

# Gender-related asylum claims in Europe



## A comparative analysis of law policies and practice focusing on women in nine EU Member States



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**GENDER-RELATED ASYLUM CLAIMS IN EUROPE:**  
COMPARATIVE ANALYSIS OF LAW,  
POLICIES AND PRACTICE FOCUSING ON WOMEN  
IN NINE EU MEMBER STATES



FRANCE, BELGIUM, HUNGARY, ITALY,  
MALTA, ROMANIA, SPAIN, SWEDEN  
AND THE UNITED KINGDOM

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## *ACRONYMS*

CEAS	Common European Asylum System
CEDAW	Convention for the Elimination of All Forms of Discrimination against Women
CCE	The Belgian Council for Aliens Law Litigation (Conseil du contentieux des étrangers)
CGRS	Belgian Office of the Commissioner General for Refugees and Stateless Persons
CNDA	French National Court of Asylum (Cour nationale du droit d'asile)
COI	Country of Origin Information
EAC	European Asylum Curriculum
EASO	European Asylum Support Office
ECRE	European Council on Refugees and Exiles
EMHRN	Euro-Mediterranean Human Rights Network
ERF	European Refugee Fund
EU	European Union
ExCom	Executive Committee
FGM	Female Genital Mutilation
FRA	European Union Agency for Fundamental Rights
GBV	Gender-based violence
IAC	Immigration and Asylum Chamber (UK)
LGTBI	Lesbian, gay, bisexual, trans and intersex people
NGO	Non-Governmental Organisation
OAR	Spanish Office for Asylum and Refuge
OPT	Occupied Palestinian Territory
OE	Belgian Aliens' Office (Office des étrangers)
OFPRA	The French Office for the Protection of Refugees and Stateless Persons (Office français de protection des réfugiés et apatrides)
OIN	Hungarian asylum authority – the Office for Immigration and Nationality
PACE	Parliamentary Assembly of the Council of Europe
QADT	The United Kingdom Border Agency Quality Audit and Development Team
RIO-DAI	Romanian Immigration Office – Directorate for Asylum and Integration
SMB	The Swedish Migration Board
TC	Italian Territorial Commissions
UKBA	United Kingdom Border Agency
UNHCR	United Nations High Commissioner for Refugees





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## I. INTRODUCTION AND BACKGROUND

Across the European Union women constitute on average one third of people who apply for asylum in their own right. The principle of the fair and consistent treatment of all individuals, including asylum seekers and refugees is enshrined in a range of international human rights mechanisms including the Universal Declaration of Human Rights and the 1951 Convention relating to the Status of Refugees and the 1967 Protocol (the Refugee Convention). European Union law obliges Member States to ensure equality between women and men<sup>[1]</sup> and to gender-mainstream all policies within its competence (article 3).<sup>[2]</sup> EU Member States therefore have a clear obligation both to respect asylum seekers' human rights and not to discriminate between men and women.

The Refugee Convention defines a refugee as a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.<sup>[3]</sup>

When women flee persecution in their home country and seek protection in Europe, they may have been persecuted because of their gender. This is termed gender-related persecution. They may also have been persecuted not by the State, but by their family or community thereby not necessarily fitting into the conventional image of a political refugee fleeing persecution from the State. Certain types of harm may also be gender-specific or predominantly gender-specific, such as FGM, rape, domestic violence, forced marriage and forced abortion. In its Guidelines on Gender-Related Persecution (UNHCR Gender Guidelines),<sup>[4]</sup> the UNHCR defines gender and gender-related claims as follows:

*In order to understand the nature of gender-related persecution, it is essential to define and distinguish between the terms “gender” and “sex”. Gender refers to the relationship between women and men based on socially or culturally constructed*

[1] Consolidated version of the Treaty on European Union, 2010/C 83, articles 2 and 3.

[2] Consolidated version of the Treaty on the Functioning of the European Union, 2010/C 83, article 8.

[3] Article 1A.

[4] 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.

*and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time. Gender-related claims may be brought by either women or men, although due to particular types of persecution, they are more commonly brought by women. In some cases, the claimant's sex may bear on the claim in significant ways to which the decision-maker will need to be attentive. In other cases, however, the refugee claim of a female asylum-seeker will have nothing to do with her sex. Gender-related claims have typically encompassed, although are by no means limited to, acts of sexual violence, family/ domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals.<sup>[5]</sup>*

Concerns about how women's claims for asylum are considered in relation to international refugee law have been raised regularly over the past decade by academics, practitioners and those working within the asylum system itself. For example, over ten years ago Professor Spijkerboer stressed that women applicants often have no voice in the asylum process<sup>[6]</sup> and four years later the Information Centre about Asylum and Refugees in the UK stated:

*There is a growing body of scholarship ... internationally ... demonstrating how women's experiences of persecution are different from those of their male counterparts, and how the model of interpretation applied in industrialized countries discriminates against women in the refugee status determination procedure.<sup>[7]</sup>*

More recently, Roger Haines QC, the Deputy-Chair of the New Zealand Refugee Status Appeals Authority, recognised the trend that sought to redress the balance, stating that "on accepted principles of treaty interpretation, sex and gender have always been at the heart of the refugee definition. Difficulties arise only because of misinformed decision making. The refugee definition requires the adoption of an integrative perspective of human rights generally and this includes women's rights"<sup>[8]</sup>

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[5] *Idem.*

[6] T. Spijkerboer, *Gender and refugee status* (Aldershot: Dartmouth Publishing, 2000).

