



## research paper on the application of the concept of internal protection alternative

up-dated as of autumn 2000

1. INTRODUCTION
2. UNHCR'S POSITION
  - 2.1. UNHCR Handbook on Procedures and Criteria for Determining Refugee Status
  - 2.2. UNHCR Overview of Protection Issues (1995)
  - 2.3. UNHCR's Position Paper "Relocating Internally as a Reasonable Alternative to Seeking Asylum"
  - 2.4. Note on Iraqi Asylum-Seekers regarding the Applicability of Internal Relocation Alternative and the Question of Return of Rejected cases
  - 2.5. Executive Committee Conclusions
3. POSITION OF EUROPEAN UNION MEMBER STATES AS REGARDS INTERNAL PROTECTION ALTERNATIVE (1996)
4. COUNCIL OF EUROPE
  - 4.1. European Convention on Human Rights
  - 4.2. Recommendations of the Parliamentary Assembly
5. UN COMMITTEE AGAINST TORTURE (CAT)
6. POSITION OF ECRE
7. SELECTED ACADEMIC ARGUMENT
  - 7.1. Guy Goodwin-Gill
  - 7.2. James Hathaway
  - 7.3. Gaetan de Moffarts
8. PRACTICE OF STATES WITH REGARD TO THE INTERPRETATION AND APPLICATION OF THE INTERNAL PROTECTION ALTERNATIVE
  - 8.1. Australia
  - 8.2. Austria
  - 8.3. Belgium
  - 8.4. Canada
  - 8.5. Denmark
  - 8.6. Finland
  - 8.7. France
  - 8.8. Germany
  - 8.9. Italy
  - 8.10. Luxembourg
  - 8.11. The Netherlands
  - 8.12. New Zealand
  - 8.13. Portugal
  - 8.14. Spain
  - 8.15. Sweden
  - 8.16. Switzerland
  - 8.17. United Kingdom
    - 8.17.1. Interpretation by the courts
    - 8.17.2. Paragraph 343 of HC 395
    - 8.17.3. Interpretation by the Immigration Appeal Tribunal
  - 8.18. United States of America
9. CONCLUSION

### 1. INTRODUCTION

In assessing whether an asylum seeker's fear of persecution is well-founded under the definition of refugee as contained in Article 1A(2) of the 1951 Refugee Convention, many countries take into account whether the applicant can avail him or her self of a safe place in his country of origin (IPA: internal protection alternative, also referred to as "internal flight alternative"). This paper examines the recognition given in national and European jurisprudence, as well as the position of inter-governmental organisations, UN bodies and selected academics on the concept of internal protection alternative. The position of the European Council on Refugees and Exiles (ECRE) is also outlined. The first version of this paper was finalised in November 1998. The paper was updated in autumn 2000. Detailed information on asylum procedures in Western European countries can be obtained from the publication by Fabrice Liebaut, Legal and Social Conditions for Asylum Seekers and Refugees in Western Europe, Danish Refugee Council, May 2000. A useful resource for country information is the Country Reports published by ECRE. A substantial part of the research regarding the case law for this paper has been carried out on the internet. In the annex, we have listed the relevant websites to search for national and international case law. ECRE would like to acknowledge the generous contributions of the ELENA National Coordinators and the work of Claudia Reinprecht in up-dating this paper.

## **2. UNHCR'S position**

### **2.1. UNHCR handbook on procedures and criteria for Determining Refugee Status**

#### **Paragraph 91 states:**

"The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality...persecution may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so."

### **2.2. UNHCR Overview of Protection Issues (1995)**

As Paragraph 91 of the UNHCR Handbook does not address the substantive elements of the internal protection alternative, UNHCR clarified its viewpoint on the issue in September 1995:

"The underlying assumption justifying the application of 'internal flight alternative' is that the state authorities are willing to protect the rights of the individual concerned but are being prevented from or otherwise are unable to assure such protection in certain areas of the country. Therefore the notion should not, in principle,

be applied in situations where the person is fleeing persecution from state authorities, even if the same authorities may refrain from persecution in other parts of the country."

UNHCR also elaborated on its interpretation of "reasonable" relocation:

"The discussion about the contents of the protection available in an internal flight alternative have primarily focused on the aspects relating to physical safety. However, other aspects must also be taken into consideration. Protection must be meaningful. A person should not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so. In addition to security aspects, this would require that basic civil, political and socio-economic human rights of the individual would be accepted. Questions of an economic nature, such as access to suitable employment, are not strictly relevant to the availability of protection, although the inability to survive elsewhere in the country may be another compelling reason to grant international protection.

Another consideration in assessing the qualification of 'reasonable' includes an evaluation of the subjective circumstances surrounding the alleged persecution, such as the depth and quality of the fear itself. In some situations the subjective fear may be so great that the applicant, quite understandingly, is unwilling to avail himself of the protection of his or her country regardless of the absence of real danger elsewhere in the country. This must remain a persuasive factor in the overall claim."

This statement was particularly welcome in light of the failure by the UNHCR Handbook to assist in the interpretation of "reasonable." Whilst the statement has brought coherence to the interpretation of internal protection alternative, state parties to the 1951 Refugee Convention, however, have been at liberty to develop their own jurisprudence on the concept.

### **2.3. UNHCR's Position Paper "Relocating Internally as a Reasonable Alternative to Seeking Asylum (the So- called "Internal Flight Alternative" or "Relocation Principle")**

On 9 February 1999, UNHCR issued a position paper discussing relocation as an alternative to asylum. The essential message of the paper is that this notion should never be an easy answer or "short-cut" to deciding refugee claims. In response to the current perceived misuse of the concept, the paper analyses how and when a limited use of "internal relocation" may be warranted. UNHCR's general approach to the issue is drafted in paragraph 7 of the paper:

"The internal relocation notion, which advocates staying within the borders of one's country and trying to find safety there, rather than leaving and seeking asylum abroad, rests on understandings which are basically at odds with those underlying the fundamental refugee protection principles. For this reason, UNHCR cannot agree that internal relocation amounts to a "principle" of refugee law; it is rather, in UNHCR's view, a factor or possibility to be analysed in the course of status determination in some individual cases. Caution has to be exercised where this notion is involved, not least because of its potential incompatibility with the right to seek and enjoy asylum from persecution."

UNHCR condemned the use of the notion of internal relocation to deny access to refugee status determination. It recommended that the notion be situated within the framework of the status determination analysis. Within this framework, UNHCR considered that two key points be addressed in analysing when and how the internal relocation may contribute to determining well-foundedness of fear of persecution in a particular case. These are the relevance of the relocation in the individual case, and the reasonableness of the relocation for the person concerned given the claimant's personal profile and given the country's particular political, ethnic, religious and other makeup. The UNHCR reiterated that the analysis must take into account the reality of the situation at the time of the determination/decision and the time of return.

The paper also dealt with relocation in relation to state agents, internally displaced persons (IDPs) and burden of proof. The use of the relocation notion should not lead to shifting burdens or additional burdens. Referring to paragraph 196 of the Handbook UNHCR stated: "The usual rule must continue to apply, i.e. the burden of proving allegations rests on he (or she) who asserts it."

## **2.4. Note on Iraqi Asylum-Seekers regarding the Applicability of Internal Relocation Alternative and the Question of Return of Rejected cases**

In the Note on Iraqi Asylum-Seekers regarding the Applicability of Internal Relocation Alternative and the Question of Return of Rejected cases, UNHCR set out more specifically the possible criteria for the "reasonableness"- test:

"Factors which need to be considered in judging the reasonableness of the relocation include, among others, the asylum-seeker's age, sex, health, educational or professional background, the presence of family members, the existence of ethnic and religious communities to which the asylum-seeker belongs, and political and other links to the area."

In the context of gender-based refugee claims, UNHCR has

extracted a number of observations from a Symposium held in 1997 in Geneva, including on the concept of internal protection alternative. It was said that the considerations involved in determining whether an internal protection alternative could reasonably be said to exist for women are different to those applying to men, since the implications may be different for men and women.

## **2.5. Executive Committee Conclusions**

UNHCR has noted that applications raising the issue of the internal protection alternative are complex and should not be considered in accelerated asylum procedures. It voiced its concern that "the use of this notion to deny access to refugee status determination, rather than situating it within the framework of the status determination analysis, risks seriously distorting refugee law."

## **3. POSITION OF EUROPEAN UNION MEMBER STATES AS REGARDS INTERNAL PROTECTION ALTERNATIVE (1996)**

On 4 March 1996, the European Union Member States adopted the following position concerning a harmonised application of the definition of refugee:

"Where it appears that persecution is clearly confined to a specific part of a country's territory, it may be necessary, in order to check that the condition laid down in Article 1A of the Geneva Convention has been fulfilled, namely that the person concerned "is unable or, owing to such fear (of persecution), is unwilling to avail himself of the protection of that country", to ascertain whether the person concerned cannot find effective protection in another part of his own country, to which he may be reasonably expected to move."

The text does not interpret what is "reasonable." The European Commission has said that the Joint Position needs to be revisited, as several substantial issues remain contentious which will not be useful with a view to the harmonisation of asylum law in the EU. European Union Member States are due to begin the process of preparing EU legislation interpreting the definition of a "refugee" under Art 63 (1) (c) of the Amsterdam Treaty shortly. This will provide an opportunity for the EU to clarify the term "reasonableness" in line with the UNHCR position, and in line with the Tampere Conclusions:

"13. The European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody

is sent back to persecution, i.e. maintaining the principle of non-refoulement."

The EU General Affairs Council adopted on 26 January 1998 a 46-point Action Plan on the "Influx of Migrants from Iraq and Neighbouring Countries". Point seven calls for the Council "in the light of the advice from the UNHCR, to consider (...) the possibility of identifying safe areas within the region of origin ('internal flight options)."

Following an initiative of the Dutch delegation at its meeting on 7 and 8 December 1998, the General (Foreign) Affairs Council formally adopted, on 25 January 1999, the mandate of the High Level Working Group (HLWG) on Asylum and Migration to establish a common, integrated, cross-pillar approach targeted at the situation in the most important countries of origin of asylum seekers and migrants. In the framework of the HLWG Action Plans on Somalia, Iraq and other countries have been drafted which refer to the concept of internal protection alternative.

In March 1999, the Commission began work on asylum procedures with its working paper "Towards common standards for asylum procedures" (3 March). The European Parliament adopted Resolution A5-0123/2000 on the working document in the plenary session of 13 to 16 June 2000. In September 2000, the European Commission's issued its Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status. Article 28(2) of the Proposal explicitly excludes any application being rejected as manifestly unfounded on the basis of Article 1(F) of the Geneva Convention or on the basis of an internal flight alternative.

## **4. COUNCIL OF EUROPE**

### **4.1. European Convention on Human Rights**

In two decisions, the European Court of Human Rights appears to take into account an internal protection alternative test in practice insofar as in the case of *Vilvarajah v United Kingdom*, it considered that large parts of Sri Lanka remained peaceful and subsequently concluded that there was no violation of Art. 3 of the European Convention on Human Rights (ECHR). In *Chahal v United Kingdom*, the Court took into account the fact that no safety from torture or inhuman and degrading treatment contrary to the absolute safeguard of Art. 3 of the European Convention on Human Rights was available in the entire territory of India. It subsequently found that the order for deportation to India would be a violation of Art. 3.

In several cases relating to Former-Yugoslavia, the Court followed a reasoning similar to that used by asylum authorities, considering internal relocation issues, as well as the rules which the authority

in charge of the enforcement of the deportation order have to follow. These cases concerning the expulsion of ethnic Croatians to Croatia and possibly Bosnia were declared inadmissible under Art. 3 ECHR and Art. 4 of Protocol No. 4 (prohibition of collective expulsion of aliens). All the applicants were ethnic Croatian from Bosnia and held both Bosnian and Croatian citizenship. The Court considered that the applicants held a Croatian passport, that Croatia was a safe country and that there was no evidence they would be sent to Bosnia. It also considered that if ever they were sent back to Bosnia, it would be to a region in which Croatians are in a majority and that, in any case, the authority in charge of the enforcement of the deportation would take into account the applicants' state of health. The Court therefore held that there was no real risk of treatment contrary to Art. 3 ECHR upon return to Croatia, or under certain circumstances, to Bosnia.

## **4.2. Recommendations of the Parliamentary Assembly**

In its Recommendation 1440 (2000), the Parliamentary Assembly said that states which wish to comply with their obligations, should recognise systematically in their refugee status determination procedures "that asylum seekers should not be required to demonstrate that they have exhausted all possibilities of reaching safety in an area within their own country (the so-called "internal flight alternative") before seeking international protection".

## **5. UN COMMITTEE AGAINST TORTURE (CAT)**

In Communication No 101/1997, Halil Haydin v Sweden, the Committee considered that, in Turkey, persons suspected of links with the PKK are frequently tortured during interrogations and that this practice is not limited to particular areas of the country. It noted in the context of the assessment of serious human rights situation in Turkey "that the Government [of Sweden] has stated that it shared the view of UNHCR, i.e. that no place of refuge is available within the country for persons who risk being suspected of being active in or sympathizers of the PKK." The Committee concludes that in the light of its previous jurisprudence that substantial grounds exist to believe that the author would be in danger of being subjected to torture if returned to Turkey.

In Communication No. 21/1995, Ismail Alan v Switzerland, the Committee considered an internal protection alternative test and reasoned that: "As regards the State party's argument that the author could find a safe area elsewhere in Turkey, the Committee notes that the author already had to leave his native area, that Izmir did not prove secure for him either, and that, since there are indications that the police are looking for him, it is not likely that a "safe" area for him exists in Turkey. In the circumstances, the Committee finds that the author has sufficiently substantiated that he personally is at risk of being subjected to torture if returned to

Turkey."

In Communication No 97/1997, Orhan Ayas v Sweden, the Committee pointed out that the practice of torture in Turkey is not limited to particular areas in Turkey. In other words, contrary to Sweden's assertions, the author does not dispose of an internal protection alternative.

## **6. POSITION OF ECRE**

The position of the non-governmental organisations members of ECRE is set out in the ECRE Paper "Position on the Interpretation of Article 1 of the Refugee Convention", September 2000.

"34. (...) There is no requirement in the Refugee Convention that a refugee should first seek safety in another part of his or her country of origin before seeking surrogate protection or that the fear of persecution should extend to the whole territory of the country of origin."

"35. The primary use made of the internal protection alternative notion has been to deny protection to those who would otherwise be recognised as refugees. Some states have not focused on the key question of whether a refugee claimant is genuinely free from a risk of serious harm in the country of origin. States have also used the notion in negative credibility findings, arguing that as the refugee claimant did not "flee" internally first their claim for asylum abroad is not genuine. ECRE notes that there have been cases where European states have denied protection on grounds of internal "flight" to persons from one ethnic group who have been forced out of their home area within the country of origin by another group: in such cases, European states have directly contributed to the worsening of a problem of internal displacement of persons."

"36. ECRE's position is that the focus of enquiry must always be on whether a refugee claimant has a well-founded fear of being persecuted in his or her country of origin."

"37. As part of the enquiry into well-founded fear in cases where an internal protection alternative may arise ECRE's position is that unless the following criteria can be fulfilled then no internal protection alternative exists:

- In the proposed site of internal protection, the risk of serious harm for a Convention reason must be less than reasonably likely to occur.
- The claimant must be able to access the area of internal protection in safety and dignity and legally.
- The area of internal protection must be free from conditions which could force the rejected claimant back into the area where there is a risk of serious harm for a Convention reason, i.e. it must

offer a durable protection alternative.

- Conditions in the area of internal protection must afford at least the same standard of protection of core human rights as the Refugee Convention does.
- The protection must be afforded by a de jure, not just de facto authority."

"38. An internal protection alternative will only exist if each criterion is met. In addition, it is ECRE's position that an internal protection alternative rarely exists where the state is the persecutor although in each case the notion of an internal protection alternative should be applied very carefully."

## **7. SELECTED ACADEMIC ARGUMENT**

### **7.1. Guy Goodwin-Gill**

Goodwin-Gill states that an internal protection alternative will be deemed to exist where (1) there is factual evidence that protection can be afforded to the asylum seeker in another region of his country of origin and (2) the asylum seeker has a chance of "maintaining some sort of social and economic existence." An internal protection alternative will not exist, however, where it would be unreasonable to expect the asylum seeker to move internally. State parties to the 1951 Refugee Convention have laid down criteria determining the availability of an internal protection alternative within their own jurisdictions. These criteria are discussed below in Section 8.

### **7.2. James Hathaway**

James C. Hathaway also upholds the argument that a person is not at risk of persecution if s/he can "access effective protection" in some part of her/his state of origin. He argues that the definition of refugee in Article 1A(2) of the 1951 Refugee Convention clearly intended that refugee status was only applicable to those persons whose only recourse to protection from persecution lies at the international level. The asylum seeker must be able to show that s/he is unable or legitimately unwilling to seek national protection from her/his home state. According to Hathaway, refugee status is justifiably denied, therefore, where the national government provides a secure alternative home to a person seeking refuge from the "errant" behaviour of regional government forces. In some instances, it is easy to imagine that the reality of central government protection from the persecutory indulges of its regional forces may not meet with expectation.

