NANSEN NOTE 3-23

Effective protection against refoulement for people fleeing Afghanistan

This NANSEN NOTE is written for the purpose of supporting practitioners and lawyers assisting applicants for international protection. It contains an analysis of relevant legislation and policies implemented by the national asylum authorities concerning access to and effective enjoyment of international protection as well as the right to liberty and standards of protection in detention.

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Summary

This NANSEN Note focuses on the assessment of protection claims made by Afghan applicants. It examines the decision-making by the Commissioner General for Refugees and Stateless Persons (CGRS) and the Council for Alien Law Litigation (CALL) in Afghan case files from the perspective of Article 13 in conjunction with Article 3 of the European Convention of Human Rights (ECHR). The Note explores whether effective protection against *refoulement* is afforded by the Belgian asylum authorities to people fleeing Afghanistan.

In the first part of the Note, NANSEN highlights three ways in which the Belgian asylum authorities place additional burdens on Afghan applicants for international protection increasing the burden of proof. In NANSEN's opinion, this raises the burden of proof to unreasonable levels. First, NANSEN observes that the asylum authorities too often fail to acknowledge the existence of an arguable claim, and as a result do not properly acknowledge their own obligations arising from Article 13 in conjunction with Article 3 ECHR. Consequently, (fresh) applications are not examined on their merits and any doubts about the risks upon return to Afghanistan are not being dispelled in accordance with the jurisprudence of the European Court Human Rights (ECtHR). Second, NANSEN observes that the asylum authorities do not always correctly identify groups systematically at risk, for members of these groups the authorities insist that applicants submit further distinguishing features to establish a real risk. Third, the CALL, in particular, interprets the Convention grounds' political opinion and religious beliefs very strict. As a result, it attaches decisive weight to the individual circumstances of an applicant in Belgium rather than the context an applicant will have to return to in Afghanistan and the perception of the Taliban of those returning from the west. Finally, NANSEN also shows that the assessments by the asylum authorities are not sufficiently supported by up-to-date domestic materials as well as materials originating from other, reliable and objective sources.

In the second part of the Note, NANSEN first focuses on identifying the type of material facts that should inform the risk assessment of applicants that must return to a situation where a particular draconian interpretation of the Sharia law has been implemented and violating these norms may lead to torture or to inhuman or degrading punishment. The analysis of the relevant decision by the ECtHR in the case of *Sufi and Elmi* and the decisions by the Belgian asylum authorities in Afghan case files shows a discrepancy between the material facts that inform the risk assessment of the ECtHR and those that currently inform the risk assessment by the asylum authorities. The ECtHR attached decisive weight to the strict social norms and the severity of the punishments for not obeying the rules, whereas the Belgian asylum authorities attach decisive weight to the level of internalisation of western norms of individual applicants. Yet, an examination of the available country of origin information shows that the current situation in Afghanistan under control of the Taliban is comparable to the situation under al-Shabaab in Somalia at the time of the *Sufi and Elmi* decision. Like al-Shabaab, the Taliban concerns itself with little details of day-to-day life and imposes severe punishments for not obeying these social norms. Furthermore, the country of origin information shows an opaque and arbitrary legal system in Afghanistan in which decrees are open to interpretation, abuse and inconsistent application. In particular, the decrees by the Ministry for Propagation of Virtue and Prevention of Vice. There exists widespread impunity. An increase in corporal punishments is being reported. The available country of origin information further shows that the Taliban are implementing and enforcing a particular draconian version of Sharia law that

goes well beyond the traditional interpretation of Islam in Afghanistan. People violating the social norms are at risk of corporal punishment, arbitrary arrest and detention. These punishments are so severe that they would all meet the threshold of persecution and serious harm. Given the analysis of the country information, NANSEN concludes that the granting of refugee status or subsidiary protection should not be dependent on the assessment of whether applicants have internalised western norms up to point where they can't be expected to obey the rules but rather whether applicants have any recent experience living under the Taliban and if they will be able to obey the rules. NANSEN also concludes that there is no information available on the treatment of returnees from the west by the Taliban. NANSEN, therefore, insists on the Belgian asylum authorities to attach due weight to this uncertainty and unpredictability. Based on an analysis of *Sufi and Elmi* and the available country information, NANSEN urges the Belgian asylum authorities to shift the focus of its risk assessment from the individual circumstances to the human rights conditions in Afghanistan, some of the worst in the world.

Concludingly, the analysis in this Note shows that the different ways of adding to the burden of proof for Afghan applicants developed by the Belgian asylum authorities adds up to a point where this burden becomes unreasonable. The existence of an arguable claim is not always properly acknowledged as are groups systematically at risk. The Convention grounds' political opinion and religious belief are interpreted very strict, neither in accordance with UNHCR Guidelines nor the jurisprudence by the European Court of Justice. Moreover, the manner in which the material facts are established by the Belgian asylum authorities regarding the risk assessment for Afghan returnees from the west, with again an emphasis on the individual circumstances rather than the dire human rights conditions, further increases that burden of proof. At the same time, the asylum authorities fail to acknowledge their own obligations to rigorously scrutinise individual applications and provide an effective remedy. These practices risk rendering the protection offered under the 1951 Refugee Convention and Article 3 ECHR illusionary for Afghan applicants.

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Content

1. Introduction

In February 2023, the United Nations High Commissioner for Refugees (hereafter: UNHCR) once again confirmed the increased protection needs of people fleeing Afghanistan compared to the situation prior to the events of 15 August 2021 when the Taliban seized control.[1] In its latest report of September 2023, the Office of the High Commissioner for Human Rights notes that the Afghan *de fact* authorities have undermined the protection of human rights at all levels. Serious human rights violations, including extrajudicial killings, arbitrary arrests and detention, torture and other forms of ill-treatment, are reportedly committed by the *de facto* authorities. Finally, Afghanistan remains one of the world's worst humanitarian crises with over two-thirds of the population requiring humanitarian assistance in 2023.[2] Therefore, UNHCR renewed its call for countries to allow civilians fleeing Afghanistan access to their territories, to guarantee the right to seek asylum, and to ensure respect for the principle of non-refoulement at all times. UNHCR also renewed its call to suspend any forcible returns to Afghanistan.[3]

The Belgian asylum authorities have adopted an inclusive protection policy with regards to certain groups of people fleeing Afghanistan, *for example* women[4] and since May 2023 also Hazara's.[5] However, Belgium continues to have one of the lowest recognition rates for Afghan applicants for international protection in the European Union (hereafter: EU). According to the Commissioner General for Refugees and Stateless Persons own statistics, the recognition rate for Afghan applicants stood at 35% in October 2023. That is down from the overall recognition rate of 44% for first instance decisions over 2022.[6] According to the European Asylum Agency, the recognition rate for Afghan applicants in the EU+ Member States for first instance decisions increased back to 66% in September 2023.[7] The EU+ recognition rate for

[1] UN High Commissioner for Refugees (UNHCR), *Guidance Note on the International Protection Needs of People Fleeing Afghanistan (Update I)*, February 2023, available at: https://www.refworld.org/docid/63e0cb714.html

[2] Ibid., p. 1 – 2; See also UN Assistance Mission in Afghanistan (UNAMA), Impact of improvised explosive devices on civilians in Afghanistan: 15 August 2021 – 30 May 2023, 27 June 2023, available at https://www.ecoi.net/en/file/local/2094034/report_on_civilian_harm_caused_by_ied_-_eng_27062023.pdf; UN Assistance Mission in Afghanistan (UNAMA), Human Rights situation in Afghanistan: May to June 2023 Update, July 2023, available at https://unama.unmissions.org/sites/default/files/human_rights_situation_in_afghanistan_may-june_2023.pdf; UN Office for the Coordination of Humanitarian Affairs (OCHA), Afghanistan: Humanitarian Update, June 2023, 10 July 2023, available at https://reliefweb.int/report/afghanistan/afghanistan-humanitarian-update-june-2023; Report of the Office of the High Commissioner for Rights, Situation of human rights in Afghanistan, 11 September 2023, available at https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ecoi.net%2Fen%2Ffile%2Flocal%2F2097200%2FA_HRC_54_21_AdvanceUneditedVersion.docx&wdOrigin=BROWSELINK; UNAMA, Human Rights situation in Afghanistan: July-September 2023 Update, October 2023, available at Human rights situation in Afghanistan Jul-Sep23 (ecoi.net)

[3] UNHCR, Guidance Note on Afghanistan, February 2023, par. 6 & par. 31.

[4] See also the opinion of the Advocate General of 9 November 2023 in C-608/22 and C-609/22 confirming that a well-founded fear may be established solely on the basis of gender and that the acts of persecution include 'an accumulation of discriminatory acts and measures adopted by a country against women and girls to restrict or even prohibit, inter alia, their access to education and healthcare, their gainful employment, their participation in public life and politics, their freedom of movement and freedom to take part in sports, depriving them of protection against gender-based and domestic violence and requiring them to cover their entire body and face, in so far as those acts and measures have the cumulative effect of depriving those women and girls of their most basic rights in society and thus undermine full respect for human dignity, as enshrined in Article 2 TEU and Article 1 of the Charter of Fundamental Rights of the European Union.'

[5] See CGVS, Afghanistan: nieuw beleid, 24 May 2022, available at https://www.cgvs.be/nl/actueel/afghanistan-nieuw-beleid & Myra, Minutes of the 'contactvergadering', June 2023 available at 20230621_PV_réunion_contact_-_contactvergadering_EXCL_OE-DVZ.pdf (myria.be)

[6] See https://www.cgvs.be/nl/cijfers. Recognition rates include refugee status as well as subsidiary status, however, only two people were granted subsidiary protection so far in 2023.

[7] https://euaa.europa.eu/latest-asylum-trends-asylum

Afghans was 54% in 2022.[8] Moreover, the European Asylum Agency notes that applicants from Afghanistan tend to be also granted national forms of protection which are unregulated at the EU level and are considered negative decisions for the purpose of EU asylum statistics.

In the NANSEN Note 3-22 of October 2022, NANSEN analysed the policies of the asylum authorities with regards to applicants fleeing Afghanistan.[9] NANSEN concluded on the basis of an analyses of the case law that the authorities failed to satisfy their duty to cooperate as laid down in article 4 (1) of the Qualification Directive and article 48/6 §1 of the Immigration Act. In particular, NANSEN showed that the authorities failed to provide all Afghan applicants with the opportunity to be heard in support of their fresh applications for international protection made after the Taliban takeover in August 2021. As a result, these applicants were not provided with the proper guidance on how to substantiate their fresh applications through appropriate questioning and they were not provided with an opportunity to clarify any potential adverse credibility findings.[10] Moreover, NANSEN showed that in the analysed cases the asylum authorities did not use all means at their disposal to gather relevant evidence. In particular, they failed to rely on precise and up-to-date information from various sources in support of their assessment in accordance with article 10 (3) (b) of the Asylum Procedures Directive.[11]

In this Note, NANSEN will again focus on the assessment of protection claims made by Afghan applicants. However, this NANSEN Note will examine the decision-making by the CGRS and the CALL in Afghan case files more from the perspective of Article 13 in conjunction with Article 3 of the European Convention of Human Rights (hereafter: ECHR). The European Court of Human Rights (hereafter: ECtHR) has time and again emphasised that in cases concerning the expulsion of applicants for international protection, the ECtHR will not examine the actual application or verify how national authorities honour their obligations under the 1951 Refugee Convention. The Court's main concern is,

> [W]hether effective guarantees exist that protect the applicant against against arbitrary refoulement, be it direct or indirect, to the country from which he or she has fled. By virtue of Article 1 of the Convention, the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention.[12]

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[8] https://euaa.europa.eu/latest-asylum-trends-annual-overview-2022

[9] NANSEN Note 3-22, Afghanistan: Een analyse van het beschermingsbeleid en risico's bij terugkeer, October 2022, par. 1, available at https://nansen-refugee.be/wp-content/uploads/2022/10/NANSEN-Notes-Afghanistan-2022-3-AFGHANISTAN-EEN-ANALYSE-VAN-HET-BESCHERMINGSBELEID-EN-RISICOS-BIJ-TERUGKEER-1.pdf

[10] NANSEN Note 3-22, p. 3 – 12; UN High Commissioner for Refugees (UNHCR), Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report, May 2013, p. 105, available at https://www.refworld.org/docid/519b1fb54.html; See also NANSEN Tools 1-23, Volgende verzoeken om internationale bescherming, 18 September 2023, available at https://nansen-refugee.be/nl/2023/09/18/volgend-verzoek-en-nieuwe-elementen-een-tool/

[11] NANSEN Note 3-22, p. 13 – 36.

[12] *S.H. v. Malta*, App Nr. 37241/21 (ECtHR, 20 December 2022) par. 100; *Lui v. Poland,* App Nr. 37610/18 (ECtHR, 6 October 2022) par. 67; *Khasanov and Rakhmanov v. Russia,* App Nr. 28492/15 and 49975/15 (ECtHR, 29 April 2022) par 102 – 103; *F.G. v. Sweden,* App Nr. 43611/11 (ECtHR, 23 March 2016) par 117; *M.S.S. v. Greece/Belgium,* App Nr. 30696/09 (ECtHR, 21 January 2011) par 286 – 287. With regards to the use of sufficient materials see also; *Salah Sheekh v. the Netherlands,* App Nr. 1948/04 (E ECtHR, 11 January 2007) par 136.

The ECtHR considers national authorities to be best placed to assess the credibility of applicants as they are able to see, hear and assess the demeanour of the individual concerned. However, that assessment is subject to the ECtHR's scrutiny.[13] Where the Court concludes that applicants are deprived of a rigorous individual assessment of their asylum claims, because the national authorities failed to conduct a risk assessment in relation to the individual situation,[14] the Court will find a violation of Article 13 in conjunction with Article 3 or just a violation of Article 3 if applicants were to be expelled without a proper *ex nunc* assessment. In certain situations, the Court finds itself compelled to examine whether applicants will be exposed to a real risk of ill-treatment proscribed by Article 3 ECHR in the event of their extradition to the destination country. The Court states that the assessment of whether applicants concerned, if extradited, would face a real risk of being subjected contrary Article 3 ECHR, should begin with the examination of the general situation in the destination country.[15] In this context, the ECtHR first assesses whether there is a general situation of violence as well as whether there are groups of people that are particularly at risk as a result of systematic targeting.

In part I of this Note, NANSEN will focus on the rigorousness of the individual assessment of applications for international protection from Afghans by the asylum authorities. In part II of this Note, NANSEN will focus on the assessment of the general conditions in Afghanistan. The NANSEN Note will particularly focus on the protection needs of Afghan applicants arising from the human rights situation in Afghanistan. The Note does not focus on the protection needs arising from the security and/or humanitarian situation. NANSEN will suggest that an alternative assessment of the human rights conditions in Afghanistan can be made based on the available country information and will discuss the implications of this assessment for Afghan applicants with no recent experience living under the Taliban.

The analysis of case law will show that often a disproportionate weight is attached to individual circumstances which, combined with the emphasis placed by the asylum authorities on 'in country' risks, leads to an unreasonable burden of proof, a failure to give due weight to the dire human rights situation, and ultimately, a lack of effective protection against refoulement for Afghan applicants in Belgium. The assessment of the risks for applicants for international protection at the 'pinch point' of arrival in Afghanistan from Belgium/Europe will show a real risk for people with no recent experience living under the Taliban.

