

Gender issues in assessing asylum claims: spreading good practice across the European Union



Briefing by the Refugee Women's Resource Project at Asylum Aid¹

This briefing was tabled by the UK Government at the Intergovernmental Consultations on Asylum, Refugees and Migration Policies in Europe, North America and Australia held in Geneva on 15/16 November 2005

1. Introduction

The Refugee Women's Resource Project welcomed the introduction of Gender Guidelines by the UK eighteen months ago. We believe that such guidance is necessary to ensure that women's and gender cases are dealt with consistently and in a way which acknowledges the particular issues faced by women in relation to an asylum claim under the Refugee Convention. We believe this to be an example of good practice that EU member States may be interested in following.

This is timely as Member States will need to have regard to gender issues in order to comply with the two new European Union Directives, the Qualification Directive² and the Asylum Procedures Directive³. We believe all member States will need to have some form of Gender Guidelines to achieve such compliance. Along with appropriate training and full implementation, this will in turn lead to improved standards.

We hope that the UK will use every opportunity to share this good practice with colleagues abroad, particularly in the European states.

2. Gender Guidelines in the UK

The Home Office in London included *Gender Issues in the Asylum Claim* within its Asylum Policy Instructions in March 2004.⁴ This covers the considerations

¹ This briefing is supported by the Asylum Rights Campaign which includes Refugee Council, Amnesty International UK Section, Medical Foundation for Victims of Torture, Jesuit Refugee Service, Justice.

² Council Directive 2004/83/EC of 29 April 2004 on *minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*

³ *Amended proposal for a Council Directive on minimum standards on procedures in Member State for granting and withdrawing refugee status* 30th April 2004

⁴ <http://www.ind.homeoffice.gov.uk/documents/asylumpolicyinstructions/apis/genderissueintheasylum.pdf?view=Binary>

caseworkers should take into account in relation to gender when assessing claims, including gender persecution and failure of state protection. It also covers procedural issues such as the need for female interviewers and interpreters. In addition, it states that country of origin information that has relevance to women's claims (such as their political, social and economic rights, protection available to them and risk on return) must be considered.

The Home Office has incorporated the Gender Guidelines into its auditing procedures through UNHCR's Quality Initiative.

The UK also has Gender Guidelines for second tier decision makers which have been in place since 2000.⁵

UNHCR has recognised the UK as having "one of the most explicitly gender-sensitive approaches to refugee status determination in Europe."⁶

3. Gender Guidelines outside Europe

Outside Europe, we note that Canada, USA, Australia and South Africa have all adopted Gender Guidelines.

The Canadian Gender Guidelines were the first to be issued in 1993 and provide a critical framework in which women's claims for protection can be understood as part of the core business of refugee protection and gender-based persecution can be considered as part of the RSD process.⁷ The USA's Gender Guidelines were produced in 1995 and cover interviews, legal analysis, training and monitoring.⁸ The following year, Australia produced Gender Guidelines providing advice on how to approach claims of gender-based persecution, procedural issues and how to interpret regulatory requirements of the different forms of protection.⁹ Finally, in South Africa, gender was accepted as an asylum applicable category within the Refugees Act 1998.

⁵ Immigration Appellate Authority 2000 *Asylum Gender Guidelines*

⁶ Crawley and Lester 2004 *Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe* UNHCR:3
http://www.unhcr.se/Protect_refugees/pdf/Gender.pdf

⁷ Canadian Immigration and Refugee Board 1993 *Guidelines for women refugee claimants fearing gender-related persecution*

⁸ United States Immigration and Naturalization Service, Office of International Affairs May 1995 *US Gender Guidelines, Consideration for Asylum Officers Adjudicating Asylum Claims from Women*

⁹ Australian Department of Immigration and Multicultural Affairs, 1996 *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers*

4. Gender policies in Europe

Within Europe, apart from the UK, only Sweden has its own Gender Guidelines.

