention. First, Article 12(2)(b) QD differs from the corresponding Geneva Convention rule excluding common criminals from being recognised as a refugee (Article 1(F)(b)) by moving the critical moment before which the commission of a non-political crime leads to exclusion. The Geneva Conventions refer to a crime committed prior to the admission to the country of refuge, the Directive orders exclusion if the crime was

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69 *Abdulla and others*, C-175/08, 176/08, 178/08 and 179/08 [2010] ECR I-1493.

70 Ibid, para 73.

71 CJEU, *Secretary of State for the Home Department*, C-255/19, ECLI:EU:C:2021:36.

72 The case is related to the 2004 version of the QD, but it is immaterial as the relevant rule in it was the same as in the 2011 version both reflecting art 1(C)(5) of the 1951 Geneva Convention.

73 *Secretary of State for the Home Department* (n 71), para 39.

74 Ibid, para 46.

committed prior to 'admission as a refugee, which means the time of issuing a residence permit based on the granting of refugee status'. Second, the QD incorporates an interpretative clause, aimed at the classification of terrorist acts as non-political crimes, by stating that 'particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes'. Third, the QD makes it explicit in Article 12(3) that incitement to acts making the person undeserving or 'otherwise participating' in such an act also entails exclusion.

Exclusion grounds were the subject of several CJEU judgments. The issue of Palestine refugees was discussed in four decisions. The first, *Bolbol*,[75] clarified that someone who may have been entitled to protection and assistance by UNRWA, but did not actually avail of it, is neither automatically recognised as a refugee under the 1951 Geneva Convention nor excluded from that possibility in a Member State. Such a person is entitled to a full examination of an asylum application, potentially leading to international protection.

The next decision in *El Kott*,[76] delivered by the Grand Chamber, broadened the chances of Palestine refugees for recognition. Member States must automatically recognise Palestine refugees who had lived in refugee camps in Lebanon but were forced to flee from them as Convention refugees, provided that in their respect the protection and assistance by UNRWA has ceased for any reason. This protection and assistance ceased to exist when the

> person's personal safety was at serious risk and it was impossible for that organ or agency to guarantee that his living conditions in that area would be commensurate with the mission entrusted to that organ or agency. A further precondition of automatic recognition of the refugee quality is that this cessation occurred 'for a reason beyond his control and independent of his volition'.[77]

This must be ascertained in an individual procedure that is limited to identifying the reasons of departure from the area of protection and the inability of UNRWA to offer it.[78]

The third decision, *Alheto*,[79] touched on procedural and qualification issues. Ms Alheto escaped from Gaza through a tunnel to Egypt from where she moved to Jordan, the place of departure to Bulgaria. Her application was examined in a regular refugee status determination procedure and rejected, partly on credibility grounds. From the point of view of the QD the following elements of the CJEU Grand Chamber judgment deserve attention. The applicable rule on exclusion of Palestine refugees or inclusion when protection from UNWRA has ceased is sufficiently precise and unconditional and therefore directly effective.[80] So even if it had not been transposed into domestic law and even if the applicant herself did not rely on it, an application from someone who had received protection from UNRWA but now applies in an EU country falls under its scope and therefore must be examined in accordance with it and not in a regular procedure that would ignore this background. The rule on Palestine refugees is *lex specialis* therefore the question is not whether the person meets the criteria for international

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[75] CJEU, *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal* (Hungary), C-31/09, ECLI:EU:C:2010:351.

[76] CJEU, *Abed El Karem El Kott and Others*, C-364/11, ECLI:EU:C:2012:826.

[77] Ibid, para 65.

[78] Ibid, paras 64, 76.

[79] CJEU, *Alheto*, C-585/16, ECLI:EU:C:2018:584.