Where a region in the asylum seeker's country of origin is controlled by a non-state entity, return on internal protection grounds should only be contemplated "where there is compelling evidence of that entity's ability to deliver durable protection":

where the asylum seeker no longer faces a well-founded fear of persecution for a Convention reason and where the asylum seeker enjoys the same rights and protection without any discrimination as others in the site of the internal protection.

In support of his assertion that the drafting history of the Convention and the UNHCR Statute intended to exclude international protection from internally protected persons, Hathaway cites the comments of two delegates made during the debate on the adoption of the 1951 Refugee Convention. The delegate for France stated that "there was no general definition covering [internal] refugees, since any such definition would involve an infringement of national sovereignty." The United States was also of the opinion at the time that the existence of sufficient national protection warranted the denial of refugee status. Mrs. Roosevelt of the United States noted: "...those problems should not be confused with the problem before the General Assembly, namely, the provision of protection for those outside their own countries, who lacked the protection of a Government...".

Hathaway makes clear that the underlying assumption that refugee status is based on an exilic premise is qualified by the restriction that the national protection sought must be genuinely accessible and meaningful in reality. He enumerates several situations in which internal protection will not be deemed to afford sufficient protection to the individual: (1) where financial, logistical, or other barriers prevent the individual from reaching internal safety; (2) where the quality of life fails to meet the basic norms of civil, political, and socio-economic human rights; and (3) where internal safety is otherwise illusory or unpredictable.

In the Michigan Guidelines, Hathaway emphasises that "a refugee claim should not be denied on internal protection grounds unless the putative asylum state is in fact able safely and practically to return the asylum-seeker to the site of internal protection." Once a risk of persecution is ascertained in at least one part of the country, Hathaway proposes a three-tier test in order to measure the reality of internal protection instead of the "reasonableness-test":

- Does the proposed site of internal protection afford the asylum seeker a meaningful "anti-dote" to the identified risk of persecution?
- Is the proposed site of internal protection free from other risks which either amount to, or are tantamount to, a risk of persecution?
- Do local conditions in the proposed site of internal protection at least meet the Refugee Convention's minimalist conceptualisation of "protection"?

Hathaway clearly shifts the burden of proof to establish the existence of internal protection to the government of the putative asylum state. Internal protection analysis should never be included as a criterion for denial of refugee status under an accelerated or manifestly unfounded claims procedure.

It's noteworthy to mention that the Michigan Guidelines have been used to assist in the evaluation of an internal protection alternative in the jurisprudence of New Zealand. They have been reproduced in full in a decision by the Refugee Status Appeals Authority.

### **7.3. Gaetan de Moffarts**

Whilst some academic commentators subscribe to the theory that the language of the Convention evinces the Convention drafters' intention that international protection for refugees should only be available where there is no recourse to viable national protection in any part of the country of origin in question, Gaetan de Moffarts disputes the premise that Paragraph 91 of the UNHCR Handbook introduced the concept of internal protection alternative. De Moffarts points out that the internal protection alternative is not directly referred to in the 1951 Refugee Convention and was not an issue of discussion in the "travaux préparatoires." He cites Roel Fernhout as an authority for the view that the concept of internal protection alternative is incongruous with the text of the Convention and the views of its drafters.

De Moffarts also states that where the fear of persecution emanates from the central authority of a state, the host state should treat the persecution as country-wide and conclude that national protection is not available, unless, exceptionally, "it is clearly established that the risk of persecution by government authorities is limited to a part of the country."

Refugee status, however, will not necessarily be granted even though the agent of persecution is an agent of the government. For instance, where an individual fears persecution from the federal police and evidence reveals that members of that police force cannot interfere with the protection of a provincial police force, an internal protection alternative is established.

It is also reasonable to assume that where the fear of persecution emanates from federal authorities, the individual is obliged to avail himself of the protection of one of the sister states. Where the fear emanates from a private agent, regard will have to be given to the domain in which that private agent operates and may operate in the future.

## **8. PRACTICE OF STATES WITH REGARD TO THE INTERPRETATION AND APPLICATION OF THE INTERNAL PROTECTION ALTERNATIVE**

## 8.1. Australia

When a protection visa application is made, a case officer of the Department of Immigration and Multicultural Affairs (DIMA), acting as a delegate of the Minister for Immigration and Multicultural Affairs, decides if the applicant engages Australia's obligations under the UN Refugees Convention.

Where an application is refused, a person can seek a merits review of that decision from an independent tribunal - either the Refugee Review Tribunal (RRT) or the Administrative Appeals Tribunal (AAT), depending on the basis for refusal.

The RRT also examines the applicant's claims against the UN Convention definition, providing an informal, non-adversarial setting to hear evidence. If the RRT is unable to make a decision favourable to the applicant on the written evidence available, it must give the applicant the opportunity of a personal hearing. People refused a protection visa at review may appeal to the Federal Court for judicial review of the decision on grounds of error of law. The Federal Court may not review the merits of a case. The Federal Court has the power to either uphold the refusal, or direct that the application be reassessed.

A final appeal may be made to the High Court (the highest Federal Constitutional court).

*Randwha v. Minister for Immigration* (1994) 52 FCR 437: This case sets down the principles involved in the application of the internal protection alternative in Australia. This approach has been subsequently confirmed.

Firstly, it is necessary to establish whether real protection from persecution is available to an asylum seeker within his country. The Court cited Hathaway and Paragraph 91 of the UNHCR Handbook in support of this principle.

Secondly, the relocation must be reasonable in all the circumstances. In deciding what considerations should be taken into account on the issue of reasonableness, Black CJ held: "The range of realities that may need to be considered on the issue of reasonableness extend beyond physical or financial barriers preventing an applicant for refugee status from reaching safety." It was not a reality, for example, for an applicant to move to a remote village where he would be separated from his wife and unable to carry out the employment in which he had been engaged for 30 years (see U.K. case, *R v. IAT ex parte Jonah* [1985] Imm AR 7 in Chapter 8.17.1). Nor need the fear of persecution necessarily extend to the whole territory of the country of origin.

In *Al-Amidi v Minister for Immigration and Multicultural Affairs*,

[2000] FCA 1081 (4 August 2000), the determination of what would be a reasonably expected would involve, e.g., consideration of whether resumption of control of northern Iraq by government authorities is unpredictable, as well as personal circumstances. There must be satisfaction of the basic norms of civil, political and socio-economic human rights in the proposed site of relocation. Age of the applicant, his ability to resume life with his family as a free person and not as a person moving from one hiding place to another; and his ability to sustain himself and his family with dignity, are further considerations to be taken into account as to the reasonableness of internal relocation.

In *Dzdiiker v Minister for Immigration And Multicultural Affairs* [2000] FCA 390, it was accepted that one factor for concluding whether relocation would be reasonable is also the extent of any hardship involved in avoiding adverse treatment, in this case avoiding attending certain theatrical performances (attendance of these cultural events was not held to be central to his religious and political beliefs).

Thirdly, where relocation is being considered by the Refugee Review Tribunal (RRT), the RRT must put this possibility and relevant country evidence to the applicant. The court considered that it is not necessary to establish a well-founded fear of persecution in part of a country before relocation is considered. For instance, in *Syan v. Refugee Review Tribunal (RRT) and Anor*, 21 December 1995, 61 FCR 284, Beazley J held that the RTT had not erred in considering the issue of an internal protection alternative without having determined whether the applicant had a well-founded fear of persecution based upon a Convention reason.

Beazley J concluded that:

"However, I am of the opinion that the Tribunal in the present case did not apply a wrong test. Rather, it approached the matter on the basis of an assumption, namely that the applicant would otherwise satisfy the Convention definition of refugee. On that assumption, it considered the question of internal flight. Had it determined that matter in favour of the applicant, it would have been necessary to determine whether the applicant had a well-founded fear of persecution for a Convention reason. However, having found against the applicant on the question of internal flight, it was not necessary to determine whether the applicant had a well-founded fear of persecution based on a Convention reason. In my opinion, it was open to the Tribunal to consider the matter in that way."

In *Minister for Immigration and Multicultural Affairs v Jang* [2000] FCA 1075, the Federal Court of Australia (FCA) considered the relocation principle in respect of feared persecution arising from enforcement of a national law. The case turned around China's enforcement of national laws restricting religious practices. The question was whether the applicant's fears were linked to his/her

region and due to a variance of the implementation of the registration laws whether the applicant could relocate elsewhere. The FCA held that the religious practices to which the applicant adhered were permissible nowhere in China, and as the attitude of the authorities may change over night, despite a variance of enforcement of the relevant laws, it upheld the Refugee Review Tribunal's holding that there would be a risk of punishment throughout China.

## 8.2. Austria

The first instance decision on an asylum application in the determination procedure and the procedure according to Section 57 of the Aliens Act 1997 on the legality of refoulement is taken by the Federal Asylum Office (Bundesasylamt). Prior to 1 January 1998, negative decisions could be appealed to the Ministry of the Interior (Bundesministerium des Innern). Since 1 January 1998, when the Federal Law Concerning the Granting of Asylum (1997 Asylum Act) entered into force, negative decisions may be appealed to the Independent Federal Asylum Review Board (UBAS) (Unabhaengiger Bundesasylsenat). An appeal against the Independent Federal Asylum Review Board may be made to the Administrative Court (Verwaltungsgerichtshof). If the Administrative Court (VwGH) finds a violation of procedural law, it remits the case back to the UBAS for reconsideration. Decisions by the Administrative Court do not, therefore, consider the merits of the asylum claim itself. It would appear from the cases discussed below that the Administrative Court will refer an applicant's case back to the UBAS where the UBAS has wrongly interpreted the facts, has based the possibility of internal protection on suppositions, or has failed to take into account all the circumstances of the case, or has failed to provide an adequate reasoning. Despite the fact that the Administrative Court does not consider the merits of asylum claims, important conclusions with regard to the internal protection alternative concept can be drawn from its remittal of the claims.

Whether an IPA exists or not, is a circumstance among others in the determination of the merits of the case and will not be considered in accelerated procedures.

Administrative Court, VwGH Case No. 94/19/0280, 24 March 1994: The Administrative Court found that the Federal Minister's argument that an internal protection alternative existed for the applicant, a practising Catholic from Nigeria, was not "strong enough to draw final conclusions". Moreover, the Court found that the Federal Minister did not give the applicant a proper chance to challenge the internal protection alternative argument with new evidence (a country report). These findings constituted a breach of procedural rules.

Administrative Court, VwGH Case No. 94/19/0246, 19 May 1994: The Administrative Court did not agree with the Federal Minister's argument that an internal protection alternative existed for the

applicant, a Christian from Nigeria. The Court found that the Federal Minister had assumed that the applicant had been living in the proposed internal protection alternative before fleeing the country. The fact that the applicant had not lived anywhere but her home town in Nigeria precluded the existence of an internal protection alternative for her.

Administrative Court, VwGH Case No. 94/20/0743, 14 March 1995: The Administrative Court found that the Federal Minister's conclusion that an internal protection alternative existed for the applicant, an Indian national, was erroneous as it was based on suppositions and was not factually proven. The Federal Minister had been unable to verify that the applicant had been seeking refuge in Bajpur (the suggested internal protection alternative) before fleeing the country or that he had been safe from persecution there.

Administrative Court, VwGH Case No. 94/20/0857, 26 July 1995: The applicant in this case was a Kurd from Turkey. The Administrative Court found that the Federal Minister did not take into account all the relevant facts in its decision on internal protection alternative, especially the fact that the applicant was a member of a political party.

Administrative Court, VwGH Case No. 95/20/0295, 18 April 1996: In a later case involving a Kurdish asylum seeker from Turkey, the Administrative Court found that the Federal Minister's decision that an internal protection alternative existed for the applicant was flawed as the Federal Minister could not specify an exact location of refuge for the applicant in Turkey.

Administrative Court, VwGH Case No. 95/20/0380, 9 May 1996: The Court found no internal protection alternative to exist in Northern Iraq for the applicant, an Iraqi Christian from Baghdad. The Court found that the Federal Minister did not take into account that this part of Iraq was under Kurdish control and that the applicant was a Christian.

Administrative Court, VwGH Case No. 95/20/0284, 12 June 1996: The Court ruled that the Federal Minister had been mistaken in concluding that the applicant was not at risk in the "security zone" of Northern Iraq. Only "a better investigation" could properly assess this risk. In addition, the Court found that the Kurdish authorities in Northern Iraq would not be able to protect the applicant against the Iraqi authorities if he were returned there.

Administrative Court, VwGH Case No. 95/01/0395, 13 November 1996: The Administrative Court found that the Federal Minister's decision regarding the availability of an internal protection alternative for a Christian asylum applicant from Nigeria was based on general facts only and was therefore a breach of procedure.

Administrative Court, VwGH Case No. 95/20/0606, 20 March 1997: The Administrative Court found that the Federal Minister had not sufficiently explained on what grounds an internal protection alternative existed for the applicant. The Federal Minister had overlooked the fact that the applicant had "spent only one night and one day in Istanbul". The Court found that if the Federal Minister had taken into account all the elements of the applicant's case, he could have given a "concrete argument about whether and where an internal protection alternative was possible."

Administrative Court, VwGH Case No. 95/20/0333, 5 June 1997: The applicant in this case was a Catholic (and former soldier) from Iraq. The Federal Minister had concluded that an internal protection alternative existed for the applicant in Northern Iraq as the applicant had stayed there for a short period of time before fleeing to Austria. In concluding that the Federal Minister had reached this conclusion erroneously, the Court emphasised the point that internal protection alternative decisions should be taken only after a very detailed investigation of the applicant's circumstances. In this regard, the Federal Minister should have ascertained where and how the applicant had lived in Northern Iraq immediately prior to leaving the country. The Court also found that the Federal Minister had neglected the fact that the applicant was Catholic and that he might not be safe in the Kurdish "security zone".

Administrative Court, VwGH Case No. 98/01/0566, 21 April 1999: The case involved a Kosovo-Albanian of Muslim belief. The decision of the UBAS was quashed by the Administrative Court because the UBAS 's decision lacked adequate reasoning as to whether an internal protection alternative in other parts of the Federal Republic of Yugoslavia existed. Considering the generally known tensions between Serbs and Albanians, it cannot be assumed without further reasoning that Kosovo-Albanians could relocate without being persecuted elsewhere in the Federal Republic of Yugoslavia.

Administrative Court, VwGH Case No. 96/21/1036-7, 28 April 2000: In this case regarding Somalia, the VwGH explicitly found it relevant to assess an internal protection alternative in the procedure on the legality of refoulement. The VwGH, already in its decision on 27 January 2000 (96/21/0032) had held that the persecution of one group of a population by another group could entail a relevant danger to an individual in the absence of a stable spatial delimitation of the civil war parties. The fact that due to an existing civil war in the country of origin and the resulting lack of a sufficiently functioning security order an expelled alien would, with considerable probability, be directly subjected to a danger (inhumane treatment, or death penalty) according to Section 37 (1) Aliens Act (in the entire territory), is relevant in the procedure according to Section 54 Aliens Act (disallowance of expulsion, compulsory return or deportation). The VwGH agreed with the

plea of the complainant who had said that he could only be expelled to Mogadishu and would run the risk already at the airport of being killed by members of the enemy clan. The Court, thus, held that it could not come to the conclusion that, because of an existing internal protection alternative, the complainant would not in the event of return face this danger.

Independent Federal Asylum Review Board (UBAS), 205.051/0-VIII/23/98, 28 October 1999: the Iraqi security service is capable of operating in Northern Iraq. Asylum seekers in this area are not protected against persecution from the state or other severe danger or disadvantages. Moreover the UBAS concluded that the area of the Northern Iraq provinces is "catastrophically under-resourced", in particular regarding medical care. The UBAS went on to say that "in general, no life is possible in the longer-term that will not lead to hunger, misery and eventually to death."

UBAS, No 203.501/0-VII/22/98, 21 October 1998: The case involved an Iraq Arab from Central Iraq who was a former official of the Iraqi Ministry of Foreign Affairs and a former member of the Baath party. The UBAS noted that the Iraqi central government has not yet given up its claim of sovereignty over the Northern Iraqi territory, and that it is notorious that both the Iraqi central government as well as both ruling Kurdish parties dispose of a tight net of agents and police spies. The UBAS held that due to the fact that the asylum seeker is not a Kurd but an Iraqi from central Iraq, former officer of the Iraqi army, member of the Baath party and official of the Foreign Ministry, he could not expect to find protection by the Kurdish parties, rather he had to expect to be disposed of by these. It could not be concluded from the fact that he had resided near by the Turkish border for one and a half month that he could be safe for a durable time. The UBAS referred to a judgment of the German administrative court that acknowledged an internal protection alternative in Northern Iraq only for persons of Kurdish origin or who have otherwise social or other bonds in Northern Iraq.

