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# Judicial Practice Makes Perfect: Explaining Asylum Recognition in the European Union

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# Judicial Practice Makes Perfect: Explaining Asylum Recognition in the European Union

## **Abstract**

Vast disparities in asylum recognition rates have persisted in the European Union despite legislative efforts to standardize the asylum determination process. National judiciaries play an important role in this process and scholars mostly agree that differences in judicial practice pose a challenge to the harmonization of recognition rates. However, no study has specifically analyzed the relationship between these two variables. The aim of this research is to determine whether differences in judicial practice account for the variation in asylum recognition rates in the EU. To observe these differences, precedent relating to three areas of the refugee determination process is identified in selected EU states. Application of this precedent is then analyzed in order to identify restrictive judicial practices. Analyses reveal that differences in judicial practice impact the outcomes of asylum cases, and therefore recognition rates.

**JUDICIAL PRACTICE MAKES PERFECT:  
EXPLAINING ASYLUM RECOGNITION IN THE EUROPEAN UNION**  
Casey Plach

***Abstract:** Vast disparities in asylum recognition rates have persisted in the European Union despite legislative efforts to standardize the asylum determination process. National judiciaries play an important role in this process and scholars mostly agree that differences in judicial practice pose a challenge to the harmonization of recognition rates. However, no study has specifically analyzed the relationship between these two variables. The aim of this research is to determine whether differences in judicial practice account for the variation in asylum recognition rates in the EU. To observe these differences, precedent relating to three areas of the refugee determination process is identified in selected EU states. Application of this precedent is then analyzed in order to identify restrictive judicial practices. Analyses reveal that differences in judicial practice impact the outcomes of asylum cases, and therefore recognition rates.*

INTRODUCTION

In a 2004 press release, the European Council on Refugees & Exiles explained, “seeking asylum in Europe remains a dangerous lottery, with a person facing widely differing chances of receiving adequate treatment and a fair outcome depending in which European country they seek asylum.”<sup>49</sup> Variation in asylum recognition rates among European Union (EU) countries illustrates this disparate treatment. For example, in 2013 the United Kingdom granted protection to 29% of asylum applicants, while recognition rates in Spain and Ireland remained much lower, at 9% and 7% respectively.<sup>50</sup> Clearly, those who flee persecution and seek refuge in Europe face unequal treatment and inconsistent odds for protection.

In order to address these inconsistencies, the United Nations High Commission for Refugees (UNHCR) and the European Union have responded in a number of ways. Acknowledging the significant role of national courts in the refugee determination process, both the EU and the UNHCR have set more specific standards for judiciaries to determine who should be granted protection. Guidelines published by the UNHCR are not binding, but regulations passed by the European Union require state compliance. One piece of EU legislation that binds all member states (with the exception of Denmark) is

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<sup>49</sup> *Europe Must End Asylum Lottery* 2004

<sup>50</sup> “UNHCR Population Statistics”

the Qualification Directive, which sets minimum standards for qualification as a refugee. However, despite these efforts to harmonize legal standards, recognition rates remain highly inconsistent. This suggests that changes in law are not sufficient to ensure harmonization and that the real barrier to harmonized recognition rates is the application and interpretation of that law.

The aim of this research is to determine whether judicial practice accounts for the variation in asylum recognition rates in the EU. Precedent relating to the refugee determination process is identified and application of this precedent is analyzed to determine how restrictive judicial practice is in selected EU states. Overall, it is hypothesized that states with restrictive judicial practices will have lower asylum recognition rates than states that apply more liberal asylum determination processes.

#### LITERATURE REVIEW

Empirical research on asylum recognition rates began in the early 1990s, at about the same time the European Union initiated efforts to harmonize asylum policy in the region. While some scholars considered questions of convergence of recognition rates in the European Union, others analyzed the variation in recognition rates and some even extended their studies to countries outside of the EU. These studies all rely on the assumption that the merit of individual claims cannot account for such a high level of variation in recognition rates. To explain this variation, other factors are tested, with a strong focus on economic and political conditions in both the origin and destination countries of asylum applicants.

Scholars have mixed opinions regarding the effect of economic conditions on recognition rates. Neumayer analyzes whether recognition rates in Western Europe converge over the period of 1980-1999 and finds that certain economic variables in the origin country and destination country are significant. Specifically, he finds that recognition rates are lower among applicants from economically poor countries.<sup>51</sup> Concerning economic conditions in the destination country, he finds that rates are lower when unemployment is high and that countries with higher GDPs have lower recognition rates.<sup>52</sup> However, other studies find that the relationship between unemployment rates

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<sup>51</sup> Neumayer 2005

<sup>52</sup> Ibid.

and recognition rates is weak at best and there is limited support for Neumeyer's other findings.<sup>53</sup> With such mixed results, it is clear that economic factors can explain only a small piece of the puzzle.

