

ASSESSING LEGAL GROUNDS FOR PROTECTING AFGHAN ASYLUM SEEKERS IN EUROPE

ANALYSING POLICIES RELATING TO SUBSIDIARY PROTECTION STATUS IN EU MEMBER STATES (MS) FOR NEWLY ARRIVED AFGHANS AS WELL AS THOSE WHO HAVE BEEN IN EUROPE FOR SOME TIME.

■ Author

CIARAN KING
INDEPENDENT LEGAL CONSULTANT

ECRE WORKING PAPER **18**

MARCH 2023



ecre

European Council
on Refugees and Exiles

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1. INTRODUCTION

Since the Taliban takeover in August 2021, Afghanistan has seen large-scale displacement of persons, reports of humanitarian crises, socio-economic decline, widespread human rights violations, and targeted attacks.¹ The present situation in the country follows a prolonged period of war, poverty, internal conflict, and political instability.² A number of recommendations were made to the EU by civil society organisations after the initial Taliban takeover calling for, among other things, rapid access to fair asylum procedures; increased resettlement commitments, and the introduction of humanitarian corridors and visas allowing people to safely travel to Europe and to access protection.³ Despite reports of violence and targeted attacks in 2022, the overall protection available for Afghan nationals has been reduced, and the efforts of EU Member States (EUMS) are generally considered insufficient.⁴

This working paper analyses the practice of select EUMS in response to the situation in Afghanistan and the available routes of protection, primarily focusing on analysing policies relating to subsidiary protection status in EUMS for newly arrived Afghans as well as those who have been in Europe for some time. It will consider the domestic legal policies and arguments relating to the granting or refusal of subsidiary protection to Afghan nationals pursuant to Art. 15(b) and 15(c) of the recast Qualification Directive (rQD),⁵ as well as alternative humanitarian grounds for protection. The paper will focus on three EUMS case studies: Belgium, Germany, and Sweden. The selection of these states is primarily based on the considerable Afghan diaspora communities residing in these countries as potential beneficiaries of international protection status. It is argued that the current humanitarian crisis in Afghanistan as well as the level of indiscriminate violence and conflict, should be considered grounds for granting subsidiary protection status to Afghan nationals under Art. 15 (b) and 15 (c) rQD. At a minimum, Afghan asylum applicants must be afforded the opportunity to explain their reasons for seeking protection and to have their grounds for refugee status adequately examined in line with international and regional refugee law.

Despite this focus, the author notes that the grounds for obtaining refugee Convention status⁶ are still present and will lead to the granting of refugee status in various cases. This is possible both through an individual assessment of an applicant's circumstances and as a direct consequence of the present situation. For example, refugee status based on an individual assessment of whether there is a reasonable degree of likelihood for the applicant to face persecution may apply to groups such as public officials of the former government, persons perceived as members or supporters of the National Resistance Front; human rights defenders; and persons perceived as being 'westernised'.⁷ Afghan nationals granted refugee status as a direct consequence of the present situation in Afghanistan may include those at risk of targeted attacks, such as individuals of Hazara ethnicity and other Shias, as well as groups where the accumulation of measures affecting fundamental rights may be considered to amount to persecution, such as women and girls.⁸ While this paper primarily focuses its analysis on routes to subsidiary protection status, but refugee grounds are still highly relevant post-Taliban takeover.

1. EUAA Country Guidance: Afghanistan, 24 January 2023, available at: <https://bit.ly/41srkuR>

2. Norwegian Refugee Council, NRC In Afghanistan, General situation, available at: <https://bit.ly/3ZvB3Pk>

3. EUAA, Asylum Report 2022: Annual Report on the Situation of Asylum in the European Union, 28 June 2022, pages 48-50 and 254.

4. ECRE, Joint statement: One year after the country's takeover by the Taliban – How did Europe welcome Afghans in need of protection? 9 September 2022, available at: <https://bit.ly/3Y83GAS>

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

6. UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

7. EUAA Country Guidance: Afghanistan, 24 January 2023, page 16. See also for an example, VG Freiburg, from September 21, 2021, A 14 K 9391/17.

8. EUAA Country Guidance: Afghanistan, 24 January 2023, page 86.

2. ANALYSIS

2.1. CEAS obligations and current guidance on Afghanistan

The Common European Asylum System (CEAS) places clear obligations on EUMS for determining first whether an applicant may qualify for refugee status protection and, if not whether they may qualify for subsidiary protection.⁹ Regardless of other policy guidance, EUMS must adhere to these legal obligations, which also extend to the requirements for a general assessment of facts, including relevant country of origin information; relevant statements and documents provided by the applicant; and the individual position and circumstances of the applicant. Any protection from persecution or serious harm must be deemed to be effective and of a non-temporary nature.¹⁰ The recast Asylum Procedures Directive (rAPD) further outlines that EUMS are required to conduct an adequate and individualised assessment of an applicant's situation and use precise and up-to-date information from various sources to reach its conclusion, with specific reference to EASO (now EUAA) and UNHCR.¹¹

Reference to the latest EUAA and UNHCR guidance is therefore necessary in assisting decision makers in their assessment of international protection claims, both for the granting of refugee status and subsidiary protection.¹² In this respect, the latest EUAA guidance shows that where no nexus to a reason for persecution under the refugee definition exists, the use of arbitrary arrests, corporal punishments, and criminal violence may allow persons to qualify for subsidiary protection under Article 15 (b) while limited access to healthcare and socio-economic grounds are generally not in themselves sufficient grounds for subsidiary protection under Article 15(b).

According to EUAA guidance, the level of indiscriminate violence is not such a level that it requires the suspension of the examination of protection claims nor is any province in Afghanistan assessed to reach such an exceptionally high level of violence that a person's mere presence on the territory would be sufficient to establish a real risk of serious harm under Article 15(c) rQD.¹³ Despite this, it notes several provinces where indiscriminate violence is taking place. However, the level of violence is of such a degree that a high level of individual elements is required to substantiate subsidiary protection claims. There is one province where a low level of individual elements is required to substantiate protection needs.¹⁴ Despite the general conclusion of recent EUAA guidance, it is clear from both international and regional legal obligations and EUAA guidance itself that EUMS must conduct an assessment of the security situation in Afghanistan and reach a conclusion based on this individual assessment.