[80] QD, art 12(1)(a).

protection but whether she can live in safety under dignified living conditions in an UNRWA field of operation.[81]

Of particular interest is the Court's argument concerning whether Jordan qualifies as a first country of asylum in respect of a Palestine refugee under UNRWA protection who left her habitual residence in the Gaza strip. The Court accepted that this may be the case, if the presumed first country of asylum forms part of the area of operations of UNRWA (as Jordan does) and the

> country agrees to readmit the person concerned after he or she has left its territory in order to apply for international protection in the European Union; and recognizes protection or assistance from UNRWA and supports the principle of nonrefoulement, thus enabling the person concerned to stay in its territory in safety under dignified living conditions for as long as necessary in view of the risks in the territory of habitual residence.[82]

In a similar case, in which a registered stateless person of Palestinian origin in Syria stayed in Jordan for two years before moving to Germany after a few days spent again in Syria, the Court had to decide if UNRWA protection had ceased and so the applicant should automatically benefit from protection under the QD.[83] The Court recalled that a voluntary departure from the UNRWA's fields of operation (Gaza Strip, the West Bank /including East Jerusalem/, Jordan, Lebanon and Syria) does not lead to *ipso facto* recognition as Convention refugee outside of the UNRWA area, and also assumed that return may be expected to any of the five UNRWA areas, not only to the former habitual residence, provided it is feasible and there are links between the person and the area.[84] As in *Alheto*, it ruled that an individual assessment, taking into account the applicant's circumstances can establish that he or she could stay in any of UNRWA's fields of operation in safety, under dignified living conditions and without being at risk of *refoulement* to the territory of habitual residence. If that was the case – to be determined by the national authorities – the person was excluded from the benefits of the QD.

When it comes to 'undeserving' refugees, in the period of increasing populism and securitisation excluding 'dangerous elements' from refugee status is the order of the day. Not surprisingly there is considerable jurisprudence on Article 12(2)(b) on non-political crimes and particularly cruel actions (of terrorism) and 12(3) on participation in them. *B and D*[85] involved former active members of organisations listed as 'persons, groups and entities involved in terrorist acts' annexed to Common Position 2001/931/CFSP. The Court took a carefully considered position. It acknowledged that terrorist acts qualify both under the non-political crime exclusion ground as well as under acts contrary to the purposes and principles of the UN.[86] Then it rejected the view that any member of a terrorist organisation must be excluded and instead premised this on an individuated assessment of the facts.[87] That assessment should extend to the role played by the person in committing terrorist acts, his or her position within

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81 Alheto (n 79), paras 87, 98, 101.
82 Ibid, para 143.
83 CJEU, *Bundesrepublik Deutschland v. XT*, C-507/19, ECLI:EU:C:2021:3.
84 Ibid, paras 53, 69.
85 CJEU, *Bundesrepublik Deutschland v. B and D, Joined Cases* C-57/09 and C-101/09, ECLIEU:C:2010:661.
86 Ibid, paras 81-82.
87 Ibid, paras 88, 94.

the organisation; the extent of the knowledge the applicant had, or was deemed to have, of those activities; and any pressure to which he or she was exposed.[88] The Court further declared that exclusion is not conditional on the person concerned representing a present danger to the host Member State,[89] and refused the idea that the exclusion decision should be preceded by a proportionality test, comparing the acts justifying exclusion with the persecution threatening upon return.[90]

In 2017, the Grand Chamber of the Court found it appropriate in *Lounani*[91] to adopt a much less permissive position. Essentially it decided that someone may be excluded from refugee status without having committed, attempted or threatened to commit a terrorist act within the meaning of Article 1(1) of Framework Decision 2002/475.[92] According to the judgment, providing logistical support to a terrorist group, such as material resources or information, forged passports and fraudulent transfer of passports as well as active participation in the organisation of a network for sending volunteers to Iraq satisfies the criterion of committing or otherwise participating in acts contrary to the purposes and principles of the UN. If someone is a member of the leadership of a terrorist group and is convicted in a Member State for participating in the activities of that group then even the requirement to establish that that person instigated a terrorist act or otherwise participated in it is waived.[93]