There is slightly more agreement on the effect that political factors have on recognition rates. It is well established that political conditions in origin countries matter. Neumayer finds that recognition rates are influenced by "political conditions in origin countries in terms of regime type, extent of human rights violations, interstate conflict, political conflict and events of genocide and politicicide."<sup>54</sup> Kate's findings support these results.<sup>55</sup> There is slightly less consensus on the effect of political conditions in destination countries. Neumayer does not find a relationship between ideology in the destination country and recognition rates, but Kate finds that countries that are traditionally more left-wing have lower recognition rates.<sup>56</sup> No study has found a significant relationship between the electoral success of radical right populist parties and recognition rates.<sup>57</sup>

From these studies it can be concluded that certain political factors are strong determinants of whether or not an asylum seeker will be granted protection, while economic factors are not as significant. Still, economic and political factors do not completely solve the puzzle. Some scholars have expanded upon existing research and studied the relationship between legal conditions and recognition rates, but overall this variable has not received as much attention as economic and political ones. Considering asylum decisions take place in a judicial setting, it is surprising that legal conditions have not been given more attention. Sicakkan studies the effect of legal and institutional frames of asylum determination on recognition rates, and concludes that, for higher recognition rates to ensue, decision-making authority should be shared with external actors that promote and implement fair practices in the courtroom, such as the UNHCR and NGOs.<sup>58</sup> Kate looks more closely at domestic law and attempts to measure its effect

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<sup>53</sup> Kate 2005; Toshkov 2013

<sup>54</sup> Neumayer 2005, 64

<sup>55</sup> Kate 2005

<sup>56</sup> Kate 2005

<sup>57</sup> Neumayer 2005; Kate 2005; Toshkov 2013

<sup>58</sup> Sicakkan 2008

on recognition rates. She outlines four areas where judicial interpretation of the UN refugee definition differs: burden of proof, persecution of non-state actors, internal flight alternative, and the meaning of “particular social group.”<sup>59</sup> However, noting difficulties in interpreting legal rulings, she only tests the interpretation of persecution of non-state actors and suggests that further research on judicial practice and domestic law would be beneficial.

International relations theory indicates that the role of domestic institutions, such as judicial bodies, does, in fact, matter. Harold Koh, along with other transnational legal process theorists, focuses on the internalization of international norms in the domestic legal structure. One specific type of internalization is legal internalization, which occurs “when an international norm is incorporated into the domestic legal system through executive action, judicial interpretation, legislative action, or some combination of the three.”<sup>60</sup> In the case of asylum and refugee law, states are bound by the Refugee Convention and are influenced by additional forms of soft law. However, national courts adjudicate asylum claims and must apply and interpret international law. As seen in the EU, states may change their domestic law to meet international and regional standards, but full compliance only occurs when norms are internalized, which falls on the responsibility of the courts.

Gregory Noll has placed Koh’s legal process theory in the refugee law context and argues that judicial interpretation is a significant factor in the variation of recognition rates in the EU.<sup>61</sup> He explains, “Rationally, one would expect that all Member states should answer the question ‘who is a refugee?’ or ‘who is a beneficiary of extraterritorial protection?’ in roughly the same manner” and lists three reasons for why this is the case.<sup>62</sup> First, all Member States are party to the 1951 Refugee Convention and therefore operate under the same international legal standards. Second, all Member States are signatories to the Dublin Convention which subjects them to the same regional criteria. Third, the harmonization efforts by the EU should have resulted in a convergence of recognition rates because it discouraged competition. Despite these conditions,

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<sup>59</sup> Kate 2005

<sup>60</sup> Koh 2005, 199

<sup>61</sup> Noll 2000

<sup>62</sup> *Ibid.*, 233

recognition rates remain inconsistent. Offering an explanation to this puzzle, Noll states, “...it must be concluded that the interpretation of the 1951 Refugee Convention...var(ies) to a substantial degree among Member States.”<sup>63</sup> Noll’s conclusion suggests that domestic practices are a strong determinant of recognition rates and that there would be value in examining differences in judicial interpretation.