[7] Information Centre about Asylum and Refugees in the UK (ICAR), *Navigation guide to women refugees and asylum seekers* (London: ICAR, 2004), p. 7.

[8] Haines R. QC, *Advancing a gendered interpretation of the Refugee Convention: Refugee Appeal No. 76044*, Presentation for the 2009 National Members' Conference of the Migration Review Tribunal and Refugee Review Tribunal, 10 September 2009, para. 25.



Information on how asylum claims involving gender-related persecution are being considered within Europe has not been collected since 2004<sup>[9]</sup> and more recent research concentrates solely on procedures<sup>[10]</sup> and not on qualifying as a refugee or reception and detention conditions. This report aims to fill this gap.

The Gensen project was set up to enhance gender equality in the European asylum process. Funded by the European Refugee Fund (ERF) it aims to help harmonise the implementation of the main European asylum legal instruments to ensure gender sensitivity. Over the course of twenty months (October 2010 to May 2012) the Gensen project undertook comparative research, national workshops, regional training and an experts meeting. The results of all these initiatives were used to identify key recommendations set out in this report.

This report consists of a comparative analysis of law, policies and practice relating to gender issues across nine EU Member States (Belgium, France, Hungary, Italy, Malta, Romania, Spain, Sweden, and the United Kingdom) and recommendations towards integrating a gender perspective in European asylum systems. The report focuses particularly on women's asylum claims, whether gender-related or not.

The Gensen project follows on from the Exchange for Change project also funded by the ERF (2008-2010). Under this project a guide for the improvement of the recognition of gender-based persecution in the asylum determination process in Europe was published by France terre d'asile, Comisión Española de Ayuda al Refugiado (CEAR) and the Consiglio Italiano per i Rifugiati (CIR) in May 2010.<sup>[11]</sup>

To avoid duplication this report focuses on women although the Gensen project as a whole included issues affecting gay, lesbian, bisexual, trans and intersex (LGBTI) asylum seekers as well. The Fleeing Homophobia project (also funded by the ERF) was running concurrently with the Gensen project and published its report in September 2011.<sup>[12]</sup> The Gensen project supports the recommendations in Fleeing Homophobia. In addition, the European Council on Refugees and Exiles recently completed a study

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[9] Crawley, H and Lester, T, *Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe*, UNHCR, Geneva, 2004.

[10] UNHCR, *Improving asylum procedures: Comparative analysis and recommendations for law and practice: Key gender related findings and recommendations*, UNHCR 2010.

[11] CEAR, CIR, FTDA, Exchange for Change: *Guide for an effective protection of refugee victims of gender-related persecution in Europe*, 2010.

[12] Spijkerboer T. and Jansen S., *Fleeing homophobia: Asylum Claims related to Sexual Orientation and Gender Identity in Europe*, COC Nederland and Vrije Universiteit Amsterdam, September 2011.

on legal aid for asylum seekers in Europe<sup>[13]</sup> so the Gensen project, whilst recognising the importance of legal aid for asylum seekers, did not focus on this issue.

This report sets the research in the context of the current legal framework in Europe. It analyses how gender is dealt with in all areas of the asylum process, specifically the refugee status determination process including decision-making and procedures, the reception and detention conditions in nine Member States. It concludes with recommendations for improving the way in which gender-related and women's asylum claims are determined within the asylum system and how they are treated throughout the process.

The notion of gender, as the social and cultural relationship between men and women, is not necessarily understood in all member States covered in this study. In **France** and **Malta**, for example, there is a tendency to rely on terminology such as "aspects related to sex" or "sex". This is relevant as the understanding of gender-related persecution and gender-specific forms of harm is essential to achieve a truly gender-sensitive refugee status determination process and procedure and ensure that women seeking asylum and asylum seekers with gender-related claims are treated with fairness and dignity while their claim is considered.

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[13] ECRE, Survey on legal aid for asylum seekers in Europe, October 2010.



## II. METHODOLOGY

The Gensen project started in October 2010, when the partners<sup>[14]</sup> jointly considered the methodology for the comparative research report. It was agreed that two questionnaires would be drafted. The first questionnaire would consider refugee status determination (RSD) issues and the asylum procedure. The second questionnaire would cover reception and detention conditions. The elaboration of the questionnaires took place between November and December 2010 in consultation with the partners.

