An Bord Um Chúnamh Dlíthiúil
Legal Aid Board

Introduction
These guidelines are a statement of best practice for the provision of legal services by solicitors/paralegals in respect of international protection cases. Solicitors/paralegals should broadly comply with the Guidelines. Circumstances may arise where a solicitor/paralegal does not follow these guidelines. In such circumstances the specific reasons for not doing are to be noted in writing on the applicant's file. This is necessary for effective risk management/quality assurance purposes and to protect the Board where complaints are made to the Board and/or proceedings are initiated against the Board alleging negligence in the provision of services.

The Board will endeavour to allocate cases to solicitors in a timely manner so as to ensure compliance with statutory deadlines. Should a case be allocated within close proximity to a deadline, the solicitor will be contacted so as to ensure that they are in a position to deal with it.

Authority to act for a client and additional services

- One Legal Aid Certificate will be granted to a Private Practitioner on referral, to cover any advice and/or legal aid required from Questionnaire/Interview/Appeal stage until finalisation of the case. For the avoidance of doubt, please note that such legal aid certificate granted to an applicant does not authorise the taking of judicial review proceedings.
- There will be no requirement for a Private Practitioner whose applicant has been granted such a certificate to apply to the Board for an amended legal aid certificate to cover each individual stage of the process.
- Where a Private Practitioner considers it necessary to have a document translated or to obtain a SPIRASI or GP report (or any other report),an application for an amended legal aid certificate must be made in all instances to Head Office in Cahirciveen (PPUnit@legalaidboard.ie).
- For Legal Aid Board Solicitors, a Legal Aid Certificate is not necessary at the advice stage, however a submission for a Legal Aid Certificate must be made if an appeal to the International Protection Appeals Tribunal is pursued.

Key Stage 1 – Approach at First Instance/Pre Questionnaire

- The applicant will be given general information and advice on the completion of the questionnaire at the first meeting. The applicant should leave this consultation with all of the information they need to enable them to complete the questionnaire. Information must be given on possible issues such as: admissibility; nexus; safe country of origin; exclusion; the importance of filling in family details for any potential future family reunification application; implicationsof15(3)(a-c)regarding any children born or later entering Ireland and the duties of the International Protection applicant.
- Information must be given on the International Protection process and the basis for granting Asylum Status as per the checklist at Appendix A.
- The applicant must be informed that the basis for grantingSubsidiaryProtection(SP) is that a person is in need of international protectionduetoarealriskofseriousharm, meaning:

1. Death penalty or execution;
2. Torture or inhuman or degrading treatment; or
3. Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

- The applicant must be informed of the Permission to Remain (PTR) procedure to include consideration at first instance; ongoing duty to inform the Minister of any changes in circumstances that might affect PTR; and 5-day statutory period following receipt of The International Protection Appeals Tribunal decision to file further PTR submissions before final review by the Minister. The importance of the client keeping the Board/PP informed of any change of address should also be highlighted. Further country of origin information (COI) may need to be sought, and further instructions may need to be taken following receipt of the Tribunal decision before any further PTR submissions are made for the Minister's final review. Given the five-day window for reviewing a negative PTR decision, the PTR application should be kept under review and updated where necessary.
- The information provided should include answers to all of the necessary and important questions relating to, for example, the applicant's family; health information; travel history and personal circumstances, including a synopsis of the details of their claim. The applicant should be provided with a detailed overview of the International Protection process.
- Inquiries should be made with IPO at the outset regarding any visa/EURODAC hits and instructions must be taken to assess whether a risk of Dublin III transfer arises to any other relevant DIII country and consideration must be given to whether there are any grounds in each client's circumstances to resist such transfer that should be brought to the early attention of the IPO, e.g. if there is family in Ireland; Article 17 discretion in humanitarian cases (submissions must also be made to the Minister in such cases); systemic deficiencies in the International Protection process in the proposed country of transfer.
- All of the information and advice detailed above must be provided to the applicant during the consultation even in circumstances where they have returned their completed questionnaire to the IPO before the first consultation.
- At this information and advice session a certain amount of factual information should be obtained from the client including medical details and contact details of the GP as well as an authority to obtain medical information if required.
- After the information session a query will, if necessary, be raised in respect of relevant Country of Origin Information with the Refugee Documentation Centre (RDC) 1st Floor Montague Court, 7-11 Montague Street Dublin 2 (Telephone : 01- 4776250 Email: (refugee_documentation_centre@legalaidboard.ie). Also consider if further documentary/medical reports may assist and should be obtained.
- The pre-questionnaire checklist at Appendix A should be used to ensure that all necessary points were covered during the consultation in terms of information given to the client.
- A post-attendance letter should be sent to the client synopsising the process as outlined. The letter should also confirm the documents which the client was advised to seek or said they could get.

Key Stage 2 – Pre-Interview Consultation

- A further consultation between the applicant and a solicitor should be arranged when the questionnaire/translated questionnaire has been received from the International Protection Office. The focus in this meeting is on legal advice based on all of the information contained in the completed questionnaire.
- The solicitor, in taking the client's instructions and in advising the client shall have regard to the checklists at Appendix B-J:

- **Appendix A - International Protection Pre-Questionnaire Consultation Checklist**
- **Appendix B: Credibility Assessment**
- **Appendix C: IPA Pre-Interview Checklist**
- **Appendix D: Determining Nationality, Former Habitual Residence and Article 1E Countries**
- **Appendix E: Persecution Flow chart**
- **Appendix F: State Protection Flow chart**
- **Appendix G: Internal Protection Alternative Checklist**
- **Appendix H: Section 15(c) Analytic Flowchart**
- **Appendix I: Standards of Probability and Assessment of Future Risk**
- **Appendix J: Article 1(F) Exclusion Checklist 1 and 2**

• Written submissions may be made to the IPO following consultation with the applicant and review of the applicant's file. Submissions should be made where a client has an arguable claim for refugee status or subsidiary protection status, and the submission should set out the basis for contending that the client is entitled to such status. The submission should include a brief synopsis of the facts and link those facts to a statement of the law. If possible the applicant will approve the submissions prior to the submissions being sent to the IPO. These submissions might include: a reference to nexus; internal relocation and state protection issues; address any inconsistencies or reasons for absence of documentation; include relevant COI; and address any potential issues that might risk a 'papers only' or 'accelerated appeal'. Submissions should also include Permission to Remain issues. Submissions in relation to Dublin III might include for example arguments in relation to the exercise of Article17 discretion or submissions in relation to family applicants in accordance with Article10. Submissions may be made in relation to language analysis reports if it is considered necessary.

Drafting the submission may commence after receipt of the questionnaire and carrying out COI and other relevant research. They can be completed following the pre-interview client consultation and further review of the file.

Key Stage 3 - Outcomes at First Instance

- If a positive Refugee Status (RS) recommendation is received, the client should be written to confirming: the outcome of the application; the fact that they will receive further correspondence from the Department of Justice and Equality (DJE) explaining the implications of Protection status; and that the solicitor will be closing the file.
- If a negative Refugee Status recommendation is received and positive Subsidiary Protection (SP) recommendation is received, the client should be written to confirming: the outcome of the application; the fact that they will receive further correspondence from the Department of Justice and Equality (DJE) explaining the implications of Subsidiary Protection status; and take the applicant's instructions re. the possibility of appealing the negative Refugee Status recommendation.
- Negative RS/SP and positive Permission to Remain (PTR) recommendation: the client should be written to confirming: the outcome of the application; the fact that they will receive further correspondence from the Department of Justice and Equality (DJE) explaining the implications of being granted PTR; and take the applicant's instructions re. the possibility of appealing the negative RS/SP recommendation. Negative RS/SP/PTR: The Solicitor shall review the recommendation of the International Protection Office and take the applicant's instructions as to whether they wish to appeal the negative RS/SP recommendation to the IPAT. If the client instructs that they want a review by the Minister of their PTR claim, the request must be made within 5 days of the negative RS/SP appeal decision from the IPAT.
- If the client is not appealing or seeking a review- a letter should be sent to the client notifying them that the case is completed and file will be closed.

Key Stage 4 – Filing an Appeal

- The Solicitor shall review the recommendation of the IPO and arrange a consultation within the timeframe for lodging an appeal to advise on the reasons for refusal and take the applicant's instructions.
- Where an applicant fails to attend for a consultation, the office should attempt to contact the applicant by telephone and to give them an opportunity to explain their reasons for missing the appointment.
- A further appointment may be offered should there be sufficient time prior to the expiry of the time period for filing a Notice of Appeal.
- No Appeal should be filed in the absence of any current clear instruction in that regard. The instruction can only be made after the recommendation of the IPO has been notified to the client.
- Solicitors must be mindful of the urgency of making an appeal and that specified deadlines must be met.

Oral appeals and appeals on the papers

The applicant should confirm whether they wish to have an oral hearing
and the solicitor should:

- Explain the procedure of the oral hearing to the applicant. If the client instructs that they do not wish to avail of an oral hearing, take instructions as to the reasons and have the applicant sign an Authority confirming that they do not wish to avail of an oral appeal hearing.
- If a solicitor forms the view that, notwithstanding an applicant's right to opt for an oral appeal, it is in the applicant's best interests to opt for an appeal on the papers, the solicitor should prepare a detailed attendance setting out the advice to the applicant and confirm that advice by letter. A Notice of Appeal submitted in such a case must be submitted in as much detail as if the applicant had not been entitled to an oral appeal.
- In the event that the matter is proceeding to an oral hearing, outline the type of questioning and the issues that may arise at the hearing; have the client sign the Notice of Appeal; ascertain whether an interpreter is required for the oral hearing and if so, seek specific details in relation to language and dialect.