2.4 Revocation of, Ending of or Refusal to Renew Refugee Status

The personal scope of Article 14 QD is limited: it only embraces refugees, who applied after the entry into force of the first QD, that is 20 October 2004. As being a refugee and benefitting from the status of refugee are separate, rules were needed to regulate the end of the personal status, which may or may not coincide with ceasing to be a refugee. There are four types of reasons for revoking, ending or not renewing formal refugee status. In case of cessation grounds,[94] and when the refugee is or should have been excluded, the Member State must end the status.[95] The third ground is when misrepresentation or omission of facts, including the use of false documents, was decisive for the granting of status,[96] while the fourth and only optional ground is when there are reasonable grounds for believing that the refugee constitutes a danger to the security of the Member State where he or she is present or constitutes a danger to the community of that Member State after having been convicted by a final judgment for a particularly serious crime.[97] This much criticised last ground is a *de facto* exclusion ground added to the exhaustive list of the Geneva Convention and Article 12 QD.

The burden of proof is shared between the refugee and the state: the first must perform their duty of disclosing relevant facts and documentation, whereas the state intending to end the status must 'demonstrate' on an individual basis that the person 'ceased to be or has never

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88 Ibid, para 97.
89 Ibid, para 105.
90 Ibid, para 111.
91 CJEU, *Lounani*, C-573/14, ECLI:EU:C:2016:380.
92 Ibid, para 77.
93 Ibid, para 81.
94 See above Section 2.2.
95 QD, art 14(1), (3)(a).
96 Ibid, art 14(3)(b).
97 Ibid, art 14(4).

been' a refugee.[98] Being a refugee is factual. Therefore taking away refugee status in the optional cases when the refugee constitutes a security or societal danger does not remove the person from the protection of the Geneva Convention. It only deprives the person from the protection against *refoulement* as does Article 33 paragraph (2) of the Geneva Convention. As long as they still remain in the territory of the Member State, certain Convention rights accrue to them. Article 14 paragraph 6 designates as such seven entitlements of the Convention.[99]

In *H.T.*[100] a Turkish recognised refugee who had strong family ties in Germany, including eight children, was expelled from the country as he collected donations for PKK and attended meetings. He was sentenced to a fine for that illegal activity in Germany.

The CJEU judgment clarified that exemption from the *non-refoulement* rule enshrined in Article 21(2) of the QD is exceptional, the last resort and not applicable in this case.[101] However, the Court attached a somewhat artificial meaning to Article 24(1) which allows derogation from the obligation to issue a residence permit to beneficiaries of refugee status. The Court opined that the provision also entitles the state to revoke or end existing residence permits as – in the surprising interpretation of the Court – 'compelling reasons of national security' used in Article 24 is broader than 'reasonable grounds' for considering someone a danger to the security of the state.[102] In sum, the Court decided that the state may be entitled to end the residence permit under Article 24 even if *refoulement* is not justified. That entails that the person deprived of the residence permit is still a refugee and is the holder of all the rights listed in chapter VII of QD, including protection from *refoulement*.

3. SUBSIDIARY PROTECTION

Subsidiary protection is only available to those who do not qualify as refugees. Before the recast, states could maintain separate procedures for examining applications for refugee status and for subsidiary protection. This is no longer the case. Every application must now be considered as aiming at refugee status, and only if the person does not qualify as a refugee may and must the state clarify if the other branch of international protection – subsidiary protection – is applicable.[103]

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[98] As Ingo Kraft points out, the wording of art 14(2) contains a drafting mistake and it was intended to cover what is now, art 14(3) on exclusion, contrary to the plain meaning of para (2), only referring to para (1) of the Article. See Ingo Kraft, 'Qualification Directive', in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law. A Commentary* (2nd edn, Beck/Hart 2016), 1228.

[99] Arts 3, non-discrimination, 4, religion, 16, access to courts, 22, public education, 31, non-penalization of irregular entry and stay under certain conditions – restrictions on movement, 32, limits on expulsion and 33, *non-refoulement* of the 1951 Convention relating to the status of refugees.

[100] CJEU, *H. T. v. Land Baden-Württemberg*, C-373/13, ECLI:EU:C:2015:413.

[101] Ibid, para 71.