Recent studies support Noll’s conclusion and further investigate the differences in judicial practice. According to Hathaway, judges have played a significant role in the development of refugee law. He states, “It was the judges of the world who led the way in developing refugee law to respond to changed circumstances ... a body of law which was traditionally very much the province of UNHCR and academics has, over the course of the last decade, become fundamentally judicialized.”<sup>64</sup> This suggests that the judiciary has had power in shaping international norms relating to asylum. Supporting Hathaway’s claim, Hélène Lambert explains, “EU states have committed themselves to greater harmonization of their national laws on asylum, but interpretation and application of these new EC laws depend to a large extent on national judiciaries.”<sup>65</sup> Similarly, Nergis Canefe states, “In so many areas of refugee law and policy, the viability of a universal commitment to protection is challenged by divergences in state practice as far as the implementation and application of the 1951 Refugee Convention is considered.”<sup>66</sup> Therefore, judicial practice is important because if judges are interpreting international law differently or are not applying it at all, vast differences in recognition rates should result.

Certain aspects of the refugee determination process have received much attention in the literature because they are highly disputed among states. Article 1:A (2) of the 1951 UN Convention Relating to the Status of Refugees defines a refugee as:

[A]ny person who...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country; or who,

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<sup>63</sup> Noll 2000, 236

<sup>64</sup> Hathaway 2003, 418

<sup>65</sup> Lambert 2009, 2

<sup>66</sup> Canefe 2010, 178

not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>67</sup>

As explained in this definition, every applicant must prove a well-founded fear of persecution. This refers to the standard of proof and threshold asylum seekers must meet to obtain protection. As one of the more ambiguous phrases in the definition, well-founded fear is open to interpretation, leading many scholars to analyze this concept.<sup>68</sup> Establishing well-founded fear is crucial to every asylum case and is therefore included as an independent variable in this study. Another phrase in this definition that is also open to interpretation is “particular social group.” In her 2012 study, Michelle Foster analyzes jurisprudential developments relating to this phrase and argues no other Convention ground “has been subject to the degree of rigorous scrutiny, debate, and conflicting interpretive approaches as the most nebulous of grounds.”<sup>69</sup> It appears that this too is critical to the asylum determination process and is also included as an independent variable in this study. Finally, the last variable, also debated among states, is internal protection alternative. While not mentioned in the refugee definition, this “notion was developed in a somewhat ad hoc manner through international and intergovernmental policy statements.”<sup>70</sup> The process for determining whether an internal protection alternative is available to an asylum applicant varies among states.<sup>71</sup>

Of all the studies reviewed, none seek to draw a causal relationship between judicial interpretation and the variation in recognition rates in the EU. The central purpose of this study is to examine such a relationship by analyzing case law in selected EU states. Because the three identified independent variables are among the most highly contested aspects of the asylum determination process, they are studied to determine how restrictive the judicial interpretation is in each state, and subsequently, how that impacts recognition rates. It is hypothesized that states in which courts have established more restrictive practices relating to well-founded fear of persecution, internal protection

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<sup>67</sup> UN General, 14

<sup>68</sup> Gorlick 2003; Carlier 1999; Sweeney 2009

<sup>69</sup> Foster 2012, 2

<sup>70</sup> Marx 2002, 179

<sup>71</sup> Eaton 2012; Marx 2002; Kelley 2002

alternative, and membership of a particular social group will have low asylum recognition rates.

### RESEARCH DESIGN AND METHODOLOGY

In order to test the hypothesis outlined above, this study analyzes judicial practice in three selected EU states: the United Kingdom, Ireland, and Spain. The United Kingdom generally has high asylum recognition rates, while Ireland and Spain remain much less willing to grant protection. The analysis of judicial practice within these states attempts to explain why there is such a difference in recognition rates. Three categories of the refugee determination process are analyzed: well-founded fear of persecution, internal protection alternative, and membership of a particular social group. Due to the EU Qualification Directive, which set standards on how to determine refugee status and required states to transpose these standards into their national law, legislation appears similar among states. Therefore, an analysis of differences in national law is not sufficient in drawing a causal connection between domestic practice and recognition rates. Furthermore, an examination of judicial precedent reveals that, in most cases, precedent is similar among courts so this is also not an appropriate measure. Therefore, a more thorough analysis of judicial decision-making is required. This is where judicial practice comes in, which, for the purposes of this study, is defined as the application of law and method of reasoning a court uses in order to come to a ruling. As such, particular attention is given to the steps justices take in determining whether an applicant should be granted protection, as well as the reasoning behind their rulings. Judicial practice is considered restrictive when justices consistently rely on specific aspects of the law or one method of reasoning to deny asylum applications. Additionally, judicial practice is considered restrictive when justices appear distrustful of asylum applicants and do not perform a complete, individual assessment.

Case law is the central data source used in this study. Using the Refworld case law database (managed by the UNHCR) and RefLAW database (managed by the University of Michigan Law School), ten cases are selected at random from each country. Only decisions from the High or Supreme Courts are reviewed in order to observe precedent and standards set for lower courts. The Qualification Directive came into force in October 2006, so cases are chosen from the years 2007-2012. A recast Qualification

Directive (which set out more specific requirements for states) was passed and came into force October 2013, but cases after this date are not reviewed because there is not enough case law for a complete analysis.