Documentation

A solicitor should ask the applicant to provide any documentation, including any identity and supporting documentation, and official documents / correspondence relating to their application, including the envelope in which the documents were received.

Appeal Forms

The solicitor should select the correct appeal form. Appeals must be submitted within the required time-limit indicated on the refusal letter.

Notice of Appeal - Refugee and Subsidiary Protection Status Appeal (Form 1)

This form is used if the applicant is appealing the recommendation not to grant Refugee Status, or the recommendation to grant neither Refugee Status nor Subsidiary Protection Status.

Notice of Appeal - Inadmissible Status Appeal(Form 2)

This form is used if the applicant is appealing the decision that their international protection application was deemed inadmissible

Notice of Appeal - Subsequent Status Appeal (Form 3)

This form is used if the applicant is appealing the decision that a subsequent protection application should not be accepted.

Notice of Appeal - Dublin III

This form is used if the applicant is appealing the decision not to grant Refugee Status under the Dublin III System Regulations.

The solicitor should clarify with the applicant whether any documentation or other proofs may be obtainable prior to the submission of the Notice of Appeal/oral hearing.

All Notices of Appeal must:

a) Contain the applicant's name; applicant's temporary residence certificate number; country of origin; date of birth; ethnic group; religion; area of former habitual residence in country of origin; profession.

(b) Set out any other bio-datarelevant to the claim; identify any changes to the biodata previously providedinrelation to the claim as well as explanations of differences where they arise.

(c) Be responsive to the groundsof refusal.

(d) Be case specific.

(e) Identify the Convention reason(s).

(f) Cite relevant COI information that supports the claim. This information must be specific to the applicant's claim and be set out in a detailed and nuanced manner.

(g) Where submissions in relation to errors of law are made include a statement of the law, including UNHCR Handbook, relevant legislation, jurisprudence (national and international) and any relevant statements from leading scholars. The stated position of the law should be applied to the facts of the applicant's case.

(h) Where submissions are made in relation to errors of fact arising from the International Protection Office (IPO) recommendation, including negative/adverse credibility findings, these must be clarified and specifically addressed. The Notice of Appeal should incorporate a summary of the error of fact; the clarification provided by the applicant (in his or her words); and an explanation for the error of fact where applicable.

(i) Address any procedural issues arising from the first instance interview. The procedural irregularity should be explained, as well as a statement provided from the applicant regarding how this affected his or her ability to present his/her claims.

(j) Make a case as to why the applicant should be recognised as a refugee and/or beneficiary of subsidiary protection.

(k) Identify any witnesses who are required to attend the oral hearing; and

(l) Identify the language and dialect of interpreter if required for oral hearing.

(m) Be accompanied by relevant and clearly marked Country of Origin Information and redacted decisions. In the event that same is unavailable at the time the Notice of Appeal is lodged, the COI should be made available at the earliest opportunity thereafter, particularly where no oral hearing is to take place. The IPAT should be advised that further documentation shall follow in the cover letter.

(n) Once the Notice of Appeal is drafted, the solicitor should sign as legal representative. Should the applicant fail to return/ to sign his/her Notice of Appeal, submit the unsigned Notice of Appeal to the IPAT in any event where you have received instructions from the applicant.

Appeal forms can be submitted to:

The International Protection AppealsTribunal

6/7 Hanover Street East

Dublin D02 W320

Tel: +353 (0) 1 474 8400

Scanned by Email to:

info@protectionappeals.ie

Key Stage 5 – IPAT Hearings and Recommendations

The IPAT will notify the Law Centre once a date for the oral hearing has been scheduled. The solicitor is expected to represent the applicant at the hearing which will be held in the offices of the IPAT in Hanover Streeton the date specified. **Recommendations from International Protection Appeals Tribunal (IPAT)**

If IPAT affirms the negative recommendations from the IPO the solicitor should advise the applicant of options open to them including:

- The possibility of voluntary repatriation
- Advice regarding any possible grounds for judicial review;
- 5 day statutory time-limit for review of refusal of PTR.

Permission to Remain Applications

The applicant should be asked to keep the Minister and the solicitor informed of significant changes in circumstances that might affect the application (and provide supporting documentation) - in particular, but not limited to:

- Any changes to their family's circumstances or composition;
- Any changes to their marital status; and
- Any major changes to their health.

Sections 49(6) (b) and 49(9) (b) of the IPA 2015 not only allow but *oblige* an applicant to inform the Minister of any change in circumstances which occurs (i) between the initial application for protection and the making of the IPO protection recommendation and (ii) during the 5 day period following the receipt by the applicant of the protection appeal decision by the IPAT.A permission to remain refusal under s.49(4) is covered by the special provisions relating to judicial review contained in s.5 of the Illegal Immigrants (Trafficking) Act 2000, and it therefore must be challenged by way of judicial review within 28 days.

Statutory Deadline Missed

In the unlikely event of a statutory deadline being missed, either through your or the applicant's fault, the solicitor should immediately furnish the IPAT with an application for an extension of the time within which to lodge the appeal (which is available in the body of the appeal form). The Managing Solicitor must be notified immediately if it is an in-house Board client. PPs should notify the Board immediately in circumstances where a request for an extension is refused.

Judicial Review

General advice to the applicant should include at all stages whether there are grounds for the institution of judicial review proceedings. If you are of the view that judicial review issues arise at any stage you should notify the applicant immediately.

Withdrawals from the process

If the applicant wishes to withdraw from the International Protection process you should advise him/her of the consequences and seek the applicant's written instructions and reasons for withdrawal.

Identifying potential victims of human trafficking

The solicitor should be aware of the definition of a victim of trafficking.

A victim of trafficking is a person who:

- Has been transported, recruited, and/or harboured [either] within a country and/or across transnational borders;
- By the use or threat of: fear, fraud, force, deception, coercion, and/or abduction;
- For the purposes of abuse, or the giving or receiving of payments and/or benefits;
- For the purpose of being exploited for labour, sexual exploitation or removal of organs.

When children and mentally impaired persons are trafficked, no violence, deception, or coercion needs to be involved. In such exploitative conditions simply transporting or harbouring constitutes trafficking.

Where it appears to a solicitor that a client may be a victim of trafficking, the client should be immediately referred to An Garda Síochána. The solicitor may also need to consider referring the client to a relevant agency.

Unaccompanied Minors

If a solicitor becomes aware that a client may actually be an unaccompanied minor they should contact the Board's Unaccompanied Minor's Unit- smithfieldseparatedchildren@legalaidboard.ie.

Post IPO Interview/Review Positive Permission to Remain Recommendations

If a positive Permission to Remain (PTR) recommendation is received following a Ministerial review, the client should be written to confirming:

- The outcome of the application;
- The fact that they will receive further correspondence from the DJE explaining the implications of their status; and
- That the law centre will be closing its file.

If a positive PTR recommendation is received at IPO interview stage, the applicant may wish to let the PTR stand if appealing negative Refugee Status or Subsidiary Protection recommendations.

A client is not to be assisted in the registration process with the Garda National Immigration Bureau following a positive decision as this is an administrative matter to be addressed by the client.

Appendix A

International Protection Pre-Questionnaire Consultation Checklist

Checklist	Information
1. ☐	Explain the role of the law centre or private practitioner in providing independent and confidential legal aid and advice to the international protection applicant in relation to their claim for protection
2. ☐	Explain the importance of notifying the IPO / IPAT / Department of Justice of any change of address and the consequences of not doing.so.
3. ☐	Explain the importance of notifying the law centre / private practitioner of any change of address
4. ☐	Explain the importance of not leaving the jurisdiction and the lack of permissions to take up employment.
5. ☐	Explain the possibility that the file may be transferred to another law centre or be reassigned to a private practitioner. *
6. ☐	Explain the role of the solicitor. Inform the client that their solicitor is responsible for the file and that all work is done at their direction.
7. ☐	Explain the functions of the law centre / private practitioner, the IPO and the IPAT and the inquisitorial nature of the international protection process.
8. ☐	Explain the possibility of the inadmissibility procedures being applied.
9. ☐	Explain the possibility of the Dublin procedures being applied.
10. ☐	Explain the definitions of a refugee and subsidiary protection, taking account of the circumstances of the client's claim and the situation in the country of origin.
11. ☐	Explain the stages of the protection process.
12. ☐	Explain the purpose of the IPO questionnaire and time limits for submitting questionnaire.
13. ☐	Provide information on the interview at IPO
14. ☐	Provide information on an appeal to IPAT (10-15 day deadline) and either an oral hearing or a papers-only appeal.
15. ☐	The application for permission to remain, the ongoing obligation to inform the minister of any change of circumstances and the 5-day statutory deadline after receipt of appeal decision.
16. ☐	The possibility of voluntary return and the implications of a deportation order.
17. ☐	Explain the onus and importance of giving a full, detailed, accurate and truthful account and the obligation to assist in the presentation and preparation of an international protection claim; the onus on the client to remain proactive and the duty to cooperate.
18. ☐	Explain the possibility of getting country of origin information on similarly situated persons
19. ☐	Explain the possibility of obtaining supporting evidence and identity documents and the importance of retaining postal envelopes.