This conclusion can be contrasted with UNHCR's guidance of February 2022 and the latest guidance issued in February 2023¹⁵ which refers to the unpredictable conditions in the country and the use of targeted violence, both of which are reported to have directly affected civilians. UNHCR previously concluded that uncertainties relating to the rule of law, authoritarian governance, and the lack of comprehensive data on human rights violations in Afghanistan means it is not possible to issue comprehensive guidance on the international protection needs of those fleeing Afghanistan in 2022.¹⁶

The latest guidance similarly indicates that present circumstances in Afghanistan "render it particularly difficult to evaluate a future risk of persecution based on the currently available information on the human rights situation".¹⁷ The situation remains volatile and uncertain, and the large scale humanitarian emergency continues. As a result, UNHCR guidance maintains, among other things, that States should suspend forcible returns of nationals and former habitual residents of Afghanistan, including to neighbouring countries in the

9. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (rAPD), Article 10(2).

10. rQD, Article 7(2).

11. rAPD, Article 10. The preamble of the rAPD further provides that the effective access to the examination procedure requires officials who first come into contact with persons seeking international protection to take account of the relevant guidelines of EASO (EUAA).

12. EUAA Country Guidance: Afghanistan, 24 January 2023, page 6.

13. EUAA Country Guidance: Afghanistan, 24 January 2023, page 33.

14. EUAA Country Guidance: Afghanistan, 24 January 2023, page 33.

15. UN High Commissioner for Refugees (UNHCR), Guidance Note on the International Protection Needs of People Fleeing Afghanistan (Update I), February 2023, available at <https://bit.ly/3F7PO2L>

16. UNHCR, Guidance Note on the International Protection Needs of People Fleeing Afghanistan, February 2022, § 12.

17. UNHCR, Guidance Note on the International Protection Needs of People Fleeing Afghanistan (Update I), February 2023, § 25.

region.¹⁸ There is no exhaustive profile of persons eligible to receive protection status, however, both the CEAS and guidance issued by EUAA refer to the legal obligation for individualised assessments to determine whether Afghans qualify for refugee status or, if not, subsidiary protection. EUMS must therefore adhere to their obligations under international and regional law and conduct an adequate and individualised assessment of an application circumstances using precise and up-to-date information from various sources.

2.2. Relevant CJEU jurisprudence

The obligations outlined above are further supported by jurisprudence of the Court of Justice of the European Union (CJEU) in *CF and DN* (C-901/19).¹⁹ Prior to this, the CJEU had not provided clarity on the criteria to be applied when determining the level of violence required to establish the existence of a serious and individual threat by reason of indiscriminate violence.²⁰

According to the referring Court, a comprehensive assessment of the circumstances would result in the conclusion that the applicants would face a serious threat on the territory in question. However, if the test was based *solely* on a quantitative assessment of civilian casualties the applications would be rejected.²¹ National legislation which is subject to fixed conditions based on quantitative criteria (such as the number of casualties in relation to a country's overall population) will not be compatible with Article 15 (c) rQD. Rather, this provision must be interpreted as meaning that in order to determine the presence of a serious and individual threat a comprehensive appraisal of all the circumstances of the individual case, in particular those which characterise the situation of the applicant's country of origin, is required.²² In reaching this conclusion the CJEU also referred to the objectives of the rQD, one being to confer subsidiary protection on those who require it and imposing criteria which relies on a quantitative threshold would be at odds with this objective.²³ Moreover, a reliance on quantitative criteria "*may be of questionable reliability in view of the specific difficulty of identifying objective and independent sources of information close to areas of armed conflict.*"²⁴

This conclusion is also in accordance with the Opinion of Advocate General Pikamäe, which in the context of a comprehensive assessment, provides that States should consider, among other things, the geographical scope of indiscriminate violence, the actual destination of the applicant in the event that they are returned to Afghanistan, the duration of the conflict, the number of civilians killed, and the nature and tactics of warfare employed.²⁵ It is again emphasised that avenues to obtain refugee status exist both in respect of the outcome of an individualised assessment and due to the general situation in Afghanistan. It is important to note that the latest guidance issued by UNHCR draws attention to challenges relating to information gathering and the fact that human rights violations in Afghanistan may remain undocumented and unreported. The lack of reports, from a variety of reliable sources, should therefore not be a reason to doubt or discredit an applicant's credibility.²⁶

A recent preliminary question referred to the CJEU by Austria seeks clarity as to the profiles of persons that may obtain refugee status.²⁷ For example, the referring Court asks whether the accumulated measures against women and girls in Afghanistan are to be regarded as sufficiently severe to justify the granting of refugee status.²⁸ While the EUAA guidance still applies,²⁹ the answer to this preliminary question will provide clarity as to whether women and girls are affected by measures in Afghanistan merely on the basis of their gender or if it remains necessary for an assessment of the individual situation to determine whether they may obtain refugee status within the meaning of Article 9(1)(b) rQD. The outcome will therefore have wide implications on the number of Afghans able to obtain refugee status. It may also be revealing of the deteriorating situation in the country.³⁰

18. UNHCR, Guidance Note on the International Protection Needs of People Fleeing Afghanistan (Update I), February 2023, § 31 and § 32.

19. EUAA, Country Guidance: Afghanistan, 20 April 2022, available at: <https://bit.ly/3EKyxwI>

20. CJEU, *CF and DN v. Bundesrepublik Deutschland* (C-901/19), 10 June 2021, § 15.

21. CJEU, *CF and DN v. Bundesrepublik Deutschland* (C-901/19), 10 June 2021, § 19.

22. CJEU, *CF and DN v. Bundesrepublik Deutschland* (C-901/19), 10 June 2021, § 37 and 45.

23. CJEU, *CF and DN v. Bundesrepublik Deutschland* (C-901/19), 10 June 2021, § 34.

24. CJEU, *CF and DN v. Bundesrepublik Deutschland* (C-901/19), 10 June 2021, § 35.

25. CJEU, *CF and DN v. Bundesrepublik Deutschland* (C-901/19), 10 June 2021, § 61(2).

26. UNHCR, Guidance Note on the International Protection Needs of People Fleeing Afghanistan (Update I), February 2023, § 24.

