

Asylum is not gender neutral

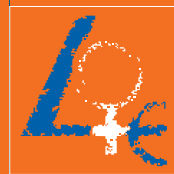
Protecting women seeking asylum

*The need for gender guidelines
to implement the EU qualification
directive and the asylum
procedures directive*

A PRACTICAL ADVOCACY GUIDE

A joint project of the:
European Women's Lobby
Refugee Women's Resource
Project at Asylum Aid, UK

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This story illustrates the experience of many women when they seek asylum in a European country:

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I feel the asylum authorities didn't really understand my experiences as a woman. Their overall attitude towards me was demeaning. I expected to be treated as an equal in the country where I sought asylum as I thought that women's rights were more advanced there.

My husband was a very violent man and for years I suffered at his hands with constant beatings and emotional distress; he even raped me a number of times. I kept going to the police but they kept telling me that my place was with my husband and sending me back to him. In the end I was too scared to go to them again. I didn't seem to have any legal rights. In my country the State doesn't protect women from such violence.

Although language wasn't a problem for me, the information I was given about the asylum procedure was very difficult to understand. Nobody asked if I needed any clarification. At my screening interview, there were also other people being interviewed in the same room, which was a big open space. The noise was so loud that I didn't feel comfortable or safe. When I had my substantive interview about my asylum claim my children kept distracting me and it was difficult to talk openly with them in the same room. But what was even more difficult was that the interview was with a male immigration officer. In my country we aren't used to having conversations with men without a family member being present, let alone about such personal experiences. He was quite nice and polite and I found I could tell him about some things but I felt too ashamed to tell him about what my husband had done to me. If this has happened to you, whatever country you come from, you feel a sense of shame, that it was your fault, and that you can't trust people anymore. Talking about rape was to me another form of torture. So I didn't get to tell my full story even though I knew I was meant to.

My claim got refused but by the appeal I got a lawyer although I had to search for a long time as some were asking for prices I couldn't afford. Finally, I got free legal aid and my lawyer was a woman. So I did tell her all about what my husband had done to me. I was afraid at first that my story would be exposed in such a way that I would feel once again violated. But my lawyer was very supportive and she helped me prepare for the appeal. This took place in an isolated room, which was much better as I felt more secure. It was a calming environment in comparison to the place where my first interview was held. And luckily the court believed me and recognised that I would be at risk of both physical and sexual violence from my husband and that in my country the State doesn't protect you from such domestic violence.

But then the immigration judge said that although I couldn't go home to my family, I could go back to my country and live somewhere else, maybe in the city, where my husband and parents-in-law wouldn't find me. The immigration authorities don't seem to realise what life is like if you are a woman on your own in my country. You have no status without a man. You have to have a husband or a father or a son to do anything, to sign a contract, to deal with your finances, to go to court, to get a passport, to travel. There are hardly any jobs that woman are allowed to do so you can't have any independence as a woman. It's frightening just to go out on your own.

If they send me back to my country, I don't know how I will survive. As a woman, alone with my children, I feel very vulnerable.



Introduction

Women's experiences of political activities and persecution may differ from those of men. The concept of both politics and persecution have historically been interpreted by States through a framework of male experiences, thus often excluding women's political opinions on gender roles as well as acts of gender-based violence and/or discrimination by either the State or non-State actors. Without integrating a gender perspective throughout the asylum process, the adherence to a male adult heterosexual norm risks resulting in many women and girls, including lesbian and bisexual women and girls, being wrongfully denied refugee status and protection under international human rights and refugee law.

According to the 1951 UN Convention on the Status of Refugees a person may be recognised as a refugee owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion if the State is unable or unwilling to protect them. The Convention does not specifically refer to gender as a ground for persecution but each ground must be analysed from a gender perspective (gender mainstreaming) as asylum is not gender neutral, hence the need for gender guidelines to ensure that all the grounds are interpreted in a way that is gender-sensitive.

In following the 1951 Convention to deal with asylum applications, EU Member States are expected to comply with two new Directives, the Qualification and the Asylum Procedures Directives. However without considering these Directives in a gender sensitive way, Member States could be failing women in the way in which they determine their asylum claims.