The questionnaires were then distributed to asylum stakeholders between January and April 2011 in the nine EU member States taking part in the research (**Belgium, France, Hungary, Italy, Malta, Romania, Spain, Sweden** and the **UK**). The countries taking part in the research were selected in order to reflect the different regional areas of the European Union. In total 132 questionnaires were completed (71 RSD and asylum procedure questionnaires and 61 reception and detention conditions questionnaires). The questionnaires and existing research were then relied on by the partners to draft “national reports”. The national reports and existing research form the basis of this comparative report. This meant that partners were able to seek clarification from respondents where necessary.

Between February and April 2011, refugee and asylum seeking women were interviewed in the partner countries (**France, Hungary, Italy, Spain** and the **UK**). The main criterion for sampling was that only those who had claimed asylum in 2008 and after were interviewed. In total 60 interviews were undertaken with participants from 27 different countries (see Figure 1). Signed consent was requested from the interviewees after the project was explained to them. A common consent form was devised purely for the purpose of the project which was used by all the partners. The consent form set out that the participants would remain anonymous and that no confidential information would be disclosed. Female interpreters were provided where necessary.

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[14] *Comisión Española de Ayuda al Refugiado* (Spain), *France terre d’asile* (France), *Asylum Aid* (United Kingdom), *Consiglio Italiano per i Rifugiati* (Italy) and the *Hungarian Helsinki Committee* (Hungary).

Figure 1

COUNTRY OF ORIGIN	NO OF INTERVIEWEES	COUNTRY OF ORIGIN	NO OF INTERVIEWEES
Afghanistan	3	Kenya	1
Armenia	1	Kosovo	1
Cameroon	1	Lebanon	1
Colombia	1	Liberia	1
Congo	2	Morocco	1
DRC	6	Nigeria	3
Ethiopia	1	OPTs	2
Eritrea	2	Sierra Leone	1
Georgia	2	Somalia	5
Ghana	2	Sri Lanka	6
Guinea-Conakry	6	Turkey	2
Ivory Coast	4	Uganda	1
Iran	1	Irán	1

Some of the difficulties encountered were the challenge to get stakeholders to respond to the long questionnaires due to the wide scope of the research. Several respondents faced difficulties in providing gender-specific information whereas others lacked the capacity to respond. This resulted in some stakeholders only responding to a very limited amount of questions. Some stakeholders in the Mediterranean region were unable to respond to the questionnaires because the research was undertaken at a time of mass movement of asylum seekers from Tunisia and Libya. Some respondents refused to answer the questionnaires because they did not recognise gender as a relevant issue. Despite repeated attempts from November 2010 to August 2011 to contact stakeholders, institutions, authorities and NGOs in Portugal and UNHCR Italy, responsible for Portugal, there was insufficient information relevant to women's asylum claims and their treatment in Portugal to include this country within the scope of the study, despite the original intentions of the partners.

In September 2011, an experts meeting was organised in Paris. All the partners and experts from civil society, UNHCR, governments and the European institutions spent two days discussing the preliminary findings of the comparative research and considering draft recommendations and strategies to ensure that asylum systems throughout Europe are made more gender-sensitive. The discussions were guided by



a briefing paper prepared specifically for this purpose. The discussions at the experts meeting gave the partners a critical but constructive insight into decision-making procedures and which recommendations would be more useful and realistic in order to improve gender-sensitive asylum systems in Europe. The recommendations in this report were drafted on the basis of the research findings and in consideration of the discussions held at the experts meeting. The recommendations do not necessarily reflect a consensus agreed at the experts meeting.

Several of the partners have published their national reports in order to provide more detailed information on their particular countries.<sup>[15]</sup> Whereas the partners of the project recognise that using comparative tables in the report may over-simplify some of the issues, it was felt that this ensured ease of reference to consider the research findings. The information in this report is correct as of April 2012.

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[15] Querton, C. *"I feel like as a woman I'm not welcome": A gender analysis of UK asylum law, policy and practice*, Asylum Aid, 2012. Soulard, E. *Le Droit d'Asile Au Feminin: Cadre Legislatif et Pratique*, France terre d'asile, December 2011. SPAN Nahuel Report <http://www.cear.es/jfiles/up2012/GENSEN%20Spain.pdf>

### III. LEGAL FRAMEWORK

This chapter covers the legal framework which governs how women's asylum claims and asylum seekers with gender-related claims should be dealt with at international and European level.

The European Union and some EU member States have already taken some concrete and positive steps to ensure that gender-related aspects are considered during the refugee status determination process and within the asylum procedure. However, there are considerable differences in the way in which EU member States examine gender-related asylum claims. In certain aspects, EU member States' practice is below the standards required by international and European human rights and refugee law.