27. CJEU, Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 22 September 2022 – AH, Case C-608/22.

28. rQD, Article 9(1)(a).

29. i.e., that for women and girls a well-founded fear of persecution would in general be substantiated.

30. InfoMigrants, 'Denmark rules that Afghan women automatically qualify for protection', 6 February 2023, available at: <https://bit.ly/3YaYtIH>

2.3. EUMS Case Studies

The next section of this paper will review and analyse the policies and legal grounds for protecting Afghan asylum seekers focussing on the examples of Belgium, Germany, and Sweden. In particular, it will consider policies relating to the routes to subsidiary protection.³¹

2.3.1. BELGIUM

In August 2021, the Commissioner General for Refugees and Stateless Persons (CGRS) adopted the policy to temporarily suspend the notification of negative decisions for Afghan applicants.³² The suspension was officially lifted on 2 March 2022 as the CGRS considered there to be sufficient information available on Afghanistan.³³ The updated CGRS policy noted the problematic situation in the country but considered the level of indiscriminate violence to have significantly decreased.³⁴ It may be possible to obtain refugee status but there are now fewer legal grounds to grant subsidiary protection status³⁵ as there was no longer a risk of individuals falling victim to indiscriminate violence.³⁶ The need for international protection must still be assessed on the basis of an individual examination and will take into consideration updated information on the situation in Afghanistan.³⁷

In the first ruling since the amended policy on the recognition of refugee or subsidiary protection, the Council for Alien Law Litigation (CALL) considered the CGRS to have conducted an insufficient investigation into subsequent requests for international protection following the Taliban takeover due to the applicant's profile as a returnee. Indeed, the CALL considered the situation for a number of groups of Afghans to have worsened, therefore allowing them to obtain refugee status.³⁸

The CGRS also failed to examine whether, in the alternative, subsidiary protection status should be granted either due to the socio-economic situation in Afghanistan or because the applicant's personal circumstances presented an increased risk to their safety in light of the security situation. Accordingly, the CALL stated that the CGRS must conduct an investigation into the security and individual situation of the applicant in a more extensive and careful manner. In this respect, it commented that the situation in Afghanistan remained volatile and that changes in the degree of indiscriminate violence had occurred recently.³⁹ The Taliban takeover was therefore recognised as a major change in the situation in the country. The initial decision was annulled and the CALL referred the case back to the CGRS for additional investigative measures in its consideration of both the possibility of obtaining subsidiary protection status on socio-economic grounds (Art. 15(b) rQD) and on the level of indiscriminate violence (Art. 15(c) rQD). It is clear from this conclusion that a detailed assessment, including of the applicants personal circumstances, is needed to assess grounds for refugee status and subsidiary protection status.

In subsequent rulings in October 2022, the CALL clarified its position on granting subsidiary protection on the basis of indiscriminate violence. It stated that subsidiary protection should not be granted to Afghan applicants on the basis of a high level of indiscriminate violence alone as it is considered to no longer reach the level necessary for believing that an Afghan civilian returned to the country would, by virtue of their presence, face a real risk to their life or endangerment of their person.⁴⁰ Instead, persons seeking subsidiary protection status on such grounds are required to specify how their personal circumstances would increase the risk of indiscriminate violence in their particular case.⁴¹ For example, in a judgment of 12 October 2022 (no. 278 654), when determining the grounds for granting subsidiary protection status to an Afghan national under Art. 15(c)

31. Some case law and research used in this working paper was taken from Nilukshi Mapalagama, Caoimhe Nolan, Fernanda Pereira and Jana Van der Smissen, who took part in the Human Rights and Migration Law Clinic of Ghent University in the academic year 2022- 2023. Many thanks to ECRE for providing this resource.
32. AIDA, ECRE, Country Report: Belgium, 2021 Update, page 17. See also: Office of the Commissioner General for Refugees and Stateless Persons (CGRS), Afghanistan New Policy: New policy for the assessment of applications for international protection, 2 March 2022. Available at: <https://bit.ly/3YaYNXV>
33. Femke Vogelaar, Nansen Note 2-22, The use of the UNHCR and European Asylum Agency policy guidelines in Afghan cases, page 2.
34. CGRS, Afghanistan New Policy: New policy for the assessment of applications for international protection, 2 March 2022.
35. Femke Vogelaar, Nansen Note 2-22, The use of the UNHCR and European Asylum Agency policy guidelines in Afghan cases, page 20.
36. AIDA, ECRE, Country Report: Belgium, 2021 Update, page 84.
37. CGRS, Afghanistan New Policy: New policy for the assessment of applications for international protection policy, 2 March 2022.
38. Council for Alien Litigation, no. 270.813, 31 March 2022.
39. Council for Alien Litigation, no. 270.813, 31 March 2022; See also AGII, 'RvV: CGRS insufficiently investigates subsequent request for international protection Afghanistan after Taliban takeover of power' 10 May 2022, available at: <https://bit.ly/3mgf9kN>
40. See also cases Council for Alien Litigation, no. 278 654, 12 October 2022; no. 278 701, 13 October 2022.
41. AGII, 'Indiscriminate violence in Afghanistan decreased after Taliban takeover: demonstrating personal circumstances necessary for asylum', 21 December 2021, available at: <https://bit.ly/3Za5vhQ>

rQD, the CALL took into consideration, *inter alia*, the CJEU's ruling in Elgafaji C-465/07 as well as the EUAA country guidance on Afghanistan (April 2022). The CALL considered the situation since the Taliban takeover to be a fundamentally new situation where violence is mainly targeted: actors causing violence in the region did not have control over the territory and the number of civilian casualties and internally displaced people had reduced considerably. As a result, the CALL found that the applicant had not provided sufficient information on the security situation nor that their personal circumstances show they are at a higher risk of harm.⁴² This position was affirmed in a decision on 13th October 2022, where the CALL stated that Afghan applicants must show how their personal circumstances increase the risk of becoming victims of indiscriminate violence. In this case, the applicant had failed to explain in concrete terms how their circumstances would increase the risk to life and that they would face a real risk of serious harm if returned to Afghanistan.⁴³