The European Women's Lobby (EWL) and the Refugee Women's Resource Project at Asylum Aid (UK) are very pleased to present this practical advocacy guide which demonstrates how both the EU Qualification and Procedures Directives should be interpreted from a gender perspective, by using the UNHCR 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 (2002). A more extensive, in-depth analysis of both of these Directives on the basis of the UNHCR Gender Guidelines (2002) is also available as a separate document for use by asylum determination officials, lawyers and legal representatives of women claiming asylum, and those providing accompanying, support, information, interpreting and guidance services. The overall aim is to provide a comprehensive analysis on how the legal provisions contained in both Directives can be effectively interpreted and applied to gender-based asylum claims.

The purpose of this present document is to provide an advocacy tool to lobby national governments and European policy-makers to interpret the Directives in a gender-sensitive way for use by:

- ▶ women's rights organisations, including EWL member organisations, and all those that do not necessarily focus on the legislative processes of asylum per se but who are fully committed to standing in solidarity with women who seek asylum throughout the EU.
- ▶ Lesbian, gay, bisexual and transgender (lgbt)-rights organisations working for the rights of lesbian and bisexual women
- ▶ specialist refugee organisations
- ▶ human rights organisations who wish to include in their work women's human rights in general and women asylum seekers' human rights in particular.

These groups are encouraged to lobby for Member States to adopt gender guidelines in the asylum determination process.

Specifically, this document calls for EU Member States to apply the UNHCR Gender Guidelines (2002) on International Protection with regards to Gender-Related Persecution. It should be pointed out however that these are proposals for minimum standards and therefore Member States are invited to adopt higher standards.

Without such guidance it will be very difficult to ensure that the gendered nature of persecution of which women are the prime victims is fully understood and that women's asylum claims are given an equal and fair assessment. We are referring to situations where heterosexual, bisexual and lesbian women fear various forms of gender-based violence and discrimination by the State or by non-State actors, including where they are in danger of being killed or subjected to physical and mental violence by their husband/partner, family or the State, persecuted for opposing gender-discriminatory norms or laws, raped in situations of conflict and war and along with their girl children are subjected to practices that are carried out in the name of 'culture', such as female genital mutilation or forced marriages. Without such guidance there is also a risk that some asylum-seeking women struggling for the human rights of themselves and others will be depoliticised and regarded as passive victims of abuse, instead of being recognised as agents in their own right and as women human rights defenders.

Similarly, it is crucial that asylum procedures are gender sensitive to ensure that women benefit equally from a non-discriminatory process, for example through choice of the gender of the interviewer and taking country information relating to the situation of women into account. These and other gender aspects are also highlighted in the UNHCR Gender Guidelines (2002).

In order to fully integrate a gender perspective into the area of asylum and comply with international human rights and refugee law and standards, Member States need to recognise inter alia that gender "refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another" and "is not static or innate but acquires socially and culturally constructed meaning over time" as stated in the UNHCR Gender Guidelines (2002). In this publication we focus on women and girls and the use of the term "woman" includes the girl child.

An individual risk assessment based on the personal circumstances of a particular woman in relation to the relevant human rights situation in her country of origin must be undertaken taking into account her ethnicity, sexual orientation, age, class and caste. The existence of a strong women's movement and increasing access to women's shelters, hotlines or female police stations may not indicate that all women, regardless of personal circumstances, can get effective and durable State protection from persecution by individuals or other non-State actors, or that it is reasonable for women to try to get assistance from the national authorities.

It is important to stress that in international human rights law, to apply for asylum is an individual right. The concept of "safe country" whether of origin or as a "safe" third country that has been developed by the European Union in the context of the Procedures Directive is in total contradiction to this right. This is particularly of concern for women, as no country can be deemed safe when violence against women occurs in all countries of the world.

The aim of this publication is to demonstrate how a gender sensitive interpretation of the Directives is possible through the use of gender guidelines, in particular the UNHCR Gender Guidelines (2002). It invites all those who are committed to women's rights, human rights, asylum seekers and refugees to put pressure on their governments to ensure that women on the margins are guaranteed their fundamental human rights and freedoms, the very reasons that have compelled them to seek international protection.