*Dependent Variable: Variation in Recognition Rates*

The dependent variable of this study is the variation in asylum recognition rates. Recognition rates are measured as the number of positive decisions divided by the number of total decisions in a given year. For example, in 2013 the UK recognitions rate was 29%, Spain was 9%, and Ireland was 7%.<sup>72</sup> There are two forms of refugee protection: Convention status and complementary protection status (also referred to as humanitarian protection). Standards for meeting Convention status and the amount of protection granted when a claim is successful are set by the UN Refugee Convention, while complementary protection status is set by individual states. Because this study is considering consistency (or lack of consistency) in judicial interpretation of international or regional law, only the Convention status is considered in the recognition rate.

*Independent Variables*

Well-Founded Fear of Persecution. The first independent variable is well-founded fear, which is related to the standard of proof set by states and the amount of evidence required of an asylum applicant to persuade the judge that his or her fear of persecution is legitimate. A common standard is not indicated in the Qualification Directive because over time individual jurisdictions have created their own standards. Almost all states set the threshold for standard of proof much lower than is required in civil or criminal cases because of the difficulties refugees face in gathering evidence and support for their case. Ireland and the UK use the standard that emerged in *Ex parte Sivakumaran* (1988): “[the] appropriate test is ‘reasonable chance,’ ‘substantial grounds for thinking,’ or ‘serious possibility.’”<sup>73</sup> Similarly, Spain has a threshold of “reasonable degree of likelihood,” which was established in *Tribunal Supremo 1988 Aranzadi No. 514*.<sup>74</sup> The UNHCR confirmed these standards, explaining “the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country

<sup>72</sup> “UNHCR Population Statistics”

<sup>73</sup> 452-453; cited in Gorlick 2003, 368

<sup>74</sup> Carlier 1999, 42

of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.”<sup>75</sup>

Due to the similar thresholds relating to standard of proof, precedent is more or less the same in each state. However, *how* states determine whether there is a reasonable degree of likelihood that persecution will occur upon return is very different, and this is where judicial practice matters. Hathaway explains, “the concept of well founded fear of persecution is generally accepted as involving a subjective perception of persecution or a threat of persecution, and an objective element in a present or prospective risk of persecution, with which the subjective perception is consistent and which is based on available information of conditions in the state of origin.”<sup>76</sup> In other words, the subjective element is the applicant’s testimony of what occurred and the evidence she provides to support her claim. The objective element is an analysis of the country of origin information (COI), which comes in the form of reports and publications by governmental and non-governmental organizations. The objective information verifies what the applicant says to ensure that her claim is plausible in the context of her country of origin. The use of each element is analyzed in the assessment of judicial practice to reveal how restrictive the determination of well-founded is in each EU state.

Internal Protection Alternative. One of the most fundamental principles of international refugee law is non-refoulement—a principle of customary international law which “provides that no one shall expel or return (“refouler”) a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom.”<sup>77</sup> States are bound by this principle, but may choose not to grant protection to an asylum seeker if there is a safe location within his or her origin country. This location is called an internal protection alternative (IPA), which is the second independent variable in this study. The Qualification Directive addresses the determination of an IPA in Article 8:

1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of

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<sup>75</sup> *Handbook and Guidelines on Procedures for Determining Refugee Status* 2011, 12

<sup>76</sup> 1991, 65; cited in (*Moldova*) Applicant

<sup>77</sup> *Guidelines on International Protection* 2003, 3

being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.

2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.<sup>78</sup>

Part one refers to the reasonableness of the IPA and part two describes how to determine whether the IPA is reasonable. Ireland and the UK have transposed this law directly into their national law, while Spain makes no reference to IPA determination in its national law. The UNHCR offers further guidance on how to determine reasonableness. It asks, “Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship? If not, it would not be reasonable to expect the person to move there.”<sup>79</sup> While precedent relating to IPA has not been developed in Spain, Ireland and the UK have both adopted the UNHCR standard of “unduly harsh” and justices make reference to it in their rulings. However, as in the example of well-founded fear, determination of what constitutes an undue hardship differs among states. To determine whether judicial practice is restrictive, this determination process is assessed.