The Swedish Migration Board produced *Gender-based persecution: Guidelines for the Investigation and Evaluation of the Needs of Women for Protection* in March 2001¹⁰. This relates to women's claims under the Refugee Convention but also to cases which are exclusively gender-related and are dealt with under a separate clause of the Aliens Act 1997 which provides for humanitarian protection only.

Eight states within Europe have included some gender related points within their general refugee status determination (RSD) procedures or other guidelines: Norway, Lithuania, Switzerland, Netherlands, Belgium, Finland, Germany and the Czech Republic.

Norway's Ministry of Justice guidelines include recognition of non-State agents and the possibility of gender constituting a Convention ground for the granting of refugee status.

Lithuania's manual for RSD staff incorporates a number of gender-related persecution points, such as a definition of Particular Social Group (PSG) including gender as a PSG, reference to women who do not conform to social and religious mores and to assessing vulnerable applicants' claims, including women.

Switzerland includes gender-related guidelines in its RSD handbook. The directive on hearing asylum claims includes a paragraph on gender-related claims stating same-sex interviewers should be provided wherever possible and automatically in cases of gender-related persecution. The annex deals with gender issues in relation to interviewing and credibility.

Germany's RSD handbook mentions interviewing female asylum-seekers and adjudicators have a handbook on the definition of gender-related persecution.

The Netherlands has guidelines related to the questioning of women and assessment of their claims and a gender-inclusive approach is incorporated in officers' training.

Belgium has gender-sensitive asylum directives in draft although it is not known whether these have been implemented.

¹⁰ Swedish Migration Board 28 March 2001 *Gender-based persecution: Guidelines for the investigation and evaluation of the needs of women for protection*

In Finland a gender-perspective should be included in all decisions made and new legislation mentions female asylum seekers.

The Czech Republic and Switzerland include gender in policies on non-refoulement or temporary/complementary protection.¹¹

The issue of Gender Guidelines has been discussed in the European Council and Parliament since 1996 and there have been recommendations for such Guidelines by a number of European bodies (see Annex 1).

5. Problems with current practice

Within Europe, the comparative analysis by UNHCR¹² found none of the 41 countries had officially adopted the UNHCR Gender Guidelines¹³ into their own legislation or policy. Although some countries have their own form of guidelines or policies as detailed above, there are inconsistencies across Europe in how asylum claims involving gender-related aspects or issues are dealt with. Below are a few selected examples demonstrating this, although there are many more potential comparisons.

- 17 out of 41 countries have recognised sexual violence as a form of persecution which “could imply that more than half ... have not...”¹⁴
- Until recently, Italy refused to recognise non-State agents whereas Norway recognises them through legislation.¹⁵
- In France, the appeals body has recognized sexual violence, specifically FGM, as a form of persecution¹⁶ whereas in Sweden cases based on a fear of FGM cannot result in refugee status.¹⁷
- Despite the reluctance of female victims to speak about sexual torture, particularly to a male interviewer, there is “considerable variation in the extent to which ... efforts are made” to allow applicants to be interviewed by an interviewer of the same sex.¹⁸
- In Switzerland, internal country of origin information reports used by the RSD authorities contain a chapter on the position of women¹⁹, in the

¹¹ *ibid*:25-27

¹² *ibid*

¹³ *Guidelines on International Protection: Gender Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* May 2002 UNHCR <http://www.unhcr.ch/cgi-bin/taxis/vtx/home/+1wwBmeU+Di8wwwwwwwwwwhFqhT0yfEtFqnp1xcAFqhT0yfEcFqGHndmnGat1omncoDn5Dzmxwwwwww1FqmRbZ/opensoc.pdf>

¹⁴ Crawley and Lester op. cit.:35

¹⁵ *ibid*: 58

¹⁶ *ibid*:36

¹⁷ *ibid*:38

¹⁸ *ibid*:108

¹⁹ *ibid*:132

Netherlands, there is a paragraph about women's situations in each country summary²⁰ whilst "the overall impression was that detailed information about women's circumstances is rare"²¹.