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The European Women's Lobby and the Refugee Women's Resource Project at Asylum Aid (UK) would like to thank in particular Maria Bexelius, Researcher in women's human rights, asylum and migration issues, for her work on this document and especially her work on the in-depth analysis of both of these Directives, a copy of which can be obtained from the European Women's Lobby.





Making women asylum seekers' human rights a reality: the next steps

The European Qualification and Asylum Procedures Directives all establish minimum standards for EU Member States in relation to asylum procedures. The term 'minimum standards' refers to a threshold below which Member States cannot go; but it must be emphasised that higher standards can also be called for, in particular to ensure compliance with international refugee law and human rights standards. Below are suggested activities to ensure that your country interprets both Directives in a gender sensitive way.

STEP 1 Suggested activities relating to the Qualification Directive

Background

The purpose of the EU Qualification Directive is to establish minimum standards for third country (i.e. non EU Member State) nationals and Stateless persons to qualify as refugees or beneficiaries of subsidiary protection within an EU Member State. It also sets minimum levels of rights and benefits attached to the protection granted and sets out the rights of family members of the beneficiaries of refugee status or subsidiary protection status.

The deadline to transpose this Directive into national law was 10 October 2006. However, at the time of finalising this publication (October 2007) not all Member States had transposed it into their domestic legislation

Although the Qualification Directive mentions gender-specific acts of persecution, Member States need to use gender guidelines to fully interpret the Directive from a gender perspective, in accordance with international human rights and refugee law and standards.

Suggested activities – a checklist

- ▶ Seek information from your government or any other reliable source on whether your country has transposed the Directive into national legislation.
- ▶ If the Directive has not been transposed, write to the relevant government ministry responsible for asylum matters asking why the transposition has been delayed and seeking a timeframe for full compliance.
- ▶ If the Directive has not been transposed, seek information on whether your government/parliament is discussing gender aspects of the Directive as raised in this paper. Find out whether any draft legislation or preparatory work i.e. instructions by the legislator on how to interpret the legislation, contains guidance on how to ensure a gender-sensitive interpretation of all criteria of the refugee definition and other relevant provisions in the Directive.

For example check that:

- ▶ EU-citizens from other EU Member States, who fulfil all the criteria of the UN refugee definition will be able to receive refugee status as it is the cornerstone of international refugee law that all asylum seekers should have their asylum applications considered individually and on the basis of their individual claim.
- ▶ Unmarried and same sex couples are included in the definition of family.
- ▶ Persecution by non-State actors is explicitly recognised and included in the refugee definition, in line with the UNHCR handbook (Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees, reedited version 1992) and Gender Guidelines (2002) and as included in the Qualification Directive itself (article 6).

- ▶ The concept of persecution is explicitly given a flexible and non-exhaustive interpretation in line with the UNHCR Handbook and Gender Guidelines (2002), to include various forms of gender-based violence and discrimination.
- ▶ Subjective and objective elements of the concept of well-founded fear are explicitly referred to taking into account that country of origin information specifically relevant to women is necessary in order to make an accurate risk assessment. This should include written reports confirming the prevalence of human rights abuses targeting women by the State or by non-State actors without the State offering effective and durable protection. However it should also be recognised that such country of origin information may be very difficult to collect, and that women fearing gender-based violence often lack documentary evidence regarding their experiences of persecution.
- ▶ The legislation will clarify that, under international law, States can be the only acceptable agent of protection and non-State actors cannot be given the responsibility of providing protection (contrary to article 7 'Actors of Protection' of the Qualification Directive).
- ▶ A gender-sensitive analysis is used to determine whether the State is unwilling or unable to give effective and durable protection against persecution by non-State actors. This should take into account whether the applicant sought protection, whether the authorities knew of the harm but failed to protect the applicant or if the applicant has reasons for thinking or knowing that it would be futile to seek government protection. It should, as indicated in the UNHCR Gender Guidelines (2002) consider not merely the law and policies but also the practice as regards the State's willingness and ability to respect, protect and fulfil the human rights of women.
- ▶ The existence of an internal flight alternative (i.e. move to another part of the country) is explicitly referred to and considered in line with the UNHCR Handbook, the Gender Guidelines (2002) as well as Guidelines on "internal flight or relocation alternative", thus taking into account that both the personal and country specific conditions for women may render it impossible or unreasonable for women to relocate to another part of the country without risking persecution or undue harm.
- ▶ It is explicitly emphasised that all five convention grounds (i.e. political opinion, religion, nationality, race and member of a particular social group) – not only the ground of particular social group – will be interpreted in a gender-sensitive way, in accordance with the UNHCR Gender Guidelines (2002).
- ▶ A provision for subsidiary protection in national asylum law will be included while also stating that the provision of subsidiary protection status does not undermine refugee status by offering subsidiary protection status systematically to women instead of full refugee status.