The CALL considers the socio-economic situation in Afghanistan to be insufficient grounds to grant subsidiary protection status pursuant to Art. 15(b) rQD. The present humanitarian and socio-economic crisis in Afghanistan are the result of many route causes where the Taliban takeover is only one contributing factor. The socio-economic situation may however be considered to fall within the meaning of inhuman and degrading or otherwise prohibited ill-treatment under Art. 3 ECHR.⁴⁴ This position is supported by CJEU case law which states that when applying Art. 15(b) rQD, Art. 3 ECHR case law can be taken into consideration, whereas an assessment of Art. 15 (c) must be carried out independently.⁴⁵ This is further supported by the updated CGRS policy which indicates that socio-economic and humanitarian circumstances are eligible for subsidiary protection only in cases where an individual is put in very extreme circumstances due to a deliberate act or omission of an actor. However, this is currently deemed not to be the case in Afghanistan.⁴⁶

While applicants do not qualify for subsidiary protection status on the basis of indiscriminate violence in Afghanistan without providing arguments as to how their personal circumstances increase the risk to their safety, it may be possible to obtain refugee status due to the risk of persecution for personal characteristics or assimilation of Western values. In such rulings, the CALL has stated that protection requests from Afghans returning from Western countries must be treated with caution as the potential treatment of such persons upon return is unclear.⁴⁷ The CALL has also ruled that refugee status may be obtained based on the risk of Hazara ethnicity being potentially exposed to acts of persecution and the broader context of violence against Shiite Muslims.⁴⁸

In a ruling from June 2022, the CALL found the applicant did not have a well-founded fear of persecution to be granted refugee status. In respect of subsidiary protection status, the applicant had failed to provide concrete arguments showing that he falls within grounds for protection. The applicant had therefore failed to individualise and concretize the real risk of harm and insight into the situation in the province from which he fled.⁴⁹ In light of UNHCR guidance, this is a concerning outcome. The requirement to provide concrete evidence of the real risk of harm is generally challenging due to problems gathering comprehensive information on the human rights situation in the country, in which UNHCR indicated that it is not possible to issue comprehensive guidance on international protection needs.⁵⁰ The situation is changing rapidly, and the needs of individuals requires careful consideration of all information, and the absence of comprehensive information is in itself evidence of a problematic situation.⁵¹

The policy adopted by the CGRS in March 2022 may result in an increase in negative decisions in international protection applications for Afghan nationals, including a decrease in subsidiary protection statuses. It has also received much criticism for failing to extend adequate protection to Afghan nationals as well as other persons

42. Council for Alien Law Litigation, no. 278.654, 12 October 2022, § 2.3.5.3.

43. Council for Alien Law Litigation, no. 278.701, 13 October 2022, § 6.4.3.2.

44. Conseil du Contentieux des Etrangers, Questions specific to Afghanistan, 20 October 2022. Available at: <https://bit.ly/3Z5kQAm>

45. CJEU, Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie, C-465/07, § 28.

46. CGRS, Afghanistan New Policy: New policy for the assessment of applications for international protection policy, 2 March 2022. Council for Alien Litigation, no. 270.813, 31 March 2022. See also AGIL, 'RvV: CGRS insufficiently investigates subsequent request for international protection Afghanistan after Taliban takeover of power' 10 May 2022.

47. See Council for Alien Law, no. 278.653, 12 October 2022. See also ELENA, 'Belgium: The Council for Alien Law Litigation recognised the refugee status to an Afghan national due to the risk of persecution on grounds of the attributed political views and due to his assimilation of Western values', 12 October 2022, available at: <https://bit.ly/3S26zcv>

48. Council for Alien Law, no. 278.700, 13 October 2022. See also, ELENA, 'Belgium: The Council for Alien Law Litigation recognised the refugee status of an Afghan national with Hazara ethnicity due to cumulative reasons' 13 October 2022, available at: <https://bit.ly/3XcRv5G>.

49. Council for Alien Law, no. 274.426, 21 June 2022.

50. UNHCR, Guidance Note on the International Protection Needs of People Fleeing Afghanistan (Update I), February 2023, § 24. See also: UNHCR, Guidance Note on the International Protection Needs of People Fleeing Afghanistan, February 2022, page 4-5.

51. UNHCR, Guidance Note on the International Protection Needs of People Fleeing Afghanistan (Update I), February 2023; UNHCR, Guidance Note on the International Protection Needs of People Fleeing Afghanistan, February 2022, page 4-5.

potentially in need of protection.⁵² As outlined in the Nansen analysis on the UNHCR guidelines, Belgium has not attached considerable value to the UNHCR guidelines (at the time, the 2022 guidelines) despite it being a particularly qualified entity to gather information on the actual situation of conflict and indiscriminate violence in Afghanistan.⁵³ The significant probative value of the UNHCR guidelines should therefore carry more weight in Belgian legal and policy decisions concerning the granting of subsidiary protection in line with Art. 15(b) and (c) rQD.⁵⁴

2.3.2. GERMANY

Germany remains one of the EUMS with the highest number of international protection applicants from Afghanistan.⁵⁵ While Germany is typically issuing low numbers of subsidiary protection status, there are other grounds for protection available, meaning few Afghan nationals are left without protection. One of the most significant developments in this respect was announced on 17 October 2022 through the Federal Admission Programme.⁵⁶ This aims to provide a structured framework of protection for people from Afghanistan who are at particular risk of ill-treatment because of their vulnerable status.⁵⁷ It further aims to support Afghans who are exposed to particular risks by virtue of their commitments to, among other things, work on human rights and women's rights as well as those working in the sphere of justice, politics, media, education, and culture. The Programme may also apply to persons who have experienced or are experiencing violence or persecution based on their gender, sexual orientation, or religion and are therefore found to be at a concrete personal risk of harm.⁵⁸

It is estimated that the Federal Admission Programme and the protection routes extended to particularly vulnerable persons most at risk of the Taliban will apply to 1000 Afghans every month by the end of 2025.⁵⁹ However, the Programme has been criticised both in terms of the content of protection and organisation by civil society and Afghan nationals seeking protection.⁶⁰ It applies only to persons living in Afghanistan and not those facing return, and it remains unclear how the policy will operate in practice, including how vulnerable persons will be identified. There are also concerns as to the lack of clarity around Germany's stance on protection and that, through inaction, Germany may be exposing Afghan persons to human rights violations.⁶¹