[13] For example, *Khasanov and Rakhmanov,* par. 105; *F.G*, par. 118.
[14] *S.H.,* par. 80 – 99; *M.D. en M.A.* v. Belgium, App Nr. 58689/12 (ECtHR, 19 Januari 2016) par. 64 – 66; F.G., par. 144 – 158; *Singh and others v. Belgium*, App Nr. 33210/11 (ECtHR, 2 October 2012) par 100 – 105.
[15] *Lui*, par. 66.

Part I. Rigorous scrutiny

To ensure that applicants are protected against arbitrary refoulement, the ECtHR assesses whether applicants for international protection have had their claim rigorously scrutinised by the national asylum authorities. In its assessment, the ECtHR often focuses on the distribution of the burden of proof and whether the assessment by the national authorities is adequately and sufficiently supported by domestic material as well as by material originating from other reliable and objective sources. Paragraph 2 will discuss how the burden of proof should be distributed according to the jurisprudence of the ECtHR and the different ways that burden of proof is raised by the Belgian asylum authorities in Afghan case files. Paragraph 3 will discuss the requirements for the use of country information according to the jurisprudence of the ECtHR and how country information is used by the asylum authorities in Afghan case files.

2. Burden of proof

This paragraph will first set out the ECtHR's framework concerning the burden of proof for determining a real risk of being subjected to treatment contrary to article 3 ECHR. Second, it will focus on how the asylum authorities are placing additional burdens on Afghan applicants and, in NANSEN's opinion, increasing the burden of proof to unreasonable levels. These additional burdens risk rendering the protection afforded by the ECHR illusionary.

2.1. The ECtHR's framework

It is the ECtHR's well-established case law that,

> It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he or she would be exposed to a real risk of being subjected to treatment contrary to Article 3; and that where such evidence is adduced, it is for the Government to dispel any doubts about it.[16]

It is for applicants for international protection to produce, to the greatest extent practically possible, documents and country information that will allow for the asylum authorities as well as the ECtHR to assess the risk a return to a destination country may entail. However, the ECtHR acknowledges that it may be difficult, if not impossible, for applicants for international protection to produce such evidence within a short time. In particular, where such evidence must be obtained from the country from which applicants have fled. Therefore, the lack of direct documentary evidence cannot be decisive by itself. Applicants for international protection often find themselves in a special situation and, according to the Court, it will be frequently necessary to give them the benefit of the doubt when assessing their credibility and the documents submitted in support thereof. The ECtHR considers that, even if some of the details of an applicant's statement may appear implausible, this does not necessarily detract from the overall general credibility of the applicant.[17]

The ECtHR also notes that,

[16] *Khasanov and Rakhmanov,* par. 109; F.G., par. 120; *J.K. and others v. Sweden*, App Nr. 59166/12 (ECtHR, 23 August 2016) par. 91; N.A. v. the United Kingdom, App Nr. 25904 (ECtHR, 17 July 2008) par. 111.
[17] *F.G.*, par. 113; *J.K.,* par. 92 – 95; *S.H.H. v. The United Kingdom,* App Nr. 60367/10 (ECtHR, 29 January 2013) par. 71; *Said v. the Netherlands,* App Nr. 2345/02 (ECtHR, 5 July 2005) par. 49.

> [I]t is the shared duty of an asylum-seeker and the immigration authorities to ascertain and evaluate all relevant facts of the case in the asylum proceedings. Asylum-seekers are normally the only parties who are able to provide information about their own personal circumstances. Therefore, **as far as the individual circumstances** are concerned, the burden of proof should in principle lie on the applicants, who must submit, as soon as possible, all evidence relating to their individual circumstances that is needed to substantiate their application for international protection.[18]

However, the ECtHR recognises all the difficulties which applicants may encounter when collecting evidence and the burden of proof should not render the protection offered under article 3 ECHR ineffective. Therefore, as far as the general situation in a country of origin is concerned, a different approach to the burden of proof should be taken. Asylum authorities have full access to information on countries of origin and should establish the situation in a country of origin *proprio motu* or by its own motion.[19]

Finally, it is established case law by the ECtHR that in specific circumstances the burden of proof shifts entirely onto the national asylum authorities and it becomes an obligation to carry out an assessment of a risk of their own motion. In particular, where an arguable claim under article 3 ECHR has been established, national asylum authorities are obligated to assess that claim in accordance with article 13 ECHR. The ECtHR states that,

> [I]n relation to asylum claims based on **a well-known general risk, when information about such a risk is freely ascertainable from a wide number of sources**, the obligations incumbent on the States under Articles 2 and 3 of the Convention in expulsion cases entail that the authorities carry out an assessment of that risk of their own motion.[20]

Moreover, the ECtHR states that,

> By contrast, in relation to asylum claims based on an individual risk, it must be for the person seeking asylum to rely on and to substantiate such a risk. Accordingly, if an applicant chooses not to rely on or disclose a specific individual ground for asylum by deliberately refraining from mentioning it, be it religious or political beliefs, sexual orientation or other grounds, the State concerned cannot be expected to discover this ground by itself. However, considering the absolute nature of the rights guaranteed under Articles 2 and 3 of the Convention, and **having regard to the position of vulnerability that asylum seekers often find themselves in, if a Contracting State is made aware of facts, relating to a specific individual, that could expose him to a risk of ill-treatment in breach of the said provisions upon returning to the country in question, the obligations incumbent on the States under Articles 2 and 3 of the Convention entail that the authorities carry out an assessment of that risk of their own motion.** This applies in particular to situations where the national authorities have been made aware of the fact that the asylum seeker may, plausibly, be a member of a group systematically exposed to a practice of ill-treatment

[18] *J.K.,* par. 96; On the shared burden of proof, see also NANSEN Note 3-22, October 2022, pp. 3 – 8.
[19] *J.K*., par. 98.
[20] *F.G.*, par. 126; *Hirsi Jamaa and others v* Italy, App nr. 27765/09 (ECtHR, 23 February 2012) par. 131 – 133; *M.S.S.,* par. 366.

> and there are serious reasons to believe in the existence of the practice in question and in his or her membership of the group concerned.[21]

Concludingly, when a serious security and/or human rights situation is known to the national authorities, because it has been documented by a wide variety of publicly available documents, or when individual elements have been established that could possibly lead to a person being exposed to a risk at ill-treatment, a claim should be considered arguable. In the case of an arguable claim, the national asylum authorities should carry out a rigorous assessment of a risk of their own motion. The obligation to carry out an examination of a possible violation of article 3 ECHR of their own motion exists independent of an applicant's behaviour or credibility,

> Having regard to the absolute nature of Articles 2 and 3 of the Convention, though, it is hardly conceivable that the individual concerned could forego the protection afforded thereunder. It follows therefore that, **regardless of the applicant's conduct,** the competent national authorities have an obligation to assess, of their own motion, all the information brought to their attention before taking a decision on his removal to Iran.[22]

2.2. Unreasonable burden of proof

NANSEN is of the opinion that the asylum authorities are placing an unreasonable burden of proof on applicants for international protection from Afghanistan. NANSEN would like to highlight three issues that lead to this unreasonable burden of proof. More specifically, NANSEN will highlight the recognition of an arguable claim (paragraph 2.2.1.), the identification of groups that are systematically targeted (paragraph 2.2.2.) and the interpretation of the Refugee Convention grounds political opinion and religious beliefs (paragraph 2.2.3).

2.2.1. An arguable claim

A right to an effective remedy, or the obligation for a rigorous scrutiny, only exists with regards to an arguable claim,

> Notwithstanding the terms of Article 13 read literally, the existence of an actual breach of another provision of the Convention (a "substantive" provision) is not a prerequisite for the application of the Article. Article 13 guarantees the availability of a remedy at national level to enforce - and hence to allege non-compliance with - the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. However, Article 13 cannot reasonably be interpreted so as to require a remedy in domestic law in respect of any supposed grievance under the Convention that an individual may have, no matter how unmeritorious his complaint may be: **the grievance must be an arguable one in terms of the Convention.**[23]

Therefore, it is for an applicant to establish an arguable claim under Article 3 ECHR before a proper examination of the merits is required in accordance with the right to an effective remedy as laid down in Article 13 ECHR. At the first, the ECtHR did not find it necessary to give an

[21] *F.G.*, par. 127; See also *M.A. v. Belgium*, App Nr. 19656/18 (ECtHR, 27 October 2020) par. 81 – 82.
[22] *F.G.*, par. 156.
[23] *Boyle and Rice v. the United Kingdom*, App Nr. 9659/82 & 9658/82 (ECtHR, 27 April 1988) par. 52.

abstract definition of the notion of arguability. It stated that it would assess whether an individual claim is arguable in light of the particular facts and the nature of the legal issue or issues raised.[24] Later, the ECtHR clarified that a claim that is not declared manifestly ill-founded and necessitates an examination on the merits will fall within the protection afforded by article 13 ECHR.[25] Complaints can be considered arguable when a violation of an article has already been found, though, the finding of a violation is not a prerequisite for the application of article 13 ECHR. Furthermore, a complaint can also be considered *prima facie* arguable.[26]

As for the factual basis of a complaint under article 3 ECHR, given the fundamental importance and absolute nature of the prohibition of torture, the burden of proof to establish an arguable claim is not set particularly high by the ECtHR. It is often enough for an applicant to provide nationality documents (copies or originals), evidence of belonging to a particular group and information on the targeting of that group in the country of origin. See, *for example*, the ECtHR's considerations in *Singh and others*,

> 86. La Cour ne partage pas cet avis. Elle considère, à la lumière **des rapports que les requérants invoquent (paragraphes 50 à 52)**, que la crainte des requérants d'être victimes de la pratique des autorités russes de refoulement vers leurs pays d'origine n'était pas dénuée de fondement. De plus, la circonstance qu'en Belgique, les requérants n'étaient plus des demandeurs d'asile ne saurait en rien préjuger qu'un sort différent leur ait été réservé par les autorités russes.
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> 87. S'agissant ensuite de leurs craintes en Afghanistan, la Cour note qu'il n'est pas contesté que les requérants se sont présentés à la frontière belge avec des documents d'identité et des copies des pages d'identité **de deux passeports afghans**, documents qu'ils se sont vus confisquer par les services de police. Il n'est pas non plus contesté que des copies de mandats de protection du HCR ont été versées au dossier par l'intermédiaire d'un fonctionnaire du HCR en place à New Delhi. La Cour dispose en outre **de plusieurs rapports indiquant que la minorité ethno-religieuse sikhe a fait l'objet de persécutions dans le passé et fait encore à ce jour l'objet de discriminations, de harcèlements voire de violence de la part des autres groupes religieux**, circonstances que le HCR recommande de prendre en considération lors de l'examen des demandes de protection de membres de cette minorité, en plus du contexte de conflit armé à large échelle en Afghanistan et de la présence d'enfants (paragraphes 44 à 48).
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> 88. La Cour estime, à la lumière de ces éléments et des problèmes juridiques en jeu, que les allégations des requérants de risques de violation de l'article 3 de la Convention **appelaient manifestement un examen circonstancié et qu'ils devaient pouvoir les défendre devant les instances belges conformément aux exigences de l'article 13.**[27]

[24] Ibid., par. 55.
[25] *Çelik and İmret v. Turkey*, App Nr. 44093/98 (ECtHR, 26 October 2004) par 57; *Singh,* par 84.
[26] European Court of Human Rights, Guide on Article 13 of the European Convention on Human Rights, 31 August 2022, p. 9 – 12, available at https://www.echr.coe.int/documents/d/echr/Guide_Art_13_ENG
[27] See also, A.M.A v. the Netherlands, App Nr. 23048/19 (ECtHR, 24 October 2023) par 77 – 78; *M.D. and M.A.*, par 57 – 67; *S.H.*, par. 56.

For establishing an arguable claim, it is not always necessary for the applicant to identify all relevant elements upon which the claim should be assessed or provide relevant country information where a claim is based on a well-known risk about which information is freely ascertainable.[28]

NANSEN observes that the asylum authorities too often do not acknowledge the existence of an arguable claim, and as a result do not properly acknowledge their own obligations arising from article 13 in conjunction with article 3 ECHR. In the Note 3-22 of October 2022, NANSEN already concluded that the asylum authorities do not always properly cooperate with Afghan applicants in assessing all the relevant elements of their claims.[29] The failure to recognise an arguable claim lies at the basis of this lack of cooperation with applicants. Moreover, it prevents applications for international protection from being rigorously scrutinised.

Fresh applications made by Afghan applicants after the Taliban takeover still have not all been examined on their merits. In accordance with the jurisprudence of the ECtHR, the fact that the situation in Afghanistan has so drastically changed and that widespread human rights violations are being reported, would make any fresh claim from an Afghan applicant arguable under article 13 ECHR.[30] Nonetheless, there are instances of Afghan applicants making fresh claims that are being declared inadmissible, without the applicant being heard by the CGRS or a proper examination on the merits of the application. In the cases analysed by NANSEN, the Belgian asylum authorities insist that referencing the general situation in Afghanistan is not sufficient and that applicants should be more specific in their application forms on how the Taliban takeover affects their particular situation.[31] It appears only in exceptional circumstances does the CALL annul these decisions and directs the CGRS to re-examine the application.[32] NANSEN observes that, to the best of its knowledge, the decisions in which the CALL acknowledges the responsibilities of the asylum authorities, are rare and as a result appear chance rather than a sign of an effective remedy.

Moreover, the ECtHR also finds it sufficient for applicants, coming from countries where the general risk is well-known, to submit (untranslated) copies of documents to establish an arguable claim and activate the protection of an effective remedy afforded by article 13 in conjunction with article 3 ECHR.[33] However, the analysed case law shows that the asylum authorities find fresh applications based on copies of documents, or even original Afghan passports for that matter, inadmissible referring to widespread corruption in Afghanistan.[34] As a result, an unreasonable burden of proof is placed on applicants, these applications are never examined on their merits and the protection afforded under article 3 ECHR risks becoming illusionary. Therefore, the jurisprudence on applicants fleeing Afghanistan shows that at least

[28] F.G., par. 125 – 127; *M.A.,* par 89.
[29] see NANSEN Note 3-22, October 2022, pp. 3 – 8.
[30] See, *for example*, *M.A.,* par. 89 where the applicant's claim was considered arguable solely based on the human rights situation in Sudan.
[31] See, *for some examples of decisions from August 2023,* CALL, App. Nr. 293.301 (24 August 2023); CALL, App. Nr. 293.302 (24 August 2023); CALL, App Nr. 293.152 (23 August 2023); See also CALL, App Nr. 281.639 (9 December 2022) and decision of the CGRS of 15 September 2023 in that same case file after intervention from NANSEN.
[32] See, *for example*, CALL, App Nr 292.539 (2 August 2023); CALL, App nr. 292.165 (18 July 2023).
[33] See, for example, A.M.A, par 77 – 78.
[34] See, *for example*, CALL, App Nr. 293.302 (24 August 2023); CALL, App Nr. 291.501 (5 July 2023); CALL, App Nr. 290.581 (20 June 2023); CALL, App Nr. 281.639 (9 December 2022).

some of the systematic issues raised by the ECtHR in cases such as *Singh and others* and *M.D. and M.A.* have yet to be resolved.

