



Asylum Aid's Response to the Tribunal Procedure Rules Consultation

September 2009

About Asylum Aid

Asylum Aid is an independent, national charity working to secure protection for people seeking refuge in the UK from persecution and human rights abuses abroad. We provide free legal advice and representation to the most vulnerable and excluded asylum seekers, and lobby and campaign for an asylum system based on inviolable human rights principles. The Refugee Women's Resource Project (RWRP) at Asylum Aid strives to obtain protection, respect and security for women seeking asylum in the UK by providing specialist advice, research and resources on asylum issues for women. Asylum Aid was runner up in the Liberty and Justice Human Rights Awards 2007.

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1. Asylum Aid welcomes the opportunity to reply to this consultation.
2. Asylum Aid is a member of the Immigration Law Practitioners' Association and has had the benefit of seeing their response in draft. Asylum Aid endorses the Immigration Law Practitioners' Association's response.
3. Asylum Aid's response concentrates on answering two questions posed by the consultation, namely:

“Question 7: Do respondents consider that the rules for the First-tier, proposed rules for the Upper Tribunal, and the draft Practice Directions/Practice Statements, provide a suitable framework for this jurisdiction?, and;

Question 9: Are there any other areas of procedure or process that respondents consider should be set out in either a) procedure rules, or b) practice directions?”

4. In our response to the Home Office/UK Border Agency Consultation on Immigration Appeals of November 2008 we said:

“...in recent important cases considered by the Court of Appeal and House of Lords, the decisions of the [Asylum Immigration Tribunal] have been overturned on the basis that it had not provided broad enough protection of the rights of women asylum seekers¹. Asylum Aid is concerned that the Immigration and Asylum chamber of the new Tribunal, conducting its business without specialist gender guidelines, will make similar errors to its predecessor.”

Our concern remains. However, this response will argue that the proposed Practice Directions/Statements should include gender guidelines, particularly focused upon the procedural and evidential issues that arise in women's asylum appeals. We have annexed to this response an extract from the Immigration Appellate Authority's Gender Guidelines (2000)² which sets out the relevant issues that a Practice Statement/Direction should cover³.

5. The history of Gender Guidelines in the context of UK asylum applications and appeals has been set out in recent academic writing:

¹ For example AA (Uganda) v Secretary of State for the Home Department [2008] EWCA Civ 579 and Fornah v Secretary of State for the Home Department [2006] UKHL 46

²By Natalia Berkowitz and Catriona Jarvis

³ It should be noted that the IAA Guidelines were published in November 2000 and the references contained therein are by definition limited to the state of the law at that time. However, Asylum Aid considers that the procedural and evidential guidance contained within the annexed section provides a starting point for the drafting of an up to date Practice Statement/Direction.

“The first such guidelines were adopted in 2000 by the Immigration Appellate Authority (now Asylum and Immigration Tribunal), with content that had been heavily influenced by the Australian and Canadian documents and guidelines developed by the Refugee Women's Legal Group in 1998. The notion that gender was of importance in the determination of asylum claims was recognized and consolidated in 2002 with the publication of the UNHCR's own guidelines on gender-related persecution. However, it was only in 2004 that the Home Office introduced a specific Asylum Policy Instruction for its case-workers. In broad terms, these guidelines recognize that the refugee definition has traditionally been adjudicated upon through a 'framework of male experiences', thus disadvantaging female claimants. All of these various national and international documents make specific reference to facilitating and contextualizing disclosures of rape and sexual violence; and within them, sexual violence is clearly identified as both a gender-related form of persecution and a violation of international human rights law. Importantly, moreover, such guidelines give not only legal but also procedural guidance to decision makers in relation to dealing sensitively and appropriately with women's narratives of persecution.

Despite this, the extent to which these guidelines have had any sustained and consistent effect on operational practice has been disputed. Research conducted in 2006, for example, suggested that the United Kingdom's Asylum Policy Instruction was rarely followed. Meanwhile, the gender guidelines specific to the appellate hearing process were recently removed from the Asylum and Immigration Tribunal's website, alongside a denial that they had ever been official policy.”⁴

6. Asylum Aid is aware that the then President of the Asylum and Immigration Tribunal's decision to remove the Guidelines in September 2006 was accompanied by the recommendation that the Immigration Judiciary could look to the Equal Treatment Benchbook for relevant guidance. However, the Equal Treatment Benchbook contains no guidance that specifically addresses the particular situation of asylum seekers⁵. Consequently the Asylum and Immigration Tribunal has been left without guidelines on the complex procedural and evidential issues that can present in asylum appeals, often including a need for understanding of the interplay between gender, language and cross-cultural understanding.

⁴ Baillot, H., Cowan, S. and Munro, V. “Seen but Not Heard? Parallels and Dissonances in the Treatment of Rape Narratives across the Asylum and Criminal Justice Contexts’ *Journal of Law and Society*, Vol. 36, No. 2, at p201 (footnotes omitted).

⁵ The Equal Treatment Benchbook, Judicial Studies Board at www.jsboard.co.uk/etac/etbb/index.htm

7. Asylum Aid has been advised by the Equality and Human Rights Commission that the Tribunal is obliged to meet the Gender Equality Duty contained in Equality Act 2006, section 2 to eliminate unlawful sex discrimination and harassment and promote equality of opportunity on the basis of gender. Although the duty does not extend to the exercise of the Tribunal's judicial function, the adoption of appropriate guidance in a practice statement would be consistent with this obligation. Appropriate guidance would also help the Tribunal to meet its obligations as a public body under section 6 of the Human Rights Act 1998, not to discriminate between men and women.
8. The importance of gender specific guidance in asylum claims has been noted at an international level. In July 2008 the UK was examined by the UN Convention on the Elimination of Discrimination against Women's Committee on the progress made in implementing the Convention. The CEDAW Committee made a concluding observation recommending:

"That the State party pay specific attention to the vulnerability of women asylum seekers while their claims are under examination and to ensure full implementation of the Asylum Gender Guidelines."⁶
9. The United Nations High Commissioner for Refugees, the body charged by the international community with protecting refugees, has adopted gender guidelines that state parties, including the UK, should have regard to as a result of their obligations under the Convention Relating to the Status of Refugees 1951, Article 35. UNHCR's guidelines specifically refer to evidential issues and procedural matters relevant to the future business of the Asylum and Immigration Chamber and Upper Tier of the Tribunal⁷.
10. The UK Border Agency has an Asylum Policy Instruction on 'Gender Issues in an Asylum Claim' which provides guidance for its caseowners in initial decision making⁸. Asylum Aid understands that this policy is in the process of being reviewed and updated.
11. Moreover, Asylum Aid is of the view the efforts that have been made in the Criminal Justice System to properly engage with the issues that arise from violence against women provide an instructive parallel⁹.

⁶ See CEDAW/C/GBR/CO/6 16/07/08 at www.bayefsky.com/pdf/uk_t4_cedaw_41_adv.pdf

⁷ See UNHCR Guidelines on International Protection: Gender related persecution within the context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees HCR/GIP/02/01 www.unhcr.org/3d58ddef4.html

⁸ October 2006

www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/genderissu eintheasylum.pdf?view=Binary

⁹ See Asylum Aid's Response to HM Government's Consultation Paper: Together we can end violence against women and girls at www.asylumaid.org.uk/publications.php?id=104

12. In light of the above, the adoption of an appropriate practice direction/statement on the particular gender related procedural and evidential issues that arise in asylum appeals would be consistent with domestic legal obligations and practice, international human rights law obligations and best practice recommended by the United Nations High Commissioner for Refugees. Such guidance, accompanied by appropriate revision of the Equal Treatment Bench Book, would help ensure that the complex gender issues that can be raised in asylum appeals are appropriately considered.

Appendix 1: Extract from the Immigration Appellate Authority Gender Guidelines by Natalia Berkowitz and Catriona Jarvis

Section 5 Procedural and evidential issues

5.1 Particular procedural and evidential issues may arise in relation to the asylum claims of women.

5.2 Women's approach to pursuing their asylum claims may well be different than that of some men.

"The first and foremost preoccupation [of victims of torture] is with their asylum claim. There is a noticeable difference between men and women in the manifestation of this anxiety, with exceptions, of course. Men are often much more vocal and active in their anxiety, they change solicitors, seek letters, reports, ask to be brought forward in the queue. They cannot settle. Most women I have seen [over 9 years of therapeutic work with survivors of torture] have just melted into the background after their arrival especially if they have no children, or have left their children behind. They are frequently 'befriended' by a lawyer who does nothing and they stay in the room allocated to them for weeks, months on end, just putting time and distance between themselves and their shame." [Hinchelwood, G. Dr. ¹⁰, *Gender-based Persecution: Report to the UN Expert Group Meeting on Gender-based Persecution*, November 1997]

Procedures and requirements – Application / Pre-Appeal Stage

5.3 The procedures and evidential standards / requirements adopted before the hearing by representatives and the Home Office ¹¹ will all affect the nature and quality of the Home Office decision and the evidence presented on appeal. For example, if a woman has been interviewed in the presence of her family members she may not have disclosed certain facts relevant to her claim for asylum ¹² and where a woman has not been able to check the contents of her Home Office interview this may affect the reliability of that record (currently the Home Office 'interviewing officers will no longer offer a read over of the written

¹⁰ Medical Foundation for the Care of Victims of Torture.

¹¹ For information generally on the conduct of Home Office asylum interviews at ports see Crawley, H., *Breaking Down the Barriers: A report on the conduct of asylum interviews at ports*, ILPA (1999).

¹² 'Provide women the opportunity to be questioned by themselves, out of the hearing of other members of their family. Victims of sexual abuse may not feel comfortable recounting their experiences in front of their fathers, husbands, brothers or children' UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees, (1991).

notes after an asylum interview' - letter from the Asylum Policy Unit of the Home Office to the Immigration Law Practitioners Association dated 23 June 2000).

Procedures and requirements at the Appeal Stage

5.4 The nature and quality of the evidence given at a hearing may be affected by the procedures adopted at the IAA, for example those adopted during the course of the hearing. Thus judiciary should consider whether the procedures which they adopt facilitate and encourage full disclosure by the asylum seeker.

5.5 Women's asylum claims will be more appropriately considered if interviewer, representative and decision-makers, including judiciary, are aware of the particular procedural and evidential difficulties that women asylum seekers face.

At the hearing

5.6 IAA judiciary may regulate the procedure to be followed at hearings; see Rule 30 Immigration and Asylum Appeals (Procedure) Rules 2000. Thus consideration should be given to:

- 1) provision of a female interpreter;
- 2) provision of an all female panel (Adjudicator, HOPO, interpreter) ¹³;
- 3) hearing the appeal in a more informal environment such as that adopted by the family courts, with the parties sitting around a table rather than a formal court setting;
- 4) hearing the case 'in chambers' (see Rule 40 Immigration and Asylum Appeals (Procedure) Rules 2000);
- 5) excluding family members, and / or others, from the hearing room (see Rule 40 Immigration and Asylum Appeals (Procedure) Rules 2000);
- 6) making the determination anonymous (i.e. not including the appellant's name or other facts identifying the appellant); and
- 7) requesting that evidence regarding sexual assaults be given in writing ¹⁴ or through video link. Consideration should be given to the above even where not requested to do so by an appellant or their representative.