#### *i. International Legal Framework*

The Refugee Convention was drafted at a time when there was "complete blindness to women, gender, and issues of sexual inequality".<sup>[16]</sup> For example, the non-discrimination provision in the Refugee Convention does not refer to sex or gender.<sup>[17]</sup> UNHCR's response to the absence of women from mainstream international refugee law instruments was to develop gender-specific criteria and guidelines, albeit much later and further to the recognition of women's rights within international human rights law. UNHCR policy in response to the needs of refugee women and girls has shifted from a focus on women as a "vulnerable" group that is associated with children. This was followed by a move from women as a vulnerable group *per se* to the identification of risk factors exposing women and girls to particular threats. By 1997, the UNHCR adopted a two-pronged approach whereby targeted actions to address the specific needs and rights of women were run in parallel with the integration of women's rights in mainstream instruments. In 2000, Bloch, Galvin and Harrell-Bond argued that there was a need for a complete rethink of legislation and policy in Europe to ensure that women asylum seekers were recognised as refugees and were successfully settled.<sup>[18]</sup> In 2010, Edwards stated that advances in the field

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[16] Alice Edwards, 'Transitioning Gender: Feminist engagement with international refugee law and policy 1950-2010', in *Refugee Survey Quarterly*, 2010, vol. 29(2), p. 22. Edwards has examined the five historical periods spanning feminist engagement with international refugee law and policy. The periods range from the complete exclusion of women in the international refugee instruments (1950-1985), to a focus on women as a specific group with special needs (1985-present); to gender mainstreaming (1997-mid-2004) and its later variation, the "age, gender and diversity mainstreaming" (2004-present). Edwards, 2010, p. 22.

[17] Article 3 of the Refugee Convention states that "the Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin".

[18] Alice Bloch, Treasa Galvin and Barbara Harrell-Bond, 'Refugee Women in Europe: Some Aspects of the Legal and Policy Dimensions' in *International Migration*, 2000, vol. 38(2).





of international refugee law and policy in gender-related claims remained “nascent, contingent, and fragile”.<sup>[19]</sup>

The Executive Committee (ExCom) of the UNHCR has provided guidance and recommendations for States to ensure women seeking asylum are adequately protected.<sup>[20]</sup> There are a variety of ExCom Conclusions that provide recommendations on the treatment of women seeking asylum in countries of asylum<sup>[21]</sup> whereas others refer to their treatment in countries of origin.<sup>[22]</sup> ExCom has recommended “the development by States of appropriate guidelines on women asylum-seekers, in recognition of the fact that women refugees often experience persecution differently from refugee men”.<sup>[23]</sup> Two years later, ExCom called “upon the High Commissioner to support and promote efforts by States towards the development and implementation of criteria and guidelines on responses to persecution specifically aimed at women, by sharing information on States’ initiatives to develop such criteria and guidelines, and by monitoring to ensure their fair and consistent application. In accordance with the principle that women’s rights are human rights, these guidelines should recognize as refugee women whose claim to refugee status is based upon a well-founded fear of persecution for reasons enumerated in the 1951 Convention and 1967 Protocol, including persecution through sexual violence or other gender-related persecution”.<sup>[24]</sup>

The United Nations first specifically recognised the plight of women refugees in 1979 when the General Assembly added an item on the situation of women refugees to the provisional agenda for the World Conference of the UN Decade of Women.<sup>[25]</sup> In its 2006 in-depth study on violence against women, the UN General Assembly recommended that States “adopt a gender-sensitive approach to the granting of

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[19] Edwards, 2010, p. 30.

[20] ExCom shares its consensus opinion on international protection through non-legally binding instruments called ExCom Conclusions. ExCom Conclusions constitute expressions of opinion which are broadly representative of the views of the international community. For more information see <http://www.unhcr.org/pages/49e6e6dd6.html>.

[21] See for example EXCOM Conclusion on Refugee Protection and Sexual Violence, No. 73 (XLIV) – 1993; EXCOM Conclusion on Refugee Women and International Protection, No. 64 (XLI) – 1990; and EXCOM Conclusion on Refugee Women and International Protection, No. 39 (XXXVI) – 1985.

[22] See UNHCR, A Thematic Compilation of Executive Committee Conclusion (4th Edition), August 2009, in particular the section on Women’s Rights, p. 251. See also EXCOM Conclusion on Women and Girls at Risk, No. 105 (LVII) – 2006, 6 October 2006 and EXCOM Conclusion on Refugee Women, No. 60 (XL) – 1989.

[23] EXCOM Conclusion on Refugee Protection and Sexual Violence, No. 73 (XLIV) – 1993, para. (e).

[24] EXCOM General Conclusion on International Protection, No. 77 (XLVI) – 1995, para. (g).