The German Foreign Office commented on the situation of violence and danger in Afghanistan following the Taliban takeover in November 2021. At that time, the security situation remained at best precarious, but the level of violence and conflict was noted to have declined dramatically.⁶² While the finding regarding the level of indiscriminate violence is consistent with the EUAA conclusion, it is nevertheless clear from EUAA guidance in 2023 that some indiscriminate violence remains in particular provinces of Afghanistan. Despite this, the Federal Admission Programme makes no specific reference to the situation of indiscriminate violence in Afghanistan, nor to Afghan nationals who may be entitled to access subsidiary protection under grounds of Art. 15(c) rQD.⁶³ Moreover, the lack of available protection under Art. 15(c) rQD is concerning in light of the

52. Marlène Panara, Info Migrants, "They feel abandoned": Non-Ukrainian asylum seekers in Belgium left out in the cold", 25 March 2022, available at: <https://bit.ly/3GP9dqF>.
53. Femke Vogelaar, Nansen Note 2-22, The use of the UNHCR and European Asylum Agency policy guidelines in Afghan cases, page 7-8.
54. Femke Vogelaar, Nansen Note 2-22, The use of the UNHCR and European Asylum Agency policy guidelines in Afghan cases, page 19.
55. Benjamin Bathke, Info migrants, "What's the status of displaced Afghans worldwide?" 28 March 2022, available at: <https://bit.ly/3QrkyAm>. See also, Schengen Visa, 'Asylum Application Rates in Germany Soared by 35.4% So Far This Year' 12 September 2022, available at: <https://bit.ly/3QF1krf>. Duetsche Well, Info migrants, 'Germany to take in 1,000 at-risk Afghans every month', 18 October 2022, available at: <https://bit.ly/3XeDKTZ>.
56. Bundesministerium desInnern und für HeimatAuswärtiges Amt, 'Federal Admissions Program for Afghanistan', available at: <https://bit.ly/3ZmZbnF>.
57. Relief Web, Federal admission programme for Afghanistan launched', 17 October 2022, available at: <https://bit.ly/3k2ijaA>.
58. Relief Web, Federal admission programme for Afghanistan launched', 17 October 2022. See also various statements from BAMF at European Country of Origin Information Network, Afghanistan Update, 22 December 2022, available at: <https://bit.ly/3WZTECe>. See also, EUAA, Afghan nationals seeking international protection in the EU+, Fact sheet EUAA/IAS/2022/10 August 2022, available at: <https://bit.ly/3WY6Elg>.
59. Duetsche Well, Info migrants, 'Germany to take in 1,000 at-risk Afghans every month', 18 October 2022, available at: <https://bit.ly/3XeDKTZ>. See also, Pro Asyl, 'Federal admission program in Afghanistan: disappointment after a long wait', 21 October 2022, available at: <https://bit.ly/3XiP4ie>.
60. Sou-Jie Van Brunnersum, Info Migrants, 'Germany's Afghan refugee program 'extremely questionable,' aid groups warn', 19 September 2022, available at: <https://bit.ly/3VQ1X1W>.
61. Fluechtlingsrat-Bayern, 'One year since the Taliban took power in Afghanistan', 17 August 2022, available at: <https://bit.ly/3vMbeh5>.
62. Sertan Sanderson, Info Migrants, 'German Foreign Office: Afghanistan under Taliban is a dangerous place to live', available at: <https://bit.ly/3lzeAeJ>.
63. Federal Ministry of the Interior and Community, Joint press release by the Federal Foreign Office and the Federal Ministry of the Interior and Community on the federal admission programme for people from Afghanistan who are at particular risk, 17 October 2022, available at: <https://bit.ly/3CybS5t>.

numerous BAMF reports on civilian casualties and general violence in the country throughout 2022.⁶⁴ In line with international legal obligations, EUMS should take into consideration reports from various reliable sources, including EUAA and UNHCR at a minimum, as part of an examination of the applicant's individual circumstances.

There are wider concerns regarding the lack of up-to-date and reliable information on the actual situation of the Taliban Government which means there is limited accurate information that can be used to support the position on the reduced level of indiscriminate violence.⁶⁵ UNHCR similarly recognised "the obstacles to information gathering and reporting in Afghanistan" as well as the "difficulty to evaluate a future risk of persecution based on the currently available information".⁶⁶

This policy and its lack of reference to the level of indiscriminate violence can be contrasted with the legal approach to subsidiary protection claims concerning persons from countries other than Afghanistan. For example, the Administrative Court of Potsdam delivered a judgment on 30 August 2022 on the level of indiscriminate violence in Somalia. In reaching its conclusion the Court took into consideration the prevalence of militia attacks where civilians were particularly and regularly affected by recurrent security incidents. According to the Court, indiscriminate violence must reach a particularly high level for civilians in the absence of individual circumstances giving rise to an increased risk of suffering. The Court's reasoning reflects the CJEU judgment in CF as the assessment of the level of violence may use an approximate quantitative assessment of risk, but must also include an assessment of the overall circumstances of the country.⁶⁷ As such, the German Government, consistent with previous legal conclusions, should recognise the level of indiscriminate violence in Afghanistan to have reached such a level to allow Afghans to access subsidiary protection in Germany pursuant to Article 15 (c) rQD.⁶⁸ If this is not the case, there should be reference to multiple sources of information regarding the level of indiscriminate violence and human rights violations in the country to indicate that the situation is safe.

