



**Asylum Aid's comments on 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 and
Council Directive 2005/85/EC of 1
December 2005 on minimum standards on
procedures in Member States for granting
and withdrawing refugee status**

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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. www.asylumaid.org.uk

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Comments on ways in which 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 (hereinafter “the QD”) and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereinafter “the APD”) might be made gender neutral.

Preface

Refugee Women’s Resource Project (hereinafter RWRP) is grateful for the invitation to propose amendments to the QD with regard to gender issues. It is to be hoped that Member States will welcome the opportunity to ensure that harmonisation of asylum systems throughout the European Union occurs within a gender neutral context in line with the requirements of international law such as the UN Convention for the Elimination of Discrimination Against Women (CEDAW)¹, UN General Assembly Declaration on Elimination of Violence Against Women, 1993 (DEVAW)² and UNHCR’s Gender Guidelines 2002³.

For example, Article 15(1) of CEDAW states that:

“States Parties shall accord to women equality with men before the law.”

Clearly this cannot be attained unless the law itself, and any associated procedures, accord the same equality to women and girls. It is submitted that because of the historic and entrenched degree of discrimination against women within society, positive discrimination is required in order to redress the imbalances that exist. The Preamble notes the necessity for such measures:

“... discrimination against women violates the principles of equality of rights and respect for human dignity, an obstacle to the participation of women, on equal terms with men, in the political social, economic and cultural life of their countries, hampers the growth of the prosperity of the society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,”

This is key to the proper understanding of the problems of women who seek asylum. Most have a well founded fear of persecution or are at risk of serious harm from non-State actors. Their persecution has its foundations in social and cultural structures

¹ Adopted by the United Nations General Assembly in 1979, and in force, 1981

² In force 1993

³ *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*, HCR/GIP/02/01

that permit, for example, domestic violence, early or forced marriage, FGM, bride-burning, “honour” killings and so forth.

While it is equally possible that women may experience persecution or serious harm for the same reasons as men, it should be recognised that women are vulnerable to particular types of harm related to their gender.

Introduction

1. It is gratifying to observe that the introduction of the QD acknowledges that persecution and serious harm can emanate from non-State actors as this is of immediate benefit to female asylum seekers who experience gender related or gender specific persecution. For example, if transposition is effective, protection claimants fearing FGM, sexual and other violence, “honour” killings, forced marriage and trafficking for the purposes of prostitution will have an increased possibility of obtaining refugee status or subsidiary protection in contrast to the past poor practice of certain Member States⁴.
2. However, it remains of concern that the minimum standards set out in the Directives were not originally drafted so as to take account of the particular experiences and problems that female refugees, especially women and lesbian, gay, bisexual and transsexual (LGBT) people fearing particular gender-related or gender specific persecution face; for example, difficulties in disclosing their sexuality or their experiences of rape, domestic violence or other forms of gender-based violence⁵ as well as ensuring that their claims are examined and determined in a gender sensitive asylum process. It is notable that the treatment of women and LGBT persons within the asylum process functions within a male-oriented framework designed with male experiences and perceptions in mind. This has been recognised by UNHCR in their guidelines on international protection, (to be used by both UNHCR staff and migration authorities in countries who have ratified the 1951 Refugee Convention⁶). As such it can cause practical difficulties when applied in women’s cases. The same social and cultural norms may prevent disclosure by women and girls without specialised assistance⁷.

⁴ *Gender Based Violence Within the Meaning of Persecution*, Maria Bexelius – International Conference on Refugee Women Fleeing Gender-Based Persecution, Montreal, 2001; *Lipservice or implementation? The Home Office Gender Guidance and women’s asylum claims in the UK*, Refugee Women’s Resource Project, 2003; *Comparative Analysis of gender-related persecution in national asylum legislation and practice in Europe*, Heaven Crawley & Trine Lester, UNHCR 2004

⁵ *Rape as a Crime of War: A Medical Perspective*, The Journal of the American Medical Association, August 4 1992 Vol. 470 and *Rape as a Method of Torture*, Edited by Dr M Peel, Medical Foundation for Victims of Torture, 2004

⁶ *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons; Guidelines for Prevention and Response*, UNHCR, 2003;

⁷ *Credibility Determination – Persuading the Cynical or Disbelieving Decision-Maker*, Ema Aitken – International Conference on Refugee Women Fleeing Gender-based Persecution, Montreal, 2001; *Comparative Analysis of gender-related persecution in national asylum legislation and practice in Europe*, Heaven Crawley & Trine

3. Due regard should be paid to norms contained in other international documents such as the CEDAW, the DEVAW and the UNHCR Gender Guidelines produced in 2002. For example, Article 2 of CEDAW mandates states parties “ ... to refrain from engaging in act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation”. It further demands that states “ ... take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise”. All EU Member States are party to CEDAW and thus under an obligation to respect these provisions.
4. With regard to the APD, it is notable that the treatment of women within the asylum seeking process functions within a male-oriented framework, designed with male experiences and perceptions in mind⁸. The assessment of the applications of women and girls must take into account the particular issues raised by gender and by sexual identity.
5. With regard to the assessment of these Directives, only amended Paragraphs and Articles are included. Amendments are indicated by “striking through” existing text while added text is underlined.

Lester, UNHCR 2004; *Documenting Women’s Rights Violations by non-state actors*, International Centre for Human Rights and Democratic Development and Women Living under Muslim Laws, 2006;

⁸ *Women Asylum-seekers in the UK: A gender perspective; some facts and figures*, Refugee Women’s Resource Project, 2003

Proposed Amendments

I - 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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular points 1(c), 2(a) and 3(a) of Article 63 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the European Economic and Social Committee(3),

Having regard to the opinion of the Committee of the Regions(4),

(new 7) In implementing this Directive, Member States shall have due regard to the differences in claims for protection made by women and girls. For example, recognition that gender related and based persecution such as female genital mutilation (FGM), forced and early marriage, sexuality, refusal to conform to social norms (such as not wearing a headscarf), bride burning and “honour” killings can constitute persecution or serious harm and that women’s progress through the asylum process can be limited by cultural norms such as not expressing their views, being primary care-givers to young children and pregnancy. Guidance can be obtained in other international instruments such as the Convention on the Elimination of Discrimination Against Women 1979, and the UNHCR Gender Guidelines.

#Comment

It is felt that it is essential to include in the Recital to this Directive the reasons why it is necessary to examine applications for protection from women in a different manner and to set out the basis in international materials for making amendments with regard to qualification for protection.

(8) It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request

international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention, or a person who otherwise needs international protection and appreciating the differences in gender has upon the types of persecution and persecutors faced.