STEP 2 Suggested activities relating to the Asylum Procedures Directive

Background

The purpose of the EU Procedures Directive is to establish minimum standards on procedures in Member States for granting and withdrawing refugee status. The Procedures Directive is to be transposed into national law no later than 1 December 2007.

Unlike the Qualification Directive, the Directive on Asylum Procedures is **totally silent in terms of gender**. This is not to say that it is gender neutral or that it is gender irrelevant. If asylum procedures lack gender sensitivity, there is a risk of discriminatory barriers preventing women from receiving a fair and equal assessment of their claim for refugee status and/or international protection whether on gender or on other grounds. In addition, the provisions of the Qualification Directive will be difficult to implement if asylum procedures are not gender sensitive. In the context of the Procedures Directive, gender guidelines will be necessary to ensure that procedures are gender sensitive to enable women to access and benefit equally from a non discriminatory asylum process, for instance, in relation to choice of the sex of the interviewer, gender sensitive questions etc. It is crucial for their ability to present all aspects of their asylum claim that women, especially those having experienced traumatic events, feel safe and that the interviewing environment is responsive to women's experiences of political activities and human rights abuses, including the highly sensitive issue of gender-based persecution.

Suggested activities – a checklist

- ▶ Write to the relevant government ministry responsible for asylum matters asking:
- ▶ What measures they will take to ensure that women asylum seekers are guaranteed fair and equal access to the asylum determination process
- ▶ How they will ensure that no direct or indirect discriminatory barriers will be prejudicial to women seeking asylum
- ▶ How they will evaluate their procedures to ensure they are gender sensitive

Seek information on whether your government/parliament is discussing **gender aspects of the Directive** as raised in this paper. Find out whether any draft legislation or preparatory work i.e. instructions by the legislator on how to interpret the legislation, contains guidance on how to ensure gender-sensitive asylum procedures.

For example check that:

- ▶ It is made explicit that asylum **officials should inform women of gender aspects of the refugee definition** thus clarifying that fear of gender-based violence and discrimination may constitute a valid basis for a refugee claim.
- ▶ It is made explicit that the applicant should be informed of the right to choose a same sex (free) legal representative, interpreters and interviewers (with knowledge of gender-related persecution claims) throughout the asylum process, including at the appeal stage, and that female interviewers and interpreters should be provided automatically for women.
- ▶ It is made explicit that all applicants, irrespective of their sex, are given the right to a separate interview without the presence of any family member in order to ensure that they have an opportunity to present their case.
- ▶ It is made explicit that persons raising gender-related refugee claims, and survivors of torture and trauma in particular, require a supportive environment where they can be reassured of the confidentiality of their claim as they, due to factors such as shame, trauma or fear, may be reluctant to identify the true extent of the persecution suffered or feared.