In April 2022, the Federal Administrative Court in Leipzig found that protection against a deportation order is based on whether a person subject to return would be able to meet their basic needs for a foreseeable period, but not necessarily a permanent basis.⁶⁹ A deportation order can therefore only be waived if the person is threatened with destitution soon after return and with a high degree of probability upon using return assistance.⁷⁰

Recent statistics indicate that 36,358 initial applications for asylum from Afghan nationals were submitted in 2022,⁷¹ with many others arriving in Germany in early 2023.⁷² It also appears that the overall rate of positive decisions for Afghan applicants is very high, around 83.5%.⁷³ Refugee status has been granted in various contexts in Germany in late 2021 and throughout 2022, including the likelihood of persecution based on gender and being perceived as westernised.⁷⁴ Where refugee status has been granted, it is evident that the Courts have assessed the individual circumstances of applicants. For example, in July 2022, the Administrative Court of Cottbus granted refugee status on the basis of the applicant's Christian faith as there was considerable probability of persecution based on their religion. It noted that the intensity of religious practice depends on the individual circumstances of the applicant – as such a general assessment on religious grounds would not have been sufficient. In September 2022, the same Court held that an applicant who was a former national police officer would face a real risk of torture if returned. This conclusion was based on the considerable indications that the applicant could be personally identified, including through the use of biometric data, and in light of

64. See European Country of Origin Information Network, Afghanistan Update, 22 December 2022, available at: <https://bit.ly/3WZTECe>.

65. Yana Gospodinova, 'A humanitarian admissions programme for Afghans', 17 August 2022, available at: <https://bit.ly/3EKtwEm>

66. UNHCR, Guidance Note on the International Protection Needs of People Fleeing Afghanistan (Update I), February 2023, § 24 and 25. See also UNHCR, Guidance Note on the International Protection Needs of People Fleeing Afghanistan, February 2022, page 4.

67. Information Network Asylum & Migration, VG Potsdam, judgment of 08/30/2022, 10 K 2842/18.A, available at: <https://bit.ly/3GP95at>. See also CJEU, CF and DN v. Bundesrepublik Deutschland (C-901/19), 10 June 2021, § 45.

68. Information Network Asylum & Migration, VG Potsdam, judgment of 08/30/2022, 10 K 2842/18.A, available at: <https://bit.ly/3GP95at>.

69. Dr. Klaus Dienelt, 'No protection against deportation in case of livelihood security for the foreseeable future after return', 21 April 2022, available at: <https://bit.ly/3mdCpQi>

70. InfoMigrants, 'German court: Deportation orders are valid even if deportees face long-term destitution', 22 April 2022, available at: <https://bit.ly/3SEkvST>

71. Sertan Sanderson, Info Migrants, 'Asylum applications in Germany on the rise in 2022', 13 January 2023, available at: <https://bit.ly/3y1fz0Y>

72. InfoMigrants, 'Around 24,000 people brought from Afghanistan to Germany in last few months', 11 January 2023, available at: <https://bit.ly/3kE0grV>

73. Sertan Sanderson, Info Migrants, 'Asylum applications in Germany on the rise in 2022', 13 January 2023, available at: <https://bit.ly/3y1fz0Y>

74. See: VG Bremen, June 24 2022, 3K 1386/20, judgment (Administrative Court of the Free Hanseatic City of Bremen); VG Freiburg, 21 September 2021, A14 K 9391/17; and Verwaltungsgericht Cottbus, 5 July 2022, VG 8K 2058/16.A.

reports that the Taliban had conducted house searches targeting employees of the former government.⁷⁵

2.3.3. SWEDEN

The Swedish Migration Agency updated its legal position on the assessment of protection needs for Afghan nationals on 24 January 2023 and provided an overview of the criteria for obtaining refugee or subsidiary protection status.⁷⁶ Recent developments indicate that Sweden will in some cases grant subsidiary protection status on grounds under both Art. 15(b) and 15(c) rQD. It has also published numerous updates on the situation in Afghanistan, emphasising the drastic change since the Taliban takeover in August 2021.⁷⁷ In a 2022 update the Swedish Migration Agency considered the level of indiscriminate violence to have decreased significantly but nevertheless referred to reports of violence resulting in civilian casualties as well as the use of asymmetric attacks targeting urban areas.⁷⁸

As of January 2023, the policy closely follows the latest country guidance issued by EUAA. This is particularly evident in respect of indiscriminate violence and the grounds for obtaining subsidiary protection status under Art. 15(c) rQD. For example, the policy adopts the same colour coding system used by EUAA to indicate which provinces of Afghanistan are characterised by indiscriminate violence or internal armed conflict. For example, some areas indicate that a person's mere presence in the territory is not sufficient to establish a real risk of serious harm, but the level of indiscriminate violence is nevertheless high. In such areas, a low level of individual factors is required to show reasonable grounds that a civilian would face a real risk of serious harm. Other areas may be characterised by low levels of indiscriminate violence, meaning a higher level of individual factors are needed to show the civilian would face a real risk of serious harm. As a result of the new guidance, an individual assessment of the applicant's vulnerability and risk of serious harm must be made in line with the updated EUAA guidance on indiscriminate violence.⁷⁹ In addition to the criteria outlined above, the Swedish Migration Agency is required to assess the actual situation in the province that the civilian applicant is resident. This assessment of the applicant's vulnerability should be made in accordance with the criteria outlined by EUAA guidance and the CJEU judgment in *Elgafaji*.⁸⁰ Using this criteria, the Migration agency may determine that a person is in need of subsidiary protection as a result of the security situation and indiscriminate violence and may benefit from protection under Article 15(c) rQD.⁸¹

Despite the updated guidance, it is evident that few provinces in Afghanistan are characterised by high levels of indiscriminate violence. In fact, most areas are found to present no real risk of a civilian facing a real risk of harm.⁸² This appears to be the case despite the numerous reports of high levels of violence or uncertainty in the country, including from the Swedish International Development Cooperation Agency (SIDA).⁸³ SIDA has also referred to humanitarian crisis in the country, the high level of food insecurity, protection risks to civilians and civil society actors, and the deteriorating general living conditions, and the escalation of violence towards particular persons including the Hazara ethnic community and women and girls.⁸⁴

The Swedish Refugee Law Centre also expressed its concern that UNHCR guidelines (of February 2022) to suspend the examination of Afghan protection cases were not being followed by EUMS, including Sweden.⁸⁵ One of the biggest concerns is the lack of any explicit reference to UNHCR guidance in decision making,

75. Verwaltungsgericht Cottbus 23 September 2022, VG 2 K 575/17.A.

76. Swedish Migration Agency, 'Protection needs assessment for nationals from Afghanistan', RS/089/2021 (version 4.0), updated 24 January 2023, available at: <https://bit.ly/3EGVUHq>. See also ELENA, 'Sweden: Updated legal position on the protection needs of Afghan nationals and general recognition of the persecution of women and girls in Afghanistan', 6 December 2022, available at: <https://bit.ly/3VSq8Nb>.