UBAS, 29 April 1999, 208.124/4-II/04/99: "An internal protection alternative would not exist due to the danger of infringements by the Serbian security forces and paramilitary units in other parts of Serbia [as a constituent part of FRY), as well as because of the danger of infringements by the Federal military police in Montenegro. Furthermore, internally displaced Kosovars would be denied access to social facilities, medical care and important civil rights, facts from which it would appear that their subsistence would be endangered (and thus relocation would not be reasonable).(...)" The deciding member of the UBAS went on to say that the examination of the existence of an internal protection alternative was superfluous in this case as the massive impairment of the collective identity of ethnic Albanians in Yugoslavia would also persist in the case of an (necessarily) isolated stay of some of these ethnic Albanians in other parts of Yugoslavia.

UBAS, 8 July 1999, 202.819/0-VII/21/98: The UBAS held that an internal protection alternative cannot be assumed to exist for the appellant in Northern Iraq, as, apart from the doubtful stability of the Kurdish security zone, it cannot be excluded with the certainty required in asylum proceedings, that the appellant would not be subjected to encroachments by Iraqi secret intelligence agents who are still active in Northern Iraq, in particular as he was severely abused by these in the past. The UBAS considered the fact that the appellant was interrogated several times on the whereabouts of his brother and was threatened with the severest consequences in the event that his brother would not surrender to the Iraqi authorities, as a factor that increased the probability that the appellant would be persecuted upon return, according to the UBAS. The appellant was consequently granted refugee status.

UBAS, 201.442/0-VI/17/98, 25 January 2000: The UBAS held that in the case of the appellant, a former PUK-collaborator, he could not lead a "normal life" in the area controlled by the PUK, because he would be regarded as a stranger. The UBAS held that upon return, it would certainly be possible that he would be killed or abducted by Iraqi agents. Furthermore, he could not be reasonably expected to relocate to the area of the PDK, e.g. in Arbil at his wife's place or his brother's, as the PUK and the PDK are fighting against each other and as it could be presumed as common knowledge that the PDK still collaborates with central Iraq. The UBAS went to say that the PUK-controlled province Sulemanija could be excluded as an internal protection alternative for the appellant as this area could not be regarded as an area where he would be free of risk (in the sense of the UNHCR paper of February 1999, see above) for the following reasons. Were the appellant to enquire at the Iraqi embassy for a return certificate, the Iraqi authorities would get aware of the appellant. The appellant would be in danger upon return due to the increasing presence of Iraqi agents in Northern Iraq. Moreover, the UBAS concluded, the appellant lacked any social or family relations in the PUK-province of Suleymanija, thus integration was not possible for him.

UBAS, 200.194/38-II/04/00, 5 May 2000: The UBAS found that it was not reasonable to expect a national of Afghanistan to return to his country of origin. The UBAS held that it could not expect the appellant to succumb to religious provisions that he felt to be unbearable, if they are coupled with the disruption of the personality due to a deprivation of non-derogable pre-requisites for psychical and physical development. The UBAS held in that context that it could expect someone to suppress completely an existing artistic gift. Furthermore, the UBAS went on to say, it could not expect someone who strictly rejects Islam to behave in a particularly intensely religious way which would be required in order to survive in the territory controlled by the Northern Alliance. Interestingly, the UBAS came to this decision by basing it on the Austrian legal order and its guarantees of human rights and fundamental freedoms. It argued that in any event it could not

expect the appellant to completely suppress his artistic talent on the basis of the Austrian legal order which accrues a high legal value to the right of freedom of art by framing it in absolute terms (ohne Gesetzesvorbehalt).

UBAS, 212.571/13-II/04/00, 18 February 2000: In the case of a national of Afghanistan, an internal protection alternative was available, according to the UBAS, because it was open to the appellant to join the forces of the Northern Alliance, which would secure his subsistence. By holding this, the UBAS meant to take into account the jurisprudence of the Administrative Court which had not even acknowledged the forced recruitment by rebel armies as such as a ground for asylum.

### 8.3. Belgium

The first instance decision on asylum applications is taken by the General Commissioner for Refugees and Stateless Persons (CGRA). An appeal against a negative decision may be made to the Commission Permanente de Recours des Réfugiés (CPRR; Permanent Commission for Refugee Appeals) which is an administrative tribunal. Its decision may be further appealed, on legal grounds rather than on its merits, to the Conseil d'Etat (Council of State).

The existence of an IPA is mainly discussed in the refugee status determination procedure, rather than in the procedure on admissibility/manifestly unfounded as the problems of the application of the concept have become increasingly recognised. However, the existence of an IPA can constitute a reason for Belgian authorities to declare an application as manifestly unfounded and inadmissible.

Refugee Appeals Board, C.P.R. (French-speaking divisions) 8 November 1990, F015: In this case, the Board held that refugee status could not be refused simply because the applicants, Christians from the South East of Turkey, could have settled in another part of their country of origin.

Refugee Appeals Board, V.B.C. (Dutch-speaking divisions), 12 November 1992, W703: In contrast to its 1990 decision, the Board found that Christians displaced from the South East of Turkey and now living in Istanbul were not persecuted for the purposes of the 1951 Refugee Convention solely on the basis of their bad economic situation. The Board held that "every asylum claim should be the object of an individual examination." In this case, therefore, Istanbul was deemed an internal protection alternative.

Refugee Appeals Board, C.P.R. (French-speaking divisions), 20 February 1992, R668: The Board held that the wife of a Polish Jew, suffering from persecution in her husband's village, could settle elsewhere in the country. The Board found that big cities offered effective protection from anti-Semitic persecution because

of their anonymity. The Board also found dispositive the fact that the applicant herself was not Jewish.

Brussels Civil Court *Revue du droit des étrangers* 1991 v. 65 p. 376: The Court overruled a determination by the Minister of Justice to refuse the application for asylum by a Nigerian citizen who claimed (1) that as a member of a Christian sect, he would be sacrificed to a god of the "ADU" religion if he were returned to Nigeria and (2) that he would be arrested by the Nigerian police who had accused him of killing a policeman. The Court held that it was impossible for the applicant to find refuge anywhere in Nigeria and that, as he had proved that there was a serious indication of a threat to his life, he should be allowed to enter Belgium.

Refugee Appeals Board, C.P.R. (French-speaking divisions), 22 April 1996: The Refugee Appeals Board held that a member of the Assyrian Democratic Organisation should receive the status of refugee since the autonomous Kurdish territory in Iraq was not considered to be a safe haven.

Refugee Appeals Board, C.P.R., 98-0777/R7400: The case involved an Israeli who feared persecution by the Israeli authorities on account of his desertion from the army and certain extremist Jewish groups, particularly active in the Jewish colony of Kuriat Arabaa, who reproached his desertion from the army, as well as making him subject to discriminations on account of his Russian origin and his orthodox religion. The CPR ruled that firstly, the appellant had not established why he could not request and obtain protection from the state, and finally that he could not rebut convincingly why he could not relocate elsewhere in Israel instead of a Jewish colony.

## 8.4. Canada

Canadian law considers the concept of an internal protection alternative as an integral part of the refugee determination process. According to the Canadian practice, the issue of IPA arises when a claimant, who otherwise meets all the elements of the Convention refugee definition in his or her home area of the country but nevertheless is not a Convention refugee because the person has an IPA elsewhere in that country. The key concepts concerning IPA come from two cases: *Rasaratnam* and *Thirunavukkarasu*. From these cases it is clear that the test to be applied in determining whether there is an IPA is two-pronged. Both prongs must be satisfied in order for there to be a finding that the claimant has an IPA (see below for the two pronged test).

In *Court of Appeal, Rasaratnam v. Canada* [1991] F.C.J. No. 1256, the Court adopted a two pronged test which the Board must satisfy before refusing an application for asylum on the ground that the applicant could avail himself of a viable internal protection alternative:

- On a balance of probabilities there must be no serious possibility of the claimant being persecuted in the part of the country of relocation; and
- Conditions in the part of the country considered as an internal protection alternative must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimant, for him to seek refuge there.

The conditions in the internal protection area, referred to in the Rasaratnam case, were examined in *Thirunavukkarasu v. Canada* [1993] FCJ: The Federal Court of Appeal offered the following test:

"...the alternative place of safety must be realistically accessible to the claimant. Any barriers to getting there should be reasonably surmountable. The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there...claimants should not be compelled to hide out in an isolated region of their country...But neither is it enough for refugee claimants to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there."

Two other general principles that emerge from *Rasaratnam* and *Thirunavukkarasu* concern notice and burden of proof. With respect to notice, the issue of IPA must be raised by the Refugee Claims Officer, the panel or the Minister (before or during the hearing). Extensive questioning during the hearing on the subject of IPA can be sufficient notice. With respect to burden of proof, once the issue is raised, the onus is on the claimant to show that he or she does not have an IPA. Even though the burden of proof rests upon the claimant, the Board cannot base a finding that there is an IPA, in the absence of sufficient evidence, solely on the basis that the claimant has not fulfilled the onus of proof.

On the issue of whether there is a serious possibility of persecution in the potential IPA, the considerations are basically the same as when making this determination with respect to the claimant's home area of the country. However, there are some specific points concerning this issue and IPA that are noteworthy:

- a) In determining whether there is an objective basis for fearing persecution in the IPA, the Convention Refugee Determination Division (CRDD) must consider the personal circumstances of the claimant, and not just general evidence concerning other persons who live there.
- b) The CRDD must consider the circumstances of those persons in the IPA who are situated similarly to the claimant.
- c) In assessing the particular circumstances of the claimant, the

CRDD may consider the condition of family members who have sought refuge in the IPA.

d) The nature and the agents of the persecution feared ought to suggest that the persecution would be confined to particular areas of the country. The fact, however, that the agents of persecution are the central authority in the country does not prevent a finding that there is an IPA.

Regarding the issue of "reasonable in all the circumstances", the Court of Appeal stated that the circumstances must be relevant to the IPA question: "They cannot be catalogued in the abstract. They will vary from case to case." However, whether certain factors are relevant to the determination of whether a given IPA would be "objectively reasonable" is an issue that transcends the particular facts of a given case. Therefore, the appropriate standard of review is "correctness" in cases where the issue is what factors the CRDD considers in assessing an IPA.

The Federal Court, however, has provided the following general guidance:

a) The test is a flexible one that takes into account the particular situation of the claimant and the particular country involved. The evidence, before the Refugee Division, of circumstances in the IPA must be more than general information and must be relevant to the claimant's specific circumstances.

b) There must be some discussion of the regional conditions which would make an IPA reasonable.

c) The presence or absence of family in the IPA is a factor in assessing reasonableness, especially in the case of minor claimants.

d) A destroyed infrastructure and economy in the IPA, and the stability or instability of the government that is in place there, are relevant factors. Instability alone is not the test of reasonableness, nor is a disintegrating infrastructure.

e) An IPA is not reasonable if it entails the perpetuation of human rights abuses.

f) Hardship in accessing the IPA must be assessed.

g) There is no onus on a claimant to personally test the viability of an IPA before seeking protection in Canada.

Dealing with specific cases, the Court has indicated it is appropriate for the CRDD to consider, in various ways, factors such as: the claimant's age, appearance (including gender), religion, political profile, the employment situation, the type of residence available, the ability to speak the language, the ability to

raise a family, the crime rate, the physical and financial barriers, the composition of the "family" unit, previous residence in the IPA area, familiarity with the IPA area, the capacity of the claimant to re-establish him or herself, whether there is a similar group located in the IPA area, race or ethnicity of the claimant (this may also go to fear of persecution), having a registration card, being registered with the police, ability to move from one residence to another e.g. legal restrictions), and the health and financial situation of the claimant. Other factors identified by the Court as being relevant to a determination of this issue include the claimant's business and social contacts in the potential IPA area, and medical and psychological reports that provide objective evidence that it would be "unduly harsh" to expect a claimant to move to a potential IPA area.

Federal Court Trial Division, *Abubakar v. Canada* [1993] FCJ 887: The Court held that the fact that the applicant, a Somalian refugee who had moved to Kenya when he was six years old, had never lived in Somalia, that he did not know where his family was, that he did not speak the language and that he had no prospects for residence or employment in Somalia were all factors to be taken into account in assessing the reasonableness of an internal protection alternative for the applicant in that country. As Professor James Hathaway has pointed out, this decision of the Canadian courts "provides a helpful elucidation of the "reasonableness" test, requiring that one take into account ability to assimilate, prior contact, family relationships, language capacity, and ability to become established. Professor Hathaway, however, also pointed out "it is frightening that the Court did not even consider the issue of whether a disputed territory could constitute an internal flight alternative, a consideration which should have occurred prior to the examination of reasonableness."

Federal Court, *Ramachandran v. Canada* [1995] FCJ 731: The Court held that the fact that the Board had relied on two previous factual findings that Colombo in Sri Lanka was a reasonable internal protection alternative for Tamils "constitutes a serious error." The Court noted that the Board "must consider all of the circumstances of the applicant in its determination that the internal flight alternative is reasonable." This decision by the Court endorsed the previous determination of the Federal Court Trial Division in *Pathmakanthan v. Canada* [1993] FCJ 1158, when it said that the "reasonableness of the internal flight alternative is a question which must be determined independently from the question of the actual availability of the internal flight alternative and must take into consideration all of the circumstances of the individual applicant..." In other words, there can no generic determination of reasonableness when the Board considers the circumstances of the particular applicant before it.

The following selected cases are also illustrative:

In *Mohsan Raza Butt v the Minister of Citizenship and*

Immigration, May 19, 1999, the Federal Court of Canada considered the application for judicial review of a Pakistani. As to the reasonableness of the relocation, the Federal Court of Canada examining the test set out in *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, Denault J held that: "While I agree with counsel for the applicant that the ability to resettle in the country of refuge is not a relevant factor, in the circumstances of this case, I am not satisfied that this impugned statement by the Tribunal warrants the Court's intervention. Indeed, it is not unreasonable to conclude that, having found that the claimant was intelligent, young, healthy and had relatives in Punjab, the Tribunal, by underlining an other positive factor of his character, wanted to compliment him on his resourcefulness. The claimant's ability to travel to Canada and relocate here simply confirmed the Tribunal's view that he could "... relocate in Pakistan outside Azad Kashmir, for instance, in Punjab."

In *Ramanathan v. Minister of Citizenship and Immigration (FCA)* August 19, 1998, IMM-5091-97, Hugessen J. held that it is wrong to exclude humanitarian and compassionate grounds when considering the question of internal protection alternative. The case involved a 75 year old man (by the time of the decision) from Sri Lanka. He had become separated from his wife and three of their children during civil strife in the part of Sri Lanka where they lived. During the course of flight from there to Colombo, he had lost touch with those children as well as with his wife. He had not heard from them since, although there was some indication that they may be alive. The applicant lived with his son, his daughter-in-law and their five children in Canada. Partly as a result of the very traumatic experiences that he had been through, and partly simply as a result of advancing years, the applicant had developed a very high degree of dependence on his son and his grandchildren and he was very close to them. The Immigration and Refugee Board, in its reasons, acknowledged that the applicant, without the aid of his son, daughter-in-law and grandchildren, would probably not be able to attend to his daily living activities. The Board found, however, that the applicant had a viable IPA in Colombo. Based on the evidence before it, it made a finding that there were available to the applicant, in Colombo, a number of government-run homes for the elderly to which elderly Tamils such as himself could be admitted and that those homes provided food and shelter and medical care for persons in the applicant's position.

Hugessen J held that:

"However, it seems to me that the factor of requiring an elderly, dependant and unwell person to live alone in a governmental or publicly supported home with governmental or publicly supported health and other social services provided to him when there is an alternative where he is presently living where he has the emotional and family support gained from close members of his family is something which should be considered when inquiring as to whether it would be unduly harsh to send that person from the

latter situation to the former."

Federal Court, *Sinnathamby v. Canada* [1993] FCJ 1160: The Court overruled a decision of the Board that a Jaffna Tamil from Sri Lanka was not entitled to refugee status in Canada. The Board concluded that Colombo was a viable internal protection alternative for the applicant because he had lived there without any problem until 1978 and could therefore resume residency there. The Board reached this decision despite evidence that the applicant had been subjected to harassment by the Sri Lankan authorities since his return there in 1992. The Court held that the state of affairs in Colombo seventeen years ago "hardly seems relevant" in assessing whether Colombo was a current viable internal protection alternative for the applicant in 1992.

The possibility of an internal protection alternative existing in Colombo for Sri Lankan Tamils from Jaffna was again the subject in question in the case of *Kulanthavelu v. Canada* [1993] FCJ 1273: The Federal Court Trial Division held that the fact that the applicant had friends and relatives in a suitable safe area and the prospect of employment there were "factors which, in the context of all of the evidence as to the circumstances for each particular claimant, contribute to whether or not it is "objectively reasonable" for the claimant to live in Colombo without fear of persecution." This judicial reasoning contrasts with the evaluation of Colombo as an internal protection alternative by the Federal Court of Appeal in *Thirunavukkarasu* where the Court held that an internal protection alternative exists "if it is objectively reasonable" for the applicant to live there, even though he had "no friends or relatives there, or that he may not be able to find suitable work there."