International Protection Pre-Questionnaire Consultation Checklist

Checklist	Information
20. ☐	Explain the relevance of internal protection and internal relocation as an option and potential for accelerated appeal.
21. ☐	The importance of supplying all information in questionnaire, including a full and detailed account of the events giving rise to the claim for protection.
22. ☐	Explain the importance of filling in family details for any potential future family reunification application.
23. ☐	Explain Family reunification, qualifying family members and time limits for application.
24. ☐	Explain the implications of 15(3) (a-c) regarding any children born or later entering Ireland and the duties of the international protection applicant.
25. ☐	Ascertain whether there is any possibility of exclusion clauses of the convention being applied.
26. ☐	Explain the cessation clauses and the possibility of voluntary return.
27. ☐	Ascertain Whether any other potential entitlements exist to obtain legal status, e.g. if the client is married to EU citizen.
28. ☐	Explain the implications of 39 (4) findings: issues raised irrelevant to international protection; clearly unconvincing claim; failed to claim asylum at first opportunity; internal protection available; country of origin designated as safe country.
29. ☐	Confirm whether presence of vulnerability indictors eg. trafficking, domestic violence, torture and refer to services, if necessary.
30. ☐	Confirm whether any relevant medical issues and sign authority, if necessary.

***Board staff only**

Appendix B

The Credibility Indicators

February 2017

Credibility assessment refers to the process of gathering relevant information from the Applicant; examining it in the light of all the information available to the Panel member; and determining whether and which of the statements and other evidence relating to material elements of the claim can be accepted. These accepted facts may then be taken into account in the analysis of the well-founded fear of persecution and real risk of serious harm. Applications must be examined and decisions taken individually, objectively and impartially but there is no infallible and fully objective means to assess the credibility of the material facts presented by the Applicant. To minimize subjectivity, credibility indicators should be used. No one indicator is a certain determinant of credibility or non-credibility. Panel members must be aware of the assumptions that underlie each indicator, and understand the factors and circumstances that can render them inapplicable and/or unreliable in an individual case (see Limitations on Credibility Assessment).

CREDIBILITY INDICATOR	✓	EXPLANATION
SUFFICIENCY OF DETAIL & SPECIFICITY		The Panel member must assess if the level and nature of the detail provided by the Applicant is reasonable and indicative of a genuine personal experience by someone with the Applicant's individual and contextual circumstances (age, gender, region of origin, education etc.)
INTERNAL CONSISTENCY		'Internal consistency' relates to consistency within an interview, or within the written and oral statements by the Applicant, or between the statements and documentary or Other evidence submitted by the Applicant. It requires a lack of discrepancies, contradictions, and variations in the information provided
CONSISTENCY OF APPLICANT'S STATEMENTS WITH INFORMATION PROVIDED BY FAMILY MEMBERS OR WITNESSES		Consistency in the facts presented by the Applicant with any statements made by dependants, other family members or witnesses may be considered an indicator of credibility.
CONSISTENCY OF APPLICANT'S STATEMENTS WITH AVAILABLE SPECIFIC AND GENERAL INFORMATION INCLUDING COI		The Panel member must assess the credibility of the material facts presented by the Applicant against what is generally known about the situation in the country of origin or place of habitual residence; accurate, independent and time-appropriate COI; available specific information; or other expert evidence (medical, anthropological, language analysis, document verification reports)
PLAUSIBILITY		'Plausibility' relates to what seems reasonable, likely or probable. The Panel member must be careful not to base a credibility finding on subjective assumptions, preconceptions, conjecture and speculation, but rather on independent, objective, reliable and time-appropriate evidence.

Appendix C

International Protection Act - Solicitors Checklist

February 2017

The International Protection Act 2015 will for the first time require that an analysis of refugee status and subsidiary protection eligibility is conducted in a single procedure. Within that analysis the law also requires that an analysis of refUgee status eligibility be conducted first and then, only where an applicant does not qualify, that an analysis of subsidiary protection take place. Applications for "Permission to Remain" will be assessed separately if an applicant does not qualify for international protection and should be considered distinctly from such applications. What follows below is a brief outline of some of the steps of analysis that should be undefiaken when preparing submissions or reviewing a case.

ISSUES	COUNSEL FILE NOTES/QUESTIONS	✓
STAGE ONE - DETERMINE THE FACTS		
CAPACITY	**Given the inconsistencies, lack of detail, etc may be seen as negative credibility indicators does your applicant have any medical reports to suggest that he or she may have troubles with memory, PTSD etc. ?**	
IDENTITY	**A determination of the applicant's nationality, including whether the applicant is stateless, and if so, what is/are the country/countries of former habitual residency. There may also be a consideration of whether Article ID or IE of the Refugee Convention applies or of whether the applicant(s) country of nationality is a designated safe country of origin.Remember, that in certain, limited cases an applicant's identity could lead to protection even where his/her story is disbelieved.**	
APPLICANT'S CLAIM	**A basic consideration of the nature of the applicant(s)'s claim(s) for protection including the identification of relevant facts core to the applicant' s case. Note should be made of any included dependents or minors and documents available or obtainable for submission by the applicant, including a consideration of whether they are originals or verified documents. Relevant to an applicant's fears are information about family and similarly situated persons. Be very clear who the applicant fears and why. Remember that a protection interview is specific to your applicant. The greater the detail you have about his or her experiences the better prepared you will be to handle issues that arise and to provide the decision maker with necessary detail to help 'shape' the narrative. In IPA for example, detail will be necessary for the second prong analysis [see below].**	
CREDIBILITY ISSUES	**An assessment of credibility will firstly require the identification of the material facts of the claim. Material facts go to the heart of a claim, peripheral ones do not. Determining credibility will require an analysis of the material fäcts asserted by the applicant in order to determine which of these material facts can be accepted for analysing well founded fear and serious harm.** **When attempting to understand the applicant's story examine any area where detail is missing or it seems implausible, understanding that being able to give an explanation for missing detail or implausibility will help the decision maker deal with that credibility indicator. A pattern of minor credibility issues may be relevant to whether the examiner is satisfied as to the applicant's general credibility and consequently whether the benefit of the doubt may be applied in appropriate cases. Key credibility indicators are:** ☐ Sufficiency of detail and specificity. ☐ Intemal consistency of oral and written information provided by the applicant. ☐ External consistency of applicant's statements with COI/other evidence. Plausibility.	

STAGE TWO - ANALYSE REFUGEE PROTECTION STATUS

PERSECUTION IPA, S.7	**It is very important to focus on a couple of things about persecution. Firstly, it can be cumulative and secondly, there is a subjective element in that different persons can react differently to the same thing. Remember as well that there is a 'presumption ' that if an applicant has been persecuted/faced serious harm before that will create a serious indication for believing — absent good reasons — that it will happen again. [s. 28(6)]**
NEXUS IPA, 2(1), 8, 31	**An analysis of whether the feared persecution has a nexus to the Convention. The grounds are set out in the definition of "refugee" which is contained in Section 2(1) of the International Protection Act 201 5:** **☐ race** **☐ religion** **☐ nationality** **☐ membership of a particular social group** **☐ political opinion** **Further guidance on the interpretation of these terms is set out in Section 8 of the Act. Note: (l) the claimed absence of state protection (see s.3 1 of the International Protection Act 2015) may be linked to a convention nexus. (2) The refugee definition states that persecution can be 'for reasons of' which necessarily implies that imputed characteristics that form the basis of persecution may satisfy the nexus requirement regardless of whether those imputed characteristics are true of the applicant. For a useful overview see:** **http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.htm 189&query=mpsg 2012**
OBJECTIVE BASIS	**Once the feared harm is identified as persecutory and having a nexus to Convention an assessment will be made whether, if the applicant were to return to his/her country of origin, he/she would face a 'reasonable chance' of future persecution. This will normally require a consideration of relevant COI, the individual profile and experiences of the applicant, as well as the experiences of similarly situated individuals in the country of nationality. Where refugee surplace claims arise s.29 of the International Protection Act 2015 will be applicable.**
STATE PROTECTION	**Section 3 1 of the Intemational Protection Act 2015 is applicable to the consideration of whether state protection is available. The analysis should consider whether the applicant or a similarly situated person can genuinely avail of meaningful state protection, having regard to factors such as: the applicant's profile; the general state of law, order, and justice in the country and its effectiveness, including the resources available to the State and its ability and willingness to use them properly and effectively to protect residents; statements of the applicant on the availability of state protection; whether the applicant sought protection prior to fleeing and whether it might reasonably have been fonhcoming if he/she had by reference to available COI . Section 28(4) of the Intemational Protection Act 2015 references some of the factors listed here.**
INTERNATIONAL PROTECTION ALTERNATIVE	**Internal Protection Alternative requires a two pronged analysis. It is up to the decision maker to identify a 'specific' IPA. The first thing that must be established is that it is 'practical', 'legal', and 'safe' [s. 32(l)(b)] to get to the IPA. If so, then the IPA itself must be safe from any serious harm/persecution — not simply what is being fled from. If the IPA is safe then the second prong involves whether it would be 'reasonable' for the applicant to live there and this is where a detailed knowledge of the applicant's particular circumstances becomes critical [s.28(4)(c)].**

STAGE THREE - ANALYSE SUBSIDARY PROTECTION STATUS

As a solicitor you will not be sure whether a decision maker may grant the applicant refugee status and therefore make an assessment of subsidiary' protection irrelevant. Consequently, you will need to address subsidiary protection as well. A solicitor will utilise the same facts for this analysis but rather than analyse 'persecution' the analysis will be of 'serious harm'. Nexus is also irrelevant to subsidiary protection. It is likely that the arguments with respect to 'state protection' and 'internal protection alternative' will be similar but keep an eye out for any particular circumstances of the applicant which might make the outcomes different. For example the 'persecutor' may be different than an actor of 'serious harm' and the consequences of persecution may differ from those of serious harm.