#Comment

Minimum standards must be put in place ensure that all persons, irrespective of gender, age, sexual orientation or gender identity have access to a fair and equal refugee or subsidiary state protection procedure. This must include awareness that there are differences in the types of experiences of, and responses to, persecution of persons of different gender.

(15) Consultations with, the United Nations High Commissioner for Refugees may shall provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention.

#Comment

It is felt that in order to maintain a common approach, adherence to the interpretative guidance provided by UNHCR (such as the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1979) and the UNHCR Guidelines on Gender-Related Persecution) should be viewed as a minimum requirement.

(20a) It is necessary when assessing applications from women that Member States should have regard to gender-specific forms of persecution

#Comment

As it states in UNHCR's Gender Guidelines, some women may not be able to articulate the persecution or serious harm that they have experienced in terms generally applied – such as “torture” or “inhuman” or “degrading treatment” for example with regard to domestic violence, rape or FGM.

~~(26) Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.~~

#Comment

This provision should be deleted because it encourages an overly narrow interpretation of Article 15(c) that indirectly discriminates against women. It should be recognised that women in areas of general armed conflict and war face particular types of risk or serious harm due to their gender, such as, for example, forced prostitution, violence and sexual violence. This provision as currently drafted risks excluding women, as a section of the population, from the subsidiary protection.

(34) With regard to social assistance and health care, the modalities and detail of the provision of core benefits to beneficiaries of subsidiary protection status should be determined by national law. The possibility of limiting the benefits for beneficiaries of subsidiary protection status to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, age, disability, pregnancy and parental assistance, in so far as they are granted to nationals according to the legislation of the Member State concerned.

CHAPTER I

GENERAL PROVISIONS

Article 2

Definitions

For the purposes of this Directive:

(a) «international protection» means the refugee and subsidiary protection status as defined in (d) and (f);

(b) «Geneva Convention» means the Convention relating to the status of refugees done at Geneva on 28 July 1951 , as amended by the New York Protocol of 31 January 1967 ;

(c) «refugee» means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(d) «refugee status» means the recognition by a Member State of a third country national or a stateless person as a refugee;

(e) «person eligible for subsidiary protection» means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

(f) «subsidiary protection status» means the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection;

(g) «application for international protection» means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;

(h) «family members» means, insofar as the family already existed in the country of origin, the following members of the family of the beneficiary of refugee or subsidiary protection status who are present in the same Member State in relation to the application for international protection:

the spouse of the beneficiary of refugee or subsidiary protection status or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens,

the minor children of the couple referred to in the first indent or of the beneficiary of refugee or subsidiary protection status, ~~on condition that~~ whether or not they are married or unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;

#Comment

Children may be subjected to early or forced marriages. Thus, the institution of marriage of itself should not be a reason to exclude them as dependents.

(i) «unaccompanied minors» means third-country nationals or stateless persons below the age of 18, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States;

(j) «residence permit» means any permit or authorisation issued by the authorities of a Member State, in the form provided for under that

State's legislation, allowing a third country national or stateless person to reside on its territory;

(k) «country of origin» means the country or countries of nationality or, for stateless persons, of former habitual residence.

(l) «women » means women and girls.

#Comment

This definition is included in order to simplify descriptions of gender persecution and serious harm

CHAPTER II

ASSESSMENT OF APPLICATIONS FOR INTERNATIONAL PROTECTION

Article 4

Assessment of facts and circumstances

1. Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.

2. The elements referred to in ¶ paragraph 1 consist of the applicant's statements and all documentation at the applicants disposal regarding the applicant's gender, age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.

3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including customs, laws, and regulations of the country of origin and the manner in which they are applied, particularly with regard to women;

#Comment

It is noted that in certain countries, customary law is as important as state legislation and case law. More broadly, custom and practice are frequently utilised in order to perpetuate the discriminatory or persecutory treatment of women.

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail herself or himself of the protection of another country where she or he could assert citizenship.

4. The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:

(a) the applicant has made a genuine effort to substantiate his the application;

(b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;

(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;

(d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and

(e) the general credibility of the applicant has been established.

6. Any assessment of the claim in particular gender related or based persecution including sexual violence shall have due regard to the fact that women in such cases may make late disclosure of such incidences.

#Comment

It is well documented that women who experience rape as a criminal act have problems recounting their experience or recounting the incident in a coherent manner. Women who have survived persecution or serious harm in the form of sexual violence should not be placed at a disadvantage when seeking protection due to delayed disclosure or have their credibility attacked with regard to providing a clear coherent account when these are attributable to or flow from trauma as a result of sexual violence.

Article 7

Actors of protection

1. Protection must be effective and durable and can be provided by:
 - (a) the State; or
 - (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.
2. Effective and durable pProtection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia , by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.
3. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Council acts.

Article 8

Internal protection

#Comment

It is the case that the majority of applications for international protection from women involve non-State actors of persecution. It is also the case that where persecution is directed by the State, it is less likely to be held that there is the option of internal protection. As such, it can be seen that the application of this provision can have a differential impact upon women seeking international protection when compared to men. Risk of future persecution or serious harm in proposed “safe” areas may be harder to demonstrate with regard to women, depending as they do upon mores and attitudes inherent in societal or cultural frameworks. As such, it is recommended that consideration be

given to the system adopted in New Zealand which takes a gender-conscious approach to the Michigan Guidelines – approved of at UNHCR’s San Remo conference in 2001 (for example the case of P Thoman Refugee Appeal No 76044 of 11th September 2008). Regard should also be had to the “UNHCR Guidelines on International Protection: Internal Flight or Relocation Alternative within the Context of Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees”.

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

#Comment

Women travelling and or living in an area without effective male protection are at risk of persecution or serious harm in many countries for societal and cultural reasons and this is exacerbated during times of conflict and war. As such, unless a guarantee is provided that a woman can travel safely and lawfully to a “safe” place within her country of origin, she cannot be held to be able to avail herself of internal flight in that instance.

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, including, among other factors, their age, gender, language, religion, sexual identity and orientation, family connections, dependents, occupation and education.
3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin.

CHAPTER III QUALIFICATION FOR BEING A REFUGEE

Article 9

Acts of persecution

1. Acts of persecution within the meaning of article 1A of the Geneva Convention must:
 - (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which

derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

2. Acts of persecution as qualified in paragraph 1, must ~~can~~, inter alia, take the form of:

(a) acts of physical or mental violence, acts of sexual violence;

(b) societal, cultural, legal, administrative, police, and/or judicial measures which are in themselves discriminatory, including failures properly to implement or enforce legislation, or which are implemented in a discriminatory manner;

#Comment

There can be a disparity between what a country does and what it wishes to be seen to be doing with regard to the provision of gender protection and equality of opportunity. For example, FGM may be unlawful but that law may not be enforced effectively; domestic violence may not be taken seriously by (male) police officers or refuges may in effect be prisons; lesbians may know that to reveal their sexual identity will result in ostracism and vulnerability to societal punishment in the form of sexual and other violence.