Guidelines Issued by the Chairperson Pursuant to Section 65(3) of Immigration Act, Immigration and Refugee Board 7 March 1996: These guidelines consolidate the judicial findings noted in the above cases with regard to the determination of the possibility of an internal protection alternative. In assessing this issue, the Refugee Division must consider the following:

- The state of infrastructure and economy in the IPA region (i.e. destroyed or not), and the stability or instability of the government that is in place there;
- Whether or not there would be undue hardship on the claimant, both in reaching the location of the IPA and in establishing residence there; and
- If there is an IPA, the claimant is not Convention refugee.

## **8.5. Denmark**

In 1998 the Danish Refugee Appeals Board decided that a security zone existed in Northern Iraq and that the internal protection alternative concept should apply in cases of Iraqi

asylum applicants. Iraqis from the Northern Iraq therefore do not obtain asylum automatically. The Board rejects asylum applications brought by Iraqi citizens, if they originate from Kurdistan or have lived there for a substantial period of time without any persecution-related problems. Decisive for the case is that the asylum-seeker has a social network there. In all cases an assessment of the availability of an internal protection alternative is based on a thorough examination of each individual case. The board considers each case on its own merits considering the specific circumstances such as ethnic background, language, religion, family links, political profile and sex of the person concerned. Consideration is also given to the possibility for the applicant to obtain adequate protection against the internal conflict between rival Kurdish parties.

With regard to asylum seekers from Somalia, the Danish asylum authorities have adopted a practice similar to that of Northern Iraq. Denmark considers northeast Somalia (Puntland) and northwest Somalia (Somaliland) as safe areas. If asylum seekers originating from either northeast or northwest Somalia do not have individual grounds for fear of persecution in their respective area of origin, their claims for asylum will normally be rejected and a decision be made that they may be forcibly returned to either northeast Somalia or northwest Somalia depending on which is their region of origin. In general, the fact that their clan is represented in the area is sufficient for the asylum authorities to determine that they can go back (i.e. there are no additional conditions required, such as particular network in the area).

With regard to asylum claims by Tamils from Sri Lanka, the Board has held that where the applicant has a well-founded fear of persecution by the guerrilla organisation (LTTE), the applicant could seek protection in regions of Sri Lanka that were controlled by the government. In some of these cases, and in conflict with its present application of the internal protection alternative with regard to Iraqi citizens, the Board refused to grant asylum despite the lack of connections or social network in the area controlled by the Sri Lankan government: R.A.B., 14 October 1994, No.21-1279.

In late 1996, the Refugee Board began to apply the internal protection alternative concept to asylum applicants originating from so-called "minority areas" in Bosnia-Herzegovina (i.e. areas where the applicant would not belong to the dominant ethnic group). As a consequence, many applicants, typically Muslims or Croats from Serb controlled areas, have been denied asylum on the grounds that they can safely return to the areas controlled by the Muslim-Croat Federation. The Board has taken this step in full awareness of the UNHCR recommendation not to apply the internal protection alternative in such cases. The continued availability of temporary protection to those denied asylum has obviously made such decisions less controversial than they might otherwise have been. The Board has thus left the question of the long-term fate of such applicants to be determined as a question

of policy rather than of asylum law. The authorities have not yet signalled a definite intention to begin returning Bosnians from minority areas. Like all rejected Bosnian asylum seekers, they continue for the moment to benefit from temporary protection. Whilst the overall practice of the Board in these cases has been characterised by inconsistency, the Board's initial practice has shown a willingness to consider the question of "reasonableness", particularly in relation to socio-economic factors, in deciding whether an internal protection alternative is appropriate. The Board has not generally found, therefore, that an internal protection alternative exists where the applicants could not, by reason of age or infirmity and the lack of a support network in the Federation controlled areas, be expected to build a new life in those areas. In April - May 1997, however, the Board changed direction in its jurisprudential thinking. It is now much less likely to take account of socio-economic factors in deciding whether the application of the internal protection alternative concept is reasonable. A particular area of difficulty concerns Muslims originating from Croat-controlled areas of the Federation and vice versa. Whilst UNHCR has made it clear that its recommendation against return applies to these groups, the Danish authorities have tended to disregard this recommendation and to simply treat the Federation as one area in which both Muslims and Croats are uniformly protected.

## **8.6. Finland**

Since the Helsinki Administrative Court has replaced the Asylum Appeals Board, the Administrative Court has not analysed the internal protection alternative as the Asylum Appeals Board did when ruling on Tamils (see below). The counsels have argued on the basis of the concept of IPA in Turkish and Sri Lankan cases but when rejecting the appeal, the Court has not really elaborated on the issue.

However, the first instance decision maker, the Directorate of Immigration has used the concept of IPA in cases of Somalis originating from Somaliland. It has argued that people originating from the North can return safely as Somaliland has been peaceful for nearly 10 years now. The Directorate has not taken any stand on how to determine the clan, how to actually return and whether a forcible return is a durable solution. A decision on a case involving a child who had received a status on humanitarian grounds (immigration status A.4) is pending before the Helsinki Administrative Court, as it would under the circumstances be harsh to send her back to Northern Somalia where she originated from.

Generally, whether an IPA exists or not is a circumstance among others in the determination of the merits of the case and will not be considered in accelerated procedures.

In the years when the Asylum Appeals Boards was the appellate authority, it appeared that the policy with regard to Tamils from Sri

Lanka who have supported the LTTE was that they were in need of international protection. For instance, in a decision of 8 March 1996, the Asylum Appeals Board reached the conclusion that a young Tamil asylum seeker from the North of Sri Lanka could not find protection anywhere in Sri Lanka due to the fact that he had been working for the LTTE for years and that he was a young Tamil male. In a case of 19 June 1997, the Appeals Board granted de facto status to a young Tamil woman from Northern Sri Lanka because she was in danger of being harassed by the authorities on account of her connections with the Tamil Tigers. It would appear from an earlier decision reached on 15 January 1996, however, that the fact that an asylum applicant is a young male Tamil is not a sufficient ground per se for granting asylum.

The Asylum Appeals Board has been similarly predisposed to applications from Tamil asylum seekers who fear harassment from both the LTTE and the Sri Lankan authorities. Decision of the Asylum Appeals Board in the Case of X., 27 February 1995: The applicant had been arrested and tortured by the Sri Lankan army in 1989 on suspicion of LTTE membership. In 1990, the LTTE also arrested the applicant suspecting him of being an informer. After his arrest by the LTTE, the applicant was pressured to work for and join the organisation. In granting the applicant a residence permit, the Appeals Board considered that the prevailing human rights situation in Sri Lanka made it impossible for the applicant to return safely to the LTTE controlled area of Jaffna, where he had lived. Furthermore, he could not be expected to seek refuge in Colombo. He had no relatives or other ties there and ran the risk of being subjected to security checks and arrest if he moved there. In reaching this conclusion, the Appeals Board stated: "According to the UNHCR, asylum seekers can safely be returned only to the southern parts of the country if the returnee has lived there for long periods and/or has close relatives there. Those Tamils originating from the north and east who have a well-founded fear of LTTE persecution cannot safely reside in the south either".

## 8.7. France

Commission des Recours des Réfugiés, Halim Jasar, 5 November 1990, CRR No. 105091: This case concerned an application for refugee status by a Yugoslav citizen of Albanian origin who feared persecution on his return to the Kosovo region. The Commission found that the applicant had not shown that he could not avail himself of the protection of the Yugoslavian authorities in the whole of the country if he were returned. Accordingly, his appeal was rejected.

Commission des Recours des Réfugiés, Nadia El Kebir, 22 July 1994, CRR: The applicant in this case was an Algerian woman who claimed that she had been persecuted by Islamic contingents in Algeria on account of her professional lifestyle there. The Commission noted that the local authorities had known about the persecutory acts suffered by the applicant but had done nothing to

pursue the perpetrators. The Commission found that the circumstances of the applicant's departure from Algeria had made it impossible for the applicant to find refuge in another part of Algeria. Accordingly, no internal protection alternative existed for the applicant and she was granted refugee status.

Commission des Recours des Refugies, Case of Korjenic, 11 December 1998: The applicant was a Muslim Bosnian national. He was forced to leave his region of origin, Foca, in 1992 in order to escape from the Serbian militia of Bosnia. He found refuge in Gorazde where he joined the Bosnian army against the Serbs. The Board considered he had a well-founded fear of persecution if he were to go back to his region of origin. It pointed out that the security of Muslims is not guaranteed in this region of the Republika Srpska where Serbs are in a majority and where the relocation of displaced Croatians and Muslim Bosnians has still not been organised. The fear of persecution, as well as the possibility of protection has to be considered from the point of view of the region of origin and the absence of national or international protection in that particular region, regardless of the possibility of relocation in other parts of the country. In September 1998, there had been a similar ruling in the case of a Muslim Bosnian whose hometown, Doboje, was controlled by the Serbian Republic of Bosnia (n. 327742, 25/09/98).

Commission des Recours des Refugies, Case of Kenjalo, 3 July 1998: The CRR followed the same reasoning with regard to a Bosnian applicant of ethnic Serbian origin. It stated that going back to her region of origin where, according to the Dayton agreement, Serbs are in minority, will expose her to a well-founded fear of persecution for neither the Confederate State nor the international community could afford her protection. The Board added that it is not necessary to check if the applicant could safely relocate to other parts of the new Confederation.

## **8.8. Germany**

German case law provides that asylum cannot be granted if an internal protection alternative exists.

With respect to Kurdish asylum seekers, whether they will be entitled to enjoy asylum or be granted refugee status, depends on whether it is accepted that they could have found an internal protection alternative in Northern Iraq or not. Two pre-requisites have to be fulfilled in order for the courts to accept a part of a country as an internal protection alternative: firstly, it must be ascertained that the asylum-seeker will not become a victim of persecution, and secondly that the subsistence level there is guaranteed. In the case of Northern Iraq as an internal protection alternative for Kurds, there is a different treatment between Kurds who lived in Central Iraq before leaving the country and those who originate from Northern Iraq.

The Courts' decisions as to whether an Iraqi Kurd is to be granted asylum or refugee status depends on the grounds on which the applicant bases her/his application. The jurisprudence differs between Kurds persecuted because of exposed political activities and those who refer only to group persecution or persecution due to lodging an asylum application. For the first category, Northern Iraq is not considered to be an internal protection alternative. Although the courts hold that Iraqi authorities have no state power in Northern Iraq, they concede that Iraqi security services have the possibility to persecute persons whom they are highly interested in. German courts admit that Northern Iraq is infiltrated with Iraqi state agents and informers. For Kurds who come originally from Central Iraq and do not belong to the above-mentioned group of persons, Northern Iraq is agreed to be a region where they are not threatened by persecution by Iraqi security services. Nonetheless most courts assume that they cannot be sent back as their subsistence level is not guaranteed.

Kurds who lived in Northern Iraq before they left the country and who are not regarded as endangered due to exposed political activities are considered as persons for whom Northern Iraq is considered an internal protection alternative by most of the Administrative Courts. However some do make an exception in the case of asylum seekers who can make credible cases that they have no relatives or other connections there that could help them to retain the required level of subsistence.

Federal Constitutional Court, 2 B v. R 403/84 1501/84, EZAR 203 No. 5: The Court set down the principle in German law that an internal protection alternative exists

- when the person is safe from political persecution in another part of the country and
- when that part of the country is without other dangers and disadvantages which could amount to political persecution (the two-pronged test).

In this case, the Court examined what "dangers and disadvantages" in the alternative location would preclude a finding that an internal protection alternative existed for persons fleeing religious persecution. The Court held that a minimum religious existence should be possible at the alternative location. The Court defined minimum religious existence to mean "the possibility of practising one's religion alone or in community with others." The Court concluded that the decision of the lower court had not taken into account whether or not Turkish citizens belonging to the Yezidi religious group would be able to practise their religion in Turkish cities [the suggested internal protection alternative] and whether the Turkish state would be able or willing to provide protection against harassment by their Muslim countrymen.

The ability of Turkish citizens from the Yezidi religion to relocate within Turkey has been considered in a number of other cases. Federal Constitutional Court, UNHCR Ref: CAS/DUE/066: The Court held that there was no internal protection alternative in existence in Turkey for practising Yezidis fleeing religious persecution. By continuing to practise their religion, they would be faced with severe financial hardship. The Court found that the fact that Turkey did not offer sufficient protection to Yezidis meant that their persecution by private Moslems was attributable to the state. In essence, therefore, asylum seekers cannot be expected to compromise their religious beliefs in order to avail themselves of safety.

Federal Constitutional Court, B v. R 1025/90 InfAusIR 6/91, pp. 198-200 2 B v. R: The two-pronged test referred to above was used by the Court to quash a decision by the lower administrative courts in Germany to refuse asylum to two Afghan citizens with connections to the mujahedeen guerilla fighters. The lower courts had refused their request for asylum on the ground that they could live in parts of Afghanistan which were controlled by resistance movements to avoid government persecution. The Constitutional Court found that the civilian population in those parts of Afghanistan controlled by the resistance movements would be exposed to the violence of a civil war. These parts of Afghanistan did not, therefore, offer an internal protection alternative.

Federal Administrative Court, BVerwG C 45.92, InfAusIR 5/94 p. 201: The dangers and disadvantages that may preclude the existence of an internal protection alternative include not only the general circumstances in the country of origin but also individual circumstances. The Court reiterated its judicial reasoning that an alternative is not present where the asylum seeker would face "threats elsewhere in his country of origin that are equivalent in intensity to those which initially led him to flee." The Court noted that the threats need not be of a political nature, so long as the asylum seeker would be "forced into a precarious position" by avoiding state perpetrated persecution in his region of origin. The individual circumstances that may be taken into account include such factors as the individual's handicap, old age, or whether the individual has family or friends in the region who can support him. The Court concluded that an internal protection alternative could be precluded on the grounds either that the alternative does not meet with the subsistence needs of the asylum seeker in question or "where there is a concrete danger to life and limb."

Federal Constitutional Court, 2 B v. R 525/90 InfAusIR 4/91 pp. 136-140: The Court held that the fact that it was unlikely that a Syrian national, belonging to the Assyrian minority, would be subjected to a wanted notice throughout Syria if he were returned there, was insufficient evidence to accept the existence of an internal protection alternative.

It is interesting to note the link between the existence of state-like

structures and the existence of an internal protection alternative. In two judgments of the Higher Administrative court of Schleswig-Holstein, the court reasoned that in Northern Iraq there were no state-like structures, thus there could not be an internal protection alternative as the concept of IPA implies the possibility of being granted state protection. However, the Federal Administrative Court decided on 8 December 1998 (BVerwG 9 C 17.98) that there could be an internal protection alternative in the de facto autonomous provinces of Northern Iraq which are in part under the protection of the UN and the gulf-war allies. The Federal Court held that even where there was no state or state-like peace order there still could be an internal protection alternative. The question which the lower court was required to re-consider was whether the asylum seeker was sufficiently secure from being persecuted, is to say whether there was a real threat that the asylum seeker would be targeted by Iraqi agents.

Federal Administrative Court, BVerwG 9 C 4.99, 16 November 1999: Even if it can be assumed that there is sufficient security from persecution in the proposed safe alternative site, the asylum seeker must be able to access that site without undue dangers. The appellant would need to establish why the appellate court could not expect him to return to the proposed safe site. If the appellant only puts forward the lack of travel documents for obtaining transit visas this will not be sufficient, as these can regularly be obtained if the alien does not refuse to cooperate.

Federal Administrative Court, BVerwG 9 C.15.99, 5 October 1999: When assessing whether an asylum seeker will be at risk of persecution (in the meaning of political persecution) upon return, the situation in the entire territory of the state of origin has to be taken into account. If there is a risk of political persecution for the asylum seeker in a part of his/her home country, s/he can only be referred to other parts of that country, when the requirements for an internal protection alternative are fulfilled that is to say, when the person is safe from persecution and when that person is also not at risk of other unreasonable disadvantages that would not exist as such in the area where the person has previously lived (site of origin). The same principle applies where the site of origin, in this case Northern Iraq, and the proposed internal protection alternative are identical. In this case, however, applicants cannot claim that there are other unreasonable disadvantages - independent of political persecution - that would not exist as such in the site of origin as s/he has lived there before. When the site of origin and the site of the proposed internal protection alternative upon return are identical, risks of other disadvantages and dangers do not regularly stem from persecution. Thus, the appellant cannot rely on the second part of the two-pronged test. However, the Administrative Court concluded that the appellate court has not applied the principles correctly. It has, wrongly, assumed that there could not be political persecution as the central Iraqi government has lost temporarily its sovereignty over Northern Iraq. According to the Administrative Court, the appellate court has not made a finding of whether the appellant is at risk of

persecution by Iraqi agents who operate in Northern Iraq. The Administrative Court thus remitted the case back to the appellate court.