Particular Social Group. According to the refugee definition, a refugee is any person who is persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion. However, the “particular social group” (PSG) ground is vague and there are no established guidelines on its meaning which is why it is included as the final independent variable. In her comparative study, Foster differentiates between two approaches to judicial interpretation of particular social group: protected characteristics/*eiusdem generis* and social protection/sociological approach.<sup>80</sup> The first approach was established in the US Board of Immigration Appeals in *Re Acosta* in 1985, where the BIA found “the well established doctrine of *eiusdem generis*, meaning literally, ‘of the same kind,’ to be most helpful in construing the phrase ‘membership of a

<sup>78</sup> Council Directive 2004/83/EC 2004

<sup>79</sup> Guidelines on International Protection 2003, 3

<sup>80</sup> Foster 2012, 5

particular social group.”<sup>81</sup> This test has developed through further case law and Foster summarizes three requirements to constitute a PSG: innate or unchangeable characteristic, characteristic fundamental to human dignity, and former status that is unalterable due to its historical permanence.<sup>82</sup> Contrarily, the social perception approach developed in France. Foster lists the two criteria established in the French case *Ourbih* in 1997: “the existence of characteristics common to all members of the group and which define the group in the eyes of the authorities in the country and of society in general.”<sup>83</sup> This test focuses on how an applicant is perceived by others, while the protected characteristics test focuses on qualities of an applicant that amount to protection.

The least restrictive approach to these tests is for a state to permit the use of either, meaning that an applicant can satisfy either of the tests to gain PSG status. The most restrictive approach would be for a state to require the satisfaction of both tests. Interestingly, the language of the Qualification Directive indicates that both tests must be satisfied because of the use of “and” in Article 10 Section 1 (d), which states:

A group shall be considered to form a particular social group where in particular:

— members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, **and**

— that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society<sup>84</sup>

However, Article 3 of the Qualification Directive permits states to adopt more favorable standards, so not all states require both tests. Ireland has replaced “and” with “or,” in its national law so that either test may be satisfied by an asylum applicant. This makes for a less restrictive standard. Spain and the UK, on the other hand, have directly transposed the Directive and, judging by the written law, both tests must be satisfied. However, in the UK Lord Bingham overturned this notion in *Fornah (2006)*. He stated,

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<sup>81</sup> Foster 2012, 6

<sup>82</sup> Ibid., 7

<sup>83</sup> Ibid., 11

<sup>84</sup> *Council Directive 2004/83/EC 2004*

If, however, this article were interpreted as meaning that a social group should only be recognized as a particular social group for the purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority.<sup>85</sup> This set the standard in the UK so that an asylum applicant may satisfy either test. The UK is seemingly now on par with its Irish counterparts in terms of PSG determination. There is no evidence, however, that Spain has lowered its standards from what is outlined in domestic law. To observe judicial practice relating to particular social group, application of the protected characteristics and social perception tests are analyzed.

### ANALYSIS

#### *Well-Founded Fear*

Ireland. In Ireland, analyses reveal that judicial practice relating to well-founded fear is often unfavorable toward asylum applicants. The court relies heavily on country of origin information (COI) to emphasize existing outlets of protection in an applicant's country of origin and often emphasizes what applicants *could* have done before seeking international protection. Protection was denied in multiple cases based on general conditions occurring in an applicant's country of origin. For example, in *(Moldova) Applicant*, a woman was fleeing from domestic violence at the hands of her husband, and the Refugee Appeals Tribunal ruled that the applicant did not "demonstrate to a reasonable degree of likelihood that she is a refugee." The Refugee Appeals Tribunal used COI to determine that government assistance and Human Rights organizations were available in Moldova and that it was the fault of the applicant for not utilizing these resources. Similar situations occurred in *C.I.A. v. Minister for Justice, Equality and Law Reform & Anor* and *(Nigeria) Applicant*. In *C.I.A.*, the court ruled that "the burden of proof rested on the applicant to establish a well-founded fear of persecution and this threshold was not met in the instant case." The court stated, "the whole thrust of the country of origin information indicates that there are grave societal difficulties for gays in Nigeria...However...there is practically no evidence before the Tribunal member to show that any prosecutions were taken." Even though the applicant attested to persecution, the court denied the applicant's case because the COI indicated that persecution on the basis of sexual orientation is rare

<sup>85</sup> *Fornah* 11; cited in Foster 2012, 39

in Nigeria. In another case, *(Nigeria) Applicant*, the court dismissed the appeal, ruling that “the objective element does not support the well-foundedness of this fear.” In this case, the possibility of state protection was determined by analyzing the effectiveness of the police force and the court ruled that, based on the COI, protection was available.