SUBSIDARY PROTECTION	**Per s.2 of the International Protection Act 2015, there are three distinct forms of 'serious harm' that may give rise to an application for subsidiary protection: a) death penalty or execution, (b) torture or inhuman or degrading treatment or punishment, or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in a situation of international or intemal armed conflict. The analysis here will consider whether the harm feared meets one or more of these definitions.**
OBJECTIVE BASIS	**Having identified the feared harm, an assessment must be carried out of whether, if the applicant were to return to his/her country of origin, there are substantial grounds for believing that that he/she would face a 'real risk' of serious harm. In the case of (c) this normally requires both an assessment of the level of indiscriminate violence and the factors particular to the applicant that show he/she would be specifically affected per the Elgafagi case. See as well the Diakité case re. the definition of intemal armed conflict. A good analysis of (c) can also be found in EASO's Judicial Analysis: https://www.easo.europa.eu/sites/default/files/public/Article-15c-QualificationDirective-201 195 EU -A-j udicial-analysisl .pdf**
EXCLUSION	**See Sections 10 and 12 of the International Protection Act 2015. Please note exclusion clauses for subsidary protection are wider than for refugee status.**
CASE LAW	**Know your case law well and where you see difficult areas of the applicant's claim be prepared with helpful case law. This means Irish law, CJEU, ECtHR and 'persuasive' foreign law — particularly common law. While not binding, it can provide guidance for decision makers and arguments for you. In particular, with regard to refugee law see the Canadian IRB's paper on: http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/ RefDef.aspx**
COI	**COI is a critical component when evaluating future harm. Where possible, always use COI From impeccable sources and be prepared to argue against biased COI Or COI being used to provide policy direction for decision makers [UKBA OGN s]. Where some COI runs against your own COI be prepared to present an argument why a decision maker should choose yours. Highlight pertinent passages for the decision maker.**

Appendix D

Determining Nationality, Former Habitual Residence & Article 1E Countires

February 2017

ANALYSING NATIONALITY

The general rule in asylum law is that a country is expected to be able and willing to protect its citizens or residents. Only when it is not, will 'surrogate ' protection be available. Therefore, it is critical to know which countries are in play. A person might (i) have single, dual, or even multiple nationality; (ii) be stateless [Former Habitual Residence], or (iii) have single, dual, or multiple nationality and be living in another country where he or she has the rights and obligations of a national of that country. In the latter case he or she may be excludable under Article I E. Consequently, it is critical at the outset to establish an applicant's nationality or residency.

ARTICLE 1E

Section I0(1)(b) of the International Protection Act 2015 is based upon Article 1E of the Convention and reads:
A person is excluded under this Act from being a refugee where 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. Irish law does not have a similar provision for subsidiary protection claims.

STATELESSNESS / FORMER HABITUAL RESIDENCE

While an Applicant with multiple nationalities must establish against each of his/her countries of nationality that there is a reasonable chance of persecution if returned, the definition of statelessness does not require a similar analysis with respect to countries of Former Habitual Residence. In these cases, it is sufficient if the Applicant can establish his/her fear of future persecution in any country of Former Habitual Residence as well as establish that no other country of Former Habitual Residence can provide him/her with protection. [See the UNHCR Handbook, paragraphs 104 and 105]. Please note that this issue is before the Supreme Court on appeal from T (D) v Refugee Appeals Tribunal & Min for Justice (No 2) [2012] IEHC 652 (O'Keeffe J.)

The Chart below provides a method of navigating the issue of nationality, Former Habitual Residence [statelessness] and Article 1E.

Does the Applicant have a country of Nationality?

Yes

Country(ies) of Nationality
If an Applicant has one Country of Nationality, then his/her claim is to be assessed only against that country subject t the exception below

Article 1e Exception
Is the Applicant potenitally excluded under Section 10(1)(b) of the International Protection Act 2015 [Article 1e]? if there is potential Article 1E country then there will not need to be a review of any Country(ies) of Nationality as the Applicant will be excluded. If, however, the Applicant would face a real chance of persecution if returned to the putative Article 1e country, then Article 1e will not apply and the claim must be assessed againsty ay conutry(ies) of nationality.

No

Step One: Former Habitual Residence only comes intoplay if the Applicant is stateless. Identify the Applicant's country or countries of Former Habitual Residence.

Step Two: Identify whether the Applicant faces a reasonable chance of perseution if returned to any country of Former Habitual Residence.

Step Three: If he/she does not face a well-founded fear in any country of Former Habitual Residence then the person is not a refugee. If he/she does face a well-founded fear in any country of Former Habitual Residence then determine whether there is another country of Former Habitual Residence which would accept him/her back and where the Applicant and where the Applicant would be safe from persecution. if there is, then the person will not be a refugee. if there is not, then the person will be a refugee.

Factors to consider when analysing Article IE

1. **N**ature of the residency rights. The authorities of the putative Article IE country must recognise the Applicant as having the 'rights and obligations' of a national of their country 'or rights and obligations equivalent to those'.
2. Rights and Obligations of a National. The "rights and obligations" generally entail (a) The right to return to the Country of Residence; (b) The right to work freely without restrictions; (c) The right to study; (d) Full access to social services. It is recognized that these rights and obligations will vary from country to country.
3. Onus to Renew Status. Once a prima facie case has been established that an Applicant is subject to Article IE then the onus shifts to the Applicant to demonstrate why he/she cannot return to that country. This can involve renewing status, obtaining travel documents and so on.
4. State Protection. Given that one of the 'rights' of nationals is to state protection then if the Appl icant faces a 'real chance' of facing persecution upon return, then the country will not be an Article IE country and the assessment will be carried out against any country(ies) of nationality.

Appendix E

Persecution Flow Chart

February 2017

Acts of persecution [International Protection Act, 2015]

7. (1) For the purposes of this Act, acts of persecution must **be-**

(a) sufficiently serious by their nature or repetition 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) an accumulation of various measures, including violations of human fights, which is sufficiently severe as to affect an individual in a similar manner as mentioned in paragraph (a).

7. (2) The following are examples of acts which may amount to acts of persecution for the purposes of subsection (1):

(a) acts of physical or mental violence, including acts of sexual violence;

(b) legal, administrative, police orjudicial measures, ora combination of these measures, that are in themselves discriminatory or are implemented in a discriminatory manner;

(c) prosecution or punishment that is disproportionate or discriminatory;

(d) denial ofjudicial 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 of a kind referred to in Section 10(2);

(f) acts of a gender-specific or child-specific nature.

7. (3) For the pumose of the definition of "refugee" in Section 2, there must be a connection between the reasons for persecution and the acts of persecution or the absence of protection.

(1) Acts of Persection	Must consitute a severe violation of basic human rights - see Article 15(2) of European Convention for the Protection of Human Rights. to be distinguished from harrassment or discrimination.	
	Serious in Nature	Death / Torture / Slavery / Forced Labour / Punishment without Law / Forced Abortion / FGM
	Serious in Repetition	Repetitive Assaults
	Cumulative	Series of harrassments which indiviudally do not amount to serious violation of human rights but cumulatively do.
(2) Examples of Persection	**Violence:** Physical, Sexual or Mental	Assault, rape, forced marriage
	Discriminatory Measures: Legal, Administrative, Police, Judicial	These would be laws, etc. which are not of general applicaiton but single out certain groups.
	Measures implemented in a discriminatory manner: Legal, Administrative, Police, Judicial	Laws of general application but applied unfairly to certain groups
	Prosecution or Punishment: Disproportionate or discriminatory	Could be relevant where applicant is fleeing prosecution
	Denial of Judicial Redress: Resulting in a disproportionate discriminatory punishment	Detention without right of judicial review. Article 5(4) of ECHR
	Prosecution for Military Service Avoidance: Involving Exclusionary Acts	Ordinary requirement to perform military servce would not be persecutory nor would a reaosnable penalty for refusing to serve, but being punished for avoiding exclusionary activities would be persecutory.
	Acts of a Gender Speicifc or Child-Specific Nature	FGM, Child Trafficking
(2) Nexus	There must be a connection between the persecution and one of the 5 grounds in the convention.	

EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FREEDOMS

Article 15 - Derogation in time of emergency
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

Article 2 — Right to life
1. Everyone's right to life shall be protected by law. No one shall be deprived of 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 - Prohibition of slavery and forced labour
1. 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.