The Administrative Court of Sigmaringen inferred from the Federal Administrative Court's judgment of 5 October 1999 that an element of durability and stability is implied in the concept of internal protection alternative in order to meet the pre-requisite of being sufficiently safe from persecution in the proposed internal protection alternative. The Administrative Court of Oldenburg held also that there was no internal protection alternative due to a threat of an invasion by the Iraqi army.

Würzburg Administrative Court, Ref: W 9 K 92.30416, 15 March 1994: The Court concluded that as at 1992 Bosnian Muslims could not be expected to find protection either in the areas of Bosnia-Herzegovina controlled by the Serbs or the Croats, or in the one area controlled by the Muslims, as a result of the ongoing Serb violence there. The Court held that "an internal flight alternative is not established where asylum-relevant violations remain a real possibility and where the asylum seeker is exposed to additional dangers and prejudices similar to the violations of asylum-relevant rights." It is interesting to note that the Court in this case took into account the opinions of both The Foreign Office and Amnesty International in their "estimate" that there was no internal protection alternative in Bosnia at the time of the asylum seeker's application in Germany. The Foreign Office and Amnesty International had reached this conclusion on the basis that the administration, economy and supply systems had all collapsed.

Bavarian Administrative Court, Ref: AN 5 K 89.39099, 9 Jan 1992: The Bavarian Administrative Court has followed a similar rationale when dealing with claims for refugee status from Yugoslav nationals of Albanian origin. The Court reasoned that as Croatia and Slovenia had seceded from Yugoslavia, there was no internal protection alternative available for those persons seeking refuge from the repressive policy by the Serbian government in the Kosovo region.

Stuttgart Administrative Court, Ref: A 9 K 10452, 12 July 1990: The Court found that there was no internal protection alternative in Yugoslavia in 1988 for a Yugoslav asylum seeker belonging to the Albanian minority. The Court also found that, despite recent political developments in Yugoslavia, the applicant was still unprotected against persecution. Consequently, the applicant had a right to asylum in Germany.

Bavarian Administrative Court, Ref: AN 12 K 89.39598, 30 May 1990: The Court held that internal protection alternatives do not exist anywhere in Sri Lanka for Tamils because "returnees would have to face serious economic difficulties which were not present in their regions of origin before they fled." It would appear from this case that if an asylum seeker cannot survive economically,

asylum may be granted if the other requirements of the Convention are met.

Bavarian Higher Administrative Court, Ref: Az. 24 BZ 87.30943, 15 Nov 1991: In relation to the availability of an internal protection alternative in Sri Lanka for young male Tamils persecuted in the Sri Lankan army, the Court has held that no internal protection alternative exists where "the applicant would have to face risks that he did not have to face before he left Sri Lanka." By "risks" the Court not only meant "eventual persecution in other parts of Sri Lanka, but also "shortages of housing, and unemployment."

Higher Administrative Court (OVG) Sachsen-Anhalt, 26 Sept 1996, 1 L 10/95:

An internal protection alternative cannot only be assumed when Turkish authorities begin with a country-wide search, but already when the security authorities in the home area have a mere suspicion that the asylum seeker sympathizes with the Kurdish movement.

Hessian Higher Administrative Court, Ref: 13 UE 1568/84, 2 May 1990: The Court found that an internal protection alternative was not available to a Lebanese asylum seeker, as Syrian troops, who perceived the applicant to be an opponent of the Syrian ruling Baath party, were in the process of expanding their already extensive control over a large part of Lebanon. Consequently, the Court held that "it was ...not certain that the applicant would be safe from persecution by the Syrian military for a considerable period of time."

Sigmaringen Administrative Court, A 3 K 14668/93 InfAusIR 5/94 pp. 209-210, 17 February 1994: The Administrative Court suspended a deportation order made by the Federal Agency against a Liberian asylum-seeker, holding that there were no internal protection alternatives in the country. In reference to information supplied by the Foreign Secretary, the Court found that in the areas controlled by the National Patriotic Front of Liberia (NPFL) (some 50-60 per cent of the country) "everyone is in danger." It found that the Economic Community of West African State Cease-Fire Monitoring Group (ECOMOG) troops did not protect individuals. The Court concluded that deporting the applicant back to any part of Liberia was not "reasonable" in light of the limited function of the ECOMOG troops in protecting human rights and the failure of the Benin peace treaty.

On 15 May 1998, the Higher Administrative Court of Hamburg, held that the internal protection alternative in Western Turkey which is generally open to asylum seekers of Kurdish origin, is not automatically excluded for a thirteen year old Kurd merely on the grounds that he cannot on his own find his way in an alien environment. If he cannot be accommodated with his relatives, acquaintances or in a children's home, the parents living in Turkey can regularly be expected to accompany a child to the site of the

internal protection alternative.

## 8.9. Italy

There is no available jurisprudence on the applicability of the internal protection alternative in Italy. In Italian law, the existence of an internal protection alternative within the country of origin should not preclude someone from obtaining refugee status. The Italian Refugee Council is not aware of any cases to which the internal protection alternative has been applied. According to UNHCR sources, whose representative is an advisory member of the Italian Central Commission for the determination of refugee status, the Commission never considers or applies the concept of internal protection alternative to applications of Kurdish asylum seekers from Iraq.

## 8.10. Luxembourg

The Council of State applies the internal protection alternative as a ground for refusing refugee status. Council of State, 28 June 1994: In this case, the applicant had been persecuted in Kosovo after taking part in a pro-independence demonstration. The Council of State refused the applicant's claim for refugee status because "after he had left Kosovo, he had been living for more than six months in the north of [the former] Yugoslavia without being persecuted or prosecuted." The Council considered that the fact that the applicant had continued living in the country after his participation in the Kosovo independence protest indicated that an internal protection alternative in the country was available to him.

## 8.11. The Netherlands

Dutch case law takes, increasingly, into account the UNHCR Position Paper, Relocating Internally as a Reasonable Alternative to Seeking Asylum - (The So-Called "Internal Flight Alternative" or "Relocation Principle") of February 9, 1999.

In REK, 13 September 1999, AWB 99/3380, the Rechtseenheidskamer (REK) justified the decision of the Secretary of State to end the policy of provisional residence permits to rejected asylum seekers from Iraq on grounds of IPA. However, the REK ruled that the North of Iraq cannot be an IPA for every rejected asylum seeker from Iraq. The Dutch authorities have to examine in each individual case whether the applicant has sufficient ties with Northern Iraq.

In REK, AWB 99/104, 3 June 1999, the REK justified the decision of the Secretary of State that the province of Mudug is (relatively) safe, so that rejected asylum seekers from Somalia can be returned to Mudug as long as they have got a clan relation in Mudug (in general the Secretary of State pursues the policy that when persons have clan relations in a safe part of Somalia, these persons have an IPA).

Court of Unity, AWB 99/73, 3 June 1999: After the northern provinces of Somalia were considered as a relocation alternative for rejected Somali asylum seekers who had clan-related ties with the north (Court of Unity, March 6, 1997, AWB 96/7941), the question was brought before the Court of Unity whether the province of Mudug (including the southern part) could be considered as a relocation alternative and whether the protection by the northern clans against random violence from other clans could be considered adequate. As to the first question, the Court of Unity held that the whole province of Mudug could be considered as a safe relocation alternative. This decision affects especially the Darod clan and Hawiye clan, as their traditional clan territory also spreads out over the southern part of Mudug. As to the clan protection itself, the Court held that the relationship between the rejected asylum seeker and large clans such as Darod and Hawiye was too remote to expect a sufficient degree of protection. The question of whether such protection is available is dependent on the traditional presence of sub-clans, such as the Darod Marehan and Darod Majerteen, in the safe parts of Somalia. As a consequence, members of some sub-clans (for instance the Darod Ogaden), as well as members of other southern clans who do not qualify for admission on individual grounds, still have to be granted a provisional status in light of the general situation in Somalia.

Court of Unity, AWB 99/1073, 2 June 1999: The Court of Unity held that the situation in northern Sudan is sufficiently stable to return rejected Sudanese asylum seekers from Northern Sudan. However, rejected Sudanese asylum seekers from the south of Sudan who belong to the non-Arabic population or the Nuba population cannot be returned to the north as they may be suspected of SPLA sympathies. Even if these asylum seekers have stayed for a long period in the north of Sudan, this cannot lead to the conclusion that they will be able to safely reside in the north after their return. Therefore, they will still be granted a provisional status.

The District Court of Haarlem, AWB 98/7946 VW, 16 September 1999:

The applicant of Somalian nationality was a member of the Reer Hamar. During the war the family suffered robberies by bandits. Members of the family were killed or injured. According to the court, the fact that the reports of the Minister for Foreign Affairs states that there are no indications that the Reer Hamar cannot relocate themselves elsewhere is absolutely insufficient to come to a finding that there is a relocation alternative. The President ruled that members of the Reer Hamar must be granted a refugee status, except for those who do not risk the persecution that the Reer Hamar face in general, on account of individual facts and circumstances.

In its decision of September 13, 1999, AWB 99/4335, the District

Court Den Haag (Rechtseenheidskamer) applied the UNHCR standards on the situation in northern Iraq. Although this case concerned the situation for rejected refugees and not the IPA for refugees, the principles laid down by the Rechtseenheidskamer were of such a general character that there is no doubt as to their wider application. This was made clear in a second decision of March 20, 2000 (Court Den Haag, AWB 99/81105), also concerning rejected asylum seekers from Iraq, where it was held that there is no ground to distinguish between 'internal flight alternative', 'internal protection alternative' and 'internal relocation/resettlement alternative'.

In the first decision (September 13, 1999), the Rechtseenheidskamer held that the UNHCR view on the situation in northern Iraq, as mentioned in its Note of June 14, 1999, showed sufficient evidence that northern Iraq could be considered an internal protection alternative. The Rechtseenheidskamer held:

"The deciding analysis is whether, in all the circumstances of the case, it would have been (and would now be) possible and reasonable to expect the asylum-seeker to seek and obtain safety within his or her own country, rather than seeking asylum abroad. Factors which need to be considered in judging the reasonableness of the relocation include, among others, the asylum-seeker's age, sex, health, educational or professional background, the presence of family members, the existence of ethnic and religious communities to which the asylum-seeker belongs, and political and other links to the area..."

The court held that rejected asylum seekers from the relatively stable north would have to provide evidence themselves that, in their individual case, northern Iraq could not be considered an IPA. In cases of asylum seekers from central Iraq it is on the Dutch state to show that an IPA applies.

In the second decision (March 20, 2000) the Rechtseenheidskamer gave a further interpretation of the 'reasonableness' of the IPA in cases of asylum seekers from central Iraq. An IPA applies if the (rejected) asylum seeker has family ties, community ties or political ties with northern Iraq. This would follow from the aforementioned UNHCR Note on Iraq of 14 June 1999. The Rechtseenheidskamer held that the UNHCR view on the IPA can be seen as an interpretation of the minimum standards for a human existence. This standard, according to the Rechtseenheidskamer, is also found in the exception of the country of former residence, where the criterion is whether the asylum seeker can remain or could have remained in this country under circumstances that are locally "not abnormal". The fact that international relief organisations are active in northern Iraq is, in this respect, not decisive if the access to basic and essential provisions for every one is (still) not guaranteed.

In its decisions the Rechtseenheidskamer follows rather closely the UNHCR's points of view on the situation in Iraq. The fact that

UNHCR describes the situation within the Kurdish enclave in northern Iraq as "volatile and susceptible to change" does not stand in the way of the IPA. The Rechtseenheidskamer focuses rather on the "reasonableness analysis" than on the "safety analysis". It does not mention the "absorption capacity" of the IPA. Also, the fact that the agent of general oppression in Iraq (and in individual cases, the agent of persecution) is the state, does not seem to be of importance.

Not only in the case of Iraq, but also for other nationalities, more detailed case law has followed. Of special interest is a decision of the Court Haarlem, AWB 99/6682, 13 June 2000, in the case of an Ahmadiyya from Pakistan, who claimed to be persecuted by orthodox Muslims. The court allowed the appeal because the UNHCR 'reasonableness analysis' (see UNHCR Position Paper, Relocating Internally as a Reasonable Alternative to Seeking Asylum - (The So-Called "Internal Flight Alternative" or "Relocation Principle"), February 9, 1999) was not applied. The Dutch State held that an IPA was available in one of the big cities in Pakistan. The Court found this approach too general: the individual circumstances had to be taken into account.

In the case of a Tamil asylum seeker from Sri Lanka the Court Haarlem, AWB 00/5578, 23 June 2000, also held that an internal protection alternative in Colombo did not automatically apply: "It is questionable whether the mere fact that one of the applicant's cousins lives in Colombo means there is a real IPA. UNHCR, in its Position Paper of February 9, 1999, seems to require that more conditions be met. In light of the question whether an IPA is available, several subjective and objective factors will have to be taken into account, like age, gender, personal relations, professional background and skills and the financial situation of the alien."

Several older cases decided by the Council of State indicated that the possibility of an internal protection was excluded if the national authorities are the agent of the persecution: ARRvS, 2 September 1982, RV 1982, 4, ARRvS, 14 September 1988, RO2.86.1433 A+B, ARRvS 8 June 1993, GV (oud) D12-232. Similarly, in the case of AWB 96/6210, 25 June 1997, the Court of Zwolle rejected the government submission that the applicant, a Muslim of the Sandjak region who was fleeing persecution from the Serbian authorities, could avail himself of an internal protection alternative in Belgrade or "other parts of the Former Yugoslavia".

Where persecution was inflicted by non-state agents, the willingness and the ability of the state to provide protection against such persecution must be established in order to determine the applicability of internal protection alternatives. For instance, in RO2.92.3389, 8 November 1994, the Council of State held that there is no internal protection alternative in Sri Lankan government-controlled territories for those persons fleeing persecution from the Tamil Tigers, as "there was no certainty that the Sri Lankan authorities could protect an important political

opponent of the Tamil Tigers". The Court of Zwolle held that even though there were "safe havens" for escaped slaves in some districts of Nouakchott, there was no reason to expect the applicant, a slave, to relocate internally as the authorities were only in a position to protect slaves in part of the country, and not the whole country: AWB 95/3389, 11 March 1997.

It followed that where an applicant was fleeing persecution sanctioned by a state in control of only 10 per cent of the country, an internal protection alternative would be available to the applicant in those areas controlled by opposition forces: RO2.92.0475, 21 September 1994. Where those opposition forces, however, were also perpetrators of persecution, the applicant could not be expected to find refuge in the areas controlled by them. For instance, in RO.93.3958, 26 March 1997, the Council of State held that it could not apply the internal protection alternative to the applicant's case because the applicant had been persecuted not only by the state but also by the Kurdistan Workers' Party (PKK) in South East Turkey. Likewise, in AWB 97/1525, 15 July 1997, the Court of Den Haag held that the applicant could not be expected to return to Sri Lanka to avail himself of state protection there as he had failed to comply with conditions of reporting in the past and had also previously escaped from detention. As the applicant's fears of detention and torture by the LTTE and the Sri Lankan authorities were "not impossible", he could not be expected to return to Sri Lanka.

The fact that the applicant had suffered persecution at the hands of state agents did not necessarily mean, however, that the Council of State would always find in the applicant's favour. For instance, the Council held that further inquiry of possible protection alternatives should be made in the case of an asylum applicant who had quite clearly been the victim of persecution at the hands of the Turkish authorities in the South East of Turkey: ABRvS, 30 October 1995, RO2.93.2197.

The Council of State also held that persecution at the hands of "lower authorities" did not preclude the applicability of an internal protection alternative: ABRvS, RO2.92.4410, 6 December 1994. Likewise, the Court of Zwolle held that the applicant, a Roma from Slovakia, who had been coerced into dropping two charges of discrimination against the local police, could have asked for protection from "higher authorities." Accordingly, the Court refused the applicant's request for asylum, concluding that the applicant could find refuge elsewhere in Slovakia: 96/2197, 28 February 1997.

Generally, the courts did not consider that the general security situation in the internal protection alternative is a determinative factor in the consideration of its availability. However, in AWB 96/1497, 20 January 1997, the Court of Zwolle held that an internal protection alternative was not available to the applicants because the situation in Iraqi Kurdistan was too unstable for them

to return. The Court discounted the argument that the applicants had lived there for a long period of time and that it was, therefore, feasible for them to do so again. The Court concluded that the Iraqi authorities retained a certain measure of control over the area and that it was a possibility that they would search for the applicants there in the future.