[25] UN doc. A/RES/34/161, 17 December 1979 cited in United Nations, The United Nations and the advancement of women, 1945-96 (New York: United Nations, 1996), 243.

asylum”<sup>[26]</sup> and noted that “Treaty bodies have also highlighted the lack, in many countries, of comprehensive laws on trafficking and specific provisions for a gender-sensitive approach in their asylum laws”.<sup>[27]</sup>

The Convention for the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by the UN General Assembly in 1979, commits the States which ratify it to incorporate the principle of equality between men and women into their legal system, and to ensure the elimination of acts of discrimination against women by persons, organisations or enterprises. The CEDAW Committee considers violence against women as a form of sex discrimination and the Convention recommends that States take effective measures to overcome violence against women, whether public or private. The rights to equality between men and women and non-discrimination on the grounds of sex enshrined in CEDAW are crucial components for the international protection of women refugees and asylum seekers. All EU Member States are signatories to the Convention on the Elimination of all forms of Discrimination against Women.<sup>[28]</sup> In October 2011, the CEDAW Committee adopted a statement on the anniversary of the Refugee Convention and called for gender equality for refugees and noted “the CEDAW Committee calls on States to recognize gender related forms of persecution and to interpret the ‘membership of a particular social group’ ground of the 1951 Convention to apply to women. Gender sensitive registration, reception, interview and adjudication processes also need to be in place to ensure women’s equal access to asylum”.<sup>[29]</sup>

## *ii. European Legal Framework*

The Parliamentary Assembly of the Council of Europe (PACE) passed a Recommendation in 1998 on the situation of refugee women in Europe considering that “Member States of the Council of Europe should eliminate all gender-related discrimination among refugees, and adapt the treatment of women refugees to their specific situation and requirements”.<sup>[30]</sup>

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[26] UN General Assembly, ‘In-depth study on all forms of violence against women’: UN doc. A/61/122/Add.1, 6 July 2006, para. 382, p. 107.

[27] *Ibid.*, para. 276, p. 78.

[28] [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en).

[29] CEDAW Statement on the Anniversaries of the 1951 Convention Relating to the Status of Refugees and the 1961 Convention on the Reduction of Statelessness, adopted on 19 October 2011 during the 50th session, *A call for Gender Equality for Refugees and Stateless Persons*.

[30] Parliamentary Assembly of the Council of Europe, Recommendation 1374 (1998) on the Situation of Refugee Women in Europe, para. 5.



In 2010, the Council of Europe adopted a Convention on Preventing and Combating Violence against Women and Domestic Violence. One of its aims is to “contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women”.<sup>[31]</sup>

Overall the existing instruments of the Common European Asylum System (CEAS) are weak in terms of recognising both gender-specific persecution and gender-related persecution. The Council of the EU noted in its European Pact on Immigration and Asylum that “considerable disparities remain between one Member State and another concerning the grant of protection and the forms that protection takes”.<sup>[32]</sup> The five year Stockholm Programme is silent on any gender issues that could arise in the asylum system. Harmonisation under the CEAS has been and remains a challenge. UNHCR recently noted that “it is clear that interpretation and application of the asylum instruments continue to differ, often producing sharply divergent outcomes in terms of international protection”.<sup>[33]</sup>

In the EU, the Charter of Fundamental Rights establishes that the right to asylum shall be guaranteed with due respect for the Refugee Convention and in accordance with the Treaty establishing the European Community.<sup>[34]</sup> The Charter also sets out that everyone is equal before the law,<sup>[35]</sup> that any discrimination based on sex and sexual orientation shall be prohibited<sup>[36]</sup> and that equality between men and women must be ensured in all areas.<sup>[37]</sup>

The European Parliament Resolution on the role and place of immigrant women in the EU<sup>[38]</sup> calls on Member States “to enforce policies that ensure the equality of all people, such as that of the 1951 Convention relating to the status of Refugees, so that measures taken against illegal immigration by the Member States are fully compatible with the principles of non-discrimination”.<sup>[39]</sup>

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[31] Article 1b.

[32] Council of the European Union, European Pact on Immigration and Asylum, 24 September 2008, 13440/08, section IV.

[33] UNHCR's Recommendations to Poland for its EU Presidency, July–December 2011, p. 5.

[34] Charter of Fundamental Rights of the European Union (2000/C 364/01), Article 18.

[35] *Ibid.*, Article 20.

[36] *Ibid.*, Article 21(1).

[37] *Ibid.*, Article 23.

[38] European Parliament resolution on women's immigration: the role and place of immigrant women in the European Union (2006/2010(INI)).

[39] *Ibid.*, para. 37.

Nevertheless, there are few references to gender in the 2004 Qualification Directive,<sup>[40]</sup> none in the Procedures Directive<sup>[41]</sup> and the Reception Conditions Directive only refers to pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other forms of psychological, physical or sexual violence as vulnerable persons.<sup>[42]</sup>

The international and European Refugee Legal Framework has evolved in the last decade, first to recognise the existence of forms of gender-related persecution, but also to call all States to adopt a particular approach to, and recognise, gender-related asylum claims.

Despite extensive guidance and recommendations from the UN, UNHCR, the Council of Europe and some references in EU legislation, the recognition that gender may be an essential element in asylum claims is still lacking in some EU member States. The framework for ensuring that asylum decision-making and reception and detention conditions are sensitive to gender is considerable. This research projects aims to compare the law, policy and practice in nine EU member States and assess the extent to which they are complying with the existing international and European legal framework.