These three cases indicate that Ireland has a tendency to use COI against its applicants to prevent them from reaching the burden of proof. Courts must consider COI in order to check the subjective fear of the applicant, but Irish courts appears to rely very heavily on COI, meaning that they make generalizations rather than looking at specific situations. This observation is supported by the fact that three of the ten cases analyzed were appealed based on complaints that COI was too strongly considered and a personal assessment was not made (*H.A.-R. and S.A.-R v. Refugee Appeals Tribunal and Another; C.I.A. v. Minister for Justice, Equality and Law Reform & Anor; W.M.M. v. Refugee Appeals Tribunal and Another*). Relatedly, in cases where COI demonstrates a very serious situation of conflict and persecution, protection is more likely to be provided. For example, in *M.M.A. v. Minister for Justice, Equality and Law Reform & Anor*, a Sudanese man was granted protection because COI very strongly supported his case. However such cases are rare, and reliance on COI most often leads to unfavorable conditions for applicants.

Lack of consideration of the subjective evidence provided by applicants indicates that Irish courts approach their asylum applicants with caution and mistrust. This is supported by certain comments Justices make in their assessments. For example, in *(Moldova) Applicant*, the court spent much of its ruling focusing of what the applicant *could* have done. Although the applicant sought police assistance at the local level, she did not seek protection at the regional or superior level. Furthermore, the justice points out that she “did not seek the advice of a lawyer or recourse to the courts in Moldova or to any of the Human Rights bodies operating in Moldova.” The court also alludes to the fact that the husband’s actions amount to criminal assault, and the applicant could have attempted charging him with this. A similar situation occurs in *H.A.-R. and S.A.-R.*, where the court ruled, “There is no evidence that state protection was sought and was unavailable...People cannot expect the state to protect them if they are not prepared to

invoke state protection.” This emphasis on what applicants could have done demonstrates a skeptical attitude toward asylum-seekers and an unwillingness to provide protection.

Spain. In Spanish courts, country of origin information is also used to deny asylum claims, but in a way that is almost opposite to Ireland. Justices use COI to prove that a population as a whole is at risk, and then proceed to deny protection on the basis that individual persecution is not present. In certain cases, COI indicates a likelihood of persecution and the court acknowledges that there is conflict. However, unless the applicant can prove individual persecution, the case is denied. This is called the “nexus requirement”—applicants must show that they are being persecuted individually because of a certain personal quality they possess. Spain is right to consider this, but in certain cases the consideration appears to be exaggerated. For example, in *Recurso No. 4397/2006*, a Russian woman fled from persecution by Chechnyan rebels. The court ruled, “based on the available country of origin information...the alleged facts respond to a situation of common criminality that affects all of the population and not in particular those that come from Kazakhstan.”<sup>86</sup> A similar ruling was held in *Recurso No. 6252/2004* where the court explained, “It is jurisprudential doctrine that a general situation of internal conflict in a country, including the weakening of state powers and a surge of uncontrolled groups that can put at risk a person’s most basic human rights, is not by itself one of the causes that results in recognition as a refugee.” Spanish courts emphasize individual persecution and even when COI supports an applicant’s fear of persecution, protection is often denied because the nexus requirement is not satisfied and therefore a well-founded fear is not proven.

United Kingdom. In determining whether an asylum-seeker’s fear of persecution is well-founded, the UK’s consideration of the applicant’s evidence often leads to more favorable outcomes. Unlike Ireland and Spain, country of origin information is considered along with an applicant’s testimony and both are given equal consideration. In *SA (political activist - internal relocation) Pakistan v. Secretary of State for the Home Department*, the court considered the applicant’s own evidence that the police worked against him based on his political beliefs. The Justice writes in the court’s assessment,

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<sup>86</sup> Note: Case law for Spain was originally in Spanish. All direct quotes from Spanish case law are my own translations.

“On the appellant’s own evidence the response of the police on a significant number of occasions could not remotely be construed as even-handed...It was also the appellant’s uncontradicted evidence that the police normally sided with the PPP and against the appellant.” The court makes little mention to COI in this case and appears much more open to evidence provided by the applicant. Similarly, in *SW (lesbians - HJ and HT applied) Jamaica v. Secretary of State for the Home Department* the court gives substantial consideration to the applicant’s evidence. The layout of the decision supports this, given that the court first outlines “country guidance conclusions,” which are the conclusions it can come to based on COI, and then proceeds to the appellant’s case, which contains subjective information. The UK court analyzes the asylum applicant’s situation in the context of COI, which benefits the applicant because in some cases his or her personal situation can be an exception to the more general situation of the country. Overall, UK courts appear to place more trust in their applicants and are willing to consider subjective information along with objective evidence. This helps applicants in proving a well-founded fear of persecution and ultimately results in higher recognition rates.