[102] Ibid, para 75.

[103] Art 10(2) of the Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection [2013] OJ L180/60 read in conjunction with art 2(f) QD. *In H.N. v. Minister for Justice, Equality and Law Reform, Ireland* that concerned the 'old' *acquis* the CJEU confirmed that Ireland had the right to maintain two separate procedures, but also had the right to allow access to the procedure for subsidiary protection only once the applicant had failed to prove her refugee quality in the other procedure. Para 35 of the judgment was clear: 'an application for subsidiary protection should not, in principle, be considered before the competent authority has reached

3.1 Definition

The definition of the beneficiary of subsidiary protection has not changed with the recast. It is derived from Article 2(f) in conjunction with Article 15 QD.

3.1.1 Elements of the definition

A beneficiary of subsidiary protection is 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 [exclusion grounds do] not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

Article 15 defines 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.

In the early 2000s, at the time of the QD's adoption, some Member States considered subsidiary protection a 'lesser' status than refugee status as well as more temporary, justifying fewer rights and more exclusion grounds.[104] There was also a fear that offering unconditional protection to victims of armed conflicts would lead to the arrival of significant numbers of forced migrants. The other point of view was that subsidiary protection is an equal, yet different form of full protection.[105]

The underlying political-moral question is clear: if the threat of persecution and the threat of serious harm create a right of the applicant to protection, then no differentiation is justified[106] as the consequences of both are equally severe. In fact, events justifying subsidiary protection

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the conclusion that the person seeking international protection does not qualify for refugee status'. That became EU law in the recast system. See CJEU, *N.*, C-604/12, ECLI:EU:C:2014:302.

[104] Madeline Garlick, 'Protection in the European Union for People Fleeing Indiscriminate Violence in Armed Conflict', in Volker Türk, Alice Edwards and Cornelis Wouters (eds), *In Flight from Conflict and Violence: UNHCR's Consultations on Refugee Status and Other Forms of International Protection* (CUP 2017) 244; McAdam, *Complementary Protection in International Refugee Law* (n 11), 90–93; Céline Bauloz and Géraldine Ruiz, 'Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection?', in Vincent Chetail, Philippe de Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System. The New European Refugee Law* (Brill Nijhoff 2016) 241.

[105] See UNHCR, 'Some Additional Observations and Recommendations on the 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" COM(2001) 510 final, 2001/0207(CNS) of 12 September 2001' (Refworld, July 2002) 8 <www.refworld.org/docid/3e493dc94.html> accessed 7 January 2022.

[106] McAdam, *Complementary Protection in International Refugee Law* (n 11), 91; Hemme Battjes, 'Subsidiary Protection and Reduced Rights' in Karin Zwaan (ed), *The Qualification Directive: Central*

are frequently more life- and integrity-threatening than persecution. However, if subsidiary protection is seen as a measure of solidarity and compassion, as a gift of the protecting state, that is 'granted' in the unfortunate terminology of the QD, then differentiation in rights may seem justified. The fact that the Directive on Family Reunification[107] is not applicable to beneficiaries of subsidiary protection reflects the perception of unequal protection statuses.[108] A significant move in the opposite direction was made by the recast, when it eliminated most of the differences in the rights of refugees and beneficiaries of subsidiary protection.

3.1.2 Substantial grounds, real risk, serious harm

Subsidiary protection is based on 'substantial grounds' for believing a 'real risk' of 'serious harm' is present. The most important dissimilarity to refugee status is the indifference towards the ground of the harm. The five refugee grounds do not play a role; it is immaterial why torture or inhuman treatment threatens, or why indiscriminate violence is raging. The substantial grounds for believing that a real risk of ill treatment exists is taken from the language of the European Court of Human Rights as it set the standard for prohibiting removal to a country where treatment contrary to Article 3 of the ECHR threatens.[109] It has been convincingly argued that the 'real risk' of serious harm test does not differ from the standard used for assessment of 'well-founded fear' of persecution.[110] Anderson, Foster, Lambert and McAdam agree and add that real risk entails foreseeability but need not mean imminence.[111]

Regarding serious harm, in 2009, the CJEU delivered its *Elgafaji* judgment, clarifying the interrelationship of the three categories of harm.[112] First the Court confirmed that Article 15(b) corresponds in essence to Article 3 of the ECHR, whereas paragraph (c), referring to an individual threat by reason of indiscriminate violence during an armed conflict, has a content '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'.[113]

Themes, Problem Issues, and Implementation in Selected Member States (Wolf Legal Publishers 2007) 52–4.