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[40] 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, articles 1(3)(c),9(2)(f),10(1)(d), 20(3), 29(3).

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

[42] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.



## IV. GENDERED STATISTICS ON ASYLUM APPLICATIONS AND DECISIONS

Statistical data that is gender-disaggregated provides essential information for policy makers to assess whether policy and/or legislation is not indirectly discriminatory against or places asylum seekers of one sex at a particular disadvantage. It also allows public authorities to take action to address differential outcomes. Without this data it is not possible to monitor progress towards meeting the needs of victims of gender-related persecution.<sup>[43]</sup>

In 1998, the PACE noted its regret “that no reliable information and statistics about refugee women are collected in a systematic way by Council of Europe Member States”<sup>[44]</sup> and therefore called on the Committee of Ministers to “initiate the setting-up of a European system for data collection and needs assessment in regards to refugee women”.<sup>[45]</sup> In its 2006 report on women’s immigration, the European Parliament Committee on Women’s Rights and Gender Equality noted that both at Member State and EU level, they “encountered great difficulty in collecting and recording data and statistics on migration flows into Europe and, in particular, on women’s migration”.<sup>[46]</sup> In 2006, the European Parliament passed a Resolution calling on “the Commission to collect gender-related data on immigration into the EU and to arrange for the analysis of that data by the European Institute for Gender Equality in order to highlight further the particular needs and problems of women immigrants and the most appropriate methods of integrating them into the societies of the host countries”.<sup>[47]</sup> In 2007, the European Parliament and the Council noted that “Community statistics on migration and asylum are currently subject to serious problems of non availability of data and poor harmonization”.<sup>[48]</sup> UNHCR noted that Europe was the only region where demographic data was available for less than half of all persons of concern by the end of 2010.<sup>[49]</sup>

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[43] Opinion of the Committee on Equal Opportunities for Women and Men, Parliamentary Assembly of the Council of Europe on Gender-related claims for asylum, Doc, 12359, 24 September 2010, para.5.

[44] Parliamentary Assembly of the Council of Europe, Recommendation 1374 (1998) on the Situation of Refugee Women in Europe, para. 2.

[45] *Ibid.*, para. 6(iii).

[46] European Parliament Committee on Women’s Rights and Gender Equality, Report on women’s immigration: the role and place of immigrant women in the European Union, A6-0307/2006, Explanatory Statement.

[47] European Parliament resolution on women’s immigration: the role and place of immigrant women in the European Union (2006/2010(INI)), para. 29.

[48] Decision No 1578/2007/EC of the European Parliament and of the Council of 11 December 2007 on the Community Statistical Programme 2008 to 2012, Title IV – Visas, Asylum, Immigration and Other Policies related to Free Movement of Persons, ‘current situation’.

[49] UNHCR, Global Trends 2010: 60 years and still counting, p. 33.

Regulation No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection recognises that “harmonized and comparable Community statistics on migration and asylum are essential for the development and monitoring of Community legislation and policies relating to immigration and asylum”.<sup>[50]</sup> Under the Regulation, Member States shall amongst others supply the Commission with statistics on the numbers of persons having submitted an application for international protection disaggregated by age, sex and citizenship of persons concerned;<sup>[51]</sup> persons covered by first instance decisions granting or withdrawing refugee status or subsidiary protection status disaggregated by age, sex and citizenship of the persons concerned;<sup>[52]</sup> persons covered by final decisions granting or withdrawing refugee status or subsidiary protection at appeal or review disaggregated by age, sex and citizenship of the persons concerned.<sup>[53]</sup> The Regulation is directly applicable and legally binding in its entirety on all EU Member States.<sup>[54]</sup>

The Commission has adopted two Regulations<sup>[55]</sup> setting out common definitions pertaining to the data required to be gathered under Regulation 862/2007 “in order to ensure that data from different statistical and administrative sources in the Member States are comparable, and to allow reliable Community-wide overviews to be drawn up”. The harmonised statistical definitions are based on the UN Recommendations and EU legislation on asylum and immigration.

The UN has recommended that the following statistics be disaggregated by sex: applications pending at beginning of period, applications submitted during period, positive decisions during period (refugee status or humanitarian protection status), negative decisions during period, cases otherwise closed, applications pending at end of period, and positive decisions during period by status, first instance and appeal stages.<sup>[56]</sup>

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[50] Recital (6) Regulation 862/2007.

[51] Article 4(1) Regulation 862/2007.

[52] Article 4(2) Regulation 862/2007.

[53] Article 4(3) Regulation 862/2007.

[54] Article 288 Treaty on the Functioning of the European Union.