#### *Internal Protection Alternative*

Ireland. When it comes to the assessment of an internal protection alternative, Ireland appears to have a restrictive understanding of the phrase “unduly harsh.” For example, courts do not consider it unduly harsh for an applicant to avoid persecution by keeping his or her identity hidden upon return to origin country. In *C.I.A. v. Minister for Justice, Equality and Law Reform & Anor*, a Nigerian man fled his country and applied for asylum in Ireland, claiming persecution on the basis of his sexual orientation. The court stated, “It was open to the Tribunal member to reach the almost unassailable conclusion that no real difficulties arose for the applicant if his homosexual practices remained private.” In this case, the court denies protection, claiming that the applicant should not be persecuted if he keeps his identity hidden. This test is more restrictive than in the UK, where an asylum-seeker should not be required to conceal his or her identity. Although this is but one example of a difference in judicial precedent, it is likely that other differences exist that are preventing favorable outcomes in Irish courts.

Although interpretation of “unduly harsh” is unfavorable toward applicants, the High Court does appear to be developing a more liberal approach to the way in which it assesses IPA. In *W.M.M. v. Refugee Appeals Tribunal and Another*, the High Court declared that the Refugee Appeals Tribunal erred in its IPA determination. The justice explained that the Tribunal member must,

have regard to general conditions prevailing in the part of the country of origin to which relocation is proposed, and this necessitates identifying a specific locality and carrying out appropriate inquiries to verify that the particular persecution will not be encountered there, and that it is a place to which the claimant can reasonably be expected to move without undue hardship. This was not done in the case.

After this assessment, the court grants leave in the case. In two other cases, *FUR v. Minister for Justice, Equality and Law Reform and Another* and *N.J. v. Refugee Appeals Tribunal & Anor*, the court denies protection because an IPA is available, but a more thorough assessment was made, which may indicate the adoption of less restrictive practices. In *F.U.R.* the court analyzed the particular circumstance of an applicant and referenced UK case law and guidelines. In *N.J.*, the court considered the applicant’s family situation, her employment history, and her story on how she traveled to Ireland. Given these cases, it appears that IPA assessments remain restrictive, but are developing. Spain. Internal protection alternative is not assessed in many cases and if so, it serves as a supplementary argument used in denying a claim. In two cases protection was denied, in part, because an IPA was available. In *Recurso No. 1318/2006* the court ruled, “there is no fact that allows us to conclude that at the present time...internal relocation would not be sufficient to avoid the persecution that he reports.” Similarly, in *Recurso No. 4397/2006* the court stated, “in this case, given the present circumstances, a simple relocation of the applicants toward more remote zones than that in which they settled could permit them to elude the persecution that they report.” In both of these cases, IPA was cited at the end of the decision and used as additional support to deny a claim, indicating that IPA is not a significant aspect of the asylum determination process in Spanish courts. These findings are supported by another study, which concluded, “IPA is something that could be interpreted as being applied as a secondary argument when the

credibility of the applicant is disputed, or when there is not a well-founded fear of persecution.”<sup>87</sup> The “unduly harsh” standard was not referenced or evaluated in any case. Due to the limited use of IPA, this variable should not affect recognition rates in Spain. United Kingdom. Courts in the UK have more liberal standards concerning what constitutes an “unduly harsh” IPA, which leads to more favorable outcomes for applicants. Contrary to Ireland, UK courts consider it to be unduly harsh for an applicant to avoid persecution by keeping his identity hidden upon return to his origin country. This standard originated in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* and was applied in *SW (lesbians - HJ and HT applied) Jamaica v. Secretary of State for the Home Department*, which involved an applicant fleeing persecution for her sexual orientation. The court granted protection and stated, “...the appellant impressed us as a calm and credible witness and we believe her firm evidence that she would not return to living discreetly, whatever the risk.” This standard was also applied in *SA (political activist - internal relocation) Pakistan v. Secretary of State for the Home Department*, which involved persecution based on political opinion. In this case the court also granted protection and ruled that a person should not have to act contrary to his normal behavior in order to avoid persecution. Unlike Ireland, it is not considered reasonable for applicants to conceal their identity. This precedent set by the Upper Tribunal is evidence that certain IPA standards are more liberal in the UK, giving applicants a higher chance obtaining protection.