[107] Council Directive 2003/86/EC on the right to family reunification [2003] OJ L251/12.

[108] Some Member States – in the vein of equality of protection needs – in fact extend its application to subsidiary protection beneficiaries, others do not. Kees Groenendijk, Roel Fernhout, Dominique van Dam, Ricky van Oers and Tineke Strik, *The Family Reunification Directive in EU Member States. The First Year of Implementation* (Centre for Migration Law 2007) 41–2. In fact the first version of the Reception Conditions Directive only extended to applicants for refugee status. States were entitled to apply it to applicants for subsidiary protection. Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18.

[109] Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (2nd edn, volume 3, Intersentia 2014) 348.

[110] EASO, 'Qualification for international protection' (n 38), 114–15.

[111] Anderson, Foster, Lambert and McAdam, 'Imminence in Refugee and Human Rights Law' (n 21), 111, 120.

[112] CJEU, *Elgafaji v. Staatssecreteris van justizie*, C-465/07, ECLI:EU:C:2009:94.

[113] Ibid, para 28.

That interpretation had to harmonise the clearly incompatible terms of individual threat and indiscriminate violence, which appeared in the text as a result of political compromise.[114] The Court concluded that

> '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 … a civilian, returned … 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.[115]

Paragraph (c) applies if mere presence entails a real risk to life or person of a civilian. The Court adopted a 'sliding scale test' by constructing a reverse proportionality between the individualisation of the threat and the level of indiscriminate violence. The Court stated 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'.[116] In *CF and DN*,[117] the Court ruled on the criteria to be applied in determining the level of violence necessary to prove the existence of a serious and individual threat by reason of indiscriminate violence and found that fixing a ratio of victims per civilian population as a precondition to apply 15(c) is not permitted. In order to determine whether there is a 'serious and individual threat', a comprehensive appraisal of all the circumstances of the individual case is required.

The CJEU was also instrumental in interpreting 'armed conflict'. In *Diakité*,[118] it refused to give the term the same meaning as in international humanitarian law, and opted for an autonomous interpretation, according to which 'an internal armed conflict exists … if a State's armed forces confront one or more armed groups or if two or more armed groups confront each other'.[119] The intensity of the conflict and the organisation of the armed forces is immaterial; what matters alone is the level of indiscriminate violence.[120]

It seems that the relationship of paragraphs (b) and (c) of Article 15 QD has not been clearly settled. If paragraph (b) indeed corresponds to Article 3 as interpreted by the ECtHR then it may be a vehicle to prevent return to a situation of armed conflict with high level of violence as can be paragraph (c). Whereas a more personalised risk was required by the ECtHR when applying Article 3, it later moved towards relaxing that obligation.[121] In *Elgafaji*, the CJEU claimed that if the level of violence is lower than mere presence constituting a threat to life, then an increased individualisation of the risk was required.[122] A remaining difference, of course, is that paragraph (b) is not conditioned on the existence of an armed conflict.

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[114] Hugo Storey, 'Qualification for Subsidiary Protection' in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law. A Commentary* (2nd edn, Beck/Hart 2016) 1235.

[115] *Elgafaji v. Staatssecreteris van justizie* (n 112), para 35.

[116] Ibid, para 39.

[117] CJEU, *CF, DN v. Bundesrepublik Deutschland*, C-901/19, ECLI:EU:C:2021:472.

[118] CJEU, *Aboubacar Diakité v. Commissaire General aux réfugiés et aux apatrides*, C-285/12, ECLI:EU:C:2014:39.