In AWB 96/10979, 10 June 1997, the Court of Zwolle stated that the "personal circumstances" of the applicant may be of importance in determining the reality of an internal protection alternative. The applicant in this case was a single woman of Krajinean origin. Her father was deceased, her sister and mother were resident in the Netherlands and Germany and the whereabouts of her brother were unknown. Moreover, the situation in Krajina was "unrelentingly poor". In light of these personal circumstances, the Court concluded that it would be a sign of "disproportionate harshness" to send the applicant back to Krajina or another part of Croatia without first conducting an inquiry into the probability of a safe return.

The Court of Haarlem stated that the government was required to inform the Court of "acceptable" protection alternatives: AWB 96/3936, 20 December 1996. In this case, the Court held that the Secretary of State must provide the Court with information regarding the treatment of Jews in various parts of the Russian Federation so that the "acceptability" of potential protection alternatives could be examined by the Court.

Likewise, the Court of Zwolle indicated what circumstances will give rise to an obligation on behalf of the Secretary of State to consider the "reasonableness" of internal protection alternatives: AWB 96/9375, 29 May 1997. These circumstances include, systematic discriminatory treatment in a relatively short period of time and a failure by the state to provide adequate protection against such treatment. In another case under its consideration, the Court of Zwolle made clear that an investigation by the Secretary of State into the "reasonableness" of an internal protection alternative cannot be met simply by relying on findings in a report of the Ministry of Foreign Affairs: AWB 97/137, 29 May 1997.

## **8.12. New Zealand**

The leading case in New Zealand with respect to the concept of internal protection alternative is the decision of the Court of Appeal in *Butler v Attorney-General*, (1999) NZAR 205, 13 October 1997. The Court of Appeal held the following:

"Central to the definition of "refugee" is the basic concept of protection, namely the protection accorded (or not) by the country of nationality or, for those who are stateless, the country of habitual residence. If there is a real chance that those countries will not provide protection, the world community is to provide

surrogate protection either through other countries or through international bodies. The lynch-pin is the State's inability to protect. The true object of the Convention is not just to assuage fear, however reasonably and plausibly entertained, but to provide a safe haven for those unfortunate people when fear of persecution is in reality well-founded."

"On the issue of relocation, the various references to and tests for "reasonableness" or "undue harshness" must be seen in context, or against the backdrop that the issue is whether the claimant is entitled to the status of refugee. It is not a stand alone test, authorizing an unconfined inquiry into all the social, economic and political circumstances of the application including the circumstances of members of the family. (...) While family circumstances might be relevant to the reasonableness element, there was no basis for such a link on the facts of the present case "

"Rather than being seen as free-standing, the reasonableness test in the relocation context must be related to the primary obligation of the country of nationality to protect the claimant. Meaningful national state protection which can be genuinely accessed requires provision of basic norms of civil, political and socio-economic rights. It is not a matter of a claimant's convenience or of the attractiveness of the place of relocation. More must be shown. The reasonableness element must be tied back to the definition of "refugee" set out in the Convention and to the Convention's purposes of original protection or surrogate protection for the avoidance of persecution. The relocation element is inherent in the definition; it is not distinct. The question is whether, having regard to those purposes, it is unreasonable in a relocation case to require claimants to avail themselves of the available protection of the country of nationality."

Subsequently, in Refugee Appeal No. 71684/99 (29 October 1999) the Refugee Status Appeals Authority re-examined the New Zealand jurisprudence in the light of both Butler and the Guidelines on the Internal Protection Alternative convened by the Program in Refugee and Asylum Law, University of Michigan Law School, April 9-11, 1999 (Michigan Guidelines). It found that the Guidelines properly reflected and summarised the principles to be applied in New Zealand when considering the issue of internal protection. The RSAA noted that the term "relocation" was to be abandoned in favour of the term "internal protection" as the latter term emphasises that the central core of the inquiry is protection from persecution. The Michigan Guidelines are reproduced in full in this case.

The New Zealand approach is, in the words of the RSAA, as follows:

"Because under New Zealand law the issue of internal protection does not arise unless and until a determination is made that the refugee claimant holds a well-founded fear of persecution for a

Convention reason, the inquiry into internal protection is really an inquiry into whether a person who satisfies the Refugee Convention and who is prima facie a refugee - at least in relation to an identified part of the country of origin - should lose that status by the application of the internal protection principle. There is considerable force to the logic that putative refugee status should only be lost if the individual can access in his or her own country of origin the same level of protection that he or she would be entitled to under the Refugee Convention in one of the state parties to the Convention."

The RSSA held in the context whether the internal protection alternative had to have existed at the time of the asylum seeker's departure:

"Past harm, and past persecution in particular, is not a pre-requisite to refugee status, nor, if it exists, is it enough on its own to justify the grant of refugee status. The relevance of this principle in the current context is that it has never been required of refugee claimants in New Zealand that they demonstrate that they were unable to flee to some other part of their country of origin as an alternative to escaping abroad."

"But more importantly, the Authority's approach postpones the inquiry into internal protection until after identification of the anticipated harm and of the degree of the risk of that harm eventuating. This provides a sound foundation from which to then embark upon the inquiry mandated by the protection principle, namely 'protection from what?'"

The RSSA clearly stated in the context of manifestly unfounded procedures that "[I]t is (...) not possible for the question of internal protection to be considered in a summary manner. "

The RSSA enquired into what constitutes meaningful internal protection:

"In the refugee context, protection must mean, at the very least, an absence of a risk of persecution. It follows that the first requirement of the proposed site of internal protection is that it eliminates the earlier identified well-founded fear of persecution. Put simply, the place in question must be one in which the refugee claimant is not at risk of persecution for a Convention reason. As this assessment necessarily looks to the future, before a finding can be made that there is no future risk of persecution in the proposed site, it must be shown that the elimination of the risk is more than transitory. There must be sufficient evidence to allow a finding to be made that the absence of risk is a durable state of affairs. In this context, it is relevant to inquire whether the agent of persecution is a state entity which has the ability to act on a nationwide basis as compared with a non-state agent of persecution whose threat to the refugee claimant may be localized only. Where the fear of persecution stems from the unwillingness or inability of the state to offer effective protection, the inquiry will

necessarily focus on the issue whether that unwillingness or inability is localized or nationwide. "

The RSSA went on to say that:

"The inquiry must, however, go further. We are of the view that meaningful protection means more than the mere absence, in the proposed site of internal protection, of the risk of persecution (for a Convention reason) faced in the original locality. Meaningful domestic protection is not genuinely accessed where, in the proposed site of internal protection, the individual is exposed to a risk of other forms of serious harm, even if not rising to the level of persecution. Accordingly, the internal protection inquiry mandates a second step which is an inquiry whether, in the proposed site, there are other risks which either amount to, or are tantamount to, a risk of persecution. This would include factors which have the potential of forcing the refugee claimant back to the original area of persecution."

"But there is a third step to the inquiry. The view that we take is that the notion of meaningful domestic protection implies not just the absence of a risk of harm, it requires also, as Professor Hathaway has pointed out, the provision of basic norms of civil, political and socio-economic rights. These basic norms are to be found in the text of the Refugee Convention itself and in particular in Articles 2 to 33. (...)"

"But it is primarily the absence of an agreed standard of minimum rights for refugees which we see as the greatest handicap to the International Bill of Rights approach.(...) The view we have taken is that the appropriate minimal standard of effective protection for the purposes of Article 1A(2) of the Refugee Convention is the standard of human rights set by the Refugee Convention itself, ie, the rights owed by state parties to persons who are refugees".

Refugee Status Appeals Authority, Refugee Appeal, No. 71729/99, 22 June 2000: The RSAA, though following nearly in its entirety the suggestions of the Michigan Guidelines in its decision Refugee Appeal No. 71684/99, 29 October 1999 (see above), departed from what the Michigan Guidelines were proposing in the context of the burden of proof. Hathaway clearly shifts the burden of proof of establishing the existence of internal protection to the government of the putative asylum state.

The RSSA held that "the Court of Appeal [in Butler] also held at 218 that the relocation element (internal protection alternative) is inherent in the definition; it is not distinct. In the Authority's view, it follows that the burden of proof on the claimant extends also to the internal protection alternative issue and that the Authority's approach to the burden of proof as outlined in Refugee Appeal No. 523/92 Re RS is entirely in accord with Butler. The law in the United Kingdom is to the same effect: R v Secretary of State for the Home Department; Ex parte Salim [2000] Imm AR 6, 7-8 (QBD) (Latham J)".

The RSSA went on to say that:

"This interpretation led the Authority to hold in Refugee Appeal No. 71684/99 at para 66 that to the extent that the Michigan Guidelines on the Internal Protection Alternative suggest that the burden of proof on the issue of internal protection is otherwise, it has no application in the New Zealand context: That having been said, however, we have recognized in the past, and do so again now that:

(a) A high degree of caution must be exercised when determining whether an individual can genuinely access meaningful domestic protection, especially when the agent of persecution is the state; and

(b) If there is doubt, the claimant must receive the benefit of the doubt".

Refugee Status Appeals Authority, Refugee Appeal No. 523/92 Re RS, 17 March 1995: The Authority made clear that the burden of proving that no internal protection alternative existed lies with the asylum seeker. He must adduce clear and convincing evidence of the state's inability to protect. The Authority rejected the contention that there were practical impediments to the relocation of Punjabi Sikhs, such as ethnicity, linguistic barriers, religious faith, intolerance by Hindus and lack of central government support. What the Authority found dispositive in dismissing the applicant's appeal in this case was the fact that the campaign of terror in the Punjab was virtually over and that it would not be unreasonable, therefore, for the applicant to return to India. The Authority concluded that the applicant had satisfied both limbs of the relocation test as described in the above case of Refugee Appeal No. 135/92.

Refugee Status Appeals Authority Refugee Appeal No. 135/92 Re RS, 18 June 1993: This case established that refugee status will be granted to an individual if (1) the individual cannot genuinely access domestic protection that is meaningful and (2) in all the circumstances, it is unreasonable to expect the individual to relocate. On the facts of the case before it, the Authority held that it was unreasonable to expect the applicant to avail himself of the protection of the Indian government because he was a victim of state-sanctioned torture. (It should be noted at this point that the New Zealand courts generally give special recognition to victims of torture and other cruel, inhuman or degrading treatment or punishment) The Authority warned that considerable caution should be used when carrying out the relocation assessment "as it essentially involves making speculative judgments." Ethnic, religious, cultural and political differences often make the relocation alternative unrealistic. The Authority also held that if there is any doubt as to whether relocation is reasonable, the applicant must receive the benefit of the doubt. The very fact that the relocation alternative is assessed in terms of

"reasonableness" means that "an infinite variety of circumstances" will be taken into account. Consequently, the outcome of most cases will depend on their own particular facts.

Refugee Status Appeals Authority (RSSA), Refugee Appeal No. 18/92 Re JS, 5 Aug 1992: The applicant in this case feared persecution from the Khalistan Commando Force (KCF) after his father and uncle were killed by terrorists from the organisation. The Authority pointed out that where the individual feared persecution at the hands of private individuals, such as the KCF, and the government in the country of origin was willing and able to provide protection, the individual could not argue that the country of origin was unable to provide effective protection. If the individual did not seek protection of the state authorities, s/he could not convincingly argue that the state had failed to protect him. The RSSA held that relocation was available not only when the individual was able to avoid detection by his persecutors but also when it at least reduces the chance of detection to less than a "real chance." Where the applicant has been out of his country of origin for a relatively long period of time (for the duration of the asylum process), relocation would be reasonable since the degree of risk of persecution would have reduced to well below the "real chance" threshold. The RSSA also noted that relocation would be reasonable where there was only a regionalised failure to protect. In concluding that Sikhs could settle in different part of the Punjab or in different parts of the state, the Authority dismissed the applicant's appeal.

Refugee Status Appeals Authority, Refugee Appeal No. 11/91 Re S, 5 Sep 1991: The RSSA cited Hathaway in this case as authority for the proposition that refugee status is not warranted where a national government provides a secure alternative home to those at risk. Relocation will only be feasible where the protection afforded by the state in the area of relocation is meaningful and accessible. In determining whether relocation is an available option, all of the circumstances prevailing in the country of origin must be taken into account. Language and employment difficulties are not relevant to the consideration of state protection. In the case before it, the RSSA found that the option of internal relocation for the applicant (an Indian Sikh national from the Punjab) was reasonable in light of the fact that his persecutors were non-state agents who were being actively pursued by the authorities and who lacked the resources to track individuals throughout the Punjab. The RSSA concluded, therefore, that it would not be unreasonable for the applicant to leave the Punjab, despite the fact that he might face language and employment difficulties.

### **8.13. Portugal**

Reflecting article 1 of Law 15/98, of 26th of March 1998 on the new legal framework in matters regarding asylum and refugees which governs the definition of refugee status in Portugal, the concept of the internal protection alternative has not been applied

by the Portuguese authorities per se as a ground for refusing refugee status to asylum applicants. However, the concept is sometimes applied to support a negative decision. But the fact that an asylum seeker tried to find a safe area within the territory before leaving his country of origin can also be considered as an indication of the wellfoundedness of the asylum claim.

Presently, the Portuguese authorities tend to refuse asylum claims and humanitarian status (article 8 of the referred Law) from nationals from Angola and Nigeria, adding to the conclusions the existence of certain regions in these countries to which the applicants could return in order to avoid further persecution. In the near past the same argument was used to refuse requests from nationals from Sierra Leone during certain stages of the civil war on the ground that certain regions were considered safe areas.

Due to the fact that both the appeal to the Portuguese Administrative Circle Court against a decision of non-admissibility of the asylum application by the national Commissioner for Refugees and the appeal to the Portuguese Administrative Supreme Court against a decision by the Home Office Minister refusing recognition of refugee status do not involve a review of the merits of an asylum application, judicial interpretation of the concept of internal protection alternative is difficult to ascertain in Portugal. What is clear from the few administrative decisions that are available is that, as mentioned above, the internal protection alternative concept is sometimes applied to support a negative decision.

## 8.14. Spain

There is no provision regarding the concept of internal protection alternative in the Spanish Asylum Law or the Implementing Regulations. Whilst the Spanish authorities do apply the notion in their consideration of asylum claims, they proceed very carefully before denying refugee status solely on this basis. An application is not dismissed a manifestly unfounded/inadmissible on grounds of an internal protection alternative. Practice is rather that the existence of safe areas within the country together with other reasons (lack of evidence, etc.) will lead to a rejection of an asylum claim. For instance, the Supreme Court on 19 June 1998 ruled that: "el informe de la Oficina de Asilo y Refugio fechado el 3 de marzo de 1994 destaca, en esencia, que la situación política de Liberia se presenta dividida en zonas territoriales, bajo la influencia de los diversos Gobiernos o Autoridades de los grupos tribales o étnicos rivales, de forma que sus ciudadanos pueden ponerse bajo la protección de las autoridades que les resultan afines, lo que no permite defender la idea de una persecución política o racial para todos los nacionales de dicho país."

The fact that an asylum seeker has moved within the territory trying to find a safe area before leaving the country of origin is indicative of the seriousness of the asylum claim. UNHCR plays a prominent consultative role in the determination procedure and

the authorities usually follow its advice. Case law on this issue is very scarce, for example, Audiencia Nacional, 20 April 1991: The Court considered the claim by a Lebanese national who had suffered persecution by the Syrian secret services. In deference to a report prepared by the Spanish Embassy in Beirut, the Court held that even though "Lebanon was in a situation of conflict and violence, there were zones of refuge" available elsewhere. The Court noted that "the conflict situation in a country [is distinct] from the personal fear of the asylum-seeker of being persecuted for one of the motives justifying refuge."

### **8.15. Sweden**

The first instance decision-making body for applications for refugee status is the Migration Board. A negative decision may be appealed to the Aliens Appeal Board.

The immigration authorities in Sweden uphold the concept of internal protection alternative by denying refugee status to asylum applicants who can access efficient protection in another part of their country. The concept will not be applied, however, to exclude refugee status to an asylum applicant if "under the circumstances it would not have been reasonable" for the applicant to seek refuge in another part of his/her country. The concept, however, is not applied in order to declare an application as manifestly unfounded or inadmissible.

An interesting case in the context with the Dublin Convention as regards differing state practice in interpreting the refugee definition in Germany and Sweden is the following. On 29 June 2000, the Swedish Government decided on the case of a family from Bosnia-Herzegovina who would be in the minority if repatriated. This family applied for asylum in Sweden after being in Germany for over four years. When the family arrived, the Dublin Convention, under which provisions Sweden was entitled to send them back to Germany, was already in force. However, Sweden did not send them back immediately. Whereas Germany considers that Bosnians who would be in a minority upon return can make use of an internal protection alternative, Sweden has paid close attention to the terms of the Dayton Agreement and has not returned asylum seekers originating from so-called "minority areas". The family, Muslims from Vlasenica (within the territory of Srpska Republic) where no normalisation process is taking place, was allowed to remain in Sweden on political-humanitarian grounds.