6. Why Gender Guidelines are necessary

The Refugee Women's Resource Project welcomes the fact that the Qualification Directive includes recognition of sexual violence and gender-specific abuse and actions of non-state agents if the state is unable or unwilling to protect as persecution.²² We are also pleased that the Asylum Procedures Directive states that a woman should not be interviewed in front of family members²³. These result in an obligation on States to take into account gender issues.

However the Directives do not go nearly as far as Gender Guidelines such as those produced in the UK and by UNHCR (see Annex 2). We believe that in order to implement the two Directives, each member State will need to have some form of policy and procedures, providing minimum standards. Without this, the ideas mentioned in the Directives are insufficient to allow their good intentions to be converted into good practice. There is a window of opportunity to do this between the present time and late 2006 when the Directives need to be complied with.

Implementation of Gender Guidelines will result in the appropriate gender issues being taken into account by decision makers and thus better quality initial decision making. This will lead to more consistent decisions and less need for appeals.

UNHCR has stated that Gender Guidelines are "an important policy mechanism for ensuring a gender-sensitive perspective on the 1951 Convention and for ensuring that the gender-related and gender-specific aspects of asylum claims are properly assessed and taken into account in procedures for refugee status determination."²⁴

7. Recommendation

²⁰ *ibid*:131

²¹ *ibid*:131

²² Council Directive 2004/83/EC of 29 April 2004 on *minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*: art. 9-2(a) and (f)

²³ *Amended proposal for a Council Directive on minimum standards on procedures in Member State for granting and withdrawing refugee status* 30th April 2004: art 11-1

²⁴ *Crawley and Lester op. cit.*: 22

One of the key recommendations in UNHCR's comparative survey of European states regarding gender-related persecution was:

States should produce clear guidance on procedural and substantive issues relevant to gender-related persecution. This guidance should draw upon and reflect the principles and standards in the UNHCR Gender Guidelines. Such guidance should be applicable to decision-makers at all stages of the RSD [refugee status determination] process (ie both initial decisions and appeals) and should be non-discretionary.

Implementation of the guidance should be evaluated and monitored by States on a regular basis (every 2 years). This information should be made available to UNHCR.²⁵

We strongly endorse this recommendation.

Conclusion

With the current emphasis on harmonisation and consistency across Europe in relation to asylum issues, we believe it is important that such consistency is provided in decision making in relation to gender claims. The new Directives are in danger of being undermined if they cannot be implemented through a lack of the policies or procedures necessary to put them into practice. The period until the Directives come into force is therefore a key time in which each EU state could produce clear guidance on assessing and dealing with claims of gender-related persecution and failure of state protection as well as procedural issues and the importance of appropriate country information. We believe that the UK is in a good position to take the lead in promoting this given the good practice it has already put into place.

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²⁵ *ibid*:159

Annex 1

Background information

European Council and Parliament resolutions

In 1996, a European Parliament Resolution urged Member States to adopt guidelines on women asylum seekers as agreed by the UNHCR Executive Committee²⁶.

In 1998, the Council of Europe's Parliamentary Assembly urged member States "to adopt criteria and guidelines dealing with women seeking asylum, in order to enhance a gender-sensitive approach and ensure women's specific needs are met, particularly at ports of entry".²⁷

In November 2003, the European Parliament adopted a resolution on the violation of women's rights calling on Member States "when considering applications for, and possible recognition of, refugee status, to take into account persecution and/or the fear of persecution which may be suffered by women on account of their sex"²⁸.

European Women's Lobby

The European Women's Lobby in its report on Beijing+10²⁹ identifies the lack of EU Gender Guidelines as a gap in relation to women asylum seekers and refugees. It recommends that the EU and its Member States should adopt - within the process of harmonisation of EU policies on asylum - the UNHCR Gender Guidelines, to assist officials throughout all of the EU member states in understanding the nature and determining the legitimacy of asylum claims by women on the basis of gender-based violence.