Access to the Determination Process

¹³ see for example *Tiganov* (IAT) (11193), *Akyol* (IAT) (14745). See also para. 28 European Union Minimum Guarantees on Asylum Procedures: "Member States must endeavour to involve skilled female employees and female interpreters in the asylum procedure where necessary, particularly where female asylum-seekers find it difficult to present the grounds for their application in a comprehensive manner owing to the experiences they have undergone or to their cultural origin."

¹⁴ Australian Department of Immigration and Multicultural Affairs Guidelines on Gender Issues for Decision Makers ('ADIMA' Guidelines) at 3.26, Immigration and Refugee Board of Canada Gender Guidelines ('Canadian Guidelines') D3

5.7 Female asylum seekers' access to the asylum determination process may be hampered by a variety of factors and this may affect their asylum claims.

5.8 Women who arrive as part of a family unit are sometimes not interviewed or are cursorily interviewed about their experiences by either the Home Office or the representatives. In such circumstances full details of women's asylum claims are unlikely to be disclosed¹⁵; even where it is the woman, rather than the man, who has the stronger claim for asylum. Male relatives may fail to raise relevant issues because they are unaware of the details or their importance or ashamed to report them. For example, where the woman is not questioned herself, no evidence may have been given that a woman has been subjected to sexual violence, threats or harassment by police as a result of her own political opinions or those of her family. Further no evidence may have been given concerning persecution of the woman from within the family itself.

5.9 Even where women are invited to make independent claims for asylum (and / or are warned by the Home Office about the potential risks of not making an independent claim) women may still have particular difficulties in accessing the asylum determination process.

5.10 The Home Office, representatives, *and women themselves*, often assume that their asylum claims are derivative of male relatives' claims. A woman's claim for refugee status is not necessarily derivative and may be as strong or stronger than that of her male relative.

5.11 Women asylum seekers may not put themselves forward for interview or to claim refugee status independently of their family¹⁶. There are various reasons for this which may include (but are not limited to):

- that official matters are generally dealt with by the man in the family;
- a concern not to offend their husband or male associate(s) / relative(s) by acting independently;
- fear of disclosing information which will bring them into disrepute;
- fear that details of the interview may be disclosed to others;
- fear of dealing with officials;

¹⁵Provide women the opportunity to be questioned by themselves, out of the hearing of other members of their family. Victims of sexual abuse may not feel comfortable recounting their experiences in front of their fathers, husbands, brothers or children' - UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees, (1991), see also ADIMA Guidelines 3.10, 3.27.

¹⁶ Women's approach to pursuing their asylum claims may well be more passive than that of some men. See Hinchelwood, G. Dr. (Medical Foundation for the Care of Victims of Torture), "Gender-based Persecution: Report to the UN Expert Group Meeting on Gender-based Persecution 9-14" November 1997: *"The first and foremost preoccupation [of victims of torture] is with their asylum claim. There is a noticeable difference between men and women in the manifestation of this anxiety, with exceptions, of course. Men are often much more vocal and active in their anxiety, they change solicitors, seek letters, reports, ask to be brought forward in the queue. They cannot settle. Most women I have seen [over 9 years of therapeutic work with survivors of torture] have just melted into the background after their arrival especially if they have no children, or have left their children behind. They are frequently 'befriended' by a lawyer who does nothing and they stay in the room allocated to them for weeks, months on end, just putting time and distance between themselves and their shame."*

- a belief that she may achieve safety in other ways; and
- the fact that accepting that one is an exile may be very difficult (see further at 5.43).

5.12 Women may be extremely concerned that the details of the claim and / or the fact that they have claimed asylum be kept secret ¹⁷. Where an asylum interview or questioning is not confidential this is likely to affect an asylum seeker's disclosure of information and may discourage the making of an asylum claim.

5.13 When women apply for asylum as a dependant, they are not necessarily informed *in private*, or in terms and language they understand, of their right to make an independent application for asylum at any stage, or to obtain legal advice on the benefits of doing so. This may affect the number of women making independent claims for asylum and may lead to delay in their making claims - as they will only make the claims having obtained advice or where there is no other option for the family. Thus delay in making an asylum application should not necessarily affect the credibility of a woman's asylum claim (see further at 5.43).

5.14 Not all female asylum seekers enter the UK as part of a family, or other group. Women who enter and seek asylum on their own may also be affected by the matters raised above.

Obtaining Oral Evidence

General

5.15 Women face particular difficulties in making their case to the authorities, especially when they have had experiences which are difficult and painful to describe ¹⁸.

5.16 In the light of some of the particular difficulties which women may face the *judiciary* may wish to consider the procedures which *they* adopt during the hearing and note the options set out at 5.4 above. Adjudicators conducting first hearings may wish to raise these issues at a pre-hearing stage.

5.17 A non-confrontational exploratory interview is critical to allow for the full discussion of past experiences relating to a woman's claim and to facilitate the giving of all evidence which may be relevant to her claim. Where such an

¹⁷ ADIMA Guidelines 3.28.

¹⁸ see *R v SSHD ex parte Ejon*, (QBD) [1998] INLR 195 a case in which the asylum seeker was unable to disclose her past experiences of sexual violence. See also ADIMA Guidelines at 3.12 and 3.13, See also Hinchelwood, Dr. G. (Medical Foundation for the Care of Victims of Torture), 'Interviewing Female Asylum Seekers' Paper delivered at UNHCR Symposium on Gender-Based Persecution 23 February 1998 and UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees, 1991.

interview has not taken place this may affect the nature and quality of the evidence presented at appeal ¹⁹.

5.18 It is necessary to be aware that the manner in which the Home Office interview(s) was conducted and the manner in which the hearing is conducted may affect the evidence given. Evidence may be best obtained if during an asylum interview of a female asylum seeker the interview room and surrounding environment are conducive to open discussion, including providing ample time and ensuring that there are no disturbances ²⁰ and if interviewers and decision makers are aware of, and take into account, for example, women's childcare responsibilities and schedules, distances to be travelled and issues of privacy. Failure to pay attention to such issues may affect the nature and quality of the evidence given ²¹.