The Swedish practice has been adapted to the fact that there is an ongoing normalisation process taking place in Bosnia-Herzegovina. Therefore, in general, persons from a minority area where such a normalisation process is under way cannot be granted residence permits in Sweden. However, the circumstances in the place in question must have a convincingly high level of security if return is to be possible. Persons who come from minority areas where no such normalisation process is in

place can still obtain residence permits on political-humanitarian grounds. In the case of the family from BH, the Government gave much weight to the argument put forward by UNHCR that forced returns to places other than the home town or village would impede the full implementation of the Dayton Agreement. The Government stressed that in this context neither the Dublin Convention nor the terms of the Aliens Act imply that Sweden was hindered from handling an application for a residence permit just because another EU Member State was responsible for dealing with that person's asylum claim.

Two decisions of the Utlänningsnämnden (Appeal Board) demonstrate the Swedish authorities' tendency to apply the internal protection alternative as a ground for denying asylum. In a decision given by the Board on 13 December 1993, the Board refused refugee status to a Serbian Muslim from the Sandzak border area between Serbia and Montenegro who was a member of the SDA. In reaching its decision, the Board held that the applicant could avoid persecution perpetrated against Muslims in the northern part of Sandzak by seeking refuge in one of the other eleven municipalities in the Sandzak area. In a decision given on 8 December 1993, the Appeal Board refused refugee status to a 16-year-old child applicant from Sri Lanka. As a Tamil, the applicant feared persecution from both the government and the LTTE, an organisation he had left. The Appeal Board concluded that the applicant could reside elsewhere in Sri Lanka and cited Colombo as a safe internal protection alternative.

Like the Appeal Board, the Swedish immigration authorities have also applied the internal protection alternative as a ground for refusing refugee status. In a decision given on 4 November 1993, the authorities held that a family from Eastern Croatia, an area under Serbian control, was not entitled to refugee status because it could relocate to another part of Croatia controlled by the Croatian government where it could live without the risk of persecution. In a decision concerning Bosnia, however, the authorities have held that an internal protection alternative did not exist for those ethnic groups living in areas where they were in the minority: A96/3811/MP-A96/3820MP, 28 November 1996. In this context, it is interesting to note that UNHCR has recommended that cases involving Bosnian applicants must be considered in light of the principle recognised in the Dayton Peace Accords that applicants be allowed to return to the place of their former habitual residence. Relocation to another part of the country must always be voluntary.

## **8.16. Switzerland**

The Swiss Asylum Appeals Board (ARK) has applied the internal protection alternative concept in several cases involving Turkish minorities seeking asylum in Switzerland. Close scrutiny of these cases reveals that the Swiss authorities will apply the following rationale in their application of the internal protection concept. In the inadmissible procedure (decision not to examine a claim as to

its substance - Nichteintretensverfahren), the evaluation of IPA is not allowed.

The Swiss authorities will grant refugee status to asylum seekers where the feared persecution is country-wide, perpetrated by state agents and the situation is generally "hopeless." Persecution by quasi-state agents is put on the same level with persecution by state agents. An internal protection alternative will only exist if the protection offered at the proposed relocation is effective. In general, this refers to protection by the state, but also includes protection by quasi-states. However, the quasi-state should be able to afford a high degree of protection, that is to say its ability to protect is based on the durability of the quasi-state's existence, or its existence is secured by international safeguards. An internal protection alternative will only exist if the protection offered by the location of refuge is effective. An internal protection alternative will not be deemed to exist, therefore, where there is even the remotest possibility that the applicant will be forced to return to the original area of persecution. Whilst, however, an asylum applicant will be expected to relocate to another part of the country of origin, despite the inherent difficulties and disadvantages in doing so, inferior living conditions existing at the place of internal refuge will be taken into account when the reasonableness of executing a deportation order is considered.

Some commentators argue that an internal protection alternative may only exist where this might be "reasonable." Others argue, as mentioned above, that the reasonableness of the internal protection alternative is not part of the refugee determination process but only comes into play when consideration is being given to the reasonableness of the execution of a deportation order. The Swiss asylum authorities have so far followed the latter opinion.

Swiss Asylum Appeal Board (Asylrekurskommission – ARK–) (German-speaking division), 96/082: In this case, the Swiss Asylum Appeal Board held that the members of the Syrian-Orthodox minority in Turkey do not have an internal protection alternative available there.

Swiss Asylum Appeal Board (German-speaking division), 95/002, Chamber (Kammer) VII, judgment of 22 January 1996: In this case, the Appeal Board held that a conscientious objector of Syrian-Orthodox faith could not be expected to relocate to any part of Turkey because the police were looking for him throughout the whole of the country. The same rationale has been applied by the Board in the case of an Alevitic conscientious objector who had a well-founded fear of persecution in his home region of Pazarcik: ARK/96/108 and ARK96/191, Chamber (Kammer) II, judgment of 6 August 1996; similarly ARK96/256, Chamber (Kammer) II, judgment of 28 October 1996.

Swiss Asylum Appeal Board (German-speaking division), 96/225, Chamber (Kammer) III, judgment of 24 September 1996: This

case involved an asylum application by a Kurdish woman from Turkey. The applicant had been brought up in Koeyue where she had looked after her parents for a number of years. In concluding that an internal protection alternative did not exist for the applicant in the west of Turkey, the Board found the fact decisive that the applicant (a single woman) had no social network or family connections in the west of Turkey and had no command of the Turkish language. Accordingly, the Board found it to be unreasonable to expect the applicant to move there.

Swiss Asylum Appeal Board (French-speaking division), 24 June 1994, 2nd Ch., N 185 334: The Swiss Asylum Appeals Board held that Istanbul represented a valid protection alternative for the return of a Kurd with higher secondary education and adequate knowledge of the Turkish language that had already enabled him to live in Istanbul in the past.

Swiss Asylum Appeal Board (French-speaking division), 31 January 1994, 2nd Ch., N 222 361: The Board found that an asylum seeker and his family who had only worked on his parents' farm in Turkey and was illiterate did not have an internal protection alternative elsewhere in Turkey. The Board also found that it could not be ruled out that the applicant's Kurdish name might "betray his origins, which could result in persecution by the authorities in other regions of the country."

Swiss Asylum Appeal Board (French-speaking division), 6 December 1994, 2nd Ch., N 175 287: The Board held that there was no internal protection alternative for the Yezidis in the entire Turkish territory where, following the emigration of a large part of their population, they no longer had a socio-economic network.

Swiss Asylum Appeal Board (French-speaking division), 26 May 1993, 4th Ch., N 249 452: The Board found that Tamils had opportunities for internal refuge in the south of Sri Lanka, especially in the city of Colombo.

Swiss Asylum Appeal Board (French-speaking division), 21 April 1993, 4th Ch., N 138 356: There is no possibility of internal protection where the asylum seeker is directly persecuted by the central authorities. The Board recognised the claim to asylum of a member of the Turkish Communist Party/Marxist-Leninist who, according to official information from the Swiss embassy in Ankara, had been labelled an "undesirable person."

Swiss Asylum Appeal Board (French-speaking division), JICRA (Jurisprudence et informations de la Commission Suisse de recours en matière d'asile) 1993-9, 7 December 1992, JIRCA 1993, No. 9: The Board held that there was no internal protection alternative in Istanbul for two female Syrian Orthodox Christians from the South East of Turkey. The Board found that integration in Istanbul was impossible for the applicants as they did not have relatives living there and did not speak Turkish well. The Board also noted that the Syrian-Orthodox community in Istanbul did not

offer an appropriate social network for young women. Accordingly, the Board concluded that the applicants were genuine refugees.

UN Committee against Torture, *Alan v. Switzerland*, CAT/C/16/D/21/1995: The applicant in this case was a Turkish citizen of Kurdish background who was a member of an outlawed Kurdish organisation. He arrived in Switzerland in 1990 where he sought asylum on the ground that he had been tortured by the Turkish authorities. The Swiss authorities denied the applicant asylum. Shortly thereafter, the applicant presented a petition to the Committee, claiming that if he were expelled to Turkey, he would run a serious risk of being treated in a manner inconsistent with Article 3 of the Convention against Torture. Switzerland pointed out to the Committee that one of the reasons why the applicant's claim for asylum had been denied was that there was a possibility for him "to settle in a part of Turkey where he would not be at risk." Whilst acknowledging that in some areas of Turkey the Kurdish population was vulnerable because of armed conflict between Turkish security forces and guerillas, Switzerland argued that there were areas where the applicant could live without being threatened by the Turkish authorities. In deciding that Switzerland had violated the applicant's Article 3 right under the Convention against Torture, the Committee disagreed with Switzerland's contention and concluded that "it is not likely that a 'safe' area for him exists in Turkey." The Committee noted that the applicant had already had to leave both his native area and also a further place of refuge to avoid persecution by the Turkish authorities.

Swiss Asylum Appeal Board, CRA (Commission Suisse de recours en matière d'asile – CRA –) (French-speaking division), leading case, EMARK (Entscheidungen und Mitteilungen der ARK)-JICRA (the French abbreviation for decisions and information by the ARK)-GICRA (the Italian abbreviation for decisions and information by the ARK) 2000/2, S. 13 ff. : The Swiss Asylum Appeals Board held that the two quasi-state organs fighting against each other in the armed conflict in Bosnia-Herzegovina offered no valid protection alternative for refugees. The Board concluded that neither of the quasi-states provided protection that could be considered as effective enough.

Swiss Asylum Appeal Board (German-speaking division), leading case of 12 July 2000, Case of M.O.: According to the principle of internal protection alternative, a person does not qualify for refugee status if s/he can avail his/herself of the protection by the state of origin. In general, this means protection by the state, which does not exclude that quasi-states can also offer protection. However, the quasi-state should be able to afford a high degree of protection, that is to say its ability to protect is based on the durability of the quasi-state's existence, or its existence is secured by international safeguards. According to the Board, the Kurdish parties in Northern Iraq could not be considered to have these qualities. Thus, the Board concluded there was no internal protection alternative in Northern Iraq.

Swiss Asylum Appeal Board (French-speaking division), decision of 21 August 2000, Case of U.M.: The expulsion of Kurds from central Iraq to Northern Iraq as a consequence of the so-called Arabisation-policy is a violation of human rights but does not as such amount to persecution because it does not surpass the threshold of intensity. Rejected asylum seekers in this situation generally cannot be reasonably asked to return to Northern Iraq as they will not be able to secure their subsistence. Instead, complementary protection was offered to the applicant.

Swiss Asylum Appeal Board (German-speaking division), decision of 22 August 2000, case of H.O.: In general, the situation in Northern Iraq is not life threatening. Persons who do not qualify for refugee status can be asked to return, though the circumstances of the particular cases have to be taken into consideration. Persons originating from central Iraq will not, as a rule, be asked to go to Northern Iraq save if they have a network of relations which will be able to give them support. However, it can be reasonably expected from persons originating from the autonomous areas to go back to Northern Iraq, as far as it can be sufficiently excluded that certain factors such as health condition, being a member of a religious minority, age, family situation etc. necessitate an adverse finding of reasonableness of return.

Swiss Asylum Appeal Board (German-speaking division), decision from 22 August 2000, i.S. N.S.: Generally, voluntary return to Northern Iraq is possible for rejected asylum seekers. However, as a forcible return is not possible, they will get some kind of a "tolerated" status.

## **8.17. United Kingdom**

Neither the Immigration Appeal Tribunal (IAT) nor the law courts have established a definite framework for the analysis of the internal protection alternative. Even the introduction of Paragraph 343 of HC 395 in 1993 has done little to develop a consistent and coherent approach to the issue. As Dr. Hugo Storey states: "What is apparent from the present state of treatment of the IFA at court level is that despite seeing the IFA as an essential element of the Convention scheme, there has been little sign that UK judges have either welcomed or seen the necessity for decision-makers either to analyse it or apply it themselves within a clear or settled framework of analysis".

### **8.17.1. Interpretation by the courts**

Ex parte Jonah, [1985] Imm. AR 7: In this case, the Court of Appeal rejected the possibility of an internal protection alternative for an applicant from Ghana. The adjudicator had found that the applicant would not be at risk if he resided in a remote village. The Court found that the inability to pursue employment as a trade union official, which he had carried out for thirty years, as well as

the necessity to live apart from his wife and family in the capital and to withdraw to a remote part of the country in order to avoid the attention of the authorities, made the alternative unreasonable.

Yurekli v. Secretary of State for the Home Department, [1991] Imm. A.R. 153: In contrast to *ex parte* Jonah, the Queen's Bench Division in this case did not consider that the applicant's separation from his family and difficulties in obtaining regular employment prevented him from having an internal protection alternative. In reaching this decision, the Court was persuaded by the fact that the applicant had been living away from his family in Istanbul for two years since the alleged persecution in his home village.

*Ex parte* Gunes [1991] Imm AR 278: This case gave approval to Paragraph 91 of the UNHCR Handbook as a guide in operating the internal protection alternative test. Applying the reasonability test of that Paragraph, the Court rejected the contention of the applicant that proof of a localised fear of persecution was sufficient to entitle him to refugee status.

*El-Tanoukhi v. Secretary of State for the Home Department* [1993] Imm AR 71: The Court emphasised the importance of examining the general situation in a country in analysing an internal protection alternative. Lloyd LJ noted that: "...the Home Secretary is...entitled to take into account conditions in the country as a whole in deciding whether it is safe to return the applicant" to his home country under Article 33 of the 1951 Refugee Convention.

*R v. Secretary of State for the Home Department ex parte Niyaz* [1995] FC3 95/74/19/D: The Court emphasised that the fact that a civil war was ongoing in the applicant's home country did not preclude the existence of an internal protection alternative. In the case before it, the Court held that there was a reasonable guarantee of safety for the applicant (a Sri Lankan Tamil) in the south and the west of Sri Lanka.

*Ex parte* Probakaran [1996] Imm AR 603: The Court noted: "The only relevance of whether there might be a risk of persecution for a Convention reason would be whether that risk established the question of whether it was shown to be unreasonable to require that the asylum seeker go back to the safe part of his country." This statement appears to include the internal protection alternative test as a Convention requirement.

*R v. Immigration Appeals Tribunal (IAT) ex parte Ponnampalam Anandanadarajah* 4 March 1996: In analysing the appropriate test for the determination of the internal protection alternative, the Court of Appeal held that the applicant for asylum must prove that it is unreasonable to expect him to live in another part of the country. In its assessment of the reasonableness of returning the asylum seeker to his country of origin, the Tribunal has also said that the adjudicator must have regard to "all the circumstances of

the case." (See the IAT case of Ashokanathan 13294).

Lazarevic, Radivojevic, Adan and Nooh v. SSHD, 13 February 1997: In this examination of the internal protection alternative, the Court of Appeal held that refugee status could arise under Article 1A(2) of the 1951 Refugee Convention "when there is an overall failure to provide protection at home giving rise to persecution in part of the country and ineffective internal protection from generalised danger in the rest".

R v. SSHD and IAT ex p. Robinson, 11 July 1997: The applicant in this case was a Sri Lankan Tamil fearing persecution at the hands of the LTTE in areas controlled by them. The issue before the immigration authorities was whether the applicant could "safely return to an area controlled by the Sri Lankan authorities," such as Colombo. Although noting that the applicant had only been in Colombo for a few days before he was arrested and that he had no relatives living there, the Special Adjudicator concluded that the applicant did not have the requisite well-founded fear because he was not at "particular or unusual risk compared with other Tamils in Colombo." The applicant was, therefore, denied asylum. The applicant then applied for leave to move for judicial review, which was granted by the Court of Appeal. In considering the substantive issues of the case, the Court of Appeal examined the components of the internal protection alternative test. The Court held that the primary question for the decision maker when the issue of internal protection alternative arises is: "can the claimant find effective protection in another part of his own territory to which he may reasonably be expected to move?"

The Court went on to say that:

"In determining whether it would not be reasonable to expect the claimant to relocate internally, a decision-maker will have to consider all the circumstances of the case, against the backdrop that the issue is whether the claimant is entitled to the status of refugee. Various tests have been suggested. For example,

- If as a practical matter (whether for financial, logistical or other good reason) the 'safe' part of the country is not reasonably accessible;
- If the claimant is required to encounter great physical danger in travelling there or staying there;
- If he or she is required to undergo undue hardship in travelling there or staying there;
- If the quality of the internal protection fails to meet basic norms of civil, political and socio-economic human rights. So far as the last of these considerations is concerned, the preamble to the Convention shows that the contracting parties were concerned to uphold the principle that human beings should enjoy fundamental

rights and freedoms without discrimination."

In other words, "would it be unduly harsh to expect this person to move to another less hostile part of the country?"

"It would not be enough to say that an applicant did not like the weather in a safe area, or had no friends or relatives there, or would not be able to find suitable work there".

In light of these findings, the Court concluded that "it was far from obvious that Colombo was not a safe haven or an internal flight alternative".