[119] Ibid, para 35.

[120] Ibid.

[121] *Sufi and Elmi v. United Kingdom*, App Nos 8319/07 and 11449/07 (ECHR, 28 June 2011), para 217.

[122] Costello also notes this convergence. Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2016) 194–5.

There is agreement that the forms of harm mentioned in paragraphs (a) and (b) of Article 15 QD essentially reflect the corresponding rules of the ECHR as interpreted by the ECtHR,[123] with one major caveat. Referring to the country of origin in paragraph (b) incorporated two limitations compared to the ECtHR practice. First, subsidiary protection is not to be granted to those who may suffer from the radical deterioration of their health condition due to inadequate health care in their country of origin or similar humanitarian needs;[124] second, ill treatment in a third country will not entitle an applicant to subsidiary protection.

The CJEU has refined the interpretation of subsidiary protection in humanitarian cases. In *M'Bodj*,[125] it denied that Article 15(b) would cover a situation in which inhuman or degrading treatment is the result of inappropriate treatment in the country of origin of the applicant who suffers from a serious illness. It could only justify recognition if such an applicant is intentionally deprived of health care in the country of origin.[126] The Court also clarified that Member States are not allowed to extend subsidiary protection to such humanitarian cases as it would be contrary to the purpose of the directive but they could stay removal on the basis of a national humanitarian status.[127]

In *MP v. UK*,[128] the non-removability of MP was accepted by the UK, as it was acknowledged that the applicant, who had been tortured in his country of origin, Sri Lanka, and suffered from post-traumatic stress disorder (PTSD) would be subjected to inhuman treatment in his country of origin. This was the case as Sri Lanka could not offer adequate medical care and his PTSD would be substantially aggravated and lead to a serious risk of suicide. The question was whether MP was entitled to more than protection from *non-refoulement*, and should be recognised as a beneficiary of subsidiary protection under Article 15(b). The Court interpreted the intentional deprivation of appropriate care and found that, if the authorities are not prepared to offer rehabilitation to someone who is at risk of committing suicide, or if it is apparent that the authorities 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 (of which MP forms part) to obtain access to appropriate care, then subsidiary protection is justified.[129]

3.2 Cessation of Being Eligible for Subsidiary Protection and Exclusion from It

No voluntary act of the protected person may lead to the end of subsidiary protection. The only compulsory ground for cessation is the situation 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'.[130] The change must be so significant and durable that the beneficiary 'no longer faces a real risk of serious harm'. As with refugees, if compelling reasons arising out of previous serious harm are present the beneficiary of subsidiary protection must not be deprived of that status due to changed circumstances.

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123 Boeles, den Heijer, Lodder and Wouters, *European Migration Law* (n 109), 353–8.
124 Battjes, *European Asylum Law and International Law* (n 24), 236–7.
125 CJEU, Mohmed *M'Bodj v. État belge*, C-542/13, ECLI:EU:C:2014:2452.
126 Ibid, para 35.
127 Ibid, paras 39, 43.
128 CJEU, *MP v. Secretary of State for the Home Department*, C-353/16, ECLI:EU:C:2018:276.
129 Ibid, para 57.
130 QD, art 16(1).

Exclusion is mandatory when the person has committed a crime against peace, a war crime, or a crime against humanity; a serious crime (of whatever nature) or is guilty of acts contrary to the purposes and principles of the United Nations. Fugitives of justice having committed a non-serious crime may, but need not be excluded. In *Ahmed*,[131] the CJEU declared that the seriousness of the crime that could result in a person being excluded from subsidiary protection is to be assessed in the light of criteria such as, *inter alia*, the nature of the act at issue, the consequences of that act, the form of procedure used to prosecute the crime, the nature of the penalty provided and the taking into account whether most jurisdictions also classify the act as a serious crime.[132] A state must not automatically link it to the penalty provided for a specific crime (which was five years in the given case).