Some Canadian Judicial Observations

- Torture, beatings and rape are prime examples of persecution
- The term “discrimination” is not adequate to describe behaviour which includes acts of violence and death threats
- Death threats may constitute persecution even if the persons making the threats refrain from carrying them out, Whether death threats do amount to acts of persecution depends upon the personal circumstances of the claimant.
- When imposed for certain offences, the death penalty may not constitute persecution.
- Forced or strongly coerced sterilization constitutes persecution, whether the victim is a woman or a man. Forced abortion also constitutes persecution, as does the forcible insertion of an IUD.
- Female circumcision is a "cruel and barbaric practice", a "horrific torture", and an 'atrocious mutilation".
- For "persecution" to exist within the meaning of the definition, it is not necessary for the subject to have been deprived of his freedom.
- The bringing of a trumped-up charge, and interference in the due process of law, may be aspects of persecutory treatment.
- The fact that the claimant, along with al of his or her co-nationals, suffers curtailment of freedom of speech, in and of itself does not amount to persecution.
- Barring one claimant from obtaining citizenship and from taking part in political activities, and barring a second claimant (a citizen) from voting and from otherwise participating in the political process, did not constitute persecution, where the claimants enjoyed numerous other rights.
- Punishment for violation of a law concerning dress may constitute persecution.
- Denial of a right of return may constitute an act of persecution.
- Economic penalties may be an acceptable means of enforcing a state policy, - where the claimant is not deprived of his or her right to earn a livelihood.
- Where the state interferes substantially with the claimant's ability to find work, the possibility of the claimant's finding illegal employment is not an acceptable remedy.
- Permanently depriving an educated professional of his or her accustomed occupation and limiting the person to farm and factory work constituted persecution.
- By itself, confiscation of property is not sufficiently grave to constitute persecution.
- Serious economic deprivations may be components of persecution.
- Extortion may be one of the indicia of persecution, depending upon the reason for the extortion and the motivation of the claimant in paying.
- A child who would experience hardships including deprivation of medical care, education opportunities, employment opportunities and food would suffer concerted and severe discrimination, amounting to persecution.
- Education is a basic human right and a nine-year-old claimant who could have avoided persecution only by refusing to go to school was deemed to be a Convention refugee.
- It is not an act of persecution to ban certain groups of children from attending public schools, if they are permitted to have their own schools.
- Forcing a woman into a marriage violates one of her basic human rights.
- An impediment to the claimant's marrying in her homeland did not constitute persecution.

- Legal restrictions allowing certain categories of people to settle only in certain areas did not constitute persecution.
- A law which requires a person to forsake the principles or practices of his or her religion is patently persecutory, so long as the principles or practices in question are not unreasonable. Sanctions such as a short detention, fine or re-education term, which might have been imposed upon the claimant för practising his religion or belonging to a particular religious commnunity, were serious measures of discrimination and constituted persecution.
- Lamentable rough treatment, involving detention and interrogation, in a country that is experiencing serious terrorist activity, does not of itself amount to persecution.
- Minor children who are expected to provide support for other family members, after being smuggled into Canada, are not persecuted by their parents.
- The act of being illegally trafficked is not in itself persecution simply because the claimant is a minor.
- Restrictions by a state on a foreign spouse's entry into its territory that are not made on a discriminatory basis do not constitute persecution.
- Insults and attacks on a conscientious objector while in prison do not constitute persecution.

http://www.irb-cisr.gc.ca/Eng/BoaCom/references/Legjur/Pages/RefDef.aspx

Appendix F

State Protection Flow Chart

February 2017

In s. 31 of the International Protection Act, 2015 'Protection' is defined: "protection against persecution or serious harm" shall be regarded as being generally provided where reasonable steps are taken by a state or parties or organisations, including international organisations, controlling a state or a substantial part of the territory of that state to prevent the persecution or suffering of serious harm by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, where the applicant has access to such protection... [Emphasis added]. There are therefore (1) those who act to provide 'protection' and (2) the standards that must apply before it may be held that protection would be available to an applicant upon return.

Step 1	**Identify the Actors of Protection**	**There could be more than one if the state-only controls part of its territory, in which case there may be a different protection agent for the IIPA.**
	The State	**The State is presumed to be in control of its territory and to be able to provide protection.**
	Other Parties/ Organisations	**Evidence may well displace the presumption that the State is in control of all its territory, in which case one would need to look at what other parties - including international organisations - are de facto in control. See S31(3).**
Step 2	**Identify the standards and whether they have been met**	**Bear in mind that the protection is qualified by standards which "generally provide" protection. in each case, you will need to assess whether the preventative steps taken would protect the applicant.**
Step 2.1	**Is the protection effective and non-temporary**	**Particularly with respect to non-state agencies the protection offered may be neither durable nor effective.**
Step 2.2	**Have reasonable steps been taken to prevent persecution or serious harm by operating an effective legal system**	**You will to assess whether the state has taken steps to prevent persecution and serious harm that are reasonable within the country's context. You will also need to assess whether the legal system is effective as measured by the standards outlined. As protection adjudication concerns individuals you will need to assess whether the protection would be effective for the applicant**
	Detention (Police)	**Do the police attempt to prevent crime [patrols, etc.] and do they investigate complaints in a timely fashion?**
	Prosecution (Justice System)	**Does the Justice system [prosecutors] take police investigations and, where appropriate, prosecute those accused of crime?**
	Punishment (Judiciary)	**Does the Judiciary convict, where appropriate, and do punishments fit the crime?**
	Accessible?	**Is the applicant able to access the legal system?**
Step 2.2	**Have other reasonable steps been taken to prevent persecution or seirous harm?**	**Apart from an effective legal system has the state taken any other reasonable steps to 'prevent' persecution or serious harm? Perhaps, it has brought in outside training for its forces, legislated anti-corruption laws aimed at police, prosecutors or judges. Are these steps 'reasonable' given the problems that the aim to address?**
	Identify them	**What are the reasonable steps that have been taken?**
	Accessible?	**Is the applicant able to access these other preventative measures?**

Appendix G

INTERNATIONAL PROTECTION ALTERNATIVE CHECKLIST

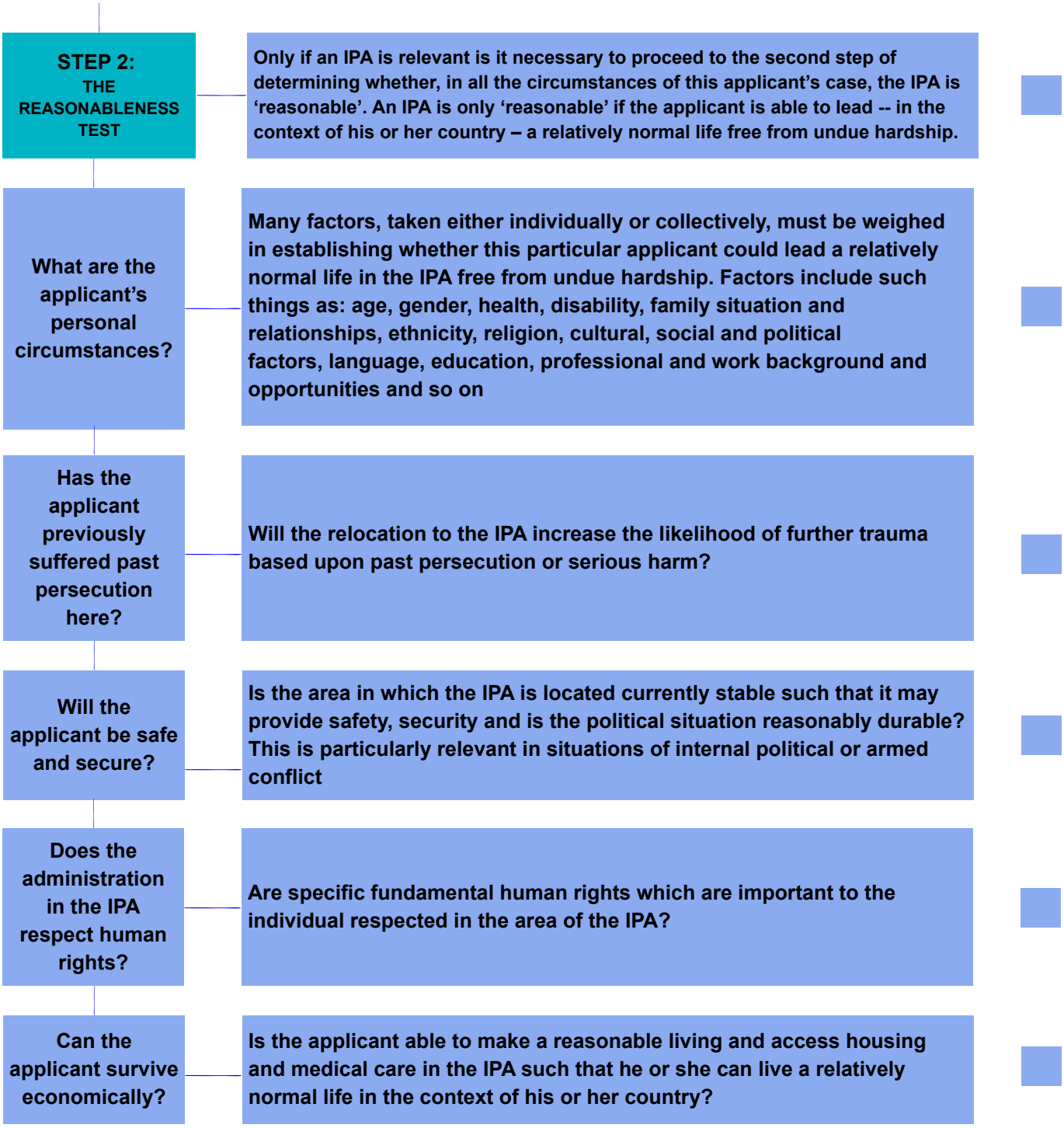
February 2017

GENERAL DIRECTIONS

Neither the 1951 Convention nor the EU Directives require or even suggest that the fear of being persecuted or of being at risk of serious harm need always extend to the territory of the applicant's country of origin. The concept of an internal protection alternative [IPA] therefore refers to a specific area of the country where there would be no reasonable chance of a well-founded fear of persecution or real risk of serious harm and where, given the particular circumstances of the case, the individual could reasonably be expected to establish him or herself without undue hardship. Consequently, if an internal protection alternative is to be considered in the context of a protection determination, a specific area must be identified by the decision maker and the applicant provided with an adequate opportunity to prepare or respond.