5.19 Even where the interviewer and the interviewing environment have been supportive of an asylum seeker and good practice has been followed, the interview process itself will impact on the manner in which an asylum seeker gives her testimony and the information which she reveals ²².

5.20 Any indication that a woman's claim may not be treated as confidential is likely to seriously hinder her ability to provide full details of her claim and may discourage her from making a claim ²³.

5.21 Emotional trauma and depression is likely to affect a woman's ability to give testimony ²⁴, her demeanour and the nature of the evidence which she gives.

¹⁹ Goodwin-Gill, G., *The Refugee in International Law*, Oxford University Press (1996), page 355: 'Research show section that errors in testimony increase dramatically in response to specific questions (25% - 33% more errors) by comparison with spontaneous testimony given in the form of a free report. Such free reports also tend to be sketchy and incomplete, however, and can be most effectively filled out by using 'open', rather than 'closed' questions.'

²⁰ ADIMA Guidelines 3.15.

²¹ see UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees, 1991: 'Be patient with female applicants to overcome inhibitions, particularly regarding sexual abuse. Questions may need to be asked in a number of different ways before victims of rape and other abuses feel able to tell their stories. Enough time should be allowed during the interviewing process to permit the female applicant to build a rapport with the interviewer so she is able to recount her experiences. Do not ask for details of the sexual abuse; the important thing in establishing a well-founded fear of persecution is to establish that some form has occurred.'

²² ADIMA Guidelines 3.21.

²³ ADIMA Guidelines 3.13.

²⁴ see *R v SSHD ex parte Ejon*, (QBD) [1998] INLR 195 in which it was accepted by the High Court that the applicant had been unable to disclose evidence because of psychological damage. See also Bremner et al *Deficits in Short-Term Memory in Post Traumatic Stress Disorder*, *Am J Psychiatry* 150:7, July 1993 - alterations and impairment of memory may be linked to post traumatic stress. Among the literature on the psychological effects of migration, war, etc. See Bathai P, *Stress in Exile*, *Issues in Social Work Education* Vol. 12.2, Summerfield and Toser, 'Low Intensity' *War and Mental Trauma in Nicaragua*, *Medicine and War* Vol. 7, 84-99 (1991), Summerfield D., *Addressing Human Response to War and Atrocity*, in *Beyond Trauma* (Kleber RJ, ed. 1995). See also the discussion of these issues in *Prosecutor v Jean-Paul Akayesu* (ICTR) Case No. ICTR-96-4-T, 2 September 1998. See also UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees, 1991.

5.22 Women may not realise that it is essential to disclose certain information. Where there are factors which would cause women not to disclose such information, they are unlikely to do so unless clearly asked about such experiences.

Effective Communication

5.23 The failure to appreciate cross-cultural differences may jeopardise the quality of the information revealed by a woman and prevent an effective interview taking place. For example the terms 'rape', 'assault', 'detain', 'charge', 'arrest', 'court' and 'hearing' may have different meanings or different connotations in different countries²⁵.

5.24 Cultural and other differences and trauma play an important role in determining demeanour i.e. how a woman presents herself physically, for example, whether she maintains eye contact, shifts her posture or hesitates when speaking²⁶.

5.25 Body language can be interpreted in many different ways. It is important that interviewers ensure they avoid gestures which may be perceived as intimidating or culturally insensitive or inappropriate and therefore inhibit discussion²⁷.

Obtaining Oral Evidence: Presence of Family Members

5.26 Female victims of violence, discrimination and abuse often do not volunteer information about their experiences and may be particularly reluctant to do so in the presence of family members or members of their community²⁸.

5.27 Women from all societies and especially from societies where the preservation of privacy in sexual or marital matters are important may be very reluctant to disclose certain information relevant to their asylum claim or that of other members of their family particularly where that information relates to sexual

²⁵ ADIMA Guidelines 3.18, See also the discussion of this issue in *Prosecutor v Jean-Paul Akayesu* (ICTR) Case No. ICTR-96-4-T, 2 September 1998. See also UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees, 1991.

²⁶ ADIMA Guidelines 3.29, See also UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees, 1991: *'Be aware of gender differences in communication, particularly non-verbal communications. As an interviewer avoid intimidating gestures that inhibit responses. In assessing the credibility of the female applicant, for example, do not judge it on the basis of such Western cultural values as the ability to maintain eye contact.'* - See also the discussion of this issue in *Prosecutor v Jean-Paul Akayesu* (ICTR) Case No. ICTR-96-4-T, 2 September 1998: *'... it is a particular feature of the Rwandan culture that people are not always direct in answering questions, especially if the question is delicate. In such cases, the answers given will very often have to be "decoded" in order to be understood correctly. This interpretation will rely on the context, the particular speech community, the identity of and the relation between the orator and the listener, and the subject matter of the question.'*

²⁷ ADIMA Guidelines 3.23.

²⁸ ADIMA Guidelines 3.12, 3.13, 3.27. See also UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees, 1991.

or family matters ²⁹. There are good reasons for women not to disclose information about their experiences of sexual violence. These can range from the fact that it is very hard to do to the fear that her experiences may become known to others and lead to her being ostracised from her family and / or community ³⁰. Further “some women cannot bear to believe the facts of their having been raped and therefore not only deny it to outsiders but even deny their experience to themselves.” ³¹

5.28 If family or community members are present during the giving of evidence / interviewing this may affect the nature and quality of the evidence given ³². Good interviewing practice includes asking asylum seekers *privately* whether they want to be interviewed outside the hearing of other members of the family, especially male family members and children.

5.29 These factors apply to pre-hearing interviews and also to the giving of directions and the hearing of a woman’s asylum appeal at the IAA.