(c) prosecution or punishment, which is disproportionate or discriminatory;

(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);

(f) acts of a gender-specific or child-specific nature, such as sexual violence, FGM, forced and early marriage, domestic violence and "honour" killings for example.

3. In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.

Article 10

Reasons for persecution

1. Member States shall take the following elements into account when assessing the reasons for persecution and consider each in a gender sensitive manner where appropriate:

- (a) the concept of race shall in particular include considerations of colour, descent, or membership of a particular ethnic group;
- (b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;
- (c) the concept of nationality shall not be confined to citizenship or lack thereof but shall in particular include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;
- (d) 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~~ or

that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects ~~might~~ shall also be considered, ~~without by themselves alone creating a presumption for the applicability of this Article;~~

- (e) the concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant .

2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.

#Comment

These amendments are necessary to first of all ensure that the definition of particular social group is not unduly narrowed (confirming the United Kingdom decision by the House of Lords in SSHD v K, Fornah v SSHD [2006] UKHL 46).

CHAPTER IV REFUGEE STATUS

CHAPTER V QUALIFICATION FOR SUBSIDIARY PROTECTION

Article 15

Serious harm

Serious harm consists of:

1(a) death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian's life or person by reason of ~~indiscriminate~~ violence in situations of international or internal armed conflict or generalised violence.

2. Serious harm shall be understood to constitute, among other things: female genital mutilation, sexual violence, domestic violence, forced or early marriage, lack of reproductive rights, bride-burning and forced prostitution.

#Comment

The suggested amendments to Article 15(c) compliment the deletion of Recital 26. Their aim is to clarify the meaning of Article 15(c) in order to ensure that first of all the provision is clearly not 'surplussage' and secondly that interpretative difficulties that are apparent in the emerging caselaw on Article 15(c) are clarified. Further, these amendments would ensure that women whose life and person face particular risks in situations of generalised violence and armed conflict are not denied a guarantee of access to subsidiary protection.

The suggested further amendment to Article 15 would ensure that the particular risks that women asylum seekers face are recognised.

CHAPTER VI SUBSIDIARY PROTECTION STATUS

CHAPTER VII

CONTENT OF INTERNATIONAL PROTECTION

Article 20

General rules

1. This Chapter shall be without prejudice to the rights laid down in the Geneva Convention.
2. This Chapter shall apply both to refugees and persons eligible for subsidiary protection unless otherwise indicated.
3. When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, women and pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

#Comment

In this amendment women are described separately from pregnant women as pregnancy creates a particular type of vulnerability.

4. Paragraph 3 shall apply only to persons found to have special needs after an individual evaluation of their situation.
5. The best interest of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors.
6. Within the limits set out by the Geneva Convention, Member States may reduce the benefits of this Chapter, granted to a refugee whose refugee status has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a refugee.
7. Within the limits set out by international obligations of Member States, Member States may reduce the benefits of this Chapter, granted to a person eligible for subsidiary protection, whose subsidiary protection status has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a person eligible for subsidiary protection.

Article 24

Residence permits

1. As soon as possible after their status has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least three years and renewable unless

compelling reasons of national security or public order otherwise require, and without prejudice to Article 21(3).

Without prejudice to Article 23(1), the residence permit to be issued to the family members of the beneficiaries of refugee status ~~may~~ must be valid for ~~less than~~ at least three years and renewable.

#Comment

It is our submission that women frequently claim refugee status as dependents of their husbands or partners due to prevailing cultural and societal norms. As such, to provide family members with residence permits for a shorter period is indirectly discriminatory on the grounds of gender and reinforces a woman's dependence on her spouse.

2. As soon as possible after the status has been granted, Member States shall issue to beneficiaries of subsidiary protection status a residence permit which must be valid for at least three years and renewable, unless compelling reasons of national security or public order otherwise require.

Without prejudice to Article 23(1) the residence permit to be issued to the family members of beneficiaries of subsidiary State protection must be valid for at least one year and renewable unless compelling reasons of national security or public order otherwise require.

#Comment

These are requested because there is no reason to distinguish in the length of residence permits between those granted a residence permit on the basis of their refugee status or their entitlement to subsidiary protection. In addition, similarly to requests for refugee protection, women are usually the dependents of their husbands or partners due to prevailing cultural and societal norms. As such, the refusal to issue a residence permit may have a negative impact on that woman with regard to her continued dependence upon her husband or partner. Thus to refuse her an equivalent residence permit may constitute a discriminatory breach of her rights under Articles 8 and 14 ECHR.

Article 30

Unaccompanied minors

1. As soon as possible after the granting of refugee or subsidiary protection status Member States shall take the necessary measures, to ensure the representation of unaccompanied minors by legal guardianship or, where necessary, by an organisation responsible for

the care and well-being of minors, or by any other appropriate representation including that based on legislation or Court order.

2. Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.

3. Member States shall ensure that unaccompanied minors are placed either:

(a) with adult relatives who have been assessed as suitable; or

#Comment

It is in the child's best interests that the suitability and ability of a person properly to care for that child such that the child is safe from harm are placed above any other considerations

(b) with a foster family; or

(c) in centres specialised in accommodation for minors; or

(d) in other accommodation suitable for minors.

In this context, the views of the child shall be taken into account in accordance with his or her age and degree of maturity.

4. As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

5. Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of the minor's family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis.

6. Those working with unaccompanied minors shall have had or receive appropriate training concerning their needs.

Article 33

Access to integration facilities

1. In order to facilitate the integration of refugees into society, Member States shall make provision for integration programmes which they consider to be appropriate or create pre-conditions which guarantee access to such programmes.

2. Where it is considered appropriate by Member States, beneficiaries of subsidiary protection status shall be granted access to integration programmes which shall operate to promote equality of opportunity and access.

#Comment

While it is appreciated that EU law provides for equality of opportunity, it is felt necessary to stress the importance of this for refugee women who may not have experienced such opportunity in their country of origin and will thus require assistance in becoming productive members of the protecting State.

CHAPTER VIII

ADMINISTRATIVE COOPERATION

CHAPTER IX

FINAL PROVISIONS

II - Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular point (1)(d) of the first paragraph of Article 63 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the European Parliament [2],

Having regard to the opinion of the European Economic and Social Committee [3],

Whereas:

(1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of establishing progressively an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

(2) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967 (Geneva Convention), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution (3) The Tampere Conclusions provide that a Common European Asylum System should include, in the short term, common standards for fair, non-discriminatory and efficient asylum procedures in the Member States and, in the longer term, Community rules leading to a common asylum procedure in the European Community.