The analysis of whether an IPA would apply in a given case requires a two-fold analysis: (I) Is the identified IPA 'Relevant'? (II) If an IPA is relevant, is it 'Reasonable'? In order to analyse an IPA the decision maker or counsel must have a thorough understanding of the applicant's personal circumstances in order to identify a likely IPA before the hearing.

ISSUES	ISSUE DETAILS	✓
IDENTIFICATION OF THE IPA	**If the decision maker intends to rely upon a possible IPA has he or she identified a specific location and provided the applicant with adequate notice?**	
STEP 1: THE RELEVANCE TEST	**Given the circumstances of the particular case is an IPA relevant? In other words, if the applicant were able to relocate would he or she be able to safely, legally and practically get to the suggested IPA? And if so, would he or she be able to remain there safe from the feared persecution or serious harm or from any other new persecution or serious harm that might arise in the IPA?**	
Is the IPA Accesible?	**Can an applicant reach the IPA safely, practically and legally and remain there?**	
Is the Agent of Persecution the State?	**It is a presumption that states are in full control of their territory such that if the state is the persecutor or the agent of serious harm an IPA is not possible. However, as with any presumption, this can be displaced with evidence that in any particular case a state is not in control of an area where an IPA may exist.**	
Is the Agent of Persecution a non- State Agent?	**If a non-State agent is the feared persecutor or the potential cause of a real risk of serious harm then an IPA will only be relevant if (a) that agent will not pursue the applicant or if he or she does so (b) there will be effective state protection**	
Is the applicant at risk of other persecution or serious harm?	**If the applicant would be at real risk of persecution or serious harm in the IPA or would be exposed to new forms of persecution or serious harm from which there would be no state protection, then the IPA is not relevant.**	


STEP 2:
THE REASONABLENESS TEST
Only if an IPA is relevant is it necessary to proceed to the second step of determining whether, in all the circumstances of this applicant's case, the IPA is 'reasonable'. An IPA is only 'reasonable' if the applicant is able to lead -- in the context of his or her country – a relatively normal life free from undue hardship.
What are the applicant's personal circumstances?
Many factors, taken either individually or collectively, must be weighed in establishing whether this particular applicant could lead a relatively normal life in the IPA free from undue hardship. Factors include such things as: age, gender, health, disability, family situation and relationships, ethnicity, religion, cultural, social and political factors, language, education, professional and work background and opportunities and so on
Has the applicant previously suffered past persecution here?
Will the relocation to the IPA increase the likelihood of further trauma based upon past persecution or serious harm?
Will the applicant be safe and secure?
Is the area in which the IPA is located currently stable such that it may provide safety, security and is the political situation reasonably durable? This is particularly relevant in situations of internal political or armed conflict
Does the administration in the IPA respect human rights?
Are specific fundamental human rights which are important to the individual respected in the area of the IPA?
Can the applicant survive economically?
Is the applicant able to make a reasonable living and access housing and medical care in the IPA such that he or she can live a relatively normal life in the context of his or her country?

Appendix H

SECTION 15 (C) ANALYTIC FLOW CHART

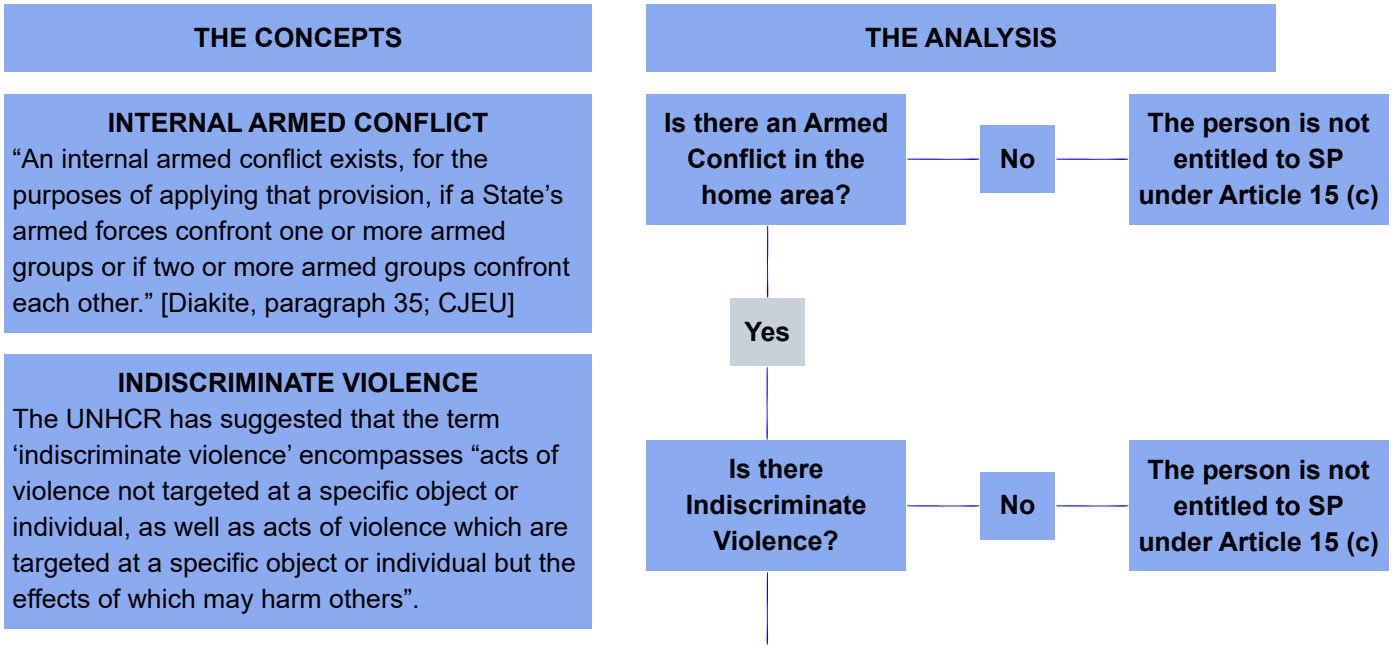
February 2017

The analysis of Article 15 (c) of the Qualification Directive [Section 2(1) of the International Protection Act 2015] requires the analysis of several concepts, only some of which have received attention from the CJEU. Consequently, the interpretation of this Article is very much a live issue. Apart from the CJEU, decisions from the ECtHR may provide guidance where similar concepts appear; similarly, decisions of national courts in the EU may also provide some guidance. This Flow Chart provides guidance on how to analyse Article 15 (c) / Section 2 (1).

Section 2 (1) of The International Protection Act 2015 defines who is 'eligible' for subsidiary protection as well as what constitutes 'serious harm'.
A person eligible for subsidiary protection means a person (a) who is not a national of a Member State of the European Union, (b) who does not qualify as a refugee, (c) in respect of whom substantial grounds have been shown for believing that he or she, if returned to his or her country of origin, would face a real risk of suffering serious harm
and who is unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country, and (d) who is not excluded undersection 12 from being eligible for subsidiary protection. Of particular note is that the person does not qualify for refugee protection and that the person faces a 'real risk of suffering serious harm' if returned to his or her country of origin.

"Serious harm" 'means – (a) death penalty or execution, (b) torture or inhuman or degrading treatment or punishment of a person in His or her country of origin, or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in a situation of international or internal armed conflict.'