²⁹ The International Criminal Tribunal for Rwanda has noted ‘the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of [Rwandan] witness to disclose graphic anatomical details of sexual violence they endured.’ - see *Prosecutor v Jean-Paul Akayesu* (ICTR) Case No. ICTR-96-4-T, 2 September 1998. Moreover the reporting of rape to authorities is very low even in Western countries. Temkin, J., *Rape and the Legal Process*, 1987, Sweet and Maxwell discusses rape reporting rates in the UK, USA and New Zealand in some detail - see pages 8-16 and notes the very low reporting of rape in those countries. She records a number of surveys including: USA: United States National Crime Survey 1979 estimated that 50% of forcible rapes were reported to the police, a survey by Diana Russell of sexual assault in the San Francisco area in 1978 found that only 1 in 10 rapes (excluding marital rape) were reported to the police. New Zealand: it has been estimated, in 1982, that four out of five ‘rape offences’ are not reported. Britain: The British Crime Survey: Scotland (published by the Scottish Office 1984) noted that 92% of sexual offences were not reported to the police; in England and Wales the British Crime Survey (published by the Home Office 1982) estimated that only 46% of rape and indecent assault offences were recorded. A survey conducted by Women’s Own magazine in 1986 found that 76% of women who claimed to have been raped did not report it to the police; according to the London Rape Crisis Centre 75% of women who reported sexual assault to them between 1976-80 did not report the offence to the police. In the UK the police have concluded that special interviewing techniques and procedures are necessary when dealing with the alleged victims of sexual violence. These initiatives are reported at pages 159-164 of Temkin, J., *Rape and the Legal Process*, 1987, Sweet and Maxwell and include special training for police officers dealing with alleged victims of sexual violence, rape suites, the use of female staff. Note also the pronouncements of the then Deputy Assistant Commissioner Jones of the Metropolitan Police (The Guardian, January 45, 1985) ‘We want to kill the myth that rape is sexually motivated - it is usually intended to inflict violence and humiliation.’ In relation to Uganda ‘in a study of 107 Ugandan women who had been raped by soldiers, only half had told anyone about the rape incident as many as 7 years after the rape, despite the fact that all still had problems related to the rape when they finally spoke of it.’ and ‘For Ugandan women, the experience of rape disrupted their sense of community; keeping this aspect of their lives secret alienated them from other people. These women often expressed the fear that they would be rejected by their partners and the rest of the community.’ Giller, JE, *War, Women and Rape*, London University 1995. Thesis; quoted in Swiss S and Giller JE, *Rape as a Crime of War: A Medical Perspective* in ‘The Journal of the American Medical Association’ August 4 1992 Vol. 470.

³⁰ In Kosovo ethnic Albanian women consider that ‘[rape] is the worst possible thing ... They would rather die than be raped, especially the unmarried, whose life is then essentially over.’ Indeed the subject is so fraught that counsellors and doctors have great problems in finding out who the victims are: ‘They cannot come and admit that they have been raped’, according to the humanitarian medical agency, *Medecins sans Frontieres*, reported in The Guardian, 19 October 1999 *Kosovo’s Wounded Women find no peace*; ADIMA Guidelines 3.12, 3.13, 3.28, 4.8.

³¹ Dr Hinchelwood, (Medical Foundation for the Care of Victims of Torture), see letter from Medical Foundation for the Care of Victims of Torture to the IAA dated 21 February 2000.

³² ADIMA Guidelines 3.12, 3.13.

Obtaining Oral Evidence Interpreters, Interviewers and Appeals

5.30 A woman may be reluctant, or find it difficult, to talk about her experiences through a male (or even female) interpreter or one who is a member of her community especially where these experiences relate to sexual or family issues³³.

5.31 Many women have been abused by men. Coupled with a fear and distrust of authorities, this fact is likely to seriously inhibit the capacity of a woman to divulge details of her experiences to a man or through a male interpreter³⁴.

5.32 The asylum applicant should be asked whether she would like a female interviewer and / or interpreter. The European Union Minimum Guarantees on Asylum Procedures state that: "Member States must endeavour to involve skilled female employees and female interpreters in the asylum procedure where necessary, particularly where female asylum-seekers find it difficult to present the grounds for their application in a comprehensive manner owing to the experiences they have undergone or to their cultural origin."³⁵

5.33 Merely being a female does *not* guarantee an awareness of gender issues³⁶ and even where the interviewer / interpreters have been female an asylum seeker may still not have fully disclosed all important features of her asylum claim³⁷.

5.34 These factors may also apply to the giving of directions and the hearing of a woman's asylum appeal at the IAA.

Obtaining Oral Evidence: Interviews and Appeals: Asking the Right Questions

5.35 The information revealed by an asylum seeker will reflect the ways in which questions are asked³⁸. Unless the correct questions are asked it is unlikely that full disclosure will be made either at interview or during the appeal hearing. The use of interpreters exacerbates this problem - unless clear and

³³ ADIMA Guidelines 3.13. See also UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees, 1991: 'The recruitment and training of female interpreters is a precondition for the most effective interviewing.'

³⁴ ADIMA Guidelines 3.13, 60. See also UNHCR Guidelines on the Protection of Refugee Women ('UNHCR Guidelines').

³⁵ see European Union Minimum Guarantees on Asylum Procedures, para. 28.

³⁶ In Sierra Leone 'Victims of sexual abuse frequently reported female rebels having taken part in rounding up operations [for rape and sexual abuse] and often singling out girls and women for their commanders.' Human Rights Watch, *Sierra Leone: Getting Away with Murder, Mutilation, Rape, New Testimony from Sierra Leone*, July 1999

³⁷ ADIMA Guidelines 3.21.

³⁸ For information on the conduct of Home Office asylum interviews see Crawley, H., *Breaking Down the Barriers: A report on the conduct of asylum interviews at ports*, ILPA (1999).

precise questions are asked they may be interpreted with a different meaning or nuance³⁹.