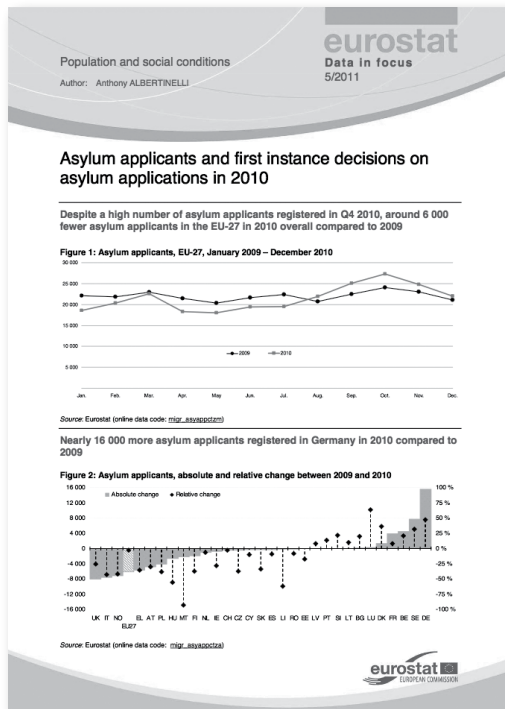
[55] Commission Regulation (EU) No 351/2010 of 23 April 2010 implementing Regulation (EC) No 862/2007 of the European Parliament and of the Council on Community statistics on migration and international protection as regards the definitions of the categories of the groups of country of birth, groups of country of previous usual residence, groups of country of next usual residence and groups of citizenship and Commission Regulation (EU) No 216/2010 of 15 March 2010 implementing Regulation (EC) No 862/2007 of the European Parliament and of the Council on Community statistics on migration and international protection, as regards the definitions of categories of the reasons for the residence permits.

[56] United Nations Recommendations on Statistics of International Migration, 1998, chapter V, para. 170.



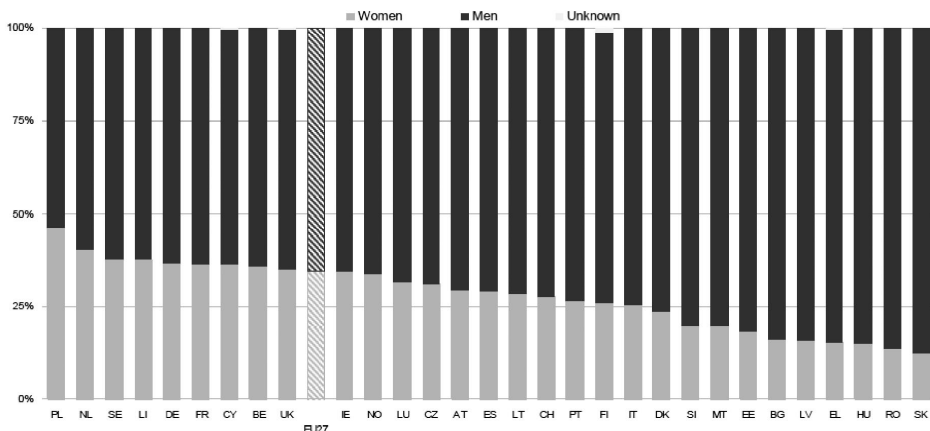
Although Member States are required to provide gender-disaggregated statistical information on the number of asylum applicants and the grant of refugee status or other subsidiary forms of protection at initial decision-making stage and appeal, this is not being done in practice, in particular for statistics at appeal. Despite providing this information to Eurostat, many national authorities do not make this data available nationally. Stakeholders therefore find it very difficult and time consuming to access the data they require.

Figure 2 [57]



[57] [http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-QA-11-005/EN/KS-QA-11-005-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-11-005/EN/KS-QA-11-005-EN.PDF)

Figure 3a: Gender distribution of asylum applicants across EU Members, 2010 (in%)



Almost all the countries covered in this comparative study, **Belgium, France, Hungary, Italy, Malta, Spain, Sweden, and the UK**, provide gender-disaggregated statistics on registered asylum applications and on the outcome of asylum decisions at first instance (See Table 1). However, only **Sweden and the UK** also publicly provide gender-disaggregated statistics on the number of asylum appeals lodged and their outcome (See Table 1). In **Italy**, it was not possible to access gender-disaggregated statistics on the number of decisions made in Italy, although gender-disaggregated data for the outcome of decisions is available. **France** provides gender-disaggregated statistics on the outcome of appeals but not on the number of appeals lodged. **Romania** provides no gender-disaggregated statistics at first instance or at appeal.





Table 1: Percentage/Number of asylum applications disaggregated by gender in 2010

		WOMEN	MEN
Belgium		32.5% (6,479)	67.5% (13,462)
France		33.7% (14,016)	66.3% (27,603)
Hungary		14.6% (308)	85.4% (1,796)
Italy (2011)		12.1% (4153)	87.8% (29,964)
Malta (2009–2010)		18.7% (481)	81.2% (2,080)
Spain		29.2% (799)	70.8% (1,945)
Sweden		38% (12,013)	62% (19,806)
	Appeals	34% (4,924)	66% (9,491)
UK		29.7% (5,329)	70.1% (12,571)
	Appeals	33% (4,577)	67% (9,343)

In the countries covered by this study, **France** receives the most overall number of female asylum applicants (14,016) and **Hungary** the least (308). **Sweden** receives the highest percentage of female asylum applicants overall (38%) and **Italy** the least (12.1%).