European Council on Refugees and Exiles

ECRE has recently suggested:

As part of the process of improving standards, common EU guidelines should be developed to assist decision-makers and promote consistency, fairness and transparency in certain types of complex case such as those involving gender-related persecution, civil war, torture survivors and children. Guidelines on gender-related persecution could be modeled on those produced by UNHCR and cover considerations caseworkers should take into account in relation to gender

²⁶ European Parliament Resolution November 1996

²⁷ Parliamentary Assembly of the Council of Europe, 1998, recommendation 1374, para 6(j)

²⁸ European Parliament Resolution on the violation of women's rights and EU international relations (2002/2286 (INI)) adopted 19/11/2003, Article 13

²⁹ European Women's Lobby November 2004 *Beijing+10: 1995-2005: Review of the Implementation of the Beijing Platform for Action by the European Union* EWL:49-51 <http://www.womenlobby.org/pdf/beijing-en.pdf>

when assessing claims, including gender persecution and failure of state protection, as well as procedural issues such as the need for female interviewers and interpreters.³⁰

³⁰ European Council for Refugees and Exiles September 2005 *Towards Fair and Efficient Asylum Systems in Europe* ECRE:21

Annex 2

Comparison between the EU Qualification and Procedures Directives and the UK's Asylum Policy Instruction on Gender Issues in the Asylum Claim (Gender Guidelines)

The **EU Qualification Directive** does recognise:

- sexual violence and gender-specific abuse as persecution [art. 9-2(a) and (f)]
- actions of non-state agents as persecution if state unable or unwilling to protect [art 6]
- gender as a circumstance relevant to a claim [art 4-3(c)]
- gender-related aspects in determining whether a particular social group exists but these do not create a PSG alone [art 10-1(d)]
- the situation of pregnant women and women who have experienced rape and sexual violence when considering subsidiary protection [art 20]
- discriminatory police or legal measures or punishment or their implementation in a discriminatory manner as persecution [art 9-2 (b)(c)(d)]

The **EU Procedures Directive** does allow for:

- a woman not to be interviewed in front of family members [art 11-1]

However, the **EU Procedures Directive** also allows for:

- evidence introduced at a late stage to be evaluated in a negative way [art 23-4(d)] (*but women disclose sexual violence late*)
- no confidentiality between a woman and her male relatives [art 11-2] (*but it is known women may feel ashamed for their male relatives to know their experience of gender persecution*)
- accelerated procedures which do not exclude claims involving evidence of sexual violence [art 23-4] (*but women do not disclose evidence of sexual violence unless they have time to gain trust*)
- the head of the family to submit an application for the whole family with dependant adults' consent [art 5-3] (*but women may not disclose their own persecution nor want to insist on making a separate application*)³¹

³¹ Siobhan Mullally Dec 2004 Gender in the refugee determination process: recognising the significance of gender in assessing qualification for refugee status in *Refugee Women: rights and wrongs* Asylum Aid:10 - 14

The **UK's Gender Guidelines** go beyond the EU Qualifications Directive and resolve some of the problems of the EU Procedures Directive through covering the following issues. They give examples of types of gender persecution and discrimination and state that internal flight may not be an option for women. In relation to procedures, they state that the interviewer and interpreter should be of the same sex as the applicant if possible, that how an applicant responds in interview can be affected if they have experienced sexual assault and that applicants should be interviewed alone if there is the possibility they have suffered such assault. They also state that caseworkers need to be sensitive to cultural/gender norms of behaviour. In relation to credibility the Gender Guidelines state that this should not be affected by women not having information that their husbands/partners have, late disclosure, or there being no physical signs of sexual violence and torture. Finally they state that caseworkers need to take account of country of origin information including the position of women before the law, their political, social and economic rights, the consequences of challenging norms, the effectiveness of protection and consequences if they were to be returned.