5.36 Some knowledge about the status and roles of women in the country from which the applicant has fled may assist the questioner in asking the right questions⁴⁰.

5.37 Questions asked during asylum interviews and hearings sometimes reflect the dominant conception that a refugee is generally a man involved in conventional politics⁴¹. It is important to ensure that the questions asked encompass the problems often faced by women. For example:

- a) Questions about political activities should not focus only on political activities as narrowly defined - such as office holding, but should be wider ranging as political activities may also include *but are not limited to* providing food or shelter, message taking, hiding people or refusing to conform to particular social norms.
- b) Where questions are asked about 'persecution' or 'torture' female asylum seekers may not give information about the particular ill-treatment which they have suffered. This may occur because the asylum seeker does not herself understand that the terms 'torture' or 'persecution' may include sexual violence, violence within the family, marriage-related harm, abortion and other forms of harm often suffered by women. A different approach might include asking whether an applicant had been, and feared being, 'treated badly'⁴².

5.38 Non-confrontational open and / or indirect questions allow the questioner to establish the applicant's reasons for fleeing and to obtain indications about whether gender-related harm has occurred⁴³.

5.39 More direct follow-up questions should be asked to ascertain details of the woman's full experiences. It should be remembered that a woman may not know what information is relevant to her claim and the questioner must use their skills to ensure that the correct information is disclosed⁴⁴. Moreover the questioner may not be aware of what information is relevant until the end of the interview. In such circumstances steps should be taken to ensure that a woman is questioned about these issues.

³⁹ ADIMA Guidelines 3.18.

⁴⁰ ADIMA Guidelines 3.14.

⁴¹ Crawley, H., *Women as Asylum Seekers: A legal handbook*, ILPA (1997) paragraph 2.2.4 at p24 and also Crawley, H., *Breaking Down the Barriers: A report on the conduct of asylum interviews at ports*, ILPA (1999).

⁴² Crawley, H., *Women as Asylum Seekers: A legal handbook*, ILPA (1997).

⁴³ see footnote 64 above.

⁴⁴ ADIMA Guidelines 3.27.

'... while the burden of proof in principle rests on the [asylum] applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application...' - paragraph 195, UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva (re-edited 1992)

'While an initial interview should normally suffice to bring an applicant's story to light, it may be necessary for the examiner to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts. Untrue statements by themselves are not a reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case.' [paragraph 199, UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva (re-edited 1992)]

Credibility

5.40 Women may face additional problems in demonstrating that their claims are credible ⁴⁵. Information to support a woman's claim may not be readily available and the nature of women's experiences and position in society may make it difficult or impossible for them to document their claims or provide evidence.

Absence of Documentary Evidence

5.41 Absence of Documentary Evidence In many circumstances refugees do not have documentary evidence relating to events which have taken place or their fears of future persecution ⁴⁶. The nature of women's activities and place within society may lead them to have particular problems ⁴⁷.

The following are some examples (this list is not exhaustive):

- a) an asylum seeker who has been persecuted because she consistently refuses to wear the veil in protest against Islamisation is unlikely to have a document to show this;
- b) an asylum seeker who has been persecuted on the basis of her husband's membership of a political party may not herself hold a party membership card and may be unable to produce her husband's card or evidence of their relationship;

⁴⁵ Immigration and Refugee Board of Canada Gender Guidelines ('Canadian Guidelines') D.

⁴⁶ see, for example, UNHCR Handbook paragraphs 196-197, 203.

⁴⁷ Canadian Guidelines C2: '...decision-makers should consider the fact that the forms of evidence which the claimant might normally provide ... of state inability to protect, will not always be either available or useful in cases of gender-related persecution.'

- c) an asylum seeker who has been persecuted on the basis of political activities such as running a soup kitchen for trade unionists, or providing shelter for politicians may not hold a party membership card;
- d) an asylum seeker who has been persecuted because of her sexual orientation is unlikely to have documentary evidence of her sexual orientation ⁴⁸; and
- e) reports regarding circumstances in the asylum seekers country of origin may fail to document or address particular issues relating to women, even where a sub-section of the report pertains to women.

Corroboration

5.42 In many cases evidence given by an asylum seeker will not be corroborated; absence of corroboration does not mean that the account given is not credible. It is an error of law to require corroborative evidence in an asylum case ⁴⁹.

Delay

5.43 Delay in claiming asylum or revealing full details of an asylum claim will not necessarily be due to the lack of credibility of a particular asylum claim or claimant.

- *A woman's priority is to achieve safety and security* (for herself and / or family members). She may not claim asylum whilst she is able to achieve safety, however temporary or illusory, through other means, whether legal or illegal. This may account for the delay in claiming asylum.
- Accepting that one is an exile is very difficult especially if it means leaving loved ones at home. This difficulty may be expressed as ambivalence about enduring exile; this is not an uncommon phenomena among women asylum seekers ⁵⁰.
- Torture, sexual violence and other persecutory treatment produce feelings of profound shame ⁵¹. This 'shame response' is a major obstacle to disclosure. Many victims will never speak about sexual

⁴⁸ Such cases may be considered either under the Convention ground of 'particular social group' (see paragraphs 3.34 - 3.38 above) or political opinion (see paragraphs 3.17-3.33).

⁴⁹ *Ackah* IAT (10953) "By making a general finding of lack of credibility and following that with a recording of statements made by the appellant with no reason as to why these should not be credible, apart from lack of substantiation, leaves open the distinct possibility that the reason for the lack of credibility was the lack of substantiation ... an appellant is entitled to know why an adjudicator disbelieves him or her, be it that the statements are inherently improbable, the evidence is contradictory or inconsistent, or the witness' demeanour and the way in which evidence is given. In this determination (apart from the lack of substantiation) there is no reason." *Kasolo* (IAT) (13190) 'It is a misdirection, in our view, to imply that corroboration is necessary.'

