Developments in the assessment of the ?reasonableness test? within the Internal Protection Alternative concept in Slovenia

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I. Introduction

As a concept, the Internal Protection Alternative (IPA) provides that the asylum authority may refuse a well-founded application for international protection, if the applicant can move to another part of their country and thereby avoid fear of persecution or serious harm, if certain conditions are met. It is part of the assessment of facts, based on the subsidiarity of international protection, i.e. another state is obliged to provide international protection only if the country of origin is unable or unwilling to do so.

IPA is regulated in Article 8 of Qualification Directive. At the moment its use is discretionary. Member States are not obliged to use it. However, according to the Commission?s latest proposal of reforms of CEAS the use of this concept shall become obligatory [1].

The IPA concept does not only pertain to security in the narrow sense (in the sense of threat to the applicant's life due to indiscriminate violence in situations of internal armed conflict). The doctrine speaks of so called ?protection and reasonableness tests?. In the framework of the ?protection test? the authorities have to assess security in the area of IPA and whether there exists an effective, safe and legal access to the area. Under the ?reasonableness test? it is assessed whether the applicant could reasonably be expected to settle in this part of the country (can they lead a relatively normal life without facing undue hardship?) (Article 8(1) Qualification Directive [2] (QD) and UNHCR Guidelines on the IFA [3]). It is necessary to take into account both general and personal circumstances (the existence of past persecution, safety and security, respect for human rights, and possibility for economic survival) (Article 8(2) QD and UNHCR Guidelines).

In Slovenia IPA is used in practice, mostly regarding Kabul in cases of Afghan applicants. Practice has demonstrated that problems have been encountered in the application of IPA by decision makers, notably in the assessment of the ?reasonableness test?, and more precisely how the humanitarian situation in the country affects the application of IPA.

In this article I want to present ECtHR case law on this issue and how Slovenian administrative and judicial practice has developed in recent years.

II. Article 3 and the humanitarian situation under jurisprudence of the European Court of Human Rights (ECtHR)

The ECtHR has established two different approaches to the question of whether the poor humanitarian situation reaches the threshold of Article 3 of the Convention. The first approach has been applied in the case of *N. v. UK*, concerning the return of a HIV-positive individual whose asylum application had been rejected to Uganda. The Court found that the alleged future damage would not result from intentional acts or omissions of State or non-state entities, but from a naturally occurring illness and the lack of sufficient resources to cope with the disease in Uganda (N. v. UK, No. 26565/05 [4], 27 May 2008, §42). When damage is therefore not caused either by the state, or by non-state entities, the humanitarian situation reaches the threshold of Article 3 only in very exceptional cases.

Another approach has been formed in the case *M.S.S. v Belgium and Greece [5]*, concerning the return of an asylum seeker to Greece under the Dublin procedure. The Court reiterated that it has not excluded the possibility that the State?s responsibility is engaged under Article 3 when an applicant, wholly dependent on State support, found themselves faced with official indifference in a situation of serious deprivation or want incompatible with human dignity.

The difference between the two approaches as regards the assessment of the humanitarian situation in the area of IPA was demonstrated in the case *Sufi and Elmi v. UK [6]*, which referred to the possibility of IPA in Somaliland. The Court reasoned that if the dire humanitarian conditions in Somalia were solely, or even predominantly attributable to poverty or to the State?s lack of resources to deal with a naturally occurring phenomenon, such as drought, the suitable approach to assess whether the precarious humanitarian situation reached the threshold of Article 3 of the Convention would be the approach formed in the case *N. v. UK*. Humanitarian situation would thus reach the threshold of Article 3 only in very exceptional cases, where the grounds against removal from the country are compelling (*M.S.S v Belgium and Greece* para 253). However, since the crisis in Somalia is predominantly due to the direct and indirect actions of the parties to the conflict, the correct approach is the one adopted in *M.S.S. v Belgium and Greece*, which required the Court to have regard to an applicant?s ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time frame (para 283).

So, where the State is somehow responsible for the precarious humanitarian situation in the country, the return of an applicant to such poor living conditions would reach the threshold of Article 3 of the Convention [7].

III. Developments in Slovenian case law

In Slovenia, as regards the interpretation of IPA in cases of asylum seekers from Afghanistan, there was a significant turning point in jurisprudence in the autumn of 2014. Until then, the courts in Slovenia agreed with the assessment of the asylum authority, which considered Kabul as a reasonable IPA. To substantiate this finding the asylum authority relied on existing reports which stated that despite the applicants not having professional qualifications and relatives in Kabul, they would have a greater chance to find work, housing and build social networks, if they were young, healthy, single men (i.e. Supreme Court of Slovenia, I Up 199/2013, 6.6.2013).