77. Swedish Migration Agency, 'Information regarding the situation in Afghanistan', updated 4 January 2023, available at: <https://bit.ly/3VYnm94>.

78. Swedish Migration Agency, 'Protection needs assessment for nationals from Afghanistan', RS/089/2021 (version 3.0), 21 April 2022, page 7, available at: <https://bit.ly/3VXrshY>.

79. Swedish Migration Agency, 'Protection needs assessment for nationals from Afghanistan', RS/089/2021 (version 4.0), updated 24 January 2023, page 7-8.

80. CJEU, *Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie*, C-465/07.

81. Swedish Migration Agency, 'Protection needs assessment for nationals from Afghanistan', RS/089/2021 (version 3.0), 21 April 2022, page 7-8, available at: <https://bit.ly/3VXrshY>.

82. Swedish Migration Agency, 'Protection needs assessment for nationals from Afghanistan', RS/089/2021 (version 4.0), updated 24 January 2023, page 7, available at: <https://bit.ly/3EGVUHq>.

83. SIDA, Humanitarian Crisis Analysis 2022 Afghanistan, March 2022, <https://bit.ly/3k0MW05>.

84. SIDA, Humanitarian Crisis Analysis 2022 Afghanistan, March 2022, page 1, 3, and 4, available at: <https://bit.ly/3k0MW05>.

85. Swedish Refugee Law Centre, Refugee assessments at first instance – one year after the Taliban took power in Afghanistan, 30 November 2022, page 43. Available at: <https://bit.ly/3ZyTmE7>.

despite this being a source of great importance.⁸⁶ This tendency not to adhere to UNHCR guidance may result in further deterioration of the global protection of refugees as fewer Afghan nationals who need protection will have access to protection or alternative protection status.⁸⁷

It is concerning to note that reliable and recent country of origin information, outside of EUAA guidance, is not routinely referred to in Swedish Migration Agency assessments. However, the lack of available data (or references to data that is available) is unsurprising as authorities responsible for monitoring human rights developments in Afghanistan have largely been shut down.⁸⁸ There are additional concerns that any country information relied upon in protection decisions is deficient.⁸⁹ The updated policy is very much in line with EUAA guidance but may indicate an overreliance on this source. There is the possibility that this may lead to generic assessments of the situation of violence which fail to take into consideration an accurate and reliable analysis of the country's evolving situation and may weaken the possibility of protection for Afghan nationals who are in genuine need. In order to make an accurate and up-to-date assessment of the actual situation of violence, there is a need to refer to a wider variety of country of origin information reports on Afghanistan, beyond both EUAA and UNHCR guidance. By doing so, this will lead to improvements in decision making and will provide evidence that the Migration Agency is continuously assessing the situation of violence and the ways it affects civilians.

As discussed above, the possibility to obtain refugee status remains and is accessible for particular groups. For example, as of December 2022, the Swedish Migration Agency assesses that all women and girls in Afghanistan risk persecution solely on the basis of being women. As a result, all women and girls who apply will be granted refugee status and a residence permit. Women and girls who may have had their asylum applications rejected may also apply for a new examination of their case. This change in policy comes as a result of the Taliban's restrictions on women in public spaces, as well as economic and social restrictions such as preventing access to work, education, and public health.⁹⁰

This development is again consistent with the EUAA country guidance. While the updated policy indicates that the Migration Agency is reviewing and monitoring the protection needs of Afghan nationals, it is nevertheless apparent that the main source guiding its conclusions is the updated EUAA guidance. Reference to a wider variety of sources may in fact reveal that this level of protection without an individual assessment is necessary for other vulnerable groups in addition to women and girls. Indeed, additional 'at risk' profiles have been identified, now including military personal, LGBTQI+ persons, Afghan nationals working for foreign governments, journalists, and human rights defenders.⁹¹ However, individual assessments are still required. While the EUAA country guidance offers some clarity as to the regions of the country that are particularly dangerous, the situation is still evolving and requires the attention of the Migration Agency. Nevertheless, this recent policy affecting women and girls is certainly evidence of good practice. As a result of this change, Sweden granted protection to 89% of women and girl applicants from August 2021 to November 2022.⁹² The Swedish Migration agency indicates that rejected applications during this period will be re-examined pending a new application. Data from the Swedish statistical database indicates that 2,012 Afghan nationals applied for asylum in 2022, compared to 1,488 in 2021.⁹³ As a result of the positive policy changes, affecting both routes to refugee status and subsidiary protection status, it is likely that this figure will rise in 2023.

86. Swedish Refugee Law Centre, Refugee assessments at first instance – one year after the Taliban took power in Afghanistan, 30 November 2022, page 44.

87. Swedish Refugee Law Centre, Refugee assessments at first instance – one year after the Taliban took power in Afghanistan, 30 November 2022, page 44.

88. Swedish Refugee Law Centre, Refugee assessments at first instance – one year after the Taliban took power in Afghanistan, 30 November 2022, page 45. See also UNHCR, Guidance Note on the International Protection Needs of People Fleeing Afghanistan (Update I), February 2023, § 24.

89. Swedish Refugee Law Centre, Refugee assessments at first instance – one year after the Taliban took power in Afghanistan, 30 November 2022, page 45 and 91.