⁵⁰ Dr Hinchelwood, Letter from Medical Foundation for the Care of Victims of Torture to the IAA dated 21 February 2000.

⁵¹ Dr. G., Hinchelwood, (Medical Foundation for the Care of Victims of Torture), Report to UN Experts Committee, 6 November 1997

- violence or will remain silent about it for many years⁵².
- Delay in claiming asylum and / or in revealing full details about an asylum claim may also be validly occasioned by other factors including many procedural and evidential factors outlined in these guidelines (see, for example, access by women to the asylum determination process at paragraphs 5.7 - 5.14 above).

Demeanour

5.44 The level and type of emotion displayed by a woman during the recounting of her experiences should play a limited role in assessing her credibility. Individual, cultural and other differences and trauma⁵³ all play an important role in determining demeanour and make it difficult to assess credibility.

A lack of displayed emotion does not necessarily mean that the woman is not distressed or deeply affected by what has happened⁵⁴. Assessing demeanour of a witness may be particularly difficult where she is from a different country, is giving evidence either through an interpreter or in English which is not their first language.

‘as Bingham MR said at various points of his article in “Current Legal Problems” 1985 Volume 38 at page 14:

“A second note of caution must also be sounded. An English judge may have, or think that he has, a shrewd idea of how a Lloyds Broker or a Bristol wholesaler, or a Norfolk farmer, might react in some situation which is canvassed in the course of a case but he may, and I think should, feel very much more uncertain about the reactions of a Nigerian merchant, or an Indian ships’ engineer, or a Yugoslav banker. Or even, to take a more homely example, a Sikh shopkeeper trading in Bradford. No judge worth his salt could possibly assume that men of different nationalities, education, trades, experience, creeds and temperaments would act as he might think he would have done or even - which may be quite different - in accordance with his concept of what a reasonable man would have done”

There is then the further source of unreliability arising principally from the fallibility of human memory. Recollections are known to fade and to be recalled. Evidence from a witness who belongs to some other nationality giving evidence in a language other than English and through an interpreter ... again are a cause of uncertainty: a matter which an adjudicator should properly take into account in assessing

⁵² see, for example, Guler, J et al., *Uganda: War, Women and Rape*, The Lancet Vol. 337, March 9 1991 set out in full at footnote 37

⁵³ see, for example, Swiss, S., & Guler, J., *‘Rape as a Crime of War, A Medical Perspective’*, in The Journal of the American Medical Association, see footnotes 36 and 37 above.

⁵⁴ ADIMA Guidelines 3.29.

credibility.... it is generally considered as central to the adjudicator's task that there is an assessment of credibility. In a cross-cultural situation, frequently through interpreters this is a formidable task.' [Kasolo (IAT) (13190)]

'I cite, for the purpose of adopting it as an expression of my own view, a passage from "The Judge as Juror: The Judicial Determination of Factual Issues", a lecture given by Bingham J at University College, London, on 7 February 1985 and published in Current Legal Problems, 1985, page 1. "...To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm." [R v SSHD ex parte Patel (QBD) [1986] Imm AR 208].

'In assessing the credibility of the female applicant, for example, do not judge it on the basis of such Western cultural values as the ability to maintain eye contact.' [UNHCR, Gender-Sensitive Techniques for Interviewing Women Refugees (1991)]

Evidence where persecution grounds are attributed / imputed and persecution as a family member

5.45 In some circumstances women may not be able to give full details of the reasons for their ill-treatment. This may be a particular problem where women are persecuted for an imputed / attributed convention reason or where they are persecuted because they are a member of a family. Women may not know details of the activities of the relatives, community members whose views / identity are imputed or attributed to them. In many cultures men do not share information about their political, military or even social activities with their female relatives, communities or associates ⁵⁵.

Oral Evidence - discrepancies

5.46 When two (or more) people give separate accounts of the same set of circumstances it is inevitable that differences occur due to recall, emphasis and perspective. Such differences do not necessarily indicate that the witnesses are not giving a truthful account to the best of their recollection and belief.

Oral Evidence

5.47 There are many reasons, some of which are referred to above, why women in particular are not forthcoming with full information about their experiences which will be exacerbated if gender-sensitive interviewing procedures are not followed. Special care must be taken in relation to evidence

⁵⁵ Canadian Guidelines D2; UNHCR, *Gender-Sensitive Techniques for Interviewing Women Refugees* (1991): 'Understand that women in many societies do not have specific information about the activities of men in their families. Gaps in their knowledge should not be construed as lack of credibility unless there is other evidence of such lack of credibility.'

pertaining to sexual violence; care must be taken before drawing any adverse inferences where an appellant, or other witness, has earlier described a rape as an attempted rape or as touching, beating or other ill-treatment or even as pain or illness⁵⁶.

Country of Origin Information

Country Information

5.48 Even where a woman does not say that she fears (or has experienced) gender-related persecution⁵⁷ or gender-specific harm⁵⁸ her asylum claim may well be affected by the position of women in her country of origin. An assessment as to whether the fear of persecution is well-founded should not be simply based on general conditions in the applicant's country of origin but should take into account the particular experiences of women in that country.