(4) The minimum standards laid down in this Directive on procedures in Member States for granting or withdrawing refugee status are therefore a first measure on asylum procedures.

(5) The main objective of this Directive is to introduce a minimum framework in the Community on procedures for granting and withdrawing refugee status.

(6) The approximation of rules on the procedures for granting and withdrawing refugee status should help to limit the secondary movements of applicants for asylum between Member States, where such movement would be caused by differences in legal frameworks.

(new 7) When determining applications from women, due regard must be had to relevant international law and guidance such as the CEDAW and UNHCR Gender Guidelines.

#Comment

These international legal instruments are key in setting out the basis for an appreciation of the necessity for a gender-sensitive treatment of women within the asylum process in order to avoid discrimination and to have an understanding of the different circumstances and experiences of persecution and serious harm faced by women.

(7) It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who ask for international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is a refugee within the meaning of Article 1(A) of the Geneva Convention.

(8) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

(9) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.

(new 10) These shall be interpreted so as to recognise that a gender perspective is necessary in order to ensure a fair and satisfactory procedure for the determination of refugee status and that types of persecution, persecutors and access to escape routes and safe areas may be fundamentally different for men and women.

(10) It is essential that decisions on all applications for asylum be taken on the basis of the facts and, in the first instance, by authorities whose personnel has the appropriate knowledge or receives the necessary, on-going training and assessments in the field of asylum and refugee matters. This shall include on-going training and assessments of discrimination awareness and equal opportunities.

#Comment

In order to ensure that training is effective and meaningful, it must be gender aware and be regularly assessed.

(11) It is in the interest of both Member States and applicants for asylum to decide as soon as possible on applications for asylum. The organisation of the processing of applications for asylum should be left to the discretion of Member States, so that they shall ~~may~~, in accordance with their national needs, prioritise or accelerate the processing of any application, taking into account the minimum standards in this Directive.

(12) The notion of public order may cover a conviction for committing a serious crime.

(13) In the interests of a correct recognition of those persons in need of protection as refugees within the meaning of Article 1 of the Geneva Convention, every applicant should, subject to certain exceptions, have an effective access to procedures that are accessible regardless of gender or other difference and give the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his/her case in an environment that facilitates disclosure and sufficient procedural guarantees to pursue his/her case throughout all stages of the procedure. Moreover, the procedure in which an application for asylum is examined should normally provide an applicant at least with the right to stay pending a decision by the determining authority, access to the services of an interpreter (who in the case of female applicants shall always be female) for submitting his/her case if interviewed by the authorities, the opportunity to communicate with a representative of the United Nations High Commissioner for Refugees (UNHCR) or with any organisation working on its behalf, the right to appropriate notification of a decision, a motivation of that decision in fact and in law, the opportunity to consult a legal adviser or other counselor (who in the case of a female applicant shall always be female) and the right to be informed of his/her legal position at decisive moments in the course of the procedure, in a language he/she ~~can reasonably be supposed to understand~~.

#Comment

An environment that facilitates disclosure is recommended by UNHCR in their Gender Guidelines 2002, and it is suggested that this will be achieved by, among other means, the provision of all female environments during interview and assessment as well as the option of a female legal representative or other counsellor.

As women face cultural and societal barriers to disclosure and as these may be enhanced by trauma, it is essential that a woman applicant is informed of her position within the procedure in a manner which is clearly comprehensible. This is in view of the seriousness of the consequences for a woman in need of international State protection who fails to obtain it (for example, the case of PB v SSHD [2008] EWHC 364, where a woman in need of refugee protection came close to being removed due, among other reasons, to a failure to disclose being a survivor of sexual violence during torture).

(14) In addition, specific procedural guarantees for unaccompanied minors should be laid down on account of their vulnerability. In this context, the best interests of, for example, the child should be a primary consideration of Member States.

(new 15) In addition specific procedural guarantees for women should be laid down to reflect their different experiences and circumstances.

(15) Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In these cases, Member States should have a choice of procedure involving exceptions to the guarantees normally enjoyed by the applicant.

(16) Many asylum applications are made at the border or in a transit zone of a Member State prior to a decision on the entry of the applicant. Member States should be able to keep existing procedures adapted to the specific situation of these applicants at the border. Common rules should be defined on possible exceptions made in these circumstances to the guarantees normally enjoyed by applicants. Border procedures should mainly apply to those applicants who do not meet the conditions for entry into the territory of the Member States.

(17) A key consideration for the well-foundedness of an asylum application is the safety of the applicant in his/her country of origin. Where a third country can be regarded as a safe country of origin, Member States should be able to designate it as safe and presume its safety for a particular applicant, unless he/she presents serious counter-indications.

(18) Given the level of harmonisation achieved on the qualification of third country nationals and stateless persons as refugees, independent research and consultation into the common criteria for designating third countries as safe countries of origin should be established prior to this measure being given effect.

#Comment

It is essential that where a measure that may have a detrimental effect on the ability of a woman to obtain international protection is to be introduced, it should be demonstrated that no detriment will in fact occur.

(19) Where the Council ~~has~~ having had due regard to all appropriate sources of country of origin information including that which demonstrates an understanding of gender issues, has satisfied itself that those criteria are met in relation to a particular country of origin, and has consequently included it in the minimum common list of safe countries of origin to be adopted pursuant to this Directive, Member States should be obliged to consider applications of persons with the nationality of that country, or of stateless persons formerly habitually resident in that

country, on the basis of the rebuttable presumption of the safety of that country. In the light of the political importance of the designation of safe countries of origin, in particular in view of the implications of an assessment of the human rights situation in a country of origin and its implications for the policies of the European Union in the field of external relations, the Council should take any decisions on the establishment or amendment of the list, after consultation of the European Parliament.