In *Gnanam v Secretary of State for the Home Department*, 30 April 1999 {1999} Imm AR 436, the Court of Appeal considered the test set out in *Robinson*. The case involved a Jaffna Tamil. The question the Court of Appeal put to itself was whether the decision-maker can consider the cumulative effect of a number of factors when deciding whether it would be reasonable to expect the claimant to relocate internally. The court found the following quote of Prof. Jackson in an IAT case in *Sachithanansan* (case No. 16860) to be the appropriate approach: "It seems common sense that a factor which does not of itself make return unduly harsh, may well do so when set alongside other factors. So, for example, discrimination in education or employment or housing conditions may not, when considered independently be sufficient to create the refugee status. They may, however, cumulatively amount to a conclusion that it would be 'unduly harsh' to return a person to the relevant country. We therefore adopt the approach of *Sayandan*". However, the Court concluded that "each case must be decided on its own facts. What may be factors in one case will not necessarily be factors in another. Factors taken individually or cumulatively may tip the balance in one case but will not necessarily do so in another".

*Nalliah Karanakaran v SSHD*, Court of Appeal, 25 January 2000: This case mainly dealt with the standard of proof applicable in determining whether it was "unduly harsh" to expect an applicant to internally relocate and the proper approach in evaluating of evidence. The appellant, Nalliah Karanakaran, from the northern Jaffna peninsula of Sri Lanka, had lost members of his family in the civil conflict. In fear of both the government forces and the LTTE, he fled from his home area to the capital Colombo where his uncle paid an agent \$7,000 to take Nalliah to the U.K. Upon arrival in March 1995, Nalliah claimed asylum. The Special Adjudicator, whilst expressing "every sympathy" with Nalliah's plight, stated that, as he was not being singled out for oppression, he had therefore failed to make a case under the 1951 Geneva Convention. He found that Nalliah would not face undue hardship if he were to return to Colombo. Nalliah's appeal against this decision was dismissed by the Immigration Appeal Tribunal. The IAT heard the opinions of experts on the situation in Sri Lanka who found it "extraordinary" that the Adjudicator believed it was safe for Tamils to live in Colombo, and who asserted that Nalliah

would face "considerable hardship" in finding shelter and work there, and consequently believed that it would be "unduly harsh" to return him. These testimonies had been dismissed as "mere speculation" by the Tribunal.

The Court of Appeal stated that the court was being asked to decide the method of establishing whether it would be unduly harsh to expect an asylum-seeker to live in a different part of his own country. It held that both the Special Adjudicator and the Tribunal failed to approach the Convention methodically, by treating the availability of internal protection as a reason for holding that the fear of persecution was not well founded. In considering the possibility of internal relocation the decision-maker or Immigration Appellate Authority had to answer the question, on the basis of all the evidence, 'would it be unduly harsh to expect the applicant to settle there?' Factors relevant to the consideration were to be taken cumulatively; the Court commended the approach in Sayandan (Immigration Appeal Tribunal, Case No.16312), in which the tribunal had carefully evaluated the cumulative effect of a number of factors by considering the likelihood of a risk and the seriousness of the consequences eventuating. While the court was unanimous in deciding that the appeal must be allowed to the extent that it was to be remitted to a differently constituted Tribunal because of its errors of approach, Lord Justice Sedley would have remitted the appeal to a different Tribunal in any event because of "the way in which highly relevant evidence of in-country conditions from experts was dismissed by this tribunal as mere speculation". He allowed the appeal and remitted the case to a different tribunal which he advised to take note that, under Article 1(A)(2) of the Geneva Convention, Nalliah was entitled to asylum provided that it could be established that he was "unable or, owing to such fear, ...unwilling to avail himself of the protection" of his home state.

### **8.17.2. Paragraph 343 of HC 395**

An attempt to clarify the jurisprudence on internal protection was made by the introduction of Paragraph 343 of HC 395. This rule incorporates the concept of the internal protection alternative as laid out in Paragraph 91 of the UNHCR Handbook.

It states:

"If there is a part of the country from which the applicant claims to be a refugee in which he would not have a well-founded fear of persecution and to which it would be reasonable to expect him to go, the application may be refused".

As Dr. Hugo Storey points out, however, the "precise ambit and effect" of Paragraph 343 is not clear. Moreover, the rule is cast in discretionary terms.

### 8.17.3. Interpretation by the Immigration Appeal Tribunal

The Immigration Appeal Tribunal (IAT) is the body below the UK courts that establishes precedent on asylum and immigration matters. The ambiguity of Paragraph 343 has inevitably led to the Tribunal rendering decisions which are not always consistent in approach.

Dupovac (R11846): Some attempt was made by the Immigration Appeal Tribunal to analyse the meaning of the rule as follows: "The Tribunal held that a successful asylum claim required the applicant to establish persecution in all parts of the country to which it was 'practical' to return".

Ashokanathan (13294): The Tribunal construed Paragraph 343 as reflecting Paragraph 91 of the UNHCR Handbook and legitimising the following approach:

"Where an appellant is found to be a Convention refugee but it is suggested that it is safe to return him to a particular part of the country to which he fears to return, it appears to us that an adjudicator needs to ask two questions:

- Is the appellant at risk there for a Convention reason?
- If he is not, is it nevertheless reasonable to return him there having regard to all circumstances of the case?"

Sulosan (12543): The Tribunal approached the internal protection alternative test by reference to the New Zealand case of Re RS No. 135/92 referred to above. The test applied by the Refugee Authority in that case was two-fold:

Can the claimant obtain meaningful protection in the country; and

Is it reasonable to expect him to relocate?

Mansoor Ahmed (15596): The Tribunal elaborated on the test laid down for an internal protection alternative in the Court of Appeal case of Robinson. It may be remembered that in Robinson the Court did not specify whether the "unduly harsh" test should be based on a subjective or objective test. In the case before it, the Tribunal cited the New Zealand case of Re RS 523/92 (see section 8.12. for the facts of this case) as authority for the proposition that the personal circumstances of the applicant should be taken into account:

"[The test is not] 'what a reasonable person should be expected to do'. This is to wholly misunderstand the subject matter. The test is what is reasonable in the particular circumstances of the specific individual whose case is under consideration. The focus is not on the hypothetical reasonable person, but on what is reasonable in the particular (ie subjective) circumstances of the specific individual claimant".

There is some debate as to whether a judicial decision maker has a duty to apply the internal protection alternative test, even when it has not been raised previously during the asylum process. Dr. Storey points out that: "If the IFA test is indeed an integral part of the Convention definition of refugee, then a duty to apply it may be seen to arise, quite independently of whether such a duty exists under UK immigration law or national administrative law generally." The Tribunal in the case of Sulosan said that it would not be "necessarily unfair for an adjudicator to deal with such matters as internal relocation for the very first time before him provided the Appellant has had a real opportunity to address the Adjudicator and bring evidence on the matter before him".

In Suleyman Okur (00/TH/00436, 27 March 2000, the Tribunal set a positive precedent to be followed in Turkish of Kurdish origin cases where there is actual or suspected political involvement particularly with the PKK. The Tribunal disposed of the internal protection argument that Kurdish relocation to the big cities was a viable option.

## **8.18. United States of America**

The asylum seeker must show that persecution emanated either from the government or from a non-governmental agency that the government is unwilling or unable to control. The Board of Immigration Appeals (BIA) require an asylum seeker who claims persecution by a non-governmental agency, to make an additional showing that the threat against them is country-wide. The courts have been a bit more reluctant to accept the BIA's concept of internal protection alternative (showing of a country-wide persecution). The courts have held that the burden of proof shifts to the government when the claimant has shown past persecution (showing of past persecution leads to presumption of well-founded fear of future persecution which in turn leads to burden on government to show change in country-wide conditions). The government has then to demonstrate that Petitioner could relocate safely in Guatemala due to a change in countrywide conditions.

United States Court of Appeals, Third Circuit, *Etugh v. United States Immigration and Naturalisation Service* (INS) 921 F, 2d 36 (3rd Cir. 1990): The applicant in this case appealed against a deportation order after his claim for refugee status was rejected by the Board of Immigration Appeals (BIA). The Court found that the applicant had erred in his application before the BIA by failing to allege that he would be unable to live safely in another part of his country (Nigeria). Failure to satisfy this evidentiary requirement meant that a prima facie case of eligibility for asylum could not be established. As deportation to Nigeria did not require the applicant to return to the local vicinity of his hometown, where the purported persecution had taken place, the Court concluded that the applicant could be returned safely to another part of the country.

Matter of R., 15 Dec 1992, Board of Appeals (BIA) Interim Decision #3195: The BIA interpreted Paragraph 91 of the UNHCR Handbook as standing for the proposition that "while it is not always necessary to demonstrate a country-wide fear, it is the exception rather than the rule that one can qualify as a refugee without such a showing." The BIA held that the applicant (a Sikh from the Punjab region of India) had not demonstrated country-wide persecution or mistreatment of Sikhs by the central government or other Indian groups. Moreover, whilst the violence in the Punjab was well documented, the BIA found that Sikhs were safe in other parts of India. As there was no evidence that it would be unreasonable to expect the applicant to move elsewhere in his own country, the BIA dismissed the applicant's appeal.

US Court of Appeals, Ninth Circuit, *Singh v. Ilchert* 63 F. 3d 1501 (1995): In contrast to the Matter of R. case, the Ninth Circuit held that an applicant for refugee status was not required to establish a country-wide fear of persecution by a national police force. The Court presumed that in a case of persecution by a governmental body, such as the national police force, the government had the ability to persecute the applicant throughout the entire country. In such circumstances, it would be "unreasonable" for the applicant to relocate. The Court found that in the case before it, the applicant would, for the most part, be unable to avoid future persecution by relocating inconspicuously to another region of India because of the manner of his religious dress and inability to speak the language or dialect of another region in India. The Court held that: "Once an applicant demonstrates past persecution, we presume a "well-founded" fear of persecution unless the INS can show by "a preponderance of the evidence" that conditions in the country have changed "to such an extent" that the applicant can no longer have a "well-founded" fear of persecution. 8 C.F.R.S 208.13. If the INS cannot rebut the presumption of a "well-founded" fear of persecution, then the applicant will be found eligible for asylum". "Where an applicant has shown past persecution, evidence that individuals can live peacefully in some parts of applicant's home country has no bearing on the applicant's eligibility for asylum or withholding of deportation." In such cases, evidence that an applicant can reasonably relocate to another part of her/his home country can only be considered in determining whether to exercise discretion to grant or deny asylum to an eligible applicant. Even so, such discretion must be exercised "within the constraints of the law".

Generally, non-governmental persecution will have territorial restrictions if the non-governmental action and/or the government's inability to respond adequately are limited to a particular area of the country. See US Court of Appeals, Second Circuit, *Sotelo-Aquije v. Slattery*, 17 F.3d 33 (1994): The BIA rejected the applicant's claim for asylum, finding that the applicant's fear of persecution from the Shining Path organisation was limited to his hometown. On appeal, however, the Court of Appeals reversed this finding, holding that documentary material

established that the Shining Path had a broad reach in its violent operations. Accordingly, an internal protection alternative did not exist for the applicant in Peru.

In re C-A-L, Interim Decision 3305, 21 February 1997, the Board of Immigration Appeals (BIA) decided rather plainly in the case of a Guatemalan that "the respondent's asylum claim must also be denied because he has not provided any convincing evidence to suggest that his fear of persecution would exist throughout Guatemala. This Board has found that an alien seeking to meet the definition of a refugee must do more than show a well-founded fear of persecution in a particular place within a country. He must show that the threat of persecution exists for him country-wide".

In an dissenting opinion, the Chairman Schmidt said that:

"Turning to the internal resettlement alternative, I agree that it is appropriate to require a refugee who has a reasonable internal resettlement alternative in his own country to pursue that option before seeking permanent resettlement in the United States. On the other hand, the internal resettlement alternative must be carefully applied. It should not be a routine basis for denying protection to refugees just because they cannot produce evidence to negate every possibility of internal relocation. The test for the internal resettlement alternative is whether, under all the circumstances, internal resettlement is a reasonable possibility."

He went on to say that

"a refugee who fears persecution from a nongovernmental body should produce some evidence regarding the internal resettlement alternative. However, the burden of proof is shared. Once the respondent has made some showing on the internal resettlement alternative, the Immigration and Naturalization Service also should provide evidence on the viability of the alternative. Cf. Matter of Vivas, 16 I&N Dec. 68, 71 (BIA 1977) (stating that the burden of going forward with evidence may be placed on the party having better control or knowledge of the evidence). In fact, much of the documentary information and expert testimony available on this subject would be more accessible to the Service than to respondents. This is particularly true because of the existence of the Service's Resource Information Center. The internal resettlement alternative should be applied only if the Immigration Judge or we find that a preponderance of the evidence establishes that internal resettlement is a reasonable possibility".

He concluded:

"I find the current record inconclusive with respect to the internal resettlement alternative. Because this is a question with potential life or death significance, I would remand the case to the Immigration Judge to have this matter redetermined under the criteria set forth above. See Matter of H---, Interim Decision 3276

(BIA 1996) (remanding to give the parties an opportunity to further develop the record)".

Rosenberg dissenting said that:

"A secondary problem, with due respect to my colleagues, is the reasoning in *Matter of R*, 20 I&N Dec. 621 (BIA 1992). There is no statutory, constitutional, or international requirement that an asylum applicant demonstrate "country-wide persecution." While related, the requirement that a refugee must be unwilling or unable to return to one's country to qualify as a refugee in need of international protection, and the consideration of whether it would be unreasonable to expect a refugee to relocate internally, are not as entwined, as the majority might prefer." He went on to say that "[T]he [UNHCR] Handbook makes clear that country-wide danger is not an absolute requirement, stating that "the fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality." He concluded by stating that "in this case, it does not appear that there is a zone of safety within Guatemala to which the respondent reasonably could be expected to relocate".

The First Circuit Court of Appeals noted in *Aguilar-Solis v Immigration and Naturalization Service (INS)*, 26 February 1999 that

"BIA precedent holds that when the alleged persecutor is a non-governmental force, a well-founded fear of persecution is to be gauged on a country-wide basis, not on the basis of problems that are endemic to particular locales. See *Matter of C-A-L-*, Int. Dec. 3305 (BIA 1997) (en banc). Here, State Department reports confirm that the peace implementation process has been faster and more complete in some regions than in others, and no record evidence supports a conclusion that the petitioner could not relocate safely to another region within El Salvador (say, San Salvador). However, the courts have not readily accepted the BIA's country-wide analysis. See , e.g. , *Singh v. Ilchert* , 63 F.3d 1501, 1510-11 (9th Cir. 1995) (finding that an applicant is not required to demonstrate a country-wide fear of persecution to establish asylum eligibility, at least after he has demonstrated past persecution). We need not resolve the question today, as the BIA's disposition of this case is fully supportable without any consideration of whether the petitioner's fear is locality-specific".

In *Chanchavac v INS*, No. 98-71195, 27 March 2000, the US Court of Appeals for the Ninth Circuit held that no internal protection alternative existed for a Guatemalan persecuted by the military: "But, as Chanchavac testified, regardless of where he lived in Guatemala, he was required to return to Xatinap to participate in the civil patrol, and according to Amnesty International, "those refusing to take part in [civil patrols] have been branded 'guerrillas', and many have been subjected to human rights violations, including harassment and attacks, 'disappearance' and extrajudicial execution." Moreover, 'it has

never been thought that there are safe places within a nation when it is the nation's government that has engaged in the acts of punishing opinion that have driven the victim to leave the country.' Singh v. Moschorak, 53 F.3d 1031, 1034 (9th Cir. 1995)".

## 9. CONCLUSION

When the UNHCR Handbook was drafted in 1977, the drafters did not anticipate that Paragraph 91 would be construed quite so frequently by state parties to the 1951 Refugee Convention to exclude refugee status to asylum seekers. In fact, very few state parties even applied the concept of internal protection alternative in their refugee determination procedures immediately following the publication of the Handbook in 1979. Today, however, there is no doubt that the concept is firmly established in the national jurisprudence of state parties to the 1951 Refugee Convention. Given the fact that international jurisprudence has to date provided little guidance with respect to the concept, state parties have been at liberty to develop their own interpretation of its determinative factors. Its nebulous frame of reference, unfortunately, has resulted in states using the internal protection alternative to vindicate an increasingly restrictive global refugee policy. It was said that, by applying the concept of IPA, European states have created a new form of geographic limitation to the Refugee Convention through the backdoor. However, with international and regional human rights bodies, such as the Committee against Torture in the Alan case and the European Court of Human Rights in the Chahal case, examining states' duties to respect and ensure the enjoyment of the civil, political and socio-economic human rights of asylum seekers, it is hoped that some framework of international precedent can be provided. A comprehensive framework for the application of the concept was elaborated in the Michigan Guidelines under the coordination of James Hathaway and has proven already useful for the New Zealand appeals jurisprudence.

End.

---

[Back to top of the page.](#)

[Back to research papers.](#)

[TOP](#) [HOME](#) [SUPPORT US](#) [CONTACT US](#) [SEARCH](#)