2.2.2. Identifying groups systematically at risk

The CGRS appears to now recognise that Hazara's are a group that is systematically at risk of persecution in Afghanistan.[35] However, for certain other groups the CGRS and the CALL do not accept that they are systematically at risk even though these groups are identified by UNHCR and the European Asylum Agency as having increased international protection needs and are considered *in general* to have a well-founded fear. The CGRS and the CALL insist that applicants from these groups show further elements to substantiate their well-founded fear. As a result, the burden of proof for these individual applicants is, in NANSEN's opinion, increased to an unreasonable level. *For example*, the CGRS states that members of the security institutions of the former government, public officials and servants of the former government, and persons affiliated with foreign forces may experience retaliatory actions. However, the CGRS does not consider it established that these groups are systematically at risk. Therefore, the CGRS requires applicants not only to submit elements capable of showing that they belong to these groups identified by UNHCR and the European Asylum Agency, but they also require applicants to submit further elements capable of showing that they are personally at risk.[36]

With regard to groups systematically at risk, the ECtHR considers in *Salah Sheekh* that,

> 148. The Court would further take issue with the national authorities' assessment that the treatment to which the applicant fell victim was meted out arbitrarily. It appears from the applicant's account that he and his family **were targeted** because they belonged to a minority and for that reason it was known that they had no means of protection; they were easy prey, as were the other three Ashraf families living in the same village (see paragraph 7 above). **The Court would add that, in its opinion, it cannot be required of the applicant that he establishes that further special distinguishing features, concerning him personally, exist in order to show that he was, and continues to be, personally at risk.** In this context, it is true that a mere possibility of ill-treatment is insufficient to give rise to a breach of Article 3. Such a situation arose in the case of Vilvarajah and Others v. the United Kingdom, where the Court found that a possibility of detention and ill-treatment existed in respect of young male Tamils returning to Sri Lanka. The Court then insisted that the applicants show that special distinguishing features existed in their cases that could or ought to have enabled the United Kingdom authorities to foresee that they would be treated in a manner incompatible with Article 3 (judgment cited above, p. 37, §§ 111-112). However, in the present case, the Court considers, on the basis of the applicant's account and the information about the situation in the "relatively unsafe" areas of Somalia in so far as members of the Ashraf minority are concerned, that it is foreseeable that upon his return the applicant will be exposed to treatment in breach of Article 3**. It might render the protection offered by that provision illusory if, in addition to the fact that he belongs to the Ashraf – which the Government have**

[35] Myria, Minutes of the 'contactvergadering,' 21 June 2023, p. 10.
[36] F.e. CGRS decision of 15 September 2023, p. 3; CALL, App. Nr. 291.296 of 30 June 2023, par. 2.3.

not disputed –, the applicant be required to show the existence of further special distinguishing features.[37]

In its determination of whether further special distinguishing features should be insisted on, the ECtHR examines if a whole group is targeted or if only 'certain profiles' of a group are at risk.[38] Therefore, ECtHR will take into account country of origin information as well as attach due weight to country guidance by UNHCR and the European Asylum Agency.[39] Furthermore, to determine whether further special distinguishing features should be insisted on, the ECtHR states that it may take account of the general situation of violence in a country if that general situation makes it more likely that the authorities (or other actors) will systematically ill-treat the group in question.[40]

Considering the jurisprudence of the ECtHR, NANSEN is of the opinion that in the abovementioned example at least 'members of the security institutions of the former government' and 'persons affiliated with foreign forces' can be considered groups systematically at risk. Therefore, applicants who can establish that they belong to one of these groups should not be required to submit further special distinguishing features. In this context, NANSEN attaches substantial weight to the European Asylum Agency's Country Guidance on Afghanistan from January 2023. According to article 11 (3) of the EUAA Regulation, the CGRS and the CALL have the obligation to take into account the guidance notes and common analysis by the European Asylum Agency when assessing individual applications. Regarding the group of 'public officials and servants of the former government,' the European Asylum Agency distinguishes certain profiles. It considers that judges, prosecutors and female former judicial personnel would in general have a well-founded fear of persecution. Whereas, for other profiles in this group, the individual assessment should take into account further special distinguishing features or risk impacting circumstances such as the institution the applicant was employed by and their role and functions.[41] However, for the groups of 'members of the security institutions of the former government' and 'persons affiliated with foreign forces,' the European Asylum Agency does not distinguish any further profiles and/or risk impacting circumstances (further special distinguishing features) that should be taken into account.[42] Furthermore, the European Asylum Agency uses the words 'in general.' These words indicate that the European Asylum Agency accepts the highest level of risks for these groups.[43] Therefore, the European Asylum Agency accepts that members of both groups are targeted in its entirety, these groups should be considered to be systemically at risk and members should not be required to show further special distinguishing circumstances.

Concludingly, NANSEN urges the CGRS and the CALL to have careful regard of the available country of origin information as well as existing country guidance by UNHCR and the

[37] *Salah Sheek,* paras 139 – 149; *Saadi* v the United Kingdom, App Nr. 37201/06 (ECtHR, 28 February 2008) par. 132; *J.K.,* paras 103 – 105.
[38] *NA.,* par. 128; *S.H.* v. the United Kingdom, App Nr. 19956/06 (ECtHR, 15 June 2010) par. 69 – 71; *Turgunov* v Russia, App Nr. 15590/14 (ECtHR, 22 October 2015) par. 51; *J.K.,* par. 116 – 117; *A.S.N and others* v the Netherlands, App Nr. 68377/17, 530/18 (ECtHR, 25 February 2020) par. 105 – 112; *Khasanov and Rakhmanov,* par. 131 – 132.
[39] See, for example, *NA.*, par. 127; *A.S.N.*, par. 111.
[40] *NA.,* par. 117.
[41] European Asylum Agency, Country Guidance: Afghanistan, Guidance Note and Common Analysis, January 2023, par. 3.2, available at https://euaa.europa.eu/sites/default/files/publications/2023-03/2023_Country_Guidance_Afghanistan_EN.pdf.
[42] European Asylum Agency, Country Guidance: Afghanistan, January 2023, paras. 3.1 & 3.3.
[43] European Asylum Agency, Country Guidance: Explained, General Guidance and methodological remarks, January 2023, p. 14, 19 available at https://euaa.europa.eu/country-guidance-explained.

European Asylum Agency to determine whether further special distinguishing features should be insisted on. With regards to country of origin information, particular attention should be paid to whether the information identifies specific profiles within a group that are being targeted or rather that a group as a whole is targeted. With regards to country guidance based on analysis of available country information, it is important to be aware of the wording used by UNHCR and the European Asylum Agency. Where UNHCR states that a particular group is *likely* to be in need of international protection, UNHCR considers that there is a presumption of recognition of refugee status.[44] The European Asylum Agency also appears to presume recognition of refugee status for applicants who have a profile for which a well-founded fear of persecution would *in general* be substantiated.[45] Moreover, particular attention should be paid to whether UNHCR and the European Asylum Agency identify certain profiles within a group at risk and whether additional risk impacting circumstances are listed. Where a profile is *likely* or *in general* considered to be in need of international protection, the individual assessment of a claim should exist of the asylum authorities dispelling any doubt about the risks for an applicant belonging to this profile. Namely, where it has been established that a group is systematically at risk, evidence has been adduced capable of proving that there are substantial grounds for believing that an applicant belonging to this group would be at risk of ill-treatment. This means the onus rests on the national authorities,[46] increasing the burden of proof by insisting on the applicant submitting further distinguishing features or risk impacting circumstances would render the protection offered under the 1951 Refugee Convention and article 3 ECHR illusionary.

2.2.3. Interpretation of the convention ground's political opinion & religious beliefs

Afghan applicants without an apparent risk profile, or lacking a credible risk profile, often (also) rely on the serious human rights situation under the current Taliban rule to claim a risk of ill-treatment due to the fact that they will have difficulties adjusting to the strict social norms. The CGRS appears to examine these claims against the criteria for subsidiary protection.[47] According to the CGRS, the available country information does not show that the fact that an applicant has spent time in Europe is sufficient to establish an international protection need.

The CALL, on the other hand, examines these claims against the criteria for refugee status. In its jurisprudence, examined for the purpose of this Note, the CALL accepts that, on the basis of the country information made available to them by the CGRS and applicants, two further risk profiles may be relevant,

(i) Persons having transgressed religious, moral and/or societal norms, or perceived to have transgressed these norms, irrespective of whether the perceived transgression of norms occurred in Afghanistan or abroad,

(ii) Persons who are westernised or who are perceived to be westernised because of, for example, their activities, behaviour, appearance and opinions, which can be

[44] UNHCR, *UNHCR Statement on the concept of persecution on cumulative grounds in light of the current situation for women and girls in Afghanistan: Issued in the context of the preliminary ruling reference to the Court of Justice of the European Union in the cases of AH and FN v. Bundesamt für Fremdenwesen und Asyl (C-608/22 and C-609/22)*, 25 May 2023, par. 5.1.11., available at: https://www.refworld.org/docid/646f0e6a4.html
[45] European Asylum Agency, Country Guidance: Explained, January 2023, p. 14, 19.
[46] *NA.*, par. 111; *R.C.* v Sweden, App. Nr. 41827/07 (ECtHR, 9 March 2010) par. 50; *F.G.*, par. 120; *J.K.*, par. 91.
[47] See, for example, CGRS decision of 2 March 2023 in CALL, App Nr. 292.515 (31 July 2023) p1.

perceived as non-Afghan or non-Muslim, this includes people who return to Afghanistan after staying in Western countries.

The CALL is of the opinion that not all Afghans returning from Europe are, or will be perceived by the Taliban as, 'westernised.' According to the CALL, applicants must therefore show characteristics or beliefs that are so fundamental to their identity or moral integrity that they cannot be expected to give those up.[48] The CALL refers in this regard to the decision by the European Court of Justice in the case of *Y and Z*.[49] The CALL states that not every Afghan who returns from Europe will have developed characteristics or behaviours that are impossible to change or virtually impossible to hide. In this regard, the CALL also refers to the decision of the ECtHR in the case of *Sufi and Elmi* and the considerations of the ECtHR with regards to the ability to 'play the game.'[50]

In paragraph 5, NANSEN will focus on the interpretation of the facts that lie at the basis of the case of *Sufi and Elmi*. It will discuss the evidence assessment and fact-finding at the basis of the CGRS and CALL's conclusion that the available country information does not show that the fact that an applicant has spent time in Europe is sufficient to establish an international protection need. However, here we will focus on the criteria against which these facts are examined by the CALL. NANSEN is of the opinion that the CALL's interpretation of a political opinion or religious belief is too strict, neither in accordance with UNHCR Guidelines nor the jurisprudence by the European Court of Justice.

The CALL has previously concluded that applicants for international protection who are 'westernised' cannot be considered to belong to a particular social group. According to the CALL, 'westernisation' is neither an innate characteristic nor a common background that cannot be changed. The CALL considered that 'westernisation' is also not a characteristic or belief that is so fundamental to the identity or conscience that a person should not be forced to renounce it.[51] However, the CALL further stated that the convention grounds religion and political opinion may be applicable to applicants who are 'westernised.' Analysed case law shows that, according to the CALL, these convention grounds also focus on characteristics or beliefs that are so fundamental to the identity or conscience that a person should not be forced to renounce it. In a series of decisions by three members dating 12 and 13 October 2022, referring to the preliminary ruling of the European Court of Justice in *X and Z*, the CALL considered that for any application on the basis of religion or political opinion to be successful, behaviour should be based on religious or political beliefs and should be particularly important to an applicant's religious or political identity or moral integrity.[52]

First, NANSEN notes that the CALL's conclusion that 'westernised' applicants cannot be considered belonging to a particular social group is neither supported by UNHCR[53] nor by the

[48] CALL, App Nr. 292.515 (31 July 2023) p26.
[49] *Y and Z v. Germany,* Appl. Nr. C-71/11 and C-99/11 (European Court of Justice, 5 September 2012) par. 70 – 71.
[50] *Sufi and Elmi v. the United Kingdom*, App Nr. 8319/07 and 11449/07 (ECtHR, 28 June 2011) par. 275.
[51] CALL, App Nr. 278.653 (12 October 2022) pp22 – 23; CALL, App Nr. 278.654 (12 October 2022) p27; CALL, App Nr. 278.699 (3 October 2022) pp23 – 24; CALL, App Nr. 278.701 (13 October 2022) p38
[52] CALL, App. Nr. 278.701 (13 October 2022) p38
[53] UNHCR, *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2002, available at https://www.refworld.org/docid/3d36f23f4.html

European Asylum Agency.[54] Recently, the Advocate-General of the European Court of Justice also considered,

> It may be relevant to add that the first indent of Article 10(1)(d) of Directive 2011/95 states that a group may also be a particular social group where its members share a common background that cannot be changed. I am not persuaded that that consideration is relevant in the present case. **It is certainly arguable that persons such as the appellants, who have spent a considerable part of the phase of their lives in which they form their identity in a Member State, share a common background that cannot be changed.** However, in the present case, no argument appears to be advanced that the appellants may have a well-founded fear of persecution because they share such a common background.[55]

Second, NANSEN notes that the convention grounds religion and political opinion should be interpreted broadly and consistent with the 1951 Refugee Convention, the wording of the Qualification Directive and the Charter of Fundamental Rights of the European Union.[56] In a written intervention before the Dutch Council of State, UNHCR confirmed that,

> 11. The concept of political opinion as a protected ground under the 1951 Convention should be understood **in a broad sense**, to incorporate "any opinion on any matter in which the machinery of State, government, society, or policy may be engaged". This presupposes that the applicant holds opinions not tolerated by, different from or critical of the policies, goals, traditions or methods of the authorities, or parts of, or groups in, society. There is no need for the applicant to describe or qualify their opinion as political, or for the opinion to conform to the applicant's true beliefs. Further, just as expressions (and non-expressions) of political opinions are protected, so too is political neutrality.
>
> 12. The 1951 Convention ground of political opinion needs to reflect the reality of the specific geographical, historical, political, legal, judicial, and socio-cultural context of the country of origin. Context is vital to understanding the substance of 'political', indeed "political opinion is not a matter of definition but depends on the context of the case". There is "not as such an inherently political or an inherently non-political activity." Thus, decision-makers need to ensure that the social and political context of the country of origin is meaningfully taken into account in assessing the existence of a political opinion.[57]

UNHCR confirmed that whether the political opinion is fundamental to an applicant is not relevant because it can change, be imputed or attributed to the applicant, irrespective of

[54] European Asylum Agency, Country Guidance: Afghanistan, January 2023, par. 3.13.
[55] See Opinion of Advocate General Collins, *K and L* v Staatsecretaris van Justitie en Veiligheid, App Nr. C-646/21 (European Court of Justice, 13 July 2023) footnote 26.
[56] See also, VluchtelingenWerk Nederland, Commissie Strategisch Procederen, Politieke overtuiging als vervolgingsgrond, 2 November 2020.
[57] UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in case numbers 202003129/1/V2 and 202004875/1/V2 before the Council of State*, 17 November 2020, available at: https://www.refworld.org/docid/619259ac4.html; See also, UNHCR, *UNHCR's written observations on the reference for a preliminary ruling of the Court of Justice of the European Union in the matter between S. and A. and Netherlands*, June 2022, Case C-151/22, available at: https://www.refworld.org/docid/62c6d38a4.html

whether the applicant actually holds the opinion. The truth is in the eye of the beholder, therefore, the perception of the actor of persecution is determining.[58]

Furthermore, neither article 10 (1) (b) nor article 10 (1) (e) of the Qualification Directive refer to beliefs or opinions that are particularly important or fundamental to a person's identity or moral integrity. Also, article 48/3 §4 (b) and (e) of the Belgian Alien Act does not refer to a person's identity or moral integrity. Only in the context of a particular social group does article 10 (1) (d) of the Qualification Directive refer to a characteristic or belief that is so fundamental to a person's identity or conscience. The question of whether a religious belief or political opinion is fundamental is not a relevant question for determining whether the convention grounds are applicable in an individual case. Such a tests places wrongly additional burdens on applicants for international protection that are not foreseen in the 1951 Refugee Convention.[59]

Even in *X and Z*, the decision of the European Court of Justice relied on by the CALL, the Court confirms the broad application of the concept of religion. It states in paragraph 70 that,

> In assessing such a risk, the competent authorities **must take account of a number of factors**, both objective and subjective. The **subjective** circumstance that the **observance of a certain religious practice in public, which is subject to the restrictions at issue, is of particular importance to the person concerned in order to preserve his religious identity is a relevant factor to be taken into account in determining the level of risk to which the applicant will be exposed in his country of origin on account of his religion**, even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned.

Therefore, the European Court of Justice states that the *subjective* circumstance, that applicants would consider a religious practice of particular importance in order to preserve their religious identity, is only one of a number of factors that should be taken into account by the national authorities to assess a risk. It would not be correct to infer from this particular consideration that as an objective general rule an application on the basis of religion or political opinion can only be successful when such beliefs or opinions are particularly important or fundamental to an applicant's identity or moral integrity. Indeed, in the case of *Fathi* the European Court of Justice reiterates the broad interpretation of the concept of religion,

> 78. The Court has already had occasion to point out, with regard to the interpretation of Directive 2004/83, **that that provision gives a broad definition of 'religion'** which encompasses all its constituent components, be they public or private, collective or individual.
>
> 79. In that regard, it is clear from the wording of that provision, and particularly the use of the words 'in particular', that the definition of the concept of 'religion' contained therein provides only **a non-exhaustive list of components that may characterise that concept in the context of an application for international protection** that is based on the fear of being persecuted for reasons of religion.

[58] Ibid., par. 15.
[59] Ibid., par. 19.

> 80. In particular, as is clear from that definition, the concept of 'religion' covers, on the one hand, the holding of theistic, non-theistic and atheistic beliefs, which, given the general nature of the words used, highlights that it covers both 'traditional' religions and other beliefs and, on the other, the participation in, either alone or in community with others, or the abstention from, formal worship, which implies that the fact that a person is not a member of a religious community cannot, in itself, be decisive in the assessment of that concept.
>
> 81. Moreover, as regards the concept of 'religion' referred to in Article 10 of the Charter of Fundamental Rights of the European Union ('the Charter'), which, as is apparent from recital 16 of Directive 2011/95, must be taken into account when interpreting that directive, **the Court has emphasised the broad understanding of that concept**, covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public, as religion may be expressed in either form.[60]

The European Court of Justice has also confirmed the broad interpretation of the concept political opinion. In the case of *P.I.,* the Court considers,

> In that connection, it is appropriate, in the first place, to observe that the wording itself of those provisions means **that the concept of 'political opinion' is to be interpreted broadly.** That premiss is based on several factors. The first is the use of the phrase 'in particular' in order to list, non-exhaustively, the features which may serve to identify that concept. Next, not only 'opinions' are referred to, but also 'thoughts' and 'beliefs' on a matter related to the potential actors of persecution and to the 'policies' or 'methods' of those actors, without those opinions, thoughts or beliefs necessarily being acted upon by the applicant. Last, the perception of the 'political' nature of those opinions, thoughts or beliefs by the actors of persecution is highlighted.[61]

That broad interpretation means that,

> [T]he concept of 'political opinion' as a 'reason for persecution' within the meaning of Article 10(1)(e) of Directive 2011/95 means that, in order to determine the existence of such opinion and the causal link between it and the acts of persecution, the competent authorities of the Member States **must take into consideration the general context of the country of origin of the applicant for refugee status, from, inter alia, a political, legal, judicial, historical and sociocultural perspective**.[62]

The European Court of Justice reiterates that it may be particularly difficult for applicants for international protection to provide evidence that a certain act or omission may be perceived by the authorities in their country of origin as a manifestation of a 'political opinion. Therefore, the assessment of the national asylum authorities must relate, in light of all the circumstances of a case, to the plausibility of the political opinions being attributed to the applicant by the actors of persecution.[63] Recently, the European Court of Justice confirmed in the case of *S, A*

[60] *Fathi* v. Predsedatel na Darzhavna agentsia za bezhantsite, App Nr. 1-56/17 (European Court of Justice, 4 October 2018).
[61] *P.I.* v. Migracijos departamentas prie Lietuvos Respublikos vidaus reikalų ministerijos, App Nr. C-280/21 (European Court of Justice, 12 January 2023), par. 26.
[62] Ibid., par. 33.
[63] Ibid., para 38 – 39.

v Staatssecretaris van Veiligheid en Justitie that the concept of political opinion is to be interpreted broadly.[64] The Court considers it important to emphasise that,

> [I]t is only in relation to the reason for persecution linked to 'membership of a particular social group', referred to in Article 10(1)(d) of Directive 2011/95, that there is mention of 'a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it'. The requirement of such an element, for the purposes of defining the concept of 'political opinion' or 'political characteristic, within the meaning of Article 10(1)(e) and (2) of that directive, **would thus amount to restricting unduly the scope to be given to that latter concept**.[65]

The Court further notes in paragraph 36,

> After all, as the UNHCR has noted in its written observations, even if the political opinions invoked by an applicant are not of a certain degree of conviction or are not 'fundamental' or deeply rooted in that applicant, he or she could be exposed, if returned to his or her country of origin, to the real risk of being persecuted on account of those political opinions or of those that the actors of potential persecution in that country would be led to attribute to him or her, having regard to the applicant's personal situation and the general context of the said country. From that point of view, only a broad interpretation of the concept of 'political opinion' as a reason for persecution is capable of achieving the objective referred to in the preceding paragraph.

The degree of a political conviction is a relevant individual element in the assessment of how well-founded a fear is of persecution. The European Court of Justice, therefore, concludes that,

> [A]rticle 4(3) to (5) of Directive 2011/95 must be interpreted as meaning that, for the purposes of assessing whether an applicant's fear of persecution on account of his or her political opinions is well founded, the competent authorities of the Member States must take account of the fact that those political opinions, **owing to the degree of conviction with which they are expressed or the possible engagement by that applicant in activities to promote those opinions, could have attracted or may attract the negative interest of the actors of potential persecution in that applicant's country of origin. It is not however required that the same opinions be so deeply rooted in the applicant that he or she could not refrain, if returned to his or her country of origin, from manifesting them, thereby exposing himself or herself to the risk of suffering acts of persecution within the meaning of Article 9 of that directive**.[66]

NANSEN concludes that the reasoning developed by the CALL in its decisions of October 2022 have formed the basis for a strict interpretation of the concepts of religion and political opinion. The CALL's reasoning requires a religion or political opinion to be fundamental to an applicant's identity or moral integrity for it to be a considered a religion or political opinion in the context of article 10 (1) of the Qualification Directive of article 48/3 §4 of the Alien Act. As a result, additional burdens are placed on applicants for international protection. In practice,

[64] *S, A* v Staatssecretaris van Veiligheid en Justitie, App Nr. C-151/22 (European Court of Justice, 21 September 2023) par. 29.
[65] Ibid., par. 34.
[66] Ibid., par. 49; See also, UNHCR, *UNHCR's written observations on the reference for a preliminary ruling of the Court of Justice of the European Union in the matter between S. and A. and Netherlands*, paras 26 – 36.

this reasoning mostly limits the establishment of a fundamental belief or opinion to young Afghan applicants that have spent (most of) their formative years in Belgium, who can show they have integrated well into society through active participation in school, youth and sports clubs, trainee positions, volunteering and/or paid jobs.[67] In its assessment, the CALL attaches decisive weight to the individual circumstances of an applicant in Belgium rather than the context an applicant will have to return to in Afghanistan and the perception of the Taliban of those returning from the west. The manner of assessment by the CALL leads to an unreasonable burden of proof placed on applicants and as a result applications for international protection from people fleeing Afghanistan are not rigorously scrutinised in accordance with Article 13 junto Article 3 ECHR. In a recent decision, the CALL appears aware of the significance of the preliminary ruling in the case of *S, A* by the EU Court of Justice.[68] However, time will tell how *S, A* will change the CALL's assessment in practice.

3. Materials from reliable and objective sources

In accordance with established jurisprudence of the ECtHR,[69] the assessment of the asylum authorities should be adequately and sufficiently supported by domestic materials as well as by materials originating from other, reliable and objective sources, such as, for instance, other contracting or non-contracting states (to the ECHR), agencies of the United Nations and reputable non-governmental organizations. The Court considers it too narrow an approach under article 3 ECHR if it were only to take into account the materials made available by the domestic authorities without comparing it with other materials from reliable and objective sources.[70] Moreover, the Court has emphasised the need for a full and *ex nunc* assessment. This means that the most up-to-date information, at the time of the decision, needs to be considered. Historical material may shed light on the current situation in a country of origin and its likely evolution, however, **the present conditions in a country are decisive**.[71]

In light of assessing the available country of origin information to be able to determine the probative or evidentiary value of such material, the ECtHR considers the source of the information. In particular, the Court will examine its independence, reliability and objectivity. In respect of country reports, the ECtHR assesses the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations. Finally, the ECtHR also considers the presence and reporting capabilities of a source in the country in question.[72] In that respect, the ECtHR observes that,

> States (whether the respondent State in a particular case or any other Contracting or non-Contracting State), through their diplomatic missions and their ability to gather information, will often be able to provide material which may be highly relevant to the Court's assessment of the case before it. It finds that the same consideration must apply, a fortiori, in respect of agencies of the United Nations, particularly given their direct access to the authorities of the country of destination as well as their ability to

[67] CALL, App Nr. 289.916 (6 June 2023) pp.15 – 16; CALL, App Nr. 289.732 (2 June 2023) p.18; CALL, App Nr. 291.774 (12 July 2023) p.15.
[68] CALL, App Nr 295.976 (23 October 2023) par. 5.3.
[69] For analysis of the use of country of origin information by the ECtHR, please see F. Vogelaar, Principles Principles Corroborated by Practice? The Use of Country of Origin Information by the European Court of Human Rights in the Assessment of a Real Risk of a Violation of the Prohibition of Torture, Inhuman and Degrading Treatment (2016) 18 (3) *European Journal of Migration and Law* 302 – 326.
[70] *Salah Sheekh,* par. 136; *Saadi,* par. 128 – 132; NA, par. 118; *Sufi and Elimi,* par. 230 – 232; F.G., par. 117; *J.K. and Others vs Sweden*, App nr. 59166/12 (ECtHR, 23 August 2016) par. 90.
[71] *Salah Sheekh*, par. 136; *F.G*., par. 115
[72] *NA.*, par. 120 – 121; *J.K.,* par. 88 – 89.

> carry out on-site inspections and assessments in a manner which States and non-governmental organisations may not be able to do.[73]

The Court has clarified that it will not disregard a report simply because a source has no presence in a country and has instead relied on information provided by other sources in the country or region. With regards to information from anonymous sources, the ECtHR recognises that,

> [W]here there are legitimate security concerns, sources may wish to remain anonymous. However, in the absence of any information about the nature of the sources' operations in the relevant area, it will be virtually impossible for the Court to assess their reliability. Consequently, the approach taken by the Court will depend on the consistency of the sources' conclusions with the remainder of the available information. Where the sources' conclusions are consistent with other country information, their evidence may be of corroborative weight. However, the Court will generally exercise caution when considering reports from anonymous sources which are inconsistent with the remainder of the information before it.[74]

3.1. The use of country information by the CGRS

The NANSEN Note 3-22 of October 2022 includes an elaborate analysis of the use of country of origin information by the CGRS in its assessment of the human rights, humanitarian and the security situation in Afghanistan.[75] NANSEN concluded based on an analysis of case law that the manner in which the CGRS used country of origin information in its assessment was not sufficiently transparent. In particular, the CGRS neither visibly assessed or weighed the information nor did the CGRS use clear references. Moreover, NANSEN concluded that the CGRS predominantly used information from the European Asylum Agency and failed to take into consideration information from other reliable and objective sources. Also, the CGRS often relied on only one source mentioned in the reports by the European Asylum Agency and even omitted taking into consideration other sources mentioned by the European Asylum Agency. Finally, NANSEN concluded that the CGRS selectively cited sources. Therefore, the findings of facts made by the CGRS were not based on accurate and up-to-date information.

NANSEN has only been able to analyse a few recent decisions by the CGRS at the time of writing this report.[76] However, the standard reasoning in the decisions NANSEN has received over the past year and examined in the available jurisprudence by the CALL, are a strong indication that the CGRS has barely changed the way it assesses the security, humanitarian and human rights in Afghanistan. The CGRS has not found it necessary to include other sources than the information from the European Asylum Agency in its assessment. Moreover, and perhaps even more importantly, the CGRS has not found it necessary to update the information in its assessment. Therefore, the CGRS is still relying on basically the same information, some of which NANSEN already considered to be out of date last year. Indeed, the CGRS now considers the European Asylum Agency's Country Guidance of January 2023. However, the EUAA Country Guidance are policy guidelines entailing an analysis of available country of origin information in EUAA COI reports.[77] In this case, the January 2023 Country

[73] *Sufi and Elmi*, par. 232.
[74] Ibid., par. 233.
[75] NANSEN Note 3-22, October 2022, p. 19 – 23.
[76] The most recent decision received by NANSEN dates 15 September 2023 and includes the standard considerations with regards to the security, humanitarian and human rights situation.
[77] For the difference between policy guidelines and country of origin information, see NANSEN Note 2-22, Het gebruik van beleidsrichtlijnen van UNHCR en het European Asielagentschap in Afghaanse dossiers, June 2022,

Guidance relies on COI reports from August 2022 and one query response from November 2022.

Therefore, the analysis of the country of origin information used in the decisions of the CGRS in the NANSEN Note 3-22 is still valid today. In particular, with regards to the human rights situation, NANSEN notes that the information relied on by the CGRS is not from different types of sources, not always relevant, not always from a primary source leading to false impressions concerning the currency of the information, limited in reliability due to the use of anonymous sources, and most importantly, no longer up to date.

3.2. The use of country of origin information by the CALL

Likewise, NANSEN notes no update on the information and sources relied on by the CALL since October 2022.[78] Indeed, the CALL is heavily reliant on what information is submitted by the CGRS and the applicant for its assessment due to its limited investigative powers laid down in article 39/2 §1, 2 of the Immigration Act. However, NANSEN recalls that given the serious human rights situation in Afghanistan and the now well-known general risk concerning which information is freely ascertainable from a wide number of sources, the burden of proof shifts to the asylum authorities in accordance with the jurisprudence of the ECtHR. Therefore, according to NANSEN, when faced with a lack of updated information, the CALL could at the very least consider annulling the decisions by the CGRS and directing them to collect accurate and up-to-date information following the example of a decision on the French language role of 19 September 2023.[79]

Given the fact that the CALL is relying on the same information it has been since October 2022, a detailed analysis is not necessary to conclude that the use of country of origin information by the CALL, as at the time of writing and based on the analysed decision, is not in accordance with the jurisprudence of the ECtHR. First, NANSEN observes that the CALL appears to solely rely on information in the COI reports of the European Asylum Agency. Therefore, NANSEN suggests that the assessment of the CALL is not sufficiently supported by domestic materials (in this case, European Union materials) as well as by materials from other, reliable and objective sources. Second, NANSEN is of the opinion that the assessment of the CALL cannot be considered an *ex nunc* assessment when the material relied on is over a year old. In particular, in the decisions analysed by NANSEN, the CALL considers research dating from before the Taliban takeover decisive in its determination of how people returning from the west will be perceived by the Taliban and what the consequences of that negative perception may be.[80] However, the situation in Afghanistan has dramatically changed since the Taliban takeover, older research may still be relevant, but only information on the present conditions can be decisive for the risk assessment.

4. Conclusions on rigorous scrutiny

In this first part of the Note, NANSEN showed that the asylum authorities are placing an unreasonable burden of proof on applicants for international protection from Afghanistan.

available at https://nansen-refugee.be/wp-content/uploads/2022/06/220616-NANSEN-Notes-UNHCR-en-EUAA-beleidsrichtlijnen-Finale-versie.pdf

[78] For example, compare CALL, App nr. 278.653 (12 October 2022) standard considerations in par. 4.3.8. and CALL, App Nr. 293.506 (31 August 2023) standard considerations in par. 6.3.4.

[79] CALL, App Nr. 294.371 (19 September 2023).

[80] See, for example, the CALL's standard considerations with regards to stigmatization in CALL, App Nr. 293.506 (31 August 2023) p.22, for further examples see footnotes 91 and 93.

NANSEN highlighted three ways in which the asylum authorities increase the burden of proof for applicants. First, NANSEN observed that the asylum authorities too often fail to acknowledge the existence of an arguable claim, and as a result do not properly acknowledge their own obligations arising from Article 13 in conjunction with Article 3 ECHR. Consequently, (fresh) applications are not examined on their merits and any doubts about the risks upon return to Afghanistan are not being dispelled in accordance with the jurisprudence of the ECtHR. Second, NANSEN observed that the asylum authorities do not always accurately identify groups systematically at risk, for members of these groups the authorities insist that applicants submit further distinguishing features to establish a real risk. Third, the CALL, in particular, developed a reasoning on the Convention grounds' political opinion and religious beliefs involving a narrow scope of application. As a result, decisive weight is attached to the individual circumstances of an applicant in Belgium rather than to the context an applicant will have to return to in Afghanistan and the perception of the Taliban of those returning from the west. Finally, NANSEN also showed that the assessments by the asylum authorities are often not sufficiently supported by up-to-date domestic materials as well as materials originating from other, reliable and objective sources.

Part II. The human rights conditions in Afghanistan

Human rights have been severely restricted under Taliban rule and gross human rights violations continue to be reported from Afghanistan.[81] Especially, women and girls have been affected. Other groups have also been specifically targeted by the Taliban, such as, former government security personnel, journalists and human rights defenders. Moreover, the Taliban is punishing Afghans who are, or are perceived as, transgressing societal and behavioural norms based on the implementation and enforcement of a particular draconian interpretation of the Sharia law. It appears most Afghan applicants, who have no specific risk profile and can be considered 'ordinary citizens', claim they fear returning to Afghanistan because they will not be able to adjust to these new norms in Afghanistan after having spent time in the West. For the assessment of these claims, the Belgian asylum authorities attach particular importance to the decision of the ECtHR in the case of *Sufi and Elmi* and the Court's considerations concerning the ability of applicants to 'play the game.'[82]

In this part of the Note, NANSEN focuses on establishing the material facts that should inform the risk assessment of applicants that must return to a situation where a particular draconian interpretation of the Sharia law has been implemented and violating these norms may lead to torture or to inhuman or degrading punishment. First, paragraph 5.1 analyses the facts that lie at the basis of the findings of the ECtHR in *Sufi and Elmi*. Second, paragraph 6 will use the findings of the analysis to establish the material facts regarding the human rights situation in Afghanistan that should inform the risk assessment of applicants that claim they fear returning, after having spent time in the West, due to the prevailing norms now in Afghanistan.

5. Identifying the material facts for the purpose of assessing the human rights conditions in Afghanistan

The decision of the ECtHR in *Sufi and Elmi* will be at the centre of this next paragraph. Paragraph 5.1. will first analyse the considerations of the Court concerning the ability to 'play the game.' The analysis aims to establish the facts the ECtHR considered material, or crucial, to the determination of the risks upon return to an al-Shabaab-controlled area in Somalia. The analysis shows that decisive weight should be attached to the severe human rights violations in a country of origin. Furthermore, the analysis shows that the Court did not consider the level of westernization of the applicant material to its risk assessment. Paragraph 5.2. will focus on the material facts identified by the Belgian asylum authorities. Paragraph 5.3. will compare the material facts relied on by the ECtHR in *Sufi and Elmi* to the material facts that currently inform the assessment of the Belgian asylum authorities.

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[81] UNAMA, The treatment of detainees in Afghanistan, Respecting Human Rights: a factor for trust, September 2023, available at https://unama.unmissions.org/sites/default/files/unama_report_-_treatment_of_detainees_200923_english.pdf; Report of the Secretary-General, The situation in Afghanistan and its implications for international peace and security, A/78/361-S/2023/678, 18 September 2023, available at https://www.ecoi.net/en/file/local/2097813/N2325802.pdf; Report of the Office of the High Commissioner for Human Rights, Situation of human rights in Afghanistan, A/HRC/54/21, 11 September 2023, available at https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ecoi.net%2Fen%2Ffile%2Flocal%2F2097200%2FA_HRC_54_21_AdvanceUneditedVersion.docx&wdOrigin=BROWSELINK

[82] See, CALL, App Nr. 278.701 (13 October 2022) par. 6.3.2.6; CALL, App. Nr. 293.506 (31 August 2023) par. 6.3.4.

5.1. Material facts as identified by the ECtHR in Sufi and Elmi

Sufi and Elmi concerned two Somali applicants who were convicted in the United Kingdom for various crimes. *Sufi* had spent about three years in the UK before being served with a deportation order in 2006 and about eight years at the time of the decision of the ECtHR in 2011. *Elmi* had spent 18 years in the UK before being served with a deportation order in 2006 and around 23 years at the time of the ECtHR decision. Both applicants alleged that if returned to Somalia they would be at real risk of ill-treatment contrary to Article 3 and/or a violation of article 2 ECHR. The ECtHR found that a return of the applicants to Mogadishu would violate article 3 ECHR because the violence in Mogadishu was of such a level of intensity that anyone in the city, except possibly those who are exceptionally well-connected to "powerful actors", would be at real risk.[83] Therefore, the ECtHR proceeded to assess an internal flight alternative. The ECtHR noted that the situation of general violence in southern and central Somalia would not be the only risk that a returnee might have. Namely, the areas in southern and central Somalia with the lowest levels of generalised violence were the areas controlled by al-Shabaab. These areas were reported to have the worst human rights conditions.[84] The considerations of the ECtHR regarding the human rights conditions are particularly relevant for the purpose of this Note.

The ECtHR noted that in the areas under the control of al-Shabaab a particularly draconian version of Sharia law was being enforced that went well beyond the traditional interpretation of Islam in Somalia. The ECtHR found that the enforcement in fact amounted to 'a repressive form of social control' because reports indicated that al-Shabaab was concerned with every little detail of daily life. The ECtHR noted that al-Shabaab concerned itself with,

> [M]en's and women's style of dress, the length of men's beards, the style of music being listened to and the choice of mobile phone ringtone. Women appear to be particularly targeted. In addition to strict dress codes, women in al-Shabaab-controlled areas are not permitted to go out in public with men, even with male relatives, and have been ordered to close their shops as commercial activity permitted them to "mix with men". There were also reports of "systematic" forced recruitment by al-Shabaab of both adults and children in the areas under its control.[85]

Furthermore, the ECtHR noted that al-Shabaab had established checkpoints at the exit/entry routes to towns under its control where goods and people were searched to ensure that the strict Islamic codes were complied with. At these checkpoints people were reported to experience ill-treatment, including flogging and forced recruitment.[86] The ECtHR considered that,

> In spite of the repressive regime in place, a number of sources told the fact-finding mission that areas controlled by al-Shabaab were generally safe for Somalis provided that they were able to "play the game" and avoid the attention of al-Shabaab by obeying their rules. However, as al-Shabaab only began seizing parts of southern and central Somalia following the fall of the Union of Islamic Courts in late 2006, the Court

[83] *Sufi and Elmi,* par. 241 – 250.
[84] Ibid., par. 272.
[85] Ibid., par. 273.
[86] Ibid., par. 274.

> considers it unlikely that a Somali **with no recent experience of living in Somalia would be adequately equipped to "play the game"**, with the risk that he would come to the attention of al-Shabaab, either while travelling through or having settled in an al-Shabaab controlled area. The Court considers that this risk would be **even greater** for Somalis who have been out of the country long enough to become "westernised" as certain attributes, such as a foreign accent, would be impossible to disguise.[87]

The ECtHR further considers,

> It is not possible to predict with any certainty the fate of a returnee who came to the attention of al-Shabaab for failing to comply with their rules. The reports suggest that punishments inflicted by al-Shabaab can include stoning, amputation, flogging and corporal punishment, **all of which would attain the minimum level of severity required to fall within the scope of Article 3**. The Court accepts that in all likelihood, the punishment would depend on the gravity of the infringement, **but the Court cannot ignore reports that Somalis have been beaten or flogged for relatively minor infringements**, such as playing scrabble, watching World Cup matches, and wearing "inappropriate" clothing.[88]

Finally, the ECtHR concludes,

> Consequently, the Court considers that a **returnee with no recent experience of living in Somalia** would be at real risk of being subjected to treatment proscribed by Article 3 in an al-Shabaab-controlled area. Accordingly, if a returnee's home area is in an al-Shabaab-controlled area, or if it could not be reached without travelling through an al-Shabaab-controlled area, the Court does not consider that he could relocate within Somalia without being exposed to a real risk of Article 3 ill-treatment.[89]

In short, the ECtHR attached substantial weight to 1) the fact that al-Shabaab enforced a draconian version of the Sharia law that went well beyond the traditional interpretation of Islam in Somalia and concerned little details of life, 2) the fact that reported punishments would all attain the minimum level of severity required to fall within the scope of serious harm, and 3) the fact that people were being punished for relatively minor infringements. NANSEN notes that the ECtHR does not mention 'westernisation' in its conclusions.[90] Therefore, the ECtHR did not limit the establishment of a real risk to Somalis who could be considered 'westernised.' The ECtHR simply noted that the risk would be *even greater* for Somalis who had been out of the country long enough to become 'westernised.' For the ECtHR, in *Sufi and Elmi,* the level of 'westernisation' of the applicants was not a decisive element in the assessment of a real risk. This interpretation of the ECtHR conclusions is enforced by the application of the principles to the applicants' cases by the Court. For both applicants, the Court found that there would be a real risk at a violation of article 3 ECHR due to the fact that they did not have any experience of living under al-Shabaab's repressive regime. The ECtHR only considered their age at the time of arrival in the UK (16 and 19 respectively), their time spent outside Somalia

[87] *Sufi en Elmi*, par. 275.
[88] Ibid., par. 276.
[89] Ibid., par. 277
[90] Ibid., see also summary of the conclusions in par. 295.

and the fact that they had never lived under al-Shabaab. The ECtHR did not consider any specific attributes that would show the applicants were in fact 'westernised.'[91]

5.2. Material facts considered by the Belgian asylum authorities

With regards to the human rights situation in Afghanistan, the analysed case law shows that the Belgian asylum authorities attach substantive weight to the applicants' integration into Belgian society to show that the applicant is truly westernised. Both the CGRS and the CALL, referring to the European Asylum Agency Country Guidance and COI reports, have determined that from the available country of origin information it cannot be inferred that all Afghan applicants who have spent time in Europe will have a well-founded fear of persecution and/or a real risk at serious harm upon return to Afghanistan.

5.2.1. CGRS

The decisions by the CGRS, that NANSEN was able to access for the purpose of drafting this analysis, include several paragraphs with standard reasoning regarding the risks for Afghan applicants who will have to return to Afghanistan from Europe. In these paragraphs the CGRS states that,

> After the Taliban takeover, international air traffic to and from Afghanistan was suspended, however, air traffic resumed in the first half of 2022. The Taliban is also issuing passports again. Some people couldn't get a passport. It was reported that at the border people were prevented from leaving the country or were checked at checkpoints. This concerned people with a specific profile, in particular, people with connections to the former government and security institutions. Otherwise, few restrictions are being imposed and citizens can freely move.
>
> The country of origin information does not show that people who return from abroad or the West are generally at such a risk necessary for the establishment of a well-founded fear of persecution. People who return to Afghanistan may be met with suspicion by the Taliban and society and they may be confronted with stigmatisation and ostracism. Stigmatisation and Ostracism could in exceptional circumstances be considered persecution. On the one hand, the Taliban shows understanding for people that want to leave Afghanistan for economic reasons and considers these reasons not related to any fear for the Taliban. On the other hand, a narrative exists with regards to the 'elites' that have left Afghanistan and are considered not good Afghans or Muslims. With regards to this negative perception, nothing in the information shows that this could lead to a situation of persecution or serious harm. Moreover, the Taliban has called on Afghans abroad to return to Afghanistan several times.
>
> Furthermore, it was reported that some returnees were victims of violence. The objective country of origin information shows that these incidents are connected to the specific profiles of the victims and were not related to their stay outside Afghanistan. If there were serious and substantiated problems with regards to the manner the Taliban treats returning Afghans, this would be reported by the institutions and organisations that are monitoring the situation in the country.

[91] Ibid., paras 302 & 310.

> An individual assessment of the reasonable probability that an applicant will be confronted with persecution because of a stay abroad or perceived westernisation, should take into account risk impacting circumstances, such as: gender, the behaviour of the applicant, the region of origin, the conservative environment, age, amount of time spent in the West and the visibility of the applicant. The applicant will also have to demonstrate that it is plausible that he has a need for international protection because of his stay in Europe.[92]

5.2.2. CALL

NANSEN observes that the analysed decisions by the CALL also include several paragraphs with standard reasoning regarding the risks for Afghan applicants who will have to return to Afghanistan from Europe.[93] In these paragraphs the CALL focuses on the Afghan constitution that has been suspended, the amendments to existing Afghan laws based on Sharia law and the establishment of the 'Ministry for Propagation of Virtue and Prevention of Vice' (Dawat wa Ershad Amr bil-Maruf wa Nahi al-Munkar) (hereafter: the MPVPV). The CALL acknowledges that the applicable legal order is still unclear, but that decrees and guidelines have been published concerning extramarital affairs, clothing, attending prayers, music and the prohibition of drugs and alcohol. It is also acknowledging that contravening these guidelines may lead to ill-treatment or inhuman punishments. In particular, the CALL notes that 'zina'[94] can lead to of killings, stoning, beatings, arrests, lashings or whippings. However, the CALL notes that the punishments differ from province to province and that it is unclear how minor violations are being punished.

Furthermore, the CALL notes that the Taliban has a social media presence but that the extent of the monitoring capabilities of the Taliban remains unclear. It notes that international media has reported that people have been arrested and killed for their social media activities. Though, this only concerned people posting messages critical of the Taliban. The CALL further notes that the Ministry of Communications and Information technology has recommended to limit access to social platforms and channels with immoral programs and that country of origin information shows that people have had their phone searched at checkpoints in Afghanistan.

With regards to people who have left Afghanistan, the CALL notes that there exists a negative attitude towards those that have left among people sympathetic to the Taliban and among some segments of the Taliban. People who have left are considered without Islamic values or are fleeing crimes they have committed. However, the CALL finds that the Taliban's view on persons returning to Afghanistan from Western countries remains ambiguous. On the one hand, the CALL notes that, the Taliban recognise the age-old tradition of Pashtuns to work abroad for a number of years. On the other hand, the Taliban considers the elites that left, not as 'Afghans', but as corrupt 'puppets' of the 'occupation', who lacked 'roots' in Afghanistan.

[92] CGRS decision of 5 June 2023.
[93] See, *for example,* some of the decisions of September 2023 involving several different members of the CALL; CALL, App. Nr. 294.865 (29 September 2023); CALL, App. Nr. 294.799 (28 September 2023); CALL, App. Nr. 294.555 (22 September 2023); CALL, App. Nr. 294.454 (20 September 2023); CALL, App. Nr. 294.396 (19 September 2023); CALL, App. Nr. 294.382 (19 September 2023); CALL, App. Nr. 294.264 (18 September 2023); CALL, App. Nr. 294.177 (14 September 2023); CALL, App. Nr. 294.038 (11 September 2023); CALL, App. Nr. 294.035 (11 September 2023); CALL, App. Nr. 293.991 (8 September 2023); CALL, App. Nr. 293.951 (7 September 2023); CALL, App. Nr. 293.857 (6 September 2023); CALL, App. Nr. 293.746 (5 September 2023); CALL, App. Nr. 293.731 (5 September 2023).
[94] According to the European Asylum Agency's Country Guidance: Afghanistan, '*zina*' concerns illicit sexual relations, adultery, pre-marital sex and can also be imputed to a woman in case of rape or sexual assault.

The CALL states that this attitude also exists among the general population, as there is an anger towards the previous government and elites due to corruption and failures. The CALL further states that, in particular, in rural Pashtun areas a person having left for Europe or the US would in general be perceived with suspicion. Nevertheless, the CALL notes that the Taliban officials have repeatedly called on Afghans to return to Afghanistan, including former politicians, military and civil leaders, university lecturers, businessmen and investors. Taliban senior officials further called on the thousands of Afghans who fled after the takeover to return, as well as all Afghans living abroad and former opponents to the Taliban. Moreover, the CALL finds that from the submitted country of origin information it appears that only Afghans from Iran, Pakistan and Turkey have returned to Afghanistan. Sources state that not many people have returned from the west. The CALL refers to an anonymous organisation with presence in Afghanistan that stated that sometimes people were targeted when they returned to Afghanistan, but the source did not see any clear connections simply to the fact that these individuals had left the country. Rather it seemed to be connected to their 'original status', such as leaving because they were affiliated with the former government, particular fears related to their ethnic background or some other reasons.

Finally, the CALL notes that the negative attitude towards returnees could possibly result in stigmatisation, where returnees are perceived with suspicion and it is often assumed that a person must have committed a crime to be deported, or that people returning from Europe were 'loaded with money.' The CALL concludes that stigmatisation, discrimination or ostracism can only in exceptional circumstances be considered persecution or serious harm. Therefore, the individual circumstances of an applicant must be assessed, including the seriousness and systematic character of these circumstances as well as whether there are cumulation of individual circumstances. In particular, the CALL will take into consideration, in accordance with the Country Guidance of the European Asylum Agency, the applicant's age, gender, area of origin and conservative environment, duration of stay in a western country, the nature of an applicant's job, visibility of the applicant and the transgression (also when the transgression took place abroad), etc.[95]

In practice, in the analysed decisions by NANSEN, the CALL appears to accept that only applicants who have left Afghanistan at a young age and have spent an important part of their formative years in Belgium will generally to be able to show that they have internalised western norms and values. Although, not all members of the CALL agree on exactly what part of those formative years are most important.[96] The CALL will take into consideration documentation that shows a 'proper and thorough integration in Belgian society,' such as school certificates, language courses, job references and witness statements from legal guardians, teachers, sports club members.[97]

[95] See, *for more examples,* decisions dating prior to September 2023, CALL, App. Nr. 293.506 (31 August 2023); CALL, App. Nr. 293.443 (30 August 2023) p.16 – 18; CALL, App. Nr. 293.302 (24 August 2023); CALL, App. Nr. 293.146 (23 August 2023); CALL, App. Nr. 292.496 (31 July 2023); CALL, App. Nr. 291.618 (7 July 2023); CALL, App. Nr. 289.916 (6 June 2023); CALL, App. Nr. 289.082 (22 May 2023); CALL, Appl. Nr. 288.248 (27 April 2023).
[96] Compare, *for example,* CALL, App. Nr. 293.152 (23 August 2023), CALL, App. Nr. 293.504 (31 August 2023), CALL, App. Nr. 293.857 (6 September 2023) and CALL, App. Nr. 294.074 (12 September 2023).
[97] See, *for example,* CALL, App. Nr. 289.916 (6 June 2023) p.15 – 16.

5.3. The material facts compared

It is clear from the above analysis that, even though the CALL refers to *Sufi and Elmi* and the ECtHR's considerations regarding the ability of applicants to 'play the game' where they must return to a situation where a particularly draconian version of Sharia law is being enforced, it makes a fundamentally different risk assessment. In the standard considerations in the analysed decisions, the CALL relies on 1) a different set of material facts to inform its risk assessment, 2) it relies on historical information rather than information on the present situation in Afghanistan and 3) it solely focuses on so-called 'in-country' risks.

First, for the ECtHR, the severe human rights conditions in Somalia in the areas under al-Shabaab control were decisive in its risk assessment. It attached due weight to the fact that al-Shabaab concerned itself with little details of day-to-day life and the severe punishments that could stem from not obeying those rules. These punishments, on the one hand meted out arbitrarily to a certain extent, on the other hand also imposed for minor infractions, would all attain a minimum level of severity under article 3 ECHR. As for the individual circumstances of the applicants Sufi and Elmi, the only fact material to the Court's risk assessment was the fact that both had no recent experience living under al-Shabaab. However, in the standard considerations in the analysed decisions, the human rights conditions in Afghanistan appear to be an afterthought for the CALL rather than at the forefront of their risk assessment. As paragraph 6 will show the situation under al-Shabaab in Somalia at the time of the *Sufi and Elmi* decision is comparable to the current situation in Afghanistan under control of the Taliban. The Taliban also concerns itself with little details of day-to-day life and imposes severe punishments for not obeying these social norms. Yet, the torture, inhuman and degrading treatment or punishment that can result from the inability to 'play the game' appears not to be a real concern where the CALL finds that the negative perception of returnees can 'only' result in stigmatisation and discrimination. It focuses on the individual circumstances of an applicant in Belgium and whether the applicant has truly internalised western norms. Only if applicants have truly internalised western norms, they cannot *expect* to be able to 'play the game.' Additionally, the internalisation of western norms appears reserved to youngsters who have spent their formative years in Belgium, further limiting the protection afforded to applicants for international protection from Afghanistan. Given the material facts relied on by the ECtHR in *Sufi and Elmi* and the analysis of the country of origin information in paragraph 6, NANSEN urges the Belgian asylum authorities to shift the focus of its risk assessment from the individual circumstances to the human rights conditions in Afghanistan, some of the worst in the world.

Second, as mentioned in paragraph 3.2, the CALL relies on research on the return and re-integration of rejected applicants to Afghanistan prior to the Taliban takeover to come to its finding that the negative perception of returnees will lead to stigmatisation and discrimination that can only be considered persecution in exceptional circumstances.[98] Indeed, historical material may shed light on the current situation in a country of origin and its likely evolution. Nevertheless, the situation in Afghanistan has dramatically changed since the Taliban

[98] C. Vera-Larrucea and H. Malm Lindberg, Those who were sent back, return and reintegration of rejected asylum seekers to Afghanistan and Iraq, October 2021, available at https://www.samuelhall.org/publications/delmi-nbspthose-who-were-sent-back-return-and-reintegration-of-rejected-asylum-seekers-to-afghanistan-and-iraq , take note that this report is based on research done between January and March 2020; F Stahlmann, Erfahrungen und Perspektieven Abgeschobener Afghanen: im Kontext Aktueller Politischer und Wirtschaftlicher Entwicklungen Afghanistan, June 2021, available at https://www.diakonie.de/fileadmin/user_upload/Diakonie/PDFs/Journal_PDF/AFG_Monitoring-Studie_FINAL.pdf

takeover. If any information is relevant to the current situation and its likely evolution, it is probably the information on how the Taliban ruled Afghanistan between 1996 and 2001, more so than the research reports relied on by the CALL. In any case, the present conditions in a country should be decisive,[99] those conditions will be set out in detail in paragraph 6.

Third, in the standard considerations in the analysed decisions, the Belgian asylum authorities focus their risk assessment on the area where applicants will settle back into Afghanistan, the so-called 'in-country' risks. They fail to properly establish the risks associated with entering Afghanistan and travelling to an area (of origin) to settle. At the pinch-point of arrival and while passing through checkpoints, there is a distinct possibility of rejected applicants being identified by Taliban officials as persons not obeying the rules and/or returnees from the west. Therefore, the risk assessment should take a careful step-by-step approach. Such an approach was taken by the ECtHR in cases like *Sufi and Elmi*, but also for example in *M.A.* A similar approach has been adopted by the UK Upper Tribunal in their Country Guidance Determinations.[100] Even the CALL itself has already focused in on risks at the pinch-point of arrival in its case law concerning Burundi.[101]

6. Assessment of the risks flowing from the human rights situation

In this paragraph the meaning of the current human rights situation will be assessed with regards to 1) the risks for returnees from the west as well as 2) the risks for Afghans who are unable to 'play the game' due to having no experience living under the Taliban. In paragraph 6.1. NANSEN emphasises the absence of any relevant information with regards to how the Taliban treats returnees from the west and discusses the meaning of this uncertainty and unpredictability for the risk assessment. In paragraph 6.2. NANSEN focuses on the consequences of not obeying the social norms implemented by the Taliban.

6.1. Returnees from the west

There has been some disagreement on whether sufficient reliable and objective information is available to determine with the requisite confidence whether an applicant fleeing Afghanistan has a well-founded fear of persecution or is safe to return to Afghanistan. In its most recent Guidance Note on the Protection Needs of People Fleeing Afghanistan,[102] UNHCR notes the current constraints on assessing the international protection needs of Afghan applicants. UNHCR refers to, among other things,

- Since its takeover of the country, the de facto authorities have been governing by decree, side-lining the parliamentary process. To date, this governance has been characterized by uncertainty, arbitrariness and disregard for the rule of law.[103]

[99] *Salah Sheekh*, par. 136; *F.G.*, par. 115
[100] UK Upper Tribunal, SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC); PS (Christianity - risk) Iran CG [2020] UKUT 00046 (IAC); XX (PJAK - sur place activities - Facebook) Iran CG [2022] UKUT 00023 (IAC); UK Upper Tribunal, GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC); KK and RS (Sur place activities: risk) Sri Lanka CG [2021] UKUT 00130 (IAC) ; UK Upper Tribunal, MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC); OA (Somalia) Somalia CG [2022] UKUT 00033 (IAC).
[101] CALL, App. Nr. 282.473 (22 December 2022).
[102] UNHCR, Guidance Note on Afghanistan, February 2023.
[103] Ibid., par. 20

- The current situation in Afghanistan poses a number of obstacles to the gathering of comprehensive information concerning the human rights situation in different parts of the country. Such obstacles include constraints on the media in Afghanistan, as well as on civil society and human rights defenders.[104]
- In May 2022, the de facto authorities dissolved the Afghanistan Independent Human Rights Commission (AIHRC), the Independent Commission for Overseeing the Implementation of the Constitution, and the Afghanistan Independent Bar Association.[105]
- The Protection Cluster in Afghanistan has identified wide-ranging challenges to human rights monitoring in the country.[106]

Therefore, UNHCR calls on decision-makers,

> [T]o give due weight to the uncertainty and unpredictability inherent in the modalities adopted by the de facto authorities for issuing decrees, coupled with the ongoing uncertainties regarding the applicability of Afghanistan's previous legal framework. UNHCR considers that these circumstances render it particularly difficult to evaluate a future risk of persecution based on the currently available information on the human rights situation in Afghanistan, and in particular to conclude with the requisite level of confidence that an Afghan asylum applicant would not face a real risk of persecution upon return to the country of origin.[107]

The CGRS communicated in March 2022 that sufficient information had become available on the situation in Afghanistan and that the decision-making regarding Afghan case files was no longer on hold. The press release emphasised that for certain situations there was a lack of information on how the Taliban would treat certain people. However, where such uncertainty existed, the CGRS would proceed to recognise the concerned applicants as refugees.[108] In the ensuing months, the CGRS insisted that sufficient information was available.[109]

However, there is one situation that is particularly difficult to assess due to a lack of comprehensive information. That is the treatment by the Taliban of returnees from west. The decisions rejecting Afghan applicants do not give proper weight to this uncertainty and unpredictability of the situation in Afghanistan for these returnees. Despite there being no clarity on how the Taliban will treat returnees from the west, applicants have not been given the benefit of doubt and have not been recognised as refugees. Instead, as mentioned, the findings in these decisions are based, and therefore decisive weight is attached to, information that pre-dates the Taliban takeover.

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[104] Ibid., par. 21
[105] Ibid., par. 22
[106] Ibid., par. 23, zie Protection Cluster, Afghanistan Protection Analysis Update: Q1 2022, 15 August 2022, www.globalprotectioncluster.org/publications/384/reports/protection-analysis-update/afghanistan-protection-analysis-update & Protection Cluster Afghanistan, Afghanistan Protection Analysis Update: Q2 2022, 4 November 2022, www.globalprotectioncluster.org/publications/654/reports/protection-analysis-update/afghanistan-protection-analysis-update & Protection Cluster, Afghanistan Protection Analysis Update, Update on past conflict and climate-related protection risks trends, December 2022, available at https://www.globalprotectioncluster.org/sites/default/files/2023-01/afghanistan_protection_analysis_update_pau_november_2022.pdf
[107] UNHCR Guidance Note on Afghanistan, February 2023, par. 25.
[108] CGRS, press release, 2 March 2022, available at https://www.cgvs.be/nl/actueel/afghanistan-nieuw-beleid
[109] See, *for example*, Binnenlandse zaken, Veiligheid, Migratie en Bestuurszaken: CGVS – Afghaanse asielzoekers – gedachtenwisseling, 8 June 2022, available at https://www.dekamer.be/media/index.html?language=nl&sid=55U2965#video

First, NANSEN would like to point out that according to the available country information none or barely any people have been forcibly returned to Afghanistan since the Taliban takeover in August 2021.[110] The available country of origin information offers, therefore, no insights into how the Taliban will treat returnees from the west in practice. There exists not clarity regarding the checks at Kabul International Airport, how the Taliban will respond to ID documents that have been granted by Embassies still loyal to the former government and/or whether the Taliban can monitor where a person has been,[111] what kind of job a person may have had in the past in Afghanistan, whether a person is a family member of someone who is being targeted, whether telephones are systematically searched, etc. In relation to this point, NANSEN would also like to refer to our analysis of the available country of origin information in our NANSEN Note 3 - 2022.[112]

Second, NANSEN would like to point out that the Taliban statements are notoriously unreliable. Therefore, no weight can be attached to statements by the Taliban that call on people to return because these people are needed to run the government and the economy.[113] Needless to say, the Taliban does not always do what it says. After all, nothing has been proven less true than that the Taliban would respect women's rights.[114] The fact that the Taliban calls on people to return, therefore, does not necessarily mean that returnees don't face any risks. The Supreme Leader has indeed called on people to return, however, he also warned that,

> [T]that if anyone disobeyed the amnesty and tried to start a war in the country, they would "face a harsh and severe reaction.[115]

6.2. The consequences of not being able to 'play the game'

Given the uncertainty and unpredictability surrounding the situation of returnees from the west, it is important to emphasise what is known about the consequences for people not being able to 'play the game,' for example, people that have no recent experience with living under the Taliban. The following analysis focuses on the existence of an opaque and arbitrary legal system (par. 6.2.1) and the existence of widespread human rights violations, in particular, the fact that even minor violations can lead to inhumane punishments that can be considered persecution and serious harm (par. 6.2.2).

The below analysis is particularly based on information from United Nations Agencies. Therefore, NANSEN considered **the authority and reputation** of these agencies and the fact that **these agencies have access to both the de facto authorities in Afghanistan as well**

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[110] See, *for example,* Liza Schuster, Risk factors of returnees to Afghanistan focusing on westernization, p.39.
[111] Human Rights Watch, New Evidence that Biometric Data Systems Imperil Afghans, Taliban now control systems with sensitive personal information, 30 March 2022, available at https://www.hrw.org/news/2022/03/30/new-evidence-biometric-data-systems-imperil-afghans
[112] NANSEN Note 3 -2022, October 2022, p.19 – 23, 41 – 45.
[113] EUAA, COI Report Afghanistan: Targeting of Individuals, August 2022, p.51 – 52 available at https://coi.euaa.europa.eu/administration/easo/PLib/2022_08_EUAA_COI_Report_Afghanistan_Targeting_of_individuals.pdf; Dr. Lize Schuster, Risk Factors of returnees to Afghanistan focusing on westernization, p.43
[114] Aljazeera, Transcript of the Taliban's first news conference in Kabul, 17 August 2021, available at https://www.aljazeera.com/news/2021/8/17/transcript-of-talibans-first-press-conference-in-kabul versus, *for example,* Report of the Special Rapporteur on the situation of human rights in Afghanistan, Situation of human rights in Afghanistan A/HRC/52/84, 9 February 2023, par. 15 – 25, available at A/HRC/52/84: Situation of human rights in Afghanistan - Report of the Special Rapporteur on the situation of human rights in Afghanistan, Richard Bennett | OHCHR
[115] Tolo News, Islamic Emirate Leader Issues Message for Eid, 29 April 2022, available at https://tolonews.com/afghanistan-177792

as the Afghan territory.[116] The access of national authorities, in particular the authorities of EU Member States, is only limited.[117] The conclusions of the UN-agencies are consistent and are support by available information from NGOs and media outlets.

6.2.1. Opaque and arbitrary legal system

Regarding the degree of arbitrariness of the enforcement of law and order in Afghanistan, NANSEN would like to note the following. The Taliban has dismantled the legal system which is now based on Sharia law. However, Sharia law is not codified. The decrees based on Sharia law are deliberately vague. The legal basis of the decrees is often unclear, and the decrees are being announced through media interviews or X (formerly Twitter). As a result, the decrees are open to interpretation and abuse.[118] The UN Secretary-General has pointed out that the decision-making process behind these regulations remains opaque, and their application is often inconsistent.[119] The uncertainty around the applicable legal framework, judicial process and available remedies, continues to this day. In December 2022, the UN Secretary-General notes his concerns around the legal framework,

> [T]he de facto authorities have still not addressed persistent ambiguities over the parameters of the political and legal system.[120]

In February 2023, the UN Special Rapporteur on the situation of human rights in Afghanistan further notes,

> There are continuing serious challenges to the rule of law in Afghanistan, with the introduction of irregular procedures, lack of clear legal authorities and the nullification of past laws. The Special Rapporteur notes that the absence of any codified law is one of the most serious concerns, while the de facto authorities reiterate that they follow sharia law (Hanafi school), it is subject to a range of interpretations. Even in legal systems rooted in sharia law, such as those in Egypt, Pakistan and Türkiye, legal codes are followed that provide consistency and predictability in the application of the law. At

[116] See, *for example*, the Report of the Special Rapporteur on the situation of human rights in Afghanistan, 9 February 2023, par. 2; 'The Special Rapporteur on the situation of human rights in Afghanistan, Richard Bennett, undertook **his second mission to Afghanistan from 8 to 20 October 2022**. In the course of the mission, he met with numerous stakeholders, including human rights defenders, legal professionals, women's groups, victims of human rights violations, journalists, women from the business community, teachers, religious scholars and representatives of minority groups, the United Nations, non-governmental organizations (NGOs) and the diplomatic community. In addition to visiting the capital, Kabul, the Special Rapporteur visited Bamyan and Panjshir Provinces, as well as hospitals, detention facilities and cultural heritage sites.'
[117] EUAA, Afghanistan Targeting of Individuals, August 2022, p. 23.
[118] UNAMA, Human Rights in Afghanistan 15 August 2021 – 15 June 2022, July 2022, p.22 – 23 available at https://unama.unmissions.org/sites/default/files/unama_human_rights_in_afghanistan_report_-_june_2022_english.pdf; See also UNAMA, Impact of improvised explosive devices on civilians in Afghanistan: 15 August 2021 – 30 May 2023, 27 June 2023; UNAMA, Human Rights situation in Afghanistan: May to June 2023 Update, July 2023; UN Office for the Coordination of Humanitarian Affairs (OCHA), Afghanistan: Humanitarian Update, June 2023, 10 July 2023; Report of the Office of the High Commissioner for Rights, Situation of human rights in Afghanistan, 11 September 2023; UNAMA, Human Rights situation in Afghanistan: July-September 2023 Update, October 2023.
[119] Report of the Secretary-General, The situation in Afghanistan and its implications for international peace and security A/76/667 – S/2022/64, 15 June 2022, par. 63 available at https://reliefweb.int/report/afghanistan/situation-afghanistan-and-its-implications-international-peace-and-security-66.
[120] Report of the Secretary-General, The situation in Afghanistan and its implications for international peace and security, 7 December 2022, par. 4, available at https://www.ecoi.net/en/file/local/2084394/N2273222.pdf

> the present time, there are no standardized procedures or substantive statutes in criminal or civil matters that police, judges or lawyers can follow in Afghanistan.[121]

Finally, in May 2023, UNAMA again confirms that,

> The de facto authorities have purportedly suspended the Constitution and initiated a review of laws passed under the Islamic Republic of Afghanistan to assess their compliance with Sharia and Afghan traditions. As of April 2023, the outcomes of the review – and therefore, the legal status of laws adopted by the Islamic Republic of Afghanistan – remain unknown. However, the de facto authorities have stated on numerous occasions that Sharia is the applicable legal framework in Afghanistan.[122]

There also exists widespread impunity. Violators of human rights are not being held accountable for their actions.[123] National organisations that investigated human rights violations in the past have been dismantled. For example, in May 2022, the 'Afghanistan Independent Human Rights Commission (AIHRC),' the 'Independent Commission for Overseeing the Implementation of the Constitution,' and the 'Afghanistan Independent Bar Association' were dismantled.[124] In February 2023, the UN Special Rapporteur on the situation of human rights in Afghanistan expressed his concerns regarding the existing impunity in Afghanistan,

> Lack of judicial accountability reinforces impunity and could lead to the commission of further serious crimes. He is also concerned that persons making allegations against the authorities may not be protected from reprisals. This discourages reporting and creates a serious impediment to accountability. He stresses the imperative for an end to impunity, redress for past crimes and immediate reforms, in conformity with the rule of law.[125]

6.2.2. Widespread human rights violations

Regarding the widespread human rights violations by the Taliban, NANSEN first notes that the gathering of comprehensive information on human rights violations is very difficult. In Afghanistan, reporting on human rights violations may endanger the person that reports it as well as endanger the person who needs to register the violations. Moreover, there are cultural

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[121] Report of the Special Rapporteur on the situation of human rights in Afghanistan,9 February 2023, par. 50; See also, Report of the Secretary-General, The situation in Afghanistan and its implications for international peace and security, A/77/772-S/2023/151, 27 February 2023, par 13, available at https://www.ecoi.net/en/file/local/2088888/N2305123.pdf; Report of the Office of the High Commissioner for Rights, Situation of human rights in Afghanistan, 11 September 2023.

[122] UNAMA, Corporal punishment and the death penalty in Afghanistan, May 2023, p. 10 – 12, available at https://unama.unmissions.org/human-rights-monitoring-and-reporting-0; See also, for example, Thomas Ruttig, Rule of the Taliban, p. 21, during the 'Afghanistan conference, The Human Rights Situation after August 2021' organised by the Danish Refugee Council of 28 November 2022, available at https://asyl.drc.ngo/media/13vhsflb/drc-afghanistan-conference-report-28nov2022.pdf; See also US State Department, 2022 Country Report on Human Rights Practices: Afghanistan, 20 March 2023, available at USDOS – US Department of State: "2022 Country Report on Human Rights Practices: Afghanistan", Document #2089060 - ecoi.net

[123] See, *for example,* Amnesty International, The rule of Taliban. A year of violence, impunity and false promise, August 2022, available at https://www.amnesty.org/en/documents/asa11/5914/2022/en/

[124] UNHCR Guidance Note on Afghanistan, February 2023, par 22; Report of the Office of the High Commissioner for Rights, Situation of human rights in Afghanistan, 11 September 2023.

[125] Report of the Special Rapporteur on the situation of human rights in Afghanistan, 9 February 2023, par. 57; See, *for example,* Amnesty International, Afghanistan: The UN Human Rights Council must end Taliban impunity, 3 March 2023, available at https://www.amnesty.org/en/documents/asa11/6475/2023/en/; US State Department, 2022 Country Report on Human Rights Practices: Afghanistan, 20 March 2023.

barriers when reporting on human rights violations. Finally, NANSEN would like to point out that the Taliban have prohibited women from working for NGOs and UN agencies. This has far-reaching implications for the ability to monitor violations. Therefore, due weight needs to be attached to the fact that human rights violations are underreported.[126]

Despite underreporting, several different sources report an increase of corporal punishments.[127] On 13 November 2022, Mullah Hibatullah Akhundzada, the Supreme Leader of the Taliban, ordered all judges to apply *hudud* and *qisas* punishments,

> [T]o apply the so-called "hudud" punishments (Islamic criminal law according to the sharia) to criminals throughout Afghanistan. Under Islamic law, hudud crimes (e.g. **apostasy**, rebellion against the ruler, theft, mugging, adultery, slander and the consumption of alcohol) are punishable by the amputation of hands and feet, whipping and death.[128]

These corporal punishments include amputations of hands and/or feet, beatings and floggings. These punishments are so severe that they would all meet the threshold of article 3 ECHR and article 48/4, §2, under b) of the Immigration Act. In May 2023, UNAMA reported a significant increase in corporal punishments by the *de facto* authorities in Afghanistan,

> Following the 13 November tweet there was a significant increase in both the number and regularity of judicial corporal punishment carried out by the de facto authorities. Between 13 November 2022 and 30 April 2023, UNAMA documented at least 43 instances of judicial corporal punishment. Within the 43 instances, 58 women, 274 men and two male children were lashed for a variety of offences, including zina, "running away from home", theft, homosexuality, consuming alcohol, fraud and drug trafficking. As before, the majority of punishments administered related to convictions of zina, adultery and "running away from home".
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> In general, punishments consisted of 30-39 lashes per convicted person, however as many as 100 lashes were reportedly given in some cases.[129]

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[126] Protection Cluster Afghanistan, Afghanistan Protection Analysis Update: Q2 2022, 4 November 2022, p.2; See also The New Humanitarian, Why tracking human rights abuses in Afghanistan is becoming harder, 20 July 2023, available at https://www.thenewhumanitarian.org/news/2023/07/20/why-tracking-human-rights-abuses-afghanistan-becoming-harder; UNAMA, Human Rights situation in Afghanistan: May – June 2023 Update, 17 July 2023, available at https://unama.unmissions.org/sites/default/files/human_rights_situation_in_afghanistan_may-june_2023.pdf

[127] Report of the Secretary-General, The situation in Afghanistan and its implications for international peace and security, 27 February 2023, par. 75; Report of the Special Rapporteur on the situation of human rights in Afghanistan,9 February 2023, par. 54; US State Department, 2022 Country Report on Human Rights Practices: Afghanistan, 20 March 2023; Amnesty International, Report on the human rights situation covering 2022: Afghanistan, 27 March 2023.

[128] UNAMA, Corporal punishment and the death penalty in Afghanistan, May 2023, p.5 – 6; Report of the Special Rapporteur on the situation of human rights in Afghanistan, 9 February 2023, par. 36 & 54; The Guardian, Afghan Supreme Leader Orders Full Implementation of Sharia Law, 14 November 2022, available at https://www.theguardian.com/world/2022/nov/14/afghanistan-supreme-leader-orders-full-implementation-of-sharia-law-taliban; Federal Office for Migration and Refugees, Briefing notes Group 62 – Information Centre for Asylum and Migration, 15 November 2022, p.1, available at https://www.bamf.de/SharedDocs/Anlagen/EN/Behoerde/Informationszentrum/BriefingNotes/2022/briefingnotes-kw46-2022.pdf?__blob=publicationFile&v=2; See also, Open Doors, Full Country Dossier Afghanistan, December 2022, p.29 e.v., available at https://www.opendoors.org/en-US/research-reports/country-dossiers/

[129] UNAMA, Corporal punishment and the death penalty in Afghanistan, May 2023, p. 14; See also Afghanistan Analysts Network, Lashing, Beating, Stoning: UNAMA tracks corporal punishment and the death penalty in Afghanistan, 8 May 2023, available at Lashing, Beating, Stoning: UNAMA tracks corporal punishment and the

In an update of 17 July 2023 UNAMA provides several different examples of corporal punishments being enforced in May and Juni 2023.[130] On 11 May 2023, leading UN experts called on the *de facto* authorities to stop the use of corporal punishments. The experts responded to a particular incident,

> On 4 May 2023, the de facto Deputy Chief Justice announced that courts across the country had sentenced 175 individuals to *Qisas* (retribution in kind) punishments and 37 to stoning. Other sentences included knocking down walls on four individuals and condemning 103 individuals to *Hudood (*crimes against God*)* punishments, such as lashing. The de facto Deputy Chief Justice did not specify a timeline for implementation of these sentences.[131]

The available country of origin information shows that the Taliban are implementing and enforcing a particular draconian version of Sharia law that goes well beyond the traditional interpretation of Islam in Afghanistan. The Taliban is concerned with every little detail of daily life.[132] The Taliban have re-established the MPVPV. This Ministry is allowed to draft policies, to provide advice, monitor, receive complaints and implement policies regarding anything the *de facto* authorities consider necessary to ensure the 'propagation of virtue and vice.' The spread of virtue and vice is a priority for the Taliban.[133] In August 2022, the MPVPV established a female morality police.[134] According to UNAMA, the decrees by the MPVPV are deliberately vague and open to interpretation and abuse.[135] This results in high unpredictability.

In August 2021, there was hope that the moderates within the Taliban would prevent Afghanistan from regressing back to the situation during the first Taliban rule (1996 – 2001). However, it is now clear that the conservatives, that want the full implementation of Sharia law, have the upper hand.[136] Over the past two years, more and more restrictions have been introduced and enforced. By June 2022, the MPVPV had published decrees that concern prohibitions — on music, in public and private spaces; on the display of images of women, including mannequins in shops; on the use of cosmetics by women; on "western" dresses and

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death penalty in Afghanistan - Afghanistan Analysts Network - English (afghanistan-analysts.org); Report of the Secretary-General, The situation in Afghanistan and its implications for international peace and security, 27 February 2023, par. 36; See also, https://www.bbc.com/news/world-asia-63736271; Amnesty International, Report on the human rights situation covering 2022: Afghanistan, 27 March 2023; Radio Free Europe, Afghan Taliban Lashes Nine Convicted Prisoners in Public, 17 January 2023, https://www.ecoi.net/en/document/2085644.html; Human Rights Watch, Annual report on the human rights situation in 2022: Afghanistan, available at https://www.ecoi.net/en/document/2085369.html

[130] UNAMA, Human Rights situation in Afghanistan: May – June 2023 Update, 17 July 2023, p. 4.

[131] UN Office of the High Commissioner for Human Rights, Afghanistan: UN Experts appalled by the Taliban announcement on capital punishment, 11 May 2023, available at https://www.ohchr.org/en/press-releases/2023/05/afghanistan-un-experts-appalled-taliban-announcement-capital-punishment; See also, Afghanistan Independent Human Rights Commission, Statement Regarding the Taliban Supreme Court's decision to punish Afghan citizens without observing the principles of a fair trail, 6 May 2023, available at Afghanistan Independent Human Rights Commission (aihrc.org.af)

[132] Report of the Office of the High Commissioner for Rights, Situation of human rights in Afghanistan, 11 September 2023, paras 37 – 40.

[133] For an interesting analysis of the first Taliban rule (1996 – 2001) and the current MPVPV see Sabawoon Samim (Afghanistan Analyst Network), Policing Public Morality: Debates on promoting virtue and preventing vice in the Taleban's second Emirate, 15 June 2022, available at https://www.afghanistan-analysts.org/en/reports/rights-freedom/policing-public-morality-debates-on-promoting-virtue-and-preventing-vice-in-the-talebans-second-emirate%ef%bf%bc/

[134] See https://nimrokhmedia.com/en/2022/08/23/the-taliban-establishes-female-moral-police-department/?

[135] UNAMA, Human Rights in Afghanistan, July 2022, p.22 – 23.

[136] Sabawoon Samim (Afghanistan Analyst Network), Policing Public Morality: Debates on promoting virtue and preventing vice in the Taleban's second Emirate, 15 June 2022.

hairstyles. The MPVPV had also published decrees that concern obligations — the enforced use of face-covering "Islamic *hijab*" for women; a male guardian to accompany women in public; five daily prayers. Additionally, the MPVPV had published decrees that concern "advice" —including (but not limited to) the length of hair and beards; restrictions on women practicing sport; driving; access to public bathing establishments.[137] The introduction of the use of face-covering for women forms a clear example of the two-stage approach often taken by the Taliban to gradually implement and enforce of restrictions. While announcing the decree on 7 May 2022, the MPVPV stated it would first start raising awareness around the obligation for women to cover their faces and only issue warnings. Thereafter, it would start with disciplinary actions. The decree is aimed at husbands, fathers and brothers of women not, or deemed not to be, in compliance.[138] In November 2022, the MPVPV announced that women and girls were no longer allowed access to parks, gyms and swimming pools.[139] In December 2022, the MPVPV prohibited women from attending university studies as well as from working for national and international NGOs.[140] Since 4 April 2023, women are also prohibited from working for the UN.[141] Even though restrictions are aimed at limiting women and girls' rights, the decrees focus on men. The Special Rapporteur on Human Rights, Richard Bennett states that,

> While restricting women's and girls' rights is the primary intended outcome of the edicts, several edicts are directed at men; for example, a civil servant faces suspension from work if his wife or daughter does not wear "proper hijab". The experts are deeply concerned that the enforcement of punishment on men for the conduct of women and girls is intended to normalize discrimination and violence against women and girls and obliterate women's agency.[142]

Despite the MPVPV claiming that the restrictions are only recommendations, sources have documented many human rights violations that were committed in the context of the enforcement of the MPVPV decrees.[143] Between mid-September and December 2022, UNAMA documented 24 human rights violations by members of the MPVPV.[144] Between December 2022 and February 2023, UNAMA documented 64 human rights violations

[137] See Report of the Special Rapporteur on the situation of human rights in Afghanistan, Situation of human rights in Afghanistan, 9 September 2022, par. 24; Amnesty International, Report on human rights situation during the first year of Taliban's return to power, August 2022, available at https://www.ecoi.net/en/document-search/?country=afg&sort_by=origPublicationDate&sort_order=desc&page=5; UNAMA, Human Rights in Afghanistan, July 2022, p. 22 - 23; UN SG, The situation in Afghanistan and its implications for international peace and security, 15 June 2022, par. 9, 34; Sabawoon Samim, Policing Public Morality: Debates on promoting virtue and preventing vice in the Taleban's second Emirate, 15 June 2022.
[138] UNAMA, Human Rights in Afghanistan, July 2022, p. 23; EUAA, Afghanistan Targeting of Individuals, August 2022, p. 44.
[139] See https://www.bbc.com/news/world-asia-63756621
[140] See https://www.bbc.com/news/world-asia-65184767; https://www.bbc.com/news/world-asia-64045497; https://www.bbc.com/news/world-asia-64086682; https://www.bbc.com/news/world-asia-63219895
[141] See, for example, BBC, Taliban order Afghanistan's hair and beauty salons to shut, 4 July 2023, available at https://www.bbc.com/news/world-asia-66094490; UNAMA, Human Rights situation in Afghanistan: May – June 2023 Update, 17 July 2023, p.6.
[142] Ibid., par. 20.
[143] See also UN SG, The situation in Afghanistan and its implications for international peace and security, 15 June 2022, par. 34; See also Amnesty International, Report on human rights situation during the first year of Taliban's return to power, August 2022, p. 33; UNAMA, Human Rights in Afghanistan, July 2022, p. 13, 17.
[144] Report of the Secretary-General, The situation in Afghanistan and its implications for international peace and security, 7 December 2022, par. 40.

committed by members of the MPVPV.[145] These violations concern ad hoc corporal punishments for different reasons,

> The reasons for ad hoc punishments meted out by de facto officials of the Department for the Propagation of Virtue and Prevention of Vice vary according to gender. In cases concerning women, it is most frequently as a punishment for failing to wear Islamic hijab as interpreted by the de facto authorities and for leaving the house without a mahram – even where travelling less than the 78km specified by the de facto authorities in their mahram edict. In cases regarding men, punishments are often meted out against barbers who have trimmed men's beards and/or men who have trimmed their beards, shopkeepers who allow women to shop in their store without mahram and men who fail to attend the mosque for prayers, as recommended by the de facto authorities.[146]

In May 2023 UNAMA also reports,

> During March and April, officials of the de facto Department for the Propagation of Virtue and Prevention of Vice, enforced a range of measures relating to the observance of Ramadan, including ensuring shops were closed during prayer times (in Balkh and Kunduz), and ordering residents to attend Tarawih evening prayers (in Badakhshan and Takhar). On 27 March, in Kunduz, de facto Department for the Propagation of Virtue and Prevention of Vice officials entered an ice cream shop that was open during evening prayers and lashed eight men. On 1 April, in Takhar, de facto Department for the Propagation of Virtue and Prevention of Vice officials forced a group of men to attend Tarawih prayers and beat another man because he was smoking a cigarette instead of praying at the mosque.[147]

In July 2023 UNAMA reports,

> UNAMA continues to record instances of de facto Ministry for the Propagation of Virtue and the Prevention of Vice personnel arbitrarily arresting and ill-treating individuals who they view as not following their decrees, particularly those pertaining to hijab (for women) and beard length (for men).[148]

The disciplinary actions and punishments meted out by the MPVPV for not complying with restrictions all meet the threshold of persecution and serious harm.

The Taliban have set up numerous checkpoints, in Kabul, but also outside Kabul. These checkpoints have been established, among other reasons, to make sure that the decrees by the MPVPV are properly followed. Several different sources confirm the establishment and

[145] Report of the Secretary-General, The situation in Afghanistan and its implications for international peace and security, 27 February 2023, par. 37.
[146] UNAMA, Corporal punishment and the death penalty in Afghanistan, May 2023, p. 15; See also Report of the Secretary-General, The situation in Afghanistan and its implications for international peace and security, 27 February 2023, par. 37; UNAMA, Human Rights in Afghanistan, July 2022, p. 17.
[147] UNAMA, Human Rights Situation in Afghanistan February – April 2023 Update, May 2023, p. 5, available at https://unama.unmissions.org/human-rights-monitoring-and-reporting-0
[148] Ibid., p. 6; see also Report of the Office of the High Commissioner for Rights, Situation of human rights in Afghanistan, 11 September 2023, par 38.

the reasons for these checkpoints.[149] At these checkpoints, people are stopped and have their belongings and phones searched.[150] These persons are at risk of being ill-treated, *for example*, people have been shot at, beaten, arbitrarily arrested and detained.[151]

Finally, NANSEN notes that conditions in prisons are poor, there is overcrowding and a lack of access to adequate food, health care, clothing and accommodation (heating).[152] People who fail to comply with the MPVPV decrees are at risk of arbitrary arrest, prolonged pre-trial detention, long-term illegal detention without any guarantees to a fair trial. Prisoners are exposed to torture, ill-treatment and inhuman treatment and punishment.[153]

7. Conclusions on the human rights conditions in Afghanistan

In this second part of the Note, NANSEN first focused on identifying the type of material facts that should inform the risk assessment of applicants that must return to a situation where a particular draconian interpretation of the Sharia law has been implemented and violating these norms may lead to torture or to inhuman or degrading punishment. The analysis of the relevant decision by the ECtHR in the case of *Sufi and Elmi* and the decisions by the Belgian asylum authorities in Afghan case files shows a discrepancy between the material facts that inform the risk assessment of the ECtHR and those that currently inform the risk assessment by the asylum authorities. The ECtHR attached decisive weight to the strict social norms and the severity of the punishments for not obeying the rules, whereas the Belgian asylum authorities attach decisive weight to the level of internalisation of western norms of the individual applicant.

Yet, an examination of the available country of origin information shows that the current situation in Afghanistan under control of the Taliban is comparable to the situation under al-Shabaab in Somalia at the time of the *Sufi and Elmi* decision. Like al-Shabaab, the Taliban

[149] See several different primary sources documented by the European Asylum Agency in, *for example*, EUAA, COI Report Afghanistan: Targeting of individuals, August 2022; See also US Department of State, 2022 Country Report on Human Rights Practices: Afghanistan, March 2023; Sabawoon Samim, Afghanistan Analysts Network, New Lives in the City: How Taleban have experienced life in Kabul, 8 February 2023, https://www.afghanistan-analysts.org/en/reports/context-culture/new-lives-in-the-city-how-taleban-have-experienced-life-in-kabul/; Freedom House, A needs assessment of Afghan Human Rights Defenders, 2022 – 2023, July 2023, p.14, available at https://freedomhouse.org/sites/default/files/2023-07/AfghanHRDSReportJan2023edit.pdf

[150] See for example regarding the searching of phones, US Department of State, 2022 Country Report on Human Rights Practices: Afghanistan, March 2023; Committee to protect Journalists, Taliban detain four media workers in Kabul, Herat, and Paktia provinces, 31 May 2022, available at https://cpj.org/2022/05/taliban-intelligence-agents-detain-four-media-workers-in-kabul-herat-and-paktia-provinces/

[151] US Department of State, 2022 Country Report on Human Rights Practices: Afghanistan, March 2023; Thomas Ruttig, Rule of the Taliban, p.23; EUAA, COI Report Afghanistan: Targeting of individuals, August 2022, p.32, 35, 43, 53, 65, 69, 112, 124, 161, 176, 179, 180, 183, 184; UNAMA, Human Rights in Afghanistan, July 2022

[152] See Report of the Special Rapporteur on the situation of human rights in Afghanistan, Situation of human rights in Afghanistan, 9 September 2022, par. 58 – 62, 89; Amnesty International, Report on human rights situation during the first year of Taliban's return to power, August 2022, p. 30; UNAMA, Human Rights in Afghanistan, July 2022, p.37 – 38; UN SG, The situation in Afghanistan and its implications for international peace and security, 15 June 2022, par. 43.

[153] Report of the Special Rapporteur on the situation of human rights in Afghanistan,9 February 2023, par. 60; Report of the Special Rapporteur on the situation of human rights in Afghanistan, 9 September 2022, par. 58 – 62; Amnesty International, Report on human rights situation during the first year of Taliban's return to power, August 2022, p.33; Afghanistan Independent Human Rights Commission, Analysis and Assessment of International Human Rights and Humanitarian Law Situation Following Taliban's Retake of Afghanistan, August 2022, p. 9, available at https://www.aihrc.org.af/media/files/Analysis%20and%20Assessment%20of%20International%20Human%20Rights%20and%20Humanitarian%20Law%20Situation%20Following%20Taliban%27s%20Retake%20of%20Afghanistan.pdf

also concerns itself with little details of day-to-day life and imposes severe punishments for not obeying these social norms. The country of origin information shows an opaque and arbitrary legal system in which decrees are open to interpretation, abuse and inconsistent application. In particular, the decrees by the Ministry for Propagation of Virtue and Prevention of Vice. There exists widespread impunity. An increase in corporal punishments is being reported. The available country of origin information shows that the Taliban are implementing and enforcing a particular draconian version of Sharia law that goes well beyond the traditional interpretation of Islam in Afghanistan. People violating the social norms are at risk of corporal punishment, arbitrary arrest and detention. These punishments are so severe that they would all meet the threshold of persecution and serious harm. Finally, NANSEN also concluded that there is no information available on the treatment of returnees from the west by the Taliban. NANSEN, therefore, insists on the Belgian asylum authorities to attach due weight to this uncertainty and unpredictability.

Concludingly, NANSEN urges the Belgian asylum authorities to shift the focus of its risk assessment from the individual circumstances to the human rights conditions in Afghanistan, some of the worst in the world. The granting of refugee status or subsidiary protection should not be dependent on the assessment of whether applicants have internalised western norms up to point where they can't be **expected** to obey the rules but rather whether applicants have any recent experience living under the Taliban and if they will be **able** to obey the rules.

8. Conclusions on effective protection against refoulement

The analysis in this Note shows that the Belgian asylum authorities have developed different ways of adding to the burden of proof for Afghan applicants up to a point where it reaches unreasonable levels. The existence of an arguable claims is not always properly acknowledged as are groups systematically at risk. The Convention grounds' political opinion and religious belief are interpreted too strict, neither in accordance with UNHCR Guidelines nor the jurisprudence by the European Court of Justice. Moreover, the manner in which the material facts are established by the Belgian asylum authorities regarding the risk assessment for Afghan returnees from the west, with again an emphasis on the individual circumstances rather than the dire human rights conditions, further increases that burden of proof. At the same time, the asylum authorities fail to acknowledge their own obligations to rigorously scrutinise individual applications and to provide an effective remedy. This renders the protection offered under the 1951 Refugee Convention and Article 3 ECHR illusionary for Afghan applicants.