- ▶ It is made explicit that the interviewer should remain neutral, compassionate and objective during the interview and use both "open-ended" and specific gender sensitive questions, which may help to reveal gender issues relevant to a refugee claim. The interviewer should take into account that the male norm influencing the interpretation of concepts such as torture and politics, may render it difficult for women to reveal their political opinions and activities as well as their experiences and fear of human rights violations.
- ▶ It is made explicit that second and subsequent interviews may be needed, particularly for victims of sexual violence or other forms of trauma.
- ▶ It is acknowledged that interviewers should be responsive to the trauma and emotion of claimants and stop an interview where a claimant is becoming emotionally distressed.
- ▶ It is acknowledged that trained psycho-social counsellors are available to assist the claimant before and after the interview.
- ▶ It is acknowledged that the type and level of emotion displayed during the recounting of experiences should not affect the claimant's credibility, as interviewers should understand that cultural differences and trauma play an important and complex role in determining behaviour.
- ▶ It is acknowledged that it is unnecessary to establish the precise details of the act of rape or sexual assault itself, but the events leading up to, and after, the act and the surrounding circumstances as well as the motivation of the perpetrator may be required. However, the interviewer should also be aware of the fact that a woman may not always be aware of the reasons for her abuse.
- ▶ It is acknowledged that the complexities of gender-related claims as well as factors such as lack of gender sensitivity among decision-makers and women's difficulties in speaking about sexual violence or sexuality, may constitute valid reasons for not immediately presenting all circumstances of an asylum claim. This together with an awareness of the difficulty in presenting written evidence supporting a gender-related asylum claim, should be taken into account when assessing appeals and new applications. The latter particularly requires a flexible interpretation of the concept of "new circumstances".
- ▶ It is made explicit that claims based on fear of gender-based violence or discrimination should be among those never subjected to accelerated asylum procedures.

Seek to have the UNHCR's Handbook and Guidelines on International Protection, particularly the Gender Guidelines (2002) included in or referred to in any publication adopted by national authorities.





STEP 3 Further lobbying activities relating to both Directives – a checklist

Lobbying actions on a national basis

Government / Parliament

- ▶ If the Directives have been transposed but inadequately, write to the government and/or parliament highlighting the importance of amending the law or issuing a binding guidance note, as appropriate, to migration authorities and courts to ensure gender issues are covered.
- ▶ If the Directive is not yet transposed and issues in relation to gender aspects, including those mentioned above, are neither being referred to in the draft national legislation nor in the draft preparatory works, or are being referred to inadequately, lobbying activities could include:
 - ▶ Writing to the government and/or Parliament highlighting the importance of explicit references to gender aspects. Explain that it needs to be spelled out by the relevant legislative body that the UNHCR Gender Guidelines (2002) may and should serve as a useful tool assisting migration authorities and courts in order to interpret the Directives in a gender-sensitive way.
 - ▶ Arranging public awareness raising activities, writing articles or otherwise trying to engage the media in highlighting the issue. Use the case of a woman seeking asylum who fears gender-related persecution (you could use the illustrative case at the beginning of this document) to illustrate how lack of proper guidance such as the UNHCR Gender Guidelines (2002) in interpreting the Directives risks many women being wrongfully denied refugee status and international protection.
 - ▶ Liaising with other NGOs working on asylum and women's rights in order to effectively coordinate your lobbying, public awareness or media activities.
- ▶ Seek information about pre-existing gender guidelines adopted by the government or the migration authority and check their current legal status as well as whether they conform with and refer to the UNHCR Gender Guidelines (2002).
- ▶ If no or inadequate gender guidelines exist, lobby the relevant body seeking to have the UNHCR's Guidelines fully included or referred to in any publication adopted by government/parliament and national authorities in relation to asylum law and/or the transposition of the EU Directives.
- ▶ If the only gender guidelines that exist have been adopted by the national migration authority, lobby the government and/or parliament to have the UNHCR's Guidelines fully included or referred to in any publication adopted by the government/parliament. This is important in order to ensure that not only officials at the migration authorities, but also judges at the courts are explicitly requested to adhere to the UNHCR Gender Guidelines (2002) while interpreting the Directive and processing asylum applications.
- ▶ Write to the government and ask how the issue of gender equality is being included in national strategies on asylum and what strategies are being adopted to ensure effective implementation of the Directives from a gender perspective. You may also ask how these strategies are being conveyed to migration authorities and the courts and request copies of the documents relating to the strategies. Include Ministers and relevant government departments responsible for women's issues/gender equality in your actions. In most countries asylum is the competence of interior/justice Ministers.
- ▶ Write to the government and/or migration authority, and call for gender disaggregated data in official statistics on asylum seekers. This should include: the numbers of women seeking asylum, the reasons for doing so, the outcome of their asylum claim and the type of protection granted (refugee status/subsidiary protection/humanitarian status/other).