In this analysis we are concerned only with the third limb of 'serious harm'

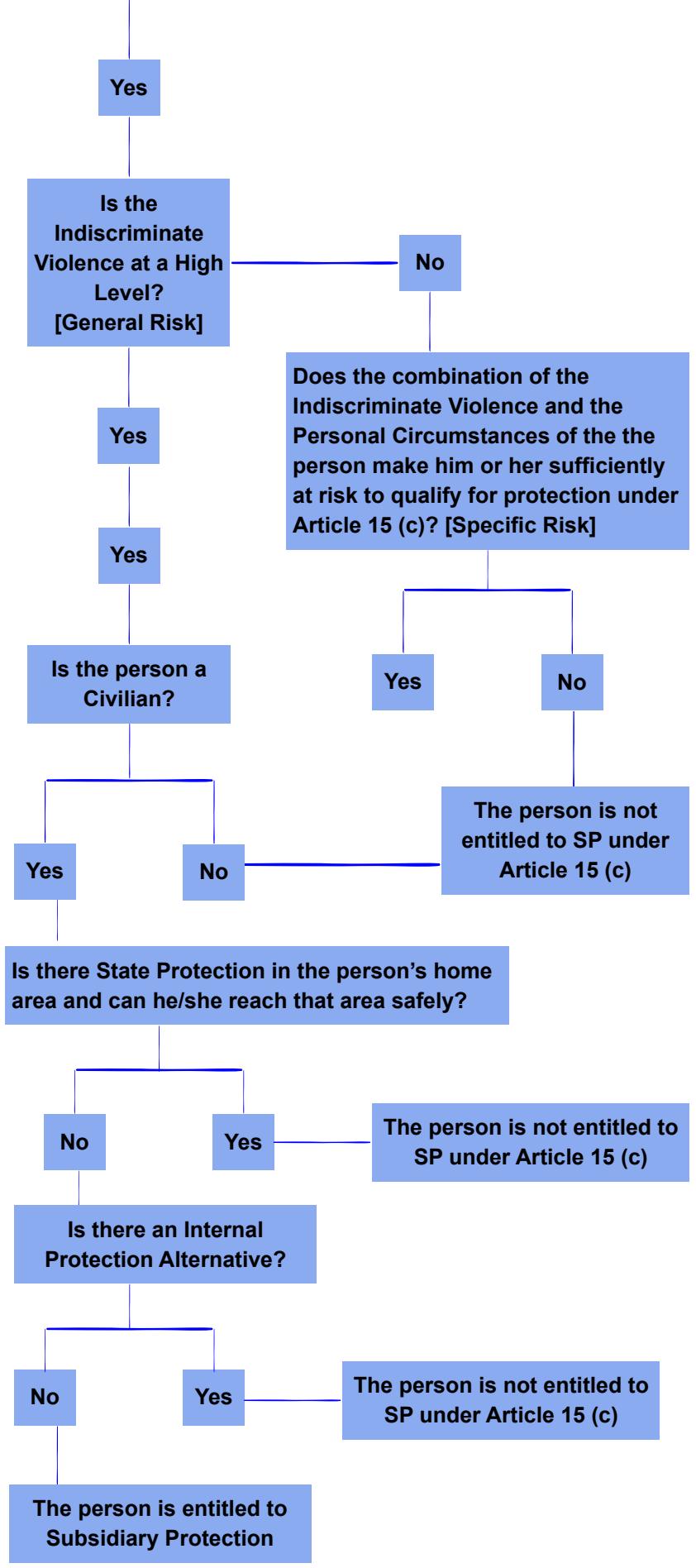


HIGH LEVEL INDISCRIMINATE VIOLENCE
[General Risk]
In Elgafaji the CJEU stated that: "the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place... reaches such a high level that substantial 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"

INDISCRIMINATE VIOLENCE WITH INDIVIDUAL FACTORS: THE SLIDING SCALE [Specific Risk]
Where the violence does not reach the level noted above, then personal characteristics of the Appellant may come into play. This is what is known as Elgafaji's 'sliding scale'. At paragraph 39 the Court states 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". Article 4 (3) of the QD [Section 28] requires that a decision maker evaluate all personal characteristics when analysing SP. Therefore, the 'personal circumstances' referred to in Elgafaji include any factor which may increase an individual's risk even though those factors may have qualified him/her for RSD. See FAC, UKUT cases.

CIVILIAN
Although there are many definitions of 'civilian' each case must be examined on its own. The ICRC has defined 'civilians' as "all persons who are not members of State armed forces or organised armed groups of a party to the conflict". The UNHCR adds to this that where a former combatant has specifically and genuinely given up violence he/she too could qualify for SP.

CIVILIAN'S LIFE OR PERSON
While the meaning of 'life' is clear the meaning of 'person' is less so. The UNHCR has stated that the 'harm' to a civilian's life or person can involve 'psychological' or 'mental' harm as well as 'physical' and in HM the UKUT stated this harm could also derive from indirect forms of violence such as intimidation, blackmail, kidnapping and so on.

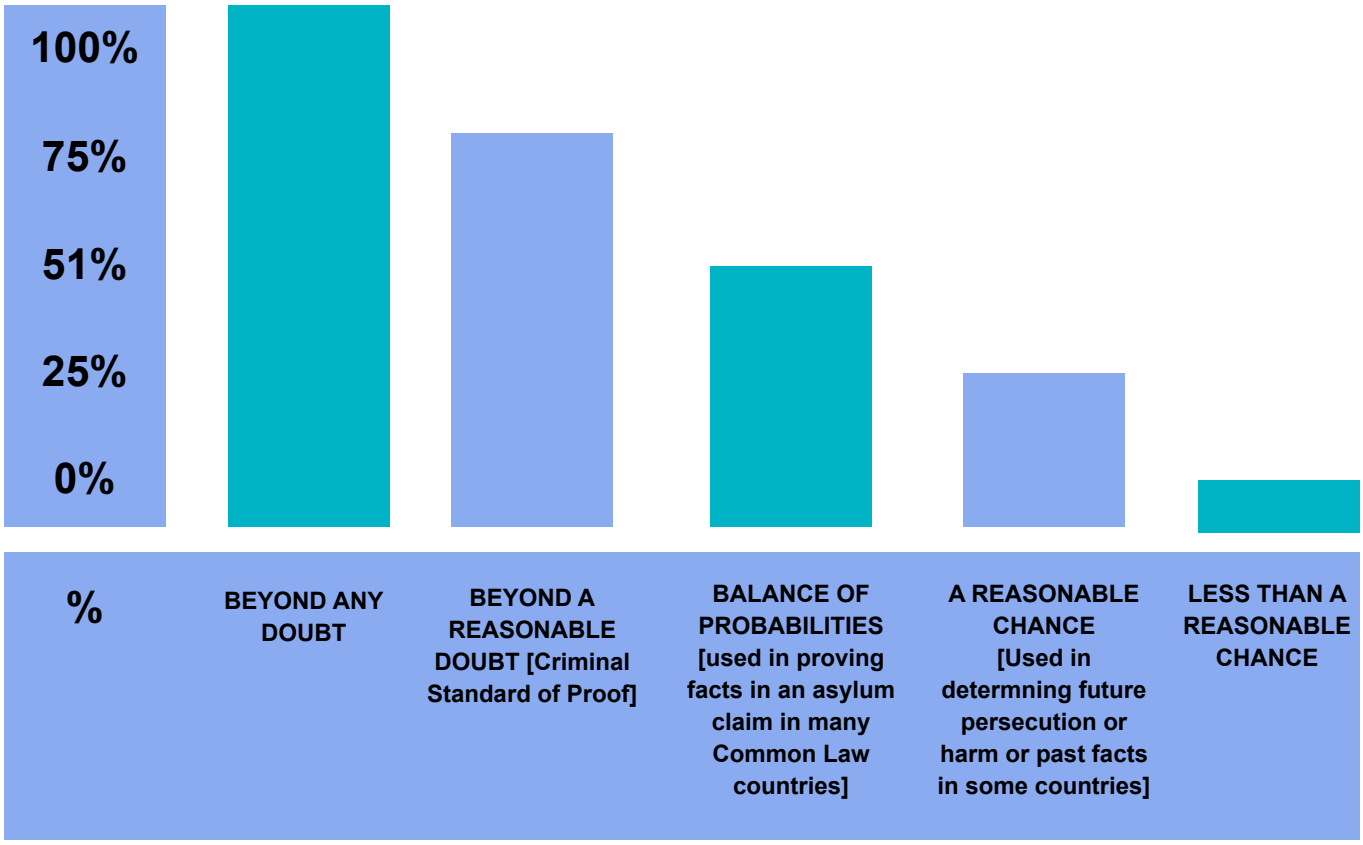


Appendix I

STANDARDS OF PROBABILITY AND ASSESSMENT OF FUTURE RISK

February 2017

International protection determinations are conducted with a two-stage approach. Stage one is the gathering of relevant information, the identification of the material facts of the application and the determination on the Balance of Probabilities which of the Applicant's statements and other evidence can be accepted. Stage two is the analysis of the well-founded fear of persecution and real risk of serious harm.



The chart above is representational only. It is meant to give a simplified view of how 'standards of probablity' and 'assessments of future risk' operate. There are many such 'standards' but this chart seeks to identify only the more common ones. The numerical values are inserted only for scale purposes and do not represent a 'numerical' factor which each level should reach

Appendix J

ARTICLE 1(F) EXCLUSION CHECKLIST: PAGE 1

February 2017

The rationale for the exclusion clauses under Article 1(f) of the Refugee Convention is to deny protection to Applicants who have committed international crimes so severe as to remove from them the right to international protection. Given the seriousness of this consequence this clause must be applied restrictively and with great care and only after a full assessment of the individual circumstances of the case.

The Exclusion provisions are incorporated into European law under provisions of the **QD**. While the **QD** provision on refugees [Article 12] closely mirrors the Convention definition as outlined above, Article 17 [Subsidiary Protection] differs somewhat. The definition of a 'serious' crime does not require that it be 'non political' nor committed 'outside the country of refuge' nor 'prior to his or her admission as a refugee'. The Exclusion provisions are incorporated into domestic law under the International Protection Act 2015. Section 10 deals with refugees, while Section 12 applies to subsidiary protection.