CHAPTER I

GENERAL PROVISIONS

Article 2

Definitions

For the purposes of this Directive:

(a) "Geneva Convention" means the Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967;

[new b] "UNHCR Gender Guidelines" means the UNHCR Gender Guidelines 2002 and any future amendments thereto;

(b) "application" or "application for asylum" means an application made by a third country national or stateless person which can be understood as a request for international protection from a Member State under the Geneva Convention. Any application for international protection is presumed to be an application for asylum, unless the person concerned explicitly requests another kind of protection that can be applied for separately;

(c) "applicant" or "applicant for asylum" means a third country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken;

(d) "final decision" means a decision on whether the third country national or stateless person be granted refugee status by virtue of Directive 2004/83/EC and which is no longer subject to a remedy within the framework of Chapter V of this Directive irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome, subject to Annex III to this Directive;

(e) "determining authority" means any quasi-judicial or administrative body in a Member State responsible for examining applications for asylum and competent to take decisions at first instance in such cases, subject to Annex I;

(f) "refugee" means a third country national or a stateless person who fulfils the requirements of Article 1 of the Geneva Convention as set out in Directive 2004/83/EC;

(g) "refugee status" means the recognition by a Member State of a third country national or stateless person as a refugee;

(h) "unaccompanied minor" means a person below the age of 18 who arrives in the territory of the Member States unaccompanied by an adult responsible for him/her whether by law or by custom, and for as long as he/she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he/she has entered the territory of the Member States;

(new i) "woman" and "women" indicates all female applicants whether or not in their majority.

(i) "representative" means a person acting on behalf of an organisation representing an unaccompanied minor as legal guardian, a person acting on behalf of a national organisation which is responsible for the care and well-being of minors, or any other appropriate representation appointed to ensure his/her best interests;

(j) "withdrawal of refugee status" means the decision by a competent authority to revoke, end or refuse to renew the refugee status of a person in accordance with Directive 2004/83/EC;

(k) "remain in the Member State" means to remain in the territory, including at the border or in transit zones, of the Member State in which the application for asylum has been made or is being examined.

CHAPTER II

BASIC PRINCIPLES AND GUARANTEES

Article 6

Access to the procedure

1. Member States may require that applications for asylum be made in person and/or at a designated place.

[new 6.1(a)] Member States shall ensure that indigent applicants are assisted to travel to the place where an application for asylum may be made.

[new 6.1(b)] Member States shall ensure that applicants who are primary care-givers to children under the age of five, pregnant women, unaccompanied minors, people with mental or physical disabilities and other vulnerable groups may make their applications in writing so as to avoid making an application in person.

#Comment

It is of concern that unless these provisions are implemented, women will be at a disadvantage where travel of more than half a

mile to apply is involved as they are more likely to have primary care-giving responsibilities and less likely to have access to means of production in order to afford travel. Other vulnerable groups should be assisted to make applications without having to travel in order to facilitate making their applications.

2. Member States shall ensure that each adult having legal capacity has the right to make an application for asylum on his/her own behalf.

3. Member States may provide that an application may be made by an applicant on behalf of his/her dependants. In such cases Member States shall ensure that dependant adults consent to the lodging of the application on their behalf, failing which they shall have an opportunity to make an application on their own behalf.

Consent shall be requested at the time the application is lodged or, at the latest, when the personal interview with the dependant adult is conducted.

4. Member States may determine in national legislation:

(a) the cases in which a minor can make an application on his/her own behalf;

(b) the cases in which the application of an unaccompanied minor has to be lodged by a representative as provided for in Article 17(1)(a);

(c) the cases in which the lodging of an application for asylum is deemed to constitute also the lodging of an application for asylum for any unmarried minor.

5. Member States shall ensure that authorities likely to be addressed by someone who wishes to make an application for asylum are able to advise that person how and where he/she may make such an application and/or may require these authorities to forward the application to the competent authority.

Article 8

Requirements for the examination of applications

1. Without prejudice to Article 23(4)(i), Member States shall ensure that applications for asylum are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible.

2. Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that:

(a) applications are examined and decisions are taken individually, objectively and impartially;

(b) precise and up-to-date information is obtained from various sources, such as the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions;

(c) the personnel examining applications and taking decisions have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law and have been trained and regularly assessed with regard to their knowledge, understanding and application of gender awareness in the asylum process.

3. The authorities referred to in Chapter V shall, through the determining authority or the applicant or otherwise, have access to the general information referred to in paragraph 2(b), necessary for the fulfilment of their task. Such information must be acquired with due regard to gender differences.

4. Member States may provide for rules concerning the translation of documents relevant for the examination of applications.

5. When determining applications from women, due regard must be had to the UNHCR Gender Guidelines.

Article 10

Guarantees for applicants for asylum

1. With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants for asylum enjoy the following guarantees:

(a) they shall be informed in a language which they ~~may reasonably be supposed to~~ understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities. They shall be informed of the time-frame, as well as the means at their disposal for fulfilling the obligation to submit the elements as referred to in Article 4 of Directive 2004/83/EC. This information shall be given in time to enable them to exercise the rights guaranteed in this Directive and to comply with the obligations described in Article 11;

(b) they shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary. Member States shall consider it necessary to give these services at least when the determining authority calls upon the applicant to be interviewed as referred to in Articles 12 and 13 and appropriate communication cannot be ensured without such services. In this case and in other cases where the competent authorities call upon the applicant, these services shall be paid for out of public funds;

(c) they shall not be denied the opportunity to communicate with the UNHCR or with any other organisation working on behalf of the UNHCR in the territory of the Member State pursuant to an agreement with that Member State;

(d) they shall be given notice in reasonable time of the decision by the determining authority on their application for asylum. If a legal adviser or other counsellor is legally representing the applicant, Member States may choose to give notice of the decision to him/her instead of to the applicant for asylum and this shall be done where it has specifically been requested by the:

#Comment

This measure is essential in order to protect women who may not have secure postal addresses from receiving papers that may disclose confidential information to other family members.

(e) they shall be informed of the result of the decision by the determining authority in a language that they ~~may reasonably be supposed to~~ understand when they are not assisted or represented by a legal adviser or other counsellor and when free legal assistance is not available. The information provided shall include information on how and by when to challenge a negative decision in accordance with the provisions of Article 9(2).

2. With respect to the procedures provided for in Chapter V, Member States shall ensure that all applicants for asylum enjoy equivalent guarantees to the ones referred to in paragraph 1(b), (c) and (d) of this Article.

Article 11

Obligations of the applicants for asylum

1. Member States may impose upon applicants for asylum obligations to cooperate with the competent authorities insofar as these obligations are necessary for the processing of the application.