National migration authorities and the courts/tribunals

- ▶ Write to the migration authorities and the courts/tribunals asking for their gender policy and their strategy for integration of a gender-perspective in their activities as well as information on what measures they undertake to ensure a gender-sensitive interpretation of the Directives, in line with the UNHCR Gender Guidelines (2002). Relevant measures could include budget allocation on gender and asylum, gender disaggregated statistics, educational measures such as guidance for all judges and other staff involved in refugee status determination, auditing the integration of a gender perspective into asylum determination processes.

Lobbying actions on a European basis

- ▶ Write to your Member of the European Parliament (MEP) and national MPs seeking a public hearing on gender guidelines.
- ▶ Write to MEPs and the European Commission and call for gender guidelines to be an integral part of the second phase of the common asylum system (after 2010) i.e. gender guidelines in all Member States, as an inherent part of the (future) single procedure
- ▶ Document women's experiences with the purpose of assessing the gender-sensitivity of asylum systems in different countries of the European Union, particularly as part of the monitoring and evaluating process of the implementation of the Directives in different countries. This could contribute to the shaping of future European asylum policies. A report on the application of the Procedures Directive is scheduled for no later than 1 December 2009 by the European Commission who "shall propose any amendments that are necessary" and report every two years after that (article 42). Similarly, the Qualification Directive report is scheduled for April 2008 (article 37.1) and at least every five years after that (article 37.2).
- ▶ Write to the European Commission and MEPs and call for gender disaggregated data in official statistics on asylum seekers. This should include: the numbers of women seeking asylum, the reasons for doing so, the outcome of their asylum claim and the type of protection granted (refugee status/subsidiary protection/humanitarian status/other).
- ▶ Check the website of the European Women's Lobby for updates on this campaign : www.womenlobby.org

Finally, it should be noted that these Directives contain several provisions which have been highly criticised by international and regional human rights and refugee organisations such as UNHCR, Amnesty International, Human Rights Watch and European Council on Refugees and Exiles (ECRE) for not being fully in accordance with international human rights and refugee law standards. These deficiencies affect the opportunities for women to get their asylum claims assessed in a fair and non-discriminatory manner.

EU Member States are bound by their international obligations under the 1951 UN Refugee Convention, the European Convention on Human Rights and Fundamental Freedoms and other international human rights treaties. The EU Directives are only minimum standards, and national legislation should not include any provisions which breach international law and standards. In view of this, it is very important to point out to your government that national legislation must rise above the minimum standards.





How to use the UNHCR Gender Guidelines to interpret the EU Directives

To assist Member States in interpreting the Directives in a gender-sensitive way, the following pages set out some of the articles of the Qualification and the Procedures Directives that are particularly relevant to women alongside the relevant paragraphs of the UNHCR Gender Guidelines (2002).

I. The Qualification Directive

The purpose of the Qualification Directive is to establish minimum standards for the qualification of third (i.e. non EU Member State) country nationals and Stateless persons as refugees or beneficiaries of subsidiary protection within a Member State, and also the minimum levels of rights and benefits attached to the protection granted. It also sets out the benefits to be enjoyed by family members of the beneficiaries of refugee status or subsidiary protection status.

Articles of the Directive with particular relevance to women

Article 6: Actors of persecution or serious harm

Article 6 of the Directive specifies actors of persecution or serious harm include:

- (a) the State;
- (b) parties or organisations controlling the State or a substantial part of the territory of the State;
- (c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm.

How to use the UNHCR Gender Guidelines to interpret the Directive

Although Article 6 broadly reflects the UNHCR Gender Guidelines by recognising that refugee status should be granted irrespective of the agent of persecution, Member States need to recognise that non-State actors may encompass not only individuals, but also collective entities such as a local populace, a political party or group.

The UNHCR Gender Guidelines refers to “serious discriminatory or other offensive acts committed by the local populace, or by individuals, can also be considered persecution if such acts are knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection.” (para 19).



Article 9: Acts of persecution

According to Article 9.2 of the Directive acts of persecution can include:

- (a) acts of physical or mental violence, including acts of sexual violence;
- (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
- (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.