It is also clear from the case law that the ?reasonableness test? started to be used only recently. Previously, the assessment mainly related to the issue of security in terms of threat to the applicant's life due to indiscriminate violence in situations of internal armed conflict. It was not required that the State would guarantee economic and social rights to the adult applicants, because the adults are expected to be able to take care of themselves. According to the jurisprudence, socio-economic conditions could be part of the IPA assessment only in exceptional circumstances: *"The applicant however, cannot rely on the poor living conditions in Kabul (poor sanitation, living in tents, huge unemployment and so forth), because they do not present serious harm within the meaning of Article 15 of Qualification Directive"*

(Supreme Court of Slovenia, I Up, 12/2013, 24.1.2013). *?Humanitarian and socio-economic conditions are exceptionally taken into account, but only in those cases where human life is in danger for reasons such as the spread of infectious disease, starvation, and the like.* (Administrative Court, I U 724/2014, 13.6.2014).

In subsequent judgments, the Supreme Court adopted a different position. Namely, that **a hypothetical presumption** that the applicant can arrange the housing by himself and take care of his social and economic security or that as a young man he could find work and survive, **is not sufficient** for the application of IPA. It is necessary to determine whether in the place of IPA, economic and social existence is assured at least to the extent that the threshold for a violation of Article 3 of the Convention is not met (Supreme Court of Slovenia: I Up 282/2014, 1.10.2014; I Up 258/2014, 9.10.2014; I Up 248/2014, 3.11.2014; I Up 291/2014, 10.12.2014). The Supreme Court explicitly mentioned the two criteria needed to assess the application of IPA: *"The so-called ?protection test? and the ?reasonableness test? of settling down in the safe area of a country, must be carried out by the court with due care, and that includes finding a safe way to the IPA, a real expectation that the applicant will be accepted in the area of the IPA and that they can settle down or that they will not be forced to leave this place due to inhumane or degrading conditions; and these include (1) safety and security, (2) respect for basic human rights, and (3) possibility of economic survival, taking into account personal circumstances"*(Supreme Court of Slovenia, I Up 291/2014, 10.12.2014).

Regarding the situation in refugee camps or settlements of internally displaced persons (IDPs), the Supreme Court further stated that ?*the applicant shall be guaranteed an individualised share of assets to meet their most basic needs such as food, sanitation, shelter, taking into account their personal circumstances. It is therefore necessary to determine whether the applicant has a real chance of economic survival, taking into account their personal circumstances.?*

IV. Conclusion

The upturn in Slovenian case law is very welcome. I see no reason why the concept of protection as defined in Article 7 of the Qualification Directive, which provides that protection should be assured by the government or political parties or organisations should not be used in the application of the IPA. As shown above, the IPA is not only possible when the security situation in the proposed area is so poor that would reach the threshold of serious harm, but also when the applicant cannot reasonably be expected to settle down in a designated area. Protection by the State in the context of the IPA therefore must be understood as the ability of the State to ensure, in addition to safety, normal living conditions to IDPs. The mere fact that less security incidents happen in Kabul does not mean that the State is able to provide protection to IDPs in Kabul. Such understanding of the concept of protection is too narrow. In my opinion, the areas from which COI reports have shown that people who do not have relatives or other social networks cannot survive, the applicant, as an IDP, depends heavily on the assistance from the State. As already mentioned above, the case law of the ECtHR shows that the responsibility of the State under Article 3 of the Convention cannot be excluded when an applicant, wholly dependent on State support, found themselves faced with official indifference in a situation of serious deprivation or want incompatible with human dignity (*M.S.S v Belgium and Greece* para 253). I therefore endorse ECRE?s recommendation [8] that when the applicant is from a country where social support is usually provided by the family, the IPA is only reasonable if the applicant has such support, or it is demonstrably unnecessary.

The issue remains that in international or EU asylum legislation or case law there are no set criteria in order to determine what kind of ?minimum living standards? should exist in the area of IPA and currently there is no agreement between Member States on how to assess this standard.

As the Slovenian Supreme Court said, a hypothetic presumption that the applicant will be able to find housing and work is not enough (Supreme Court of Slovenia: I Up 282/2014, 1.10.2014; I Up 258/2014, 9.10.2014; I Up 248/2014, 3.11.2014; I Up 291/2014, 10.12.2014). If the applicant does not have a family or other social ties in the area of ??IPA, it is necessary to consider the situation in the IDP camps. It is therefore necessary to determine whether the applicant has **a real chance of economic survival**, taking into account their personal circumstances (I Up 291/2014, z dne 10.12.2014). However, such a realistic assessment can be extremely difficult when there are no specific guidelines on what kind of living standard should be guaranteed in order for the IPA to be applicable. In my opinion, and here again, I share ECRE?s recommendations [8], the IPA should not be applied where a returnee might find himself in an IDP camp and the IPA should not be applied to a region that must already meet the needs of a significant number of refugees or displaced persons because it would not only endanger the human and social rights of the applicant, but would also diminish the availability of resources in the region.

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(This journal entry is an expression of the author?s own views, and not those of EDAL or HHC)

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