2. In particular, Member States may provide that:

(a) (i) applicants for asylum are required to report to the competent authorities or to appear before them in person, either without delay or at a specified time;

(ii) The competent authorities shall take account of whether the applicant is pregnant or the primary care-giver of children not yet in full-time education when deciding upon the conditions of reporting, including time, frequency, distance travelled, means of transportation and financial assistance to travel;

(b) applicants for asylum have to hand over documents in their possession relevant to the examination of the application, such as their passports;

(c) applicants for asylum are required to inform the competent authorities of their current place of residence or address and of any changes thereof as soon as possible. Member States may provide that the applicant shall have to accept any communication at the most recent place of residence or address which he/she indicated accordingly;

(d) the competent authorities may search the applicant and the items he/she carries with him/her within the scope of rules and law applicable to nationals of the Member States and ensuring that women applicants are only ever searched by women;

(e) the competent authorities may take a photograph of the applicant; and

(f) the competent authorities may record the applicant's oral statements, provided he/she has previously been informed thereof

Article 13

Requirements for a personal interview

1. A personal interview shall normally take place without the presence of family members unless the determining authority ~~considers it can~~ demonstrate that it is necessary for an appropriate examination to have other family members present.

#Comment

It is submitted that a woman cannot properly provide an account of her experiences when she is in the presence of other family members, particularly male family members. It can never be acceptable for a woman to disclose her account of previous persecution or serious harm where children are present, whatever the age of the child or children.

2. A personal interview shall take place under conditions which ensure appropriate confidentiality.

3. Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall:

(a) ensure that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin, or vulnerability. In particular, women applicants shall be entitled to have their interviews conducted by a woman ; and

(b) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication need not necessarily take place in the language preferred by the applicant for asylum if there is another language which he/she ~~may reasonably be supposed to understand~~ and in which he/she is able to communicate clearly. Women applicants shall be entitled to a woman interpreter.

4. Member States ~~may~~ shall provide for rules concerning the presence of third parties at a personal interview.

5. This Article is also applicable to the meeting referred to in Article 12(2)(b).

#Comment

Given the difficulties associated with disclosure for women and already outlined within this paper it is appropriate that women applicants are interviewed by woman and have a woman interpreter

Article 14

Status of the report of a personal interview in the procedure

1. Member States shall ensure that a written report is made of every personal interview, containing at least the essential information regarding the application, as presented by the applicant, in terms of Article 4(2) of Directive 2004/83/EC and a tape recording of the interview itself after the interview has taken place.

#Comment

It is considered important that there is evidence that the interview was properly conducted in order to protect all parties concerned and because the issues are of such importance to the applicant. It is of additional import in providing a record of any inability to disclose or lack of coherence on the part of the applicant for reasons where adverse credibility findings should not be made, such as, for example, trauma or other failure to be able to understand or engage with the process.

2. Member States shall ensure that applicants have timely access to the report of the personal interview. Where access is only granted after the decision of the determining authority, Member States shall ensure that access is possible as soon as necessary for allowing an appeal to be prepared and lodged in due time.

3. Member States may request the applicant's approval of the contents of the report of the personal interview.

Where an applicant refuses to approve the contents of the report, the reasons for this refusal shall be entered into the applicant's file.

The refusal of an applicant to approve the contents of the report shall not prevent the determining authority from taking a decision on his/her application nor shall it adversely influence the decision.

#Comment

This is of relevance where the written record is in a language other than that understood by the applicant or where the applicant is not literate or where the applicant is not given sufficient time to appreciate whether there is any alteration that should be made.

4. This Article is also applicable to the meeting referred to in Article 12(2)(b).

Article 15

Right to legal assistance and representation

1. Member States shall allow applicants for asylum the opportunity, ~~at their own cost~~ to consult in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their asylum applications.

2. Member States shall ensure free legal assistance and/or representation be granted on request subject to the provisions of paragraph 3.

2. In the event of a negative decision by a determining authority, Member States shall ensure that free legal assistance and/or representation be granted on request, subject to the provisions of paragraph 3.

3. Member States may provide in their national legislation that free legal assistance and/or representation is granted:

(a) only for procedures before a court or tribunal in accordance with Chapter V and not for any onward appeals or reviews provided for under national law, including a rehearing of an appeal following an onward appeal or review; and/or

(b) only to those who lack sufficient resources; and/or

(c) only to legal advisers or other counsellors specifically designated by national law to assist and/or represent applicants for asylum; and/or

(d) only if the appeal or review is likely to succeed, except if the application is subject to an accelerated procedure.

Member States shall ensure that legal assistance and/or representation granted under point (d) is not arbitrarily restricted.

#Comment

It is our position that legal representation is necessary to ensure a fair and efficient asylum process both at initial examination and on appeal or review. Women asylum seekers often present particularly complicated claims and are therefore particularly in need of legal advice. In addition they are often less likely than men to be able to afford to pay for legal representation themselves.

4. Rules concerning the modalities for filing and processing requests for legal assistance and/or representation may be provided by Member States.

5. Member States may also:

(a) impose monetary and/or time-limits on the provision of free legal assistance and/or representation, provided that such limits do not arbitrarily restrict access to legal assistance and/or representation;

(b) provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

6. Member States may demand to be reimbursed wholly or partially for any expenses granted ~~if and when the applicant's financial situation has improved considerably~~ or if the decision to grant such benefits was taken on the basis of false information supplied by the applicant.

Article 16

Scope of legal assistance and representation

1. Member States shall ensure that a legal adviser or other counsellor admitted or permitted as such under national law, and who assists or represents an applicant for asylum under the terms of national law, shall enjoy access to such information in the applicant's file as is liable to be examined by the authorities referred to in Chapter V, insofar as the information is relevant to the examination of the application without hindrance or delay.

Member States may make an exception where disclosure of information or sources can be shown to ~~would~~ jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications of asylum by the competent authorities of the Member States or the international relations of the Member States would be compromised. In these cases, access to the information or sources in question shall be available to the authorities referred to in Chapter V, except where such access is precluded in cases of national security.

#Comment

In the interests of justice and bearing in mind the importance of achieving international protection to the applicant, it is essential that information is not withheld without good cause being demonstrated.

2. Member States shall ensure that the legal adviser or other counsellor who assists or represents an applicant for asylum has access to closed areas, such as detention facilities and transit zones, for the purpose of consulting that applicant without hindrance or delay. Member States may only limit the possibility of visiting applicants in closed areas where such limitation is, by virtue of national legislation, objectively shown to be necessary for the security, or public order or administrative management of the area, or in order to ensure an efficient examination of the application, provided that access by the legal adviser or other counsellor is not thereby severely limited or rendered impossible.

3. Member States may provide rules covering the presence of legal advisers or other counsellors at all interviews in the procedure, without prejudice to this Article or to Article 17(1)(b).

4. Member States may provide that the applicant is allowed to bring with him/her to the personal interview a legal adviser or other counsellor admitted or permitted as such under national law.

Member States may require the presence of the applicant at the personal interview, even if he/she is represented under the terms of national law by such a legal adviser or counsellor, and may require the applicant to respond in person to the questions asked.

The absence of a legal adviser or other counsellor shall not prevent the competent authority from conducting the personal interview with the applicant.