It is extremely positive that Article 9.2(f) of the Directive recognises acts of a gender-specific nature as persecution. However, to ensure that Member States do not interpret this in a restrictive way, they need to apply a flexible and inclusive interpretation of the concept of persecution as well as to take into consideration the UNHCR Gender Guidelines which state:

“There is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, are acts which inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by State or private actors.” (para 9).

Also in relation to article 9.2, it should be taken into account that the UNHCR Gender Guidelines state that it would amount to persecution:

- ▶ if a law is based on a practice that does not conform to human rights standards (para 10)
- ▶ if a law against such a practice is not enforced (para 11)
- ▶ if there is a disproportionately severe penalty with a gender dimension (para 12)
- ▶ Furthermore, on the topic of discrimination, it should be taken into account that the UNHCR Gender Guidelines state it might be persecution if:
 - ▶ discrimination forms a pattern (para 14)
 - ▶ there is discrimination in providing protection (para 15)
 - ▶ persecutory or discriminatory action is due to gender, including sexuality (para 16)



Article 10: Reasons for persecution

Article 10.1 (a) - (e) of the Directive states that Member States shall consider the following when assessing the reasons for persecution:

- a) race;
- b) religion;
- c) nationality;
- d) a particular social group where in particular:
 - ▶ members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
 - ▶ that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;
 - ▶ 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;
- e) political opinion.

It is to be welcomed that the Directive refers to gender aspects in Article 10.1 (d), by mentioning that LGBT-people may constitute a particular social group. However, as no other gender aspects of the five convention grounds are directly referred to, Member States need to recognise relevant gender aspects of them all in order to ensure full compliance with international refugee law and standards. This includes recognising that persecution may be expressed in different ways against women and men and that an understanding of gendered power structures in the State, society and family is a pre-requisite for an inclusive and gender sensitive interpretation of the complex causes underlying persecution and how these may relate to the five grounds. The UNHCR Gender Guidelines include the following examples of persecution in relation to the five grounds:

- ▶ race and nationality: women may be seen as propagating a racial, ethnic or national identity and may be persecuted for this, for example through sexual violence (para 24, 27)

- ▶ religion and political opinion: when women do not abide by behavioural codes this may be interpreted as failing to fulfil their prescribed religious role or as holding an unacceptable actual or imputed political opinion in contravention of social norms and/or a particular legislation. Women may be persecuted for involvement in low-level political activity rather than the high profile activity of their male counterparts (para 25, 26, 32, 33).
- ▶ membership of a particular social group (PSG): this is often used for gender related claims but the grounds detailed above should not be over-looked. Sex is an innate and unalterable characteristic and "Women" can be a PSG (the size of the group is not relevant). The group does not have to be cohesive, members do not need to associate voluntarily and not every member needs to be at risk of persecution (para 28-31).



Article 15: Serious harm

According to Article 15 serious harm consists of:

- 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 or individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Women who are eligible for refugee status may instead be offered only subsidiary protection, for example on the grounds of Article 15(b) under the European Convention on Human Rights and the Convention against Torture. To avoid this, in interpreting Article 15 (b), Member States must be aware that although gender-based violence and discrimination may constitute torture or other inhuman or degrading treatment or punishment these human rights abuses may often occur for one of the reasons listed as convention grounds in the definition of a refugee. Member States should first assess such claims under the Refugee Convention before considering subsidiary protection grounds.

In interpreting Article 15 (c), Member States need to recognise the political nature of the systematic rape of women civilians deployed as a tactic of war. Women seeking protection under these circumstances should be considered on the grounds of refugee protection and not under subsidiary protection.

The UNHCR Gender Guidelines can assist the interpretation of women's experience of persecution in such a way that her claim can legitimately be linked to the grounds of the Refugee Convention and to the Qualification Directive, as demonstrated above.



2. The Asylum Procedures Directive

The purpose of the Asylum Procedures Directive is to establish minimum standards for procedures by Member States for granting and withdrawing refugee status.

Articles of the Directive with particular relevance to women Article 8: Requirements for the examination of applications;

Article 8.2 addresses the issue of appropriate examination of applications. It requires Member States ensure that decisions by the determining authority are taken "after an appropriate examination", which includes an examination based upon "precise and up-to-date information obtained from various resources, such as the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin" and that "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 they should have access to "general information" as regards country of origin information.