Section 10 reads:
…..
(2) A person is excluded from being a refugee where there are serious reasons for considering that he or she—...
(a) 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) has committed a serious non-political crime outside the State prior to his or her arrival in the State, or
(**c)** 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) A person is excluded from being a refugee where there are serious reasons for considering that he or she has incited or otherwise participated in the commission of a crime or an act referred to insubsection (2).

Section 12 reads:
(1) A person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that he or she—
(a) 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) has committed a serious crime,
(c) 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,
or
(d) constitutes a danger to the community or to the security of the State.
(2) A person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that he or she has incited or otherwise participated in the commission of a crime or an act referred to in subsection (1).
(3) A person is excluded from being eligible for subsidiary protection if he or she has, prior to his or her arrival in the State, committed a crime, not referred to in subsection (1), which, if committed in the State, would be punishable by imprisonment and if he or she left his or her country of origin solely in order to avoid sanctions resulting from that crime.

ISSUES	ISSUE DETAILS	✓
SECTION 10 OF THE INTERNATIONAL PROTECTION ACT 2015: EXCLUSION FROM REFUGEE STATUS		
Section 10(2)(a)	A person is excluded from being a refugee where there are serious reasons for considering that he or she—... **(a)** 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,	
Crimes Against Peace	According to the London Charter a **crime against peace** involves the "planning, preparation, initiation or waging of a war of aggression, or a war in violation international treaties, agreements, or assurances, or participation in a common conspiracy for the accomplishment of any of the foregoing". Given the nature of this crime, it can only be committed by those in a high position of authority representing State or a State-like entity. In practice, this provision has rarely been invoked.	

War Crimes

Certain breaches of international humanitarian law constitute **war crimes**. Although such crimes can be committed in both international and non-international armed conflicts, the content of the crimes depends on the nature of the conflict. War crimes cover such acts as willful killing and torture of civilians, launching indiscriminate attacks on civilians, and willfully depriving a civilian or a prisoner of war of the rights of fair and regular trial.

Crimes Against Humanity

The distinguishing feature of **crimes against humanity**, which cover acts such as genocide, murder, rape and torture, is that they must be carried out as part of a widespread or systematic attack directed against the civilian population. An isolated act can, however, constitute a crime against humanity if it is part of a coherent system or a series of systematic and repeated acts. Since such crimes can take place in peacetime as well as armed conflict, this is the broadest category under Section 10(2)(a).

International Instruments

Amongst the various international instruments which offer guidance on the scope of these international crimes are the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the four 1949 Geneva Conventions for the Protection of Victims of War and the two 1977 Additional Protocols, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the 1945 Charter of the International Military Tribunal (the London Charter), and most recently the 1998 Statute of the International Criminal Court.

Section 10(2)(b)

A person is excluded from being a refugee where there are serious reasons for considering that **he** or **she** —...
(b) has committed a serious non-political crime outside the State prior to his or her arrival in the State...

Serious

'Serious' refers to the nature of the crime. The nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the nature of the penalty, and whether most jurisdictions would consider it a serious crime are all relevant factors. For example, while murder, rape and armed robbery would be serious offences, petty theft would not.

Non-Political Crime

There must be a link between the crime and its alleged political objective; the act in question must also be proportionate to the political objective. Terrorist-type actions which are generally disproportionate to any political objective will normally be 'non-political'. **[Applicable only to 'refugee' analysis]**

Outside Country of Refuge

The crime must have been committed outside the country of refuge and before the Applicant applied for protection. If the crime was committed after admittance, then the country's criminal laws come into play. **[Applicable only to 'refugee' analysis]**

Section 10(2)(c)

A person is excluded from being a refugee where there are serious reasons for considering that he or she—...

***(c)** 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.*

As the purposes and principles of the United Nations are quite broad, the scope of this category is unclear and rarely applied except in extreme circumstances where an activity attacks the very basis of the international community's coexistence. Such activity must have an international dimension. It would appear that, generally speaking, only persons who have been in positions of power in a State or State-like entity would appear capable of committing such acts. While some terrorist activities may apply here they may also be covered under Section 10(2)(b)

Section 10(3)	*A person is excluded from being a refugee where there are serious reasons for considering that he or she has incited or otherwise participated in the commission of a crime or an act referred to in subsection (2).* This provision, while not in the Refugee Convention, is contained in the 2004 QD and has been added for clarity purposes

ARTICLE 1(F) EXCLUSION CHECKLIST: PAGE 1

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The rationale for the exclusion clauses under Article 1(f) of the Refugee Convention is to deny protection to Applicants who have committed international crimes so severe as to remove from them the right to international protection. Given the seriousness of this consequence this clause must be applied restrictively and with great care and only after a full assessment of the individual circumstances of the case.

The Exclusion provisions are incorporated into European law under provisions of the **QD**. While the **QD** provision on refugees [Article 12] closely mirrors the Convention definition as outlined above, Article 17 [Subsidiary Protection] differs somewhat. The definition of a 'serious' crime does not require that it be 'non political' nor committed 'outside the country of refuge' nor 'prior to his or her admission as a refugee'. The Exclusion provisions are incorporated into domestic law under the International Protection Act 2015. Section 10 deals with refugees, while Section 12 applies to subsidiary protection.

Section 10 reads:
…..
(2) A person is excluded from being a refugee where there are serious reasons for considering that he or she—...

(a) 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) has committed a serious non-political crime outside the State prior to his or her arrival in the State, or
(c) 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)** A person is excluded from being a refugee where there are serious reasons for considering that he or she has incited or otherwise participated in the commission of a crime or an act referred to in *subsection (2)*.

Section 12 reads:
(**1)** A person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that he or she—

(**a)** 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) has committed a serious crime,
(c) 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,
or
(**d)** constitutes a danger to the community or to the security of the State.

(**2)** A person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that he or she has incited or otherwise participated in the commission of a crime or an act referred to in *subsection (1)*.
(3) A person is excluded from being eligible for subsidiary protection if he or she has, prior to his or her arrival in the State, committed a crime, not referred to in *subsection (1)*,
which, if committed in the State, would be punishable by imprisonment and if he or she left his or her country of origin solely in order to avoid sanctions resulting from that crime.

ISSUES	ISSUE DETAILS	✓

SECTION 12 OF THE INTERNATIONAL PROTECTION ACT 2015: EXCLUSION FROM SUBSIDIARY PROTECTION STATUS

Section 12	Section 12 mirrors Section 10 with a few important exceptions. Firstly, while Article 10(2)(b) requires that the 'serious' crime be 'non political' and that it be committed outside the state and prior to arrival there are no such limitations under Section 12(1)(b). Secondly, Section 12(1)(d) adds that a person may be excludable where he or she 'constitutes a danger to the community or to the security of the state'. Finally, note the addition of Section 12(3) concerning crimes committed in the home country prior to arrival in the state where those crimes would be punishable here and the sole reason for fleeing the home country was to avoid sanctions resulting that crime.

FACTORS TO CONSIDER WHEN ANALYSING EXCLUSION UNDER SECTIONS 10 AND 12 OF THE INTERNATIONAL PROTECTION ACT 2015

Individual circumstances	Apart from a thorough consideration of all the facts in the claim, a decision maker must always consider the factors listed below
Individual Responsibility	For exclusion to be justified, individual responsibility must be established. This can occur where an individual has committed, or made a substantial contribution to the act in question knowing that his or her contribution would facilitate the criminal act. While a presumption may arise due to the person's senior position in an organisation the decision maker must still consider the organisational structure and the person's actions. The mental element *[mens rea]* must also be present. For an analysis of a recent CJEU decision see http://eulawanalysis.blogspot.ie/2017/01/foreign-fighters-helpers-excluded-from.html
Defences	***Duress*** may be a defence where the person was in imminent danger to his or her life or to continuing serious bodily harm and the act he or she perpetrated is not more serious that the act feared. ***Superior Orders*** may apply only where the Applicant was legally obliged to obey the orders, the order itself was not obviously unlawful and the Applicant was not otherwise aware that the order was unlawful. In some cases, where an Applicant has already been appropriately punished for the crime, exclusion may no longer apply; although in the case of particularly heinous crimes this exception may not apply.
Proportionality	The incorporation of a proportionality test when considering exclusion and its consequences provides a useful analytical tool to ensure that the exclusion clauses are applied in a manner consistent with the overriding humanitarian object and purpose of the 1951 Convention. The concept has evolved in particular in relation to Article 1F(b) and represents a fundamental principle of many fields of international law. As with any exception to a human rights guarantee, the exclusion clauses must therefore be applied in a manner proportionate to their objective, so that the gravity of the offence in question is weighed against the consequences of exclusion. Such a proportionality analysis would, however, not normally be required in the case of crimes against peace, crimes against humanity, and acts falling under Article 1F(c), as the acts covered are so heinous. It remains relevant, however, to Article 1F(b) crimes and less serious war crimes under Article 1F(a). It is important to note that in the case of B&D v. Germany a decision of the CJEU on November 9, 2010 the court held that 'proportionality' is not required in exclusion cases under (b) and (c). [paragraph 111] However, the rationale underpinning this finding [paragraph 107] would apply equally to (a). That being said the UNHCR takes the position outlined above and it is important to recall that Article 3 of the 2004 QD specifically allows national authorities to use more favourable standards in adjudicating claims.