Rules on subsidiary protection do not contain the exclusion of those who get protection from a UN agency other than UNHCR, therefore Palestine refugees are entitled to subsidiary protection as confirmed in *El Kott*.[133]

3.3 Revocation of, Ending of or Refusal to Renew Subsidiary Protection Status

Article 19 QD on ending subsidiary protection status corresponds to Article 14 QD on ending refugee status,[134] with two differences. First, danger to the community or to the security of the Member State is incorporated into the rules on exclusion from subsidiary protection.[135] Second, here it is clear unlike in Article 14, that the duty of the Member State to individually demonstrate that the person has ceased to be or is not eligible to subsidiary protection, extends to all possible grounds listed in Article 19.[136]

4. EFFECTIVE, NON-TEMPORARY, ACCESSIBLE PROTECTION

Both refugee status and subsidiary protection are offered as surrogate protection when the 'home state' is unable or unwilling to provide effective, durable and accessible protection. The recast QD clarified that protection must be effective and non-temporary.[137] The spectrum of effectivity extends from an intention to prevent persecution to a total elimination of its danger. The QD did not take a maximalist position: it only requires the state (or the party or organisation in control) to 'take reasonable steps' to prevent persecution or serious harm.[138]

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131 CJEU, *Shajin Ahmed v. Bevándorlási és Menekültügyi Hivatal*, C-369/17, ECLI:EU:C:2018:713.
132 Ibid, para 56.
133 *Abed El Karem El Kott* (n 76), para 68.
134 See above, Section 2.4.
135 QD, art 17(2).
136 QD, art 19(4).
137 QD, art 7(2).
138 The approach is derived from the much criticised Horvath decision of the UK House of Lords (*Horvath v Secretary of State for the Home Department* House of Lords [2000] 3 All ER 577) which assumed that 'Certainly no one would be entitled to an absolutely guaranteed immunity. That would be beyond any realistic practical expectation … threatened. There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of acting contrary to the purposes which the convention requires to have protected. More importantly there must be an ability and a readiness to operate that machinery. But precisely where the line is drawn beyond that generality is

Those steps include (but are not limited to) the operation of 'an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm' and the guarantee that the applicant has access to such protection. In assessing the effectivity of the protection, the Member States must 'take into account' the guidance offered by Union acts, for example, safe country of origin lists.[139]

That may be a realistic position in a domestic context in that crime cannot be eliminated, only reduced and punished with the hope that the punishment will deter further crimes. However, the prospect that the perpetrator will be punished with commensurate sentence may be of little comfort to an applicant, who may be sent back to the danger of rape, mutilation, or torture.[140] The decisive element ought to be whether there is a real chance that the state protection will prevent persecution or harm. If that is not the case, then the willingness of the state to protect will not meet the effectivity test.[141] In *OA*,[142] the Court refused the idea that financial and social support by family and clan constitute protection under Article 7. The non-temporary nature of the protection led to criticism against accepting international organisations and non-state actors as protectors, as their control over the territory of a state usually is temporary.[143] Another criticism concerning the actor of protection, is that the 1951 Geneva Convention only speaks of protection by the state and makes no room for other actors.[144] The lack of accountability especially with regard to human rights was also marshalled against the idea of non-state actors as protectors.[145] Finally, protection is only accessible if the applicant will have a chance to avail herself of it upon return. That is a factual question to be assessed when deciding on application.

5. INTERNAL PROTECTION ALTERNATIVE

The core idea of the internal protection alternative (also called the internal flight or relocation alternative)[146] is logical: if in part of the country of origin there is no well-founded fear of being persecuted, or in that territory the person may find effective protection against persecution or

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necessarily a matter of the circumstances of each particular case' (Lord Clyde). For a sharp critique, see: Raza Husein, 'International Human Rights and Refugee Law: The United Kingdom', in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition. Comparative Legal Practice and Theory* (Brill 2016) 145–6.

139 QD, art 7(2)-(3).

140 *Kacaj v. Secretary of State for the Home Department* [2001] UKIAT 0018.