90. Swedish Migration Agency, 'Being a woman from Afghanistan is enough to get protection', 7 December 2022, available at: <https://bit.ly/3m7loG5>; See also: Council of the European Union, Afghanistan: Declaration by the High Representative on behalf of the European Union calling for the immediate re-opening of secondary schools for girls, 28 March 2022, available at: <https://bit.ly/41Yxhzi>

91. Swedish Migration Agency, 'Information regarding the situation in Afghanistan', 9 February 2023, available at: <https://bit.ly/3ZcqssE>

92. Swedish Migration Agency, 'Being a woman from Afghanistan is enough to get protection', 7 December 2022, available at: <https://bit.ly/3m7loG5>

93. SCB Statistical Database, 'Asylum-seekers by country of citizenship and sex. Month, quarter, half year, whole year. Year 2002 – 2022', available at: <https://bit.ly/3KHpLmD>

3. CONCLUDING THOUGHTS ON THE ACTUAL SITUATION OF VIOLENCE

In a joint statement with civil society organisations in September 2022, ECRE highlighted the prevalence of targeted killings and systematic attacks, revenge killings, and civilian casualties as a result of other violence in Afghanistan.⁹⁴ The human rights situation is deteriorating, and the suffering of Afghans is increasing. The security situation is far from stable with many human rights violations going unreported due to restrictions to civil society operations and a fear of Taliban persecution.⁹⁵ Afghanistan consistently ranks as the least peaceful country by the Global Peace Index.⁹⁶ There are also many reports providing context of the general security situation of the country and targeted acts of violence, and violence against women.⁹⁷

EUAA Country of Origin Information report on Afghanistan indicates that the situation remains unstable with a recorded 2,106 civilian casualties between August 2021 and June 2022 primarily as a result of IED attacks. Moreover, 1,679 security incidents were recorded across the country during the same period.⁹⁸ An analysis of recent security trends suggest that both unidentified armed groups and the Taliban are responsible for targeted attacks on civilians and security incidents that have otherwise resulted in civilian deaths or injuries.⁹⁹

According to a recent report by Nansen on the use of UNHCR and EUAA guidelines in Afghan cases, there is not enough caution around negative decision making considering the fragile situation.¹⁰⁰ The transitional and unpredictable period in Afghanistan has undoubtedly resulted in an information gap: the situation is developing constantly meaning up-to-date country information is difficult to obtain; and there are generally difficulties verifying sources.¹⁰¹

As a result, Afghan nationals should be able to rely on existing guarantees of an individualised assessment under the rAPD and relevant CJEU jurisprudence. Ensuring the proper application of the rQD and rAPD should lead EUMS to granting refugee status if the conditions are fulfilled or recognising the dire humanitarian situation and degree of indiscriminate violence resulting in the granting of subsidiary protection. While these legal obligations must be rigorously applied, where information does not satisfy the authorities and assessments cannot be completed due to insufficient information, this cannot lead to the drawing of adverse inferences of otherwise credible applicants.¹⁰²

94. ECRE, 'Joint statement: One year after the country's takeover by the Taliban – How did Europe welcome Afghans in need of protection?' September 2022. See also: Human Rights Council, Situation of human rights in Afghanistan Report of the Special Rapporteur on the situation of human rights in Afghanistan, 9 September 2022, available at: <https://bit.ly/3iv7lo1>. See also UNHCR, Guidance Note on the International Protection Needs of People Fleeing Afghanistan (Update I), February 2023.
95. ECRE, 'Joint statement: One year after the country's takeover by the Taliban – How did Europe welcome Afghans in need of protection?' September 2022; UN Assistance Missions to Afghanistan, UN Releases Report On Human Rights In Afghanistan Since The Taliban Takeover, 20 July 2022, available at: <https://bit.ly/3vM1vqU>; Amnesty International, Afghanistan: Death in slow motion: Women and girls under Taliban rule, 27 July 2022, available at: <https://bit.ly/3WVCs0z>.
96. Institute for Economics and Peace, Global Peace Index 2022, available at: <https://bit.ly/3lxAora>.
97. EUAA, Country of origin information report Afghanistan, January 2022, available at: <https://bit.ly/3W4AZUA>. See also: EUAA Afghanistan security situation, August 2022, available at: <https://bit.ly/3CxWd66>; see also European Country of Origin Information Network, Afghanistan Update, 22 December 2022, available at: <https://bit.ly/3WZTECe>.
98. See EUAA, Afghanistan security situation, August 2022, page 62, available at: <https://bit.ly/3CxWd66>, of which 777 were coded as 'battles,' 571 as 'violence against civilians,' and 331 as 'explosions/remote violence.'
99. EUAA, Afghanistan security situation, August 2022, page 62 and 73, available at: <https://bit.ly/3CxWd66>.
100. Femke Vogelaar, Nansen Note 2-22, The use of the UNHCR and European Asylum Agency policy guidelines in Afghan cases, pages 15 and 16.
101. Femke Vogelaar, Nansen Note 2-22, The use of the UNHCR and European Asylum Agency policy guidelines in Afghan cases, pages 16 and 18.
102. UNHCR, Guidance Note on the International Protection Needs of People Fleeing Afghanistan (Update I), February 2023, § 24.

4. RECOMMENDATIONS

- » EUMS must ensure the correct application of the recast Qualification Directive and recast Asylum Procedures Directive and provide for the proper examination of asylum applications, including an assessment of grounds for refugee status or alternatively subsidiary protection;
- » This need for the proper application of the recast Qualification Directive must also be clearly reflected in EUAA country guidance;
- » EUAA Country of Origin Information report (COI) and Country Guidance on Afghanistan should be regularly updated and reflect the uncertain and rapidly evolving situation in the country as well as the reasons for limited data and information on the actual situation in the country;
- » EUAA and the European Commission should consider issuing guidance on the proper application of the rQD, both in general and in respect of the situation in Afghanistan.
- » The current humanitarian crisis in Afghanistan and level of indiscriminate violence and conflict should be considered grounds for granting subsidiary protection status to Afghan nationals pursuant to European Union law under Art. 15(b) and 15 (c) rQD respectively;
- » If EUMS consider the level of indiscriminate violence not to be of such a level as to qualify for protection under Art. 15(c) rQD, they should (a) ensure a comprehensive appraisal of all the circumstances of the applicant's case, including the circumstances which characterise the actual situation of violence in their country of origin and (b) properly examine the possibility that the state infrastructure has deteriorated and seriously impedes access to basic services and poses a risk under Art. 15 (b).
- » EUMS must use accurate, relevant, and recent country of origin information reports from a variety of sources to determine the level of indiscriminate violence;
- » Where information does not satisfy the authorities and individual assessments cannot be completed to the required standard due to insufficient information, EUMS should suspend the forcible returns of nationals and former habitual residents of Afghanistan to the country and neighbouring countries in the region.



ecre

European Council
on Refugees and Exiles

European Council on Refugees and Exiles

Avenue des Arts 7/8

Brussels 1210

Belgium

T.+32 232 900 40

ecre@ecre.org

www.ecre.org