How to use the UNHCR Gender Guidelines to interpret the Directive

In order to avoid a restrictive interpretation of Article 8, Member States need to take into account that the UNHCR Gender Guidelines State:

- ▶ Country of origin information should be collected that has relevance in women's claims, such as the position of women before the law, the political rights of women, the social and economic rights of women, the cultural and social mores of the country and consequences for non-adherence, the prevalence of such harmful traditional practices, the incidence and forms of reported violence against women, the protection available to them, any penalties

imposed on those who perpetrate the violence, and the risks that a woman might face on her return to her country of origin after making a claim for refugee status." (para 36 x).

- ▶ "No documentary proof as such is required in order for the authorities to recognise a refugee claim(...) in relation to gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available(...) Alternative forms of information might assist, such as the testimonies of other women similarly situated in written reports or oral testimony, of non-governmental or international organisations or other independent research." (para 37).



Article 10: Guarantees for applicants for asylum

Article 10.1 (a) of the Directive refers to providing information to the applicant
Article 10.1 (b) of the Directive provides the right to an interpreter.

In considering procedural issues under Article 10, Member States need to take into account that the UNHCR Gender Guidelines State:

- ▶ "It is essential that women are given information about the status determination process, access to it, as well as legal advice, in a manner and language that she understands." (para 36 ii)
- ▶ "Claimants should have the choice of having an interpreter of the same sex as themselves" (para 36 iii).

Article 12, 13 and 14: Personal interview; Requirements for personal interview; Status of the report of a personal interview in the procedure

These articles together address the issue of the personal interview.

In relation to the personal interview and the interpretation of Article 12, 13 and 14, Member States need to take into account the UNHCR Gender Guidelines state:

- ▶ "Women asylum-seekers should be interviewed separately, without the presence of male family members..." (para 36 i).
- ▶ "Claimants should be informed of the choice to have interviewers and interpreters of the same sex as themselves..." (para 36 iii).
- ▶ Female claimants need a supportive environment and to be reassured about confidentiality (para 36 iv, 36 v).
- ▶ Female claimants may not relate questions that are about 'torture' to the types of harm they fear (such as rape, sexual abuse, female genital mutilation, 'honour killings', forced marriage, etc.) (para 36 vii).
- ▶ The level of emotion a woman displays should not affect her credibility (para 36 xi).
- ▶ Women should not be asked the details of an act of rape, only the circumstances (para 36 xi).



European Union Treaty references

Article 2: of the Amsterdam Treaty : equality between women and men:

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Article 2.4 objectives – reference to asylum

(...) maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

Article 3.2 gender mainstreaming

In all the activities referred to in Article [2], the Community shall aim to eliminate inequalities, and to promote equality between men and women.

Section of Article 63 relating to asylum :

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

- (1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:
 - (a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States.
 - (b) minimum standards on the reception of asylum seekers in Member States,
 - (c) minimum standards with respect to the qualification of nationals of third countries as refugees,
 - (d) minimum standards on procedures in Member States for granting or withdrawing refugee status;
- (2) measures on refugees and displaced persons within the following areas:
 - (a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection,
 - (b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons.

References

Qualifications Directive:

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. For full text see:

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:NOT>

Asylum Procedures Directive:

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

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005L0085:EN:NOT>

UNHCR 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 (2002). For full text see:

<http://www.unhcr.org/publ/PUBL/3d58ddef4.pdf>

Founded in 1990, **the European Women's Lobby (EWL)** is the largest alliance of women's non-governmental organisations in the European Union with more than 4,000 member organisations. Our influential voice makes a significant difference as we work together to achieve equality between women and men in all areas of public and private life; actively addressing issues of economic and social justice for women, women in leadership and decision-making, women's human rights, violence against women, and women's diversity. EWL works within democratic, open and transparent procedures of communication, decision-making and accountability.

The Refugee Women's Resource Project (RWRP) was set up in April 2000 by Asylum Aid, a registered charity which provides free legal representation and advice to asylum seekers and refugees. It aims to address the ingrained gender discrimination experienced by women seeking protection in the UK from persecution and human rights abuses abroad. It provides a unique blend of gender specific legal casework, information, research and policy work and campaigning.





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