The following conclusions can be drawn from the Comparative Table on Refugee Status and Subsidiary Protection Statistics (see Table 2). In **Belgium**, **France** and the **UK**, most women and men who benefit from international protection are granted refugee status and the percentage for subsidiary protection is visibly smaller. In **Belgium**, **France**, **Hungary**, **Spain** and the **UK**, women are granted refugee status more often than subsidiary protection. In all the countries,<sup>[58]</sup> women are granted refugee status more often than men. However, in **France** women beneficiaries of international protection have five times more chance than men to be granted subsidiary protection.

**Malta** and **Sweden** represent exceptional cases where the rate of subsidiary protection granted for both women and men is significantly higher than cases where refugee status was granted. In **Malta** in particular, there is an extremely high rate of subsidiary protection status granted to women (64%), whereas only 5% are granted refugee status.

[58] It was not possible to include Italy in this analysis due to the lack of gender-disaggregated data on the total number of decisions made.

Sweden and the UK are also the only countries that provide gender disaggregated statistics on the outcome of asylum appeals. In both countries, women have a higher chance of success than men at appeal. France provides gender-disaggregated statistics on the outcome of appeals but not on the number of appeals lodged.

The UK (19%), Belgium (16.4%) and Hungary (14.8%) are the three countries where national authorities grant asylum to the highest proportion of women.

Table 2: Comparative table on Refugee Status and Subsidiary Protection Statistics in 2010<sup>[59]</sup>

	WOMEN			MEN			APPEALS ALLOWED	
	Refugee Status	Subsidiary Protection	Total positive decisions	Refugee Status	Subsidiary Protection	Total positive decisions		
Belgium	16.4 %	1.8%	18.2%	15.8 %	7.4%	23.2%	8.8%	
France	12.1 %	5.3%	17.4%	10.1%	1.3%	11.4%	22% <sup>[60]</sup>	
Hungary	14.8%	11.7% <sup>[61]</sup>	26.5%	4%	12.2% <sup>[62]</sup>	16.2%	N/A	
Malta	5%	64%	69%	2%	63%	65%	N/A	
Spain	10.4 %	5.2 %	15.6%	4.8 %	6.2%	11%	1.09% <sup>[63]</sup>	
Sweden	8 %	23.5 %	31.5%	5.1%	19.5%	24.6%	Women	Men
							9.5%	6.4%
UK	19 %	7 %	26%	16.4%	9%	25.4%	Women	Men
							32.3%	24.8%

[59] Both refugee status and subsidiary protection percentages were obtained by looking at the decisions made for women and men respectively.

[60] 5.240 allowed appeals out of 23.934 decisions. Refugee status: 1.394 women and 2.830 men. Subsidiary protection: 547 women and 473 men.

[61] Includes subsidiary protection and 'tolerated status' (a protection status against refoulement based on a more general – not individualised – risk of harm in the country of origin).

[62] Includes subsidiary protection and 'tolerated status' (a protection status against refoulement based on a more general – not individualised – risk of harm in the country of origin).

[63] 1546 Appeals. 1529 rejected. 17 estimated (14 grants of refugee status and 3 grants of subsidiary protection).



In Italy, 26.2% of those granted refugee status were women, and 73.7% were men. Of those granted subsidiary protection, 14.3% were women and 85.6% were men.<sup>[64]</sup> This suggests overall a higher recognition rate for women as they make up 12.1% of total asylum applications.

Belgium is an example of good practice as this country also provides detailed data for the different types of persecution related to gender-based claims (See Table 3). The Belgian first instance authority provides detailed data on gender-based claims, including the number of claims assessed, types of gender-related persecution mentioned, recognition rates and type of protection granted. Indeed, in order to “better identify and inform asylum seekers”, Belgium classifies gender-related claims according to the following list:

1. *Sexual orientation and gender identity*
2. *‘Honour’ crimes*
3. *Female Genital Mutilation*
4. *Forced Marriages*
5. *Domestic violence (other than sexual violence)*
6. *Sexual violence/rape*
7. *Forced sterilisation and forced abortion*

This is a positive indication of the recognition of particular forms of harm influenced by gender and the Belgian national authority’s effort in collecting this specific data is to be encouraged. However, there is not yet a common European framework of the different categories existing in gender issues.

In 2009, in Belgium, the top ten countries of origin for these types of claims were: Guinea, Cameroon, DRC, Afghanistan, Kenya, Togo, Iran, Russia, Burundi and the Ivory Coast. It should be