141 This argument relies on: Hathaway and Foster, *The Law of Refugee Status* (n 20), 318–19.

142 See above (n 71).

143 Hemme Battjes, 'Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection', in Vincent Chetail, Philippe de Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System. The New European Refugee Law* (Brill Nijhoff 2016) 197, 209–10.

144 Ibid.

145 ECRE, Asylum Aid, VluchtelingenWerk and Hungarian Helsinki Committee, *Actors of Protection and the Application of The Internal Protection Alternative. European Comparative Report (ECRE, 2014)* 29 <https://ecre.org/wp-content/uploads/2016/07/ECRE-Asylum-Aid-DCR-and-HHC_Actors-of-Protection-and-the-Application-of-the-Internal-Protection-Alternative_July-2014.pdf> accessed 7 January 2022.

146 For a comprehensive review see: Reinhard Marx, 'The Criteria of Applying the "Internal Flight Alternative" Test in National Refugee Status Determination Procedures' (2002) 14 International Journal of Refugee Law 179–218.

serious harm, then there is no need for the surrogate protection offered by the asylum state.[147] As an example, someone escaping the self-proclaimed Luhansk People's Republic might live safely in other parts of Ukraine.

Nevertheless, two questions remain which the QD – following the jurisprudence of the ECtHR[148] – answers. The first problem is access to the safe part of the territory. Frequently, the threatened person is cut off from the safe area by a front line or other hazards. According to the QD an internal protection alternative only exists if the applicant can safely and legally travel to the area and gain admittance. The second problem emerges if a dignified life is impossible for the newcomer in the otherwise safe area because of, for example, disability, religion, clan membership or language. To overcome that, the QD requires that the applicant must be reasonably expected to settle (not simply sojourn) in the safe part of the country.[149] The key issue of which political, economic and social rights and what level of economic activity should be accessible to the applicant to make the alternative reasonable has not been decided.[150]

Since finding the existence of an internal protection alternative presupposes a detailed examination of the situation in different parts of the country, as well as scrutiny into the reasonableness of the expectation according to which the applicant should move there instead of accessing protection abroad, it ought to be used as a ground for denial of recognition only in a regular procedure. That is corroborated by the Procedures Directive which does not list it as a ground for an accelerated procedure or inadmissibility.

6. CONCLUSION

Writing in 2021 about details of a directive which reflects the spirit of earlier decades, writing after years when thousands died when trying to find refuge, when EU Member States openly refute their basic obligation towards asylum seekers, when outside of Europe the 'normative power' of the EU has dissipated not least because of the less than effective response to the large scale arrivals and because of the repeated efforts to shift responsibility to Turkey and other countries, may be out of step with the present.

Nevertheless, refugee status determination and providing protection to those threatened with serious harm may eventually return to the forefront. Then the QD – and its successor regulation if ever adopted – will have a mixed impact. The beneficial aspect is that the Directive offers protection to a significant group that had not been considered to fall under the 1951 Geneva Convention by many states. It raises awareness of gender issues and the jurisprudence of the CJEU and contributes to the reinforcement of human rights and the individualisation of cases. By incorporating state practice that developed since 1954 in regard to the Geneva Convention and the protection developed on the basis of Article 3 ECHR, the Directive enables a more precise understanding of the terms used in those treaties and more predictability in refugee status determination (RSD) procedures.

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[147] James Hathaway, 'International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative' (Michigan Law, 1999) <https://repository.law.umich.edu/articles/299/> accessed 30 April 2019.

[148] *Salah Sheekh v. The Netherlands* App No 1948/10 (ECHR, 7 January 2007).

[149] QD, art 8(1).

[150] EASO, 'Qualification for International Protection' (n 38), 77–8.

However, in certain respects the directive also serves the securitising and restrictive wishes of the Member States. It incorporates the internal protection alternative, extends grounds for exclusion from protection, and creates situations in which refugees may be deprived of their residence permit while still being refugees.

The longer term fate of the QD depends on the destiny of the New Migration and Asylum Pact, and, in a broader sense, on the prospects of the Common European Asylum System (CEAS). Without a functioning responsibility sharing system across the whole EU its chances for success are limited.