5.49 Women's fear of persecution may be influenced by many factors which include, *but are not limited to*:

- *the position of women before the law (including customary / religious law) including their standing in court, the right to lay a complaint and give evidence, the weight of the evidence of women⁵⁹, divorce and custody law, the right to own property and to access contraception;*
- *the formal political rights of women including the right to vote, to hold office and belong to a political party;*
- *women's rights in respect of marriage, family and private life to marry the person of their choice, or not to marry, and to determine her own sexual orientation, the right to an education, a career, and a job or remunerated activities, the status of widows and divorcees, and freedom of dress;*
- *the consequences for women who refuse to abide by or challenge social norms regarding their behaviour including, for example, norms regarding sexual activity and pregnancy, norms around the institution of marriage including arranged marriages and divorce and norms about behaviour and dress;*

⁵⁶ '... of 107 Ugandan women raped during war, only two presented with what could be called psychological symptoms (nightmares and loss of libido). Fifty-three percent described their distress in physical complaints (headaches, chest pain and rashes) and 57% in gynaecological symptoms. The persistence of perceived infestation in this group often despite multiple treatment for symptoms (approximately two thirds had no clinical findings of infection) reflects a common sequel to rape of feeling dirty and infected. For Ugandan women, the experience of rape disrupted their sense of community: keeping this aspect of their lives secret alienated them from other people. These women often expressed the fear that they would be rejected by their partners and the rest of the community.' Swiss, S. and Giller J.E., *Rape as a Crime of War: A Medical Perspective* in 'The Journal of the American Medical Association' August 4 1992 Vol. 470.

⁵⁷ see definitions section at paras 1.11 -1.17 above.

⁵⁸ see definitions at paras 1.11 -1.17 above.

⁵⁹ For example in Ecuador women can only bring proceedings for rape or domestic violence if they have a witness and in Pakistan a woman's evidence is of less weight than a man's - US State Department, *1999 Country Reports*, February 2000, see also Research Directorate Documentation, Information and Research Branch, Immigration and Refugee Board Canada, *Human Rights Briefs: Women in Pakistan*, June 1994.

- *the incidence and form of violence against women* and the forms it takes (such as violence within the family, sexual abuse, honour killings, bride burning);
- *the efficacy or protection available to women* and the sanctions or penalties on those who perpetrate the violence; and
- *the consequences that may befall a woman on her return.*

Country Information: Documentary Evidence

5.50 There may be limited documentary evidence about the position of women in the country of origin. Background reports and country information often lack adequate information about the problems faced by women.

5.51 Information regarding women may be found from, among other sources:

- the Legal & Research Unit of the IAA;
- mainstream newspapers;
- human rights organisations and institutions including those with a particular concern with women;
- economic development and humanitarian organisations and institutions⁶⁰,
- organisations, institutions and journals specifically concerned with women;
- the Internet or CD-Rom (such as UNHCR's Refworld);
- specialist and expert witnesses familiar with the region and / or the gender issues involved;
- Home Office bulletins as well as reports produced by CIPU⁶¹; and
- The Women's Legal & Resource Centre, Asylum Aid.

Changes in the country of origin

5.52 The effect of changes in a country of origin must be considered in each particular case and whether they affect the existence and / or well-foundedness of the appellant's fears of persecution. Changes in circumstances in a country of origin which appear positive may, in fact, be irrelevant to an asylum claim, or strengthen a woman's fear of persecution, for example - where a woman fears domestic violence from family members a change of political leadership in her country of origin may be irrelevant to her asylum claim⁶².

5.53 Where refugee status should have been granted at the time of the application, but was not, the burden will be upon the Secretary of State to show

⁶⁰ Economic development organisations and institutions - such as Oxfam, Concern, and the Department for Overseas Development (DFID) are often particularly concerned with the position of women.

⁶¹ The Country Information and Policy Unit of the Home Office.

⁶² Immigration and Refugee Board of Canada Guidelines, C3.

that the circumstances have changed in the country of origin sufficiently to result in the fear no longer being well-founded⁶³.

5.54 Where circumstances have improved in the asylum seekers country of origin since the asylum seeker left the question will still be: is there is a well fear of persecution? Any changes which may affect this question must be durable before it can be said that the basis for the fear of persecution no longer exists⁶⁴.

5.55 Changes in the country of origin - fear of non-state agents of persecution. Feared non-state agents of persecution may remain in existence and a danger to the asylum applicant regardless of other changes in the country of origin. The decision-maker should ask - do the changes mean that the particular fears of persecution in the particular case are not well founded at the date of determination?

Expert Evidence (including medical evidence)

5.56 If an interviewer or decision-maker receives medical, psychological, professional or other related expert evidence at any stage, it should be considered with care and assessed impartially⁶⁵.

"In my judgement it was completely wrong for the tribunal in the present case to dismiss considerations put forward by experts of the quality who wrote opinions [about the situation in the asylum seeker's country of origin] on this case as 'pure speculation' " [per Lord Justice Sedley in *Karanakaran v SSHD* (CA) [2000] Imm AR 271, [2000] INLR 122]

"Any medical report or psychiatric report deserves careful and specific consideration, bearing in mind, particularly, that there may be psychological consequences from ill-treatment which may affect the evidence which is given by the applicant. In the tribunal's view, it is incumbent upon the adjudicator to indicate in the determination that careful attention has been given to each and every aspect of medical reports, particularly given that these are matters of expert evidence which cannot be dismissed out of hand." [Mohamed (IAT) (12412)⁶⁶]

⁶³ *Mohamed Arif v SSHD* (CA) [1999] INLR 327, [1999] Imm AR 271.

⁶⁴ In relation to the application of the cessation clause (Art 1C95) Refugee Convention) a 'change of circumstances' in the country of origin must be one which is a 'fundamental' change 'which can be assumed to remove the basis of the fear of persecution. A mere - possibly transitory - change in the facts surrounding the individual refugee's fear, which does not entail such major changes of circumstances, is not sufficient to make this clause applicable.' UNHCR Handbook paragraph 135, see also paragraph 136: 'It is frequently recognised that a person who - or whose family- has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there has been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.'

⁶⁵ In addition to these cases see also *Zaitz v SSHD* (CA) IATRF 99/0760/4, 28 January 2000.

⁶⁶ see also *Ibrahim* (IAT) (17270), upholding the case of *Mohamed* (IAT)(12412).

5.57 It should be noted that there is often no physical evidence following rape or sexual violence.