Article 17

Guarantees for unaccompanied minors

1. With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 12 and 14, Member States shall:

(a) as soon as possible take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application. This representative can also be the representative referred to in Article 19 of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [7];

(b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare

himself/herself for the personal interview. Member States shall allow the representative to be present at that interview and to ask questions or make comments, within the framework set by the person who conducts the interview.

Member States may require the presence of the unaccompanied minor at the personal interview, even if the representative is present.

2. Member States may refrain from appointing a representative where the unaccompanied minor:

(a) will in all likelihood reach the age of maturity before a decision at first instance is taken; or

(b) can avail herself/himself, free of charge, of a legal adviser or other counsellor, admitted as such under national law to fulfil the tasks assigned above to the representative; or

(c) ~~is married or has been married.~~

#Comment

Young women and girls may be subjected to forced or early marriages and the mere fact of this should not preclude their being assisted as minors.

3. Member States may, in accordance with the laws and regulations in force on 1 December 2005, also refrain from appointing a representative where the unaccompanied minor is ~~46~~ 18 years old or older, unless he/she is unable to pursue his/her application without a representative.

#Comment

Unaccompanied minors seeking asylum are frequently from areas of great conflict and are vulnerable. As such, the standard ages of majority do not necessarily mean that they are emotionally equipped to process through the asylum system as adults, especially where they have lost contact with family members.

4. Member States shall ensure that:

(a) if an unaccompanied minor has a personal interview on his/her application for asylum as referred to in Articles 12, 13 and 14, that interview is conducted by a person who has the necessary knowledge of the special needs of minors and the specific procedures in place to assist them;

(b) an official with the necessary knowledge of the special needs of minors and the specific procedures in place prepares the decision by the determining authority on the application of an unaccompanied minor.

5. Member States may use medical examinations to assess determine the age of unaccompanied minors within the framework of the examination of an application for asylum.

#Comment

It is the case that age assessment examinations can never properly determine a child or young adult's correct age. In any case, proper regard must be had to the vulnerability of the child or young adult.

In cases where medical examinations are used, Member States shall ensure that:

(a) unaccompanied minors are informed prior to the examination of their application for asylum, and in a language which they ~~may reasonably be supposed to~~ understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for asylum, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination;

(b) unaccompanied minors and/or their representatives consent to carry out an examination to determine the age of the minors concerned; and

(c) the decision to reject an application for asylum from an unaccompanied minor who refused to undergo this medical examination shall not be based solely on that refusal.

The fact that an unaccompanied minor has refused to undergo such a medical examination shall not prevent the determining authority from taking a decision on the application for asylum.

6. The best interests of the child shall be a primary consideration for Member States when implementing this Article.

[New Article 18]

Guarantees for women

#Comment

It is our submission that due to the particular experiences and circumstances of women seeking international protection, it is necessary to provide specific guarantees with regard to their procession through the process.

1. With respect to all procedures provided for in this Directive having in mind the UNHCR Gender Guidelines and without prejudice to the provisions of Articles 12 and 14, Member States shall:

(a) as soon as possible take measures to ensure that a female legal representative represents and/or assists the female applicant with respect to the examination of the application;

(b) ensure that the legal representative is given the opportunity to inform the woman about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare herself for the personal interview; Member States may require the presence of the woman at the personal interview, even if the legal representative is present;

(c) ensure that where the woman has primary care-giver responsibilities, the child or children are provided with appropriate care while the woman attends the interview;

(d) ensure that where a woman travels to interview and the children do not accompany her, due regard shall be had to the effect of separation on children and mother in each particular case when considering the time spent by the woman at the place of interview and the distance she must travel;

(d) ensure that women have and are notified of the right to have appropriate breaks throughout the interview particularly where they are pregnant, unwell or breast-feeding;

2. Member States shall ensure that women who have suffered gender related violence are never subject to accelerated procedures for determining their claims.

6. Member States shall ensure that:

(a) if a woman has a personal interview on her application for asylum as referred to in Articles 12, 13 and 14, that, unless otherwise requested, that interview is conducted by a woman who has the necessary knowledge of the special needs of such women and of the specific procedures in place to assist them;

(b) the official that makes the decision has the necessary knowledge of the special needs of women and of gender related and gender based persecution and of the specific procedures in place and assumes responsibility for preparation of the decision by the determining authority on the application of a woman.

5. Member States shall, where appropriate, make use of reports from suitably qualified individuals to assist in the assessment of the effect of any violence or sexual violence on women within the framework of the examination of an application for asylum.

In cases where medical examinations are used, Member States shall ensure that:

(a) women are informed prior to the examination of their application for asylum, and in a language which they understand, of the possibility that their trauma may be assessed by medical examination. This shall include confirmation of the confidentiality of such an examination outside the asylum application process, information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for asylum;

(b) there shall be no adverse conclusions with regard to credibility drawn from the refusal of a woman to undergo the medical examination;

(c) medical examinations shall, unless otherwise expressly requested be undertaken by female medical examiners.

(d) due regard is paid to the fact that victims of sexual violence are frequently unable to disclose their experiences for some time; that the evaluation of trauma in such cases is a complex matter and that trauma may manifest in a variety of ways;

(e) the decision to reject an application for asylum from a woman who refused to undergo this medical examination shall not be based solely on that refusal.

The fact that a woman has refused to undergo such a medical examination shall not prevent the determining authority from taking a decision on the application for asylum.

#Comment

The proposed Article contains a consolidation of some of the key aspects of the procedural safeguards that women asylum seekers require some of which are contained in other suggested amendments elsewhere.

Article 20

Procedure in the case of implicit withdrawal or abandonment of the application

1. When there is reasonable cause to consider that an applicant for asylum has implicitly withdrawn or abandoned his/her application for asylum, Member States shall ensure that the determining authority takes a decision to either discontinue the examination or reject the application on the basis that the applicant has not established an entitlement to refugee status in accordance with Directive 2004/83/EC and shall notify the applicant or their legal representative or other counsellor in writing of the decision and their right of appeal.

Member States may assume that the applicant has implicitly withdrawn or abandoned his/her application for asylum in particular when it is ascertained that:

(a) he/she has failed to respond to requests to provide information essential to his/her application in terms of Article 4 of Directive

2004/83/EC or has not appeared for a personal interview as provided for in Articles 12, 13 and 14, unless the applicant demonstrates within a reasonable time that his/her failure was due to circumstances beyond his control;

(b) he/she has absconded or left without authorisation the place where he/she lived or was held, without contacting the competent authority within a reasonable time, or he/she has not within a reasonable time complied with reporting duties or other obligations to communicate.

For the purposes of implementing these provisions, Member States may lay down time-limits or guidelines.

2. Member States shall ensure that the applicant who reports again to the competent authority after a decision to discontinue as referred to in paragraph 1 of this Article is taken, is entitled to request that his/her case be reopened, unless the request is examined in accordance with Articles 32 and 34.

Member States may provide for a time-limit after which the applicant's case can no longer be re-opened.

Member States shall ensure that such a person is not removed contrary to the principle of non-refoulement.

Member States may allow the determining authority to take up the examination at the stage where it was discontinued.

Article 21

The role of UNHCR

1. Member States shall allow the UNHCR:

(a) to have access to applicants for asylum, including those in detention and in airport or port transit zones;

(b) to have access to information on individual applications for asylum, on the course of the procedure and on the decisions taken, provided that the applicant for asylum agrees thereto;

(c) to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.

(d) to provide its Gender Guidelines as a template for the treatment of asylum-seeking women;

#Comment

The UNHCR Gender Guidelines should be viewed as a model for the protection of women applicants for international protection.

2. Paragraph 1 shall also apply to an organisation which is working in the territory of the Member State concerned on behalf of the UNHCR pursuant to an agreement with that Member State.

Article 22

Collection of information on individual cases

For the purposes of examining individual cases, Member States shall not:

(a) directly or indirectly disclose information regarding individual applications for asylum, or the fact that an application has been made, to the alleged actor(s) of persecution of the applicant for asylum;

(b) obtain any information from the alleged actor(s) of persecution in a manner that would result in such actor(s) being directly or indirectly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin.

CHAPTER III

PROCEDURES AT FIRST INSTANCE

SECTION I

Article 23

Examination procedure

1. Member States shall process applications for asylum in an examination procedure in accordance with the basic principles and guarantees of Chapter II,

2. Member States shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.

Member States shall ensure that, where a decision cannot be taken within six months, the applicant concerned shall either:

(a) be informed of the delay; or

(b) receive, upon his/her request, information on the time-frame within which the decision on his/her application is to be expected. Such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that time-frame.

3. Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees of Chapter II,

including where the application is likely to be well-founded or where the applicant has special needs

4. Member States may also provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be prioritised or accelerated if:

(a) the applicant, in submitting his/her application and presenting the facts, has only raised issues that are not relevant or of minimal relevance to the examination of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC; or

(b) the applicant clearly does not qualify as a refugee or for refugee status in a Member State under Directive 2004/83/EC; or

(c) the application for asylum is considered to be unfounded:

(i) because the applicant is from a safe country of origin within the meaning of Articles 29, 30 and 31, or

(ii) because the country which is not a Member State, is considered to be a safe third country for the applicant, without prejudice to Article 28(1); or

(d) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity and/or nationality that could have had a negative impact on the decision and did not do so under duress; or

(e) the applicant has filed another application for asylum stating other personal data; or

(f) the applicant has not produced information establishing with a reasonable degree of certainty his/her identity or nationality, or it is likely that, in bad faith, he/she has destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality and has not acted under duress; or

(g) the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having been the object of persecution referred to in Directive 2004/83/EC; or

(h) the applicant has submitted a subsequent application which does not raise any relevant new elements with respect to his/her particular circumstances or to the situation in his/her country of origin; or

(i) the applicant has failed without reasonable cause to make his/her application earlier, having had opportunity to do so; or

(j) the applicant is shown to be making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal; or

(k) the applicant has failed without good reason to comply with obligations referred to in Article 4(1) and (2) of Directive 2004/83/EC or in Articles 11(2)(a) and (b) and 20(1) of this Directive; or

(l) the applicant entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible, given the circumstances of his/her entry or

(m) the applicant is a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security and public order under national law; or

(n) the applicant refuses to comply with an obligation to have his/her fingerprints taken in accordance with relevant Community and/or national legislation; or

(o) the application was made by an unmarried minor to whom Article 6(4)(c) applies, after the application of the parents or parent responsible for the minor has been rejected and no relevant new elements were raised with respect to his/her particular circumstances or to the situation in his/her country of origin.

SECTION V

Article 35

Border procedures

1. Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide at the border or transit zones of the Member State on applications made at such locations.

2. However, when procedures as set out in paragraph 1 do not exist, Member States may maintain, subject to the provisions of this Article and in accordance with the laws or regulations in force on 1 December 2005, procedures derogating from the basic principles and guarantees described in Chapter II, in order to decide at the border or in transit zones as to whether applicants for asylum who have arrived and made an application for asylum at such locations, may enter their territory.

3. The procedures referred to in paragraph 2 shall ensure in particular that the persons concerned:

(a) are allowed to remain at the border or transit zones of the Member State, without prejudice to Article 7;

(b) are immediately informed of their rights and obligations, as described in Article 10(1) (a);

(c) have access, if necessary, to the services of an interpreter, as described in Article 10(1)(b);

(d) are interviewed, before the competent authority takes a decision in such procedures, in relation to their application for asylum by persons with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law, as described in Articles 12, 13 and 14;

(e) can consult a legal adviser or counsellor admitted or permitted as such under national law, as described in Article 15(1); and

(f) have a representative appointed in the case of unaccompanied minors or women, as described in Articles 17(1) and [new 18(1)], unless Article 17(2) or (3) applies.

Moreover, in case permission to enter is refused by a competent authority, this competent authority shall state the reasons in fact and in law why the application for asylum is considered as unfounded or as inadmissible.

4. Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 2 is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant for asylum shall be granted entry to the territory of the Member State in order for his/her application to be processed in accordance with the other provisions of this Directive.

5. In the event of particular types of arrivals, or arrivals involving a large number of third country nationals or stateless persons lodging applications for asylum at the border or in a transit zone, which makes it practically impossible to apply there the provisions of paragraph 1 or the specific procedure set out in paragraphs 2 and 3, those procedures may also be applied where and for as long as these third country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.

CHAPTER IV

PROCEDURES FOR THE WITHDRAWAL OF REFUGEE STATUS

CHAPTER V

APPEALS PROCEDURES

CHAPTER VI

GENERAL AND FINAL PROVISIONS

ANNEX II

Designation of safe countries of origin for the purposes of Articles 29 and 30(1)

A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system

and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

In making this assessment, account shall be taken, inter alia, of the extent to which protection is provided against persecution or mistreatment by:

- (a) the relevant laws and regulations of the country and the manner in which they are applied;
- (b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;
- (c) respect of the non-refoulement principle according to the Geneva Convention;
- (d) provision for a system of effective remedies against violations of these rights and freedoms.

(e) CEDAW and the UNHCR Gender Guidelines