Similar to the assessment of well-founded fear, UK courts also perform a personal and thorough assessment in determination of internal protection alternative. In *KA, AA, & IK (domestic violence - risk on return) Pakistan v. Secretary of State for the Home Department* protection was denied because there was a viable IPA, but the court considered a variety of factors in the assessment including: size of country, availability of IPA, security upon return, health, family situation, personal characteristics, availability of family assistance, education, and social disgrace. The court justifies its decision after carefully considering all these aspects of the applicant’s personality and individual situation. Although protection was denied, this practice of assessing all aspects of an individual should not be considered restrictive. In this case, if one thing would have been

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<sup>87</sup> *Actors of Protection and the Application of the Internal Protection Alternative* 2014, 7

different, the application could have been approved. In *SA*, IPA was considered but it was not regarded as reasonable based on specific aspects of the applicant's personality. The court stated, "requiring a political activist to live away from his home area in order to avoid persecution at the hands of his political opponents has never been considered as a proper application of the internal relocation principle."<sup>88</sup> The court took great care in assessing the asylum-seeker's position in society and what his life would be like upon return. This generous assessment reflects liberal judicial practice in the UK, which translates into high recognition rates.

#### *Particular Social Group*

Ireland, Spain, and the United Kingdom. In the 30 cases included in the study, no asylum application was denied on the basis that particular social group was not established.

Although Spanish law appears to be more restrictive because it indicates that both tests must be satisfied, analyses reveal that PSG determination rarely impacts the outcomes of the cases. This indicates that while particular social group remains an imprecise phrase, courts have developed an understanding of this term throughout the years—for example, gender and sexual orientation are well-established PSGs. This allows courts to quickly establish PSG at the beginning and then proceed with other aspects of a case. As a result, PSG should not have a significant impact on recognition rates.

### DISCUSSION

In 2013 Ireland granted protection to a mere 7% of asylum applicants. Analyses reveal that, in Ireland, a heavy reliance on country of origin information on top of a skeptical approach toward applicants overall leads to unfavorable conditions for asylum-seekers. Courts use COI to make generalizations about situations in specific countries and about the asylum seekers coming from those countries. Justices especially focus on state resources, such as the availability of support from the police or human rights organizations, and place emphasis on what an applicant *could* have done before seeking international protection. As a result, the court does not give due consideration to the subjective information provided by applicants, which makes it difficult to prove a reasonable likelihood of persecution. When it comes to the assessment of an internal protection alternative, precedent remains restrictive but Ireland appears to be developing

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<sup>88</sup> *SA* 2011, 8

a more liberal approach through adopting a more personal assessment. In the ten cases analyzed, protection was never denied on the basis of particular social group, indicating that this particular variable rarely impacts case outcomes.

Spain granted protection to 9% of asylum applicants in 2013. Given its civil law tradition, decisions from Spanish courts are very brief and little explanation is given behind the ruling, which makes it difficult to analyze judicial practice. However, certain patterns relating to judicial practice emerge when analyzing multiple decisions. Similar to Ireland, Spanish courts use COI to emphasize existing outlets of protection in an applicant's country of origin. However, unlike Ireland, Spain appears more willing to acknowledge a likelihood of persecution. This does not necessarily result in more favorable conditions for asylum seekers— Spain has a tendency to deny protection on the basis that individual persecution is not present. Therefore, COI is used to reference situations of conflict, which then allows the court to declare that protection is not applicable because the population as a whole is at risk. A thorough assessment of IPA was not present in any of the ten cases analyzed and when referenced, it was always at the end of the ruling and was not a significant part of the asylum determination process. Therefore, IPA does not necessarily impact recognition rates. Again, no case was denied on the basis of particular-social group, so this variable should not have a significant impact of recognition rates.

In contrast to Ireland and Spain, UK courts complete a very thorough, individual assessment of each asylum seeker and his or her specific situation, which often works in favor of the applicant and explains the UK's high recognition rate of 29%. Unlike in Ireland, country of origin information is considered in conjunction with the subjective information provided by the applicant. Reference to the evidence provided by applicants demonstrates a willingness on behalf of the court to give due consideration to the asylum-seeker's side of the story. IPA assessments are also liberal and always involve an assessment of an individual's situation. Lastly, protection was never denied on the basis of particular social group, indicating that this particular variable rarely impacts case outcomes.

## CONCLUSION

After analysis of the case law, it can be concluded that differences in judicial practice impact the outcomes of asylum cases, and therefore recognition rates. In light of these conclusions, future studies that can more systematically analyze judicial practice would be beneficial. A broader sample of cases may lead to a better understanding of judicial practice relating to each variable. Furthermore, a study that analyzes the reasoning behind a large number of rejected applications would be beneficial to see whether a court consistently denies claims on the same ground. This study could not control for all causal factors or even all aspects of judicial practice, but the results indicate that judicial practice is one explanation for the variation in asylum recognition rates. Domestic laws and even judicial precedent can be changed so that all states have the same standards, but application and interpretation of these standards is what makes the real difference. Therefore, future efforts to harmonize the asylum determination process should focus on the specific practices of courts if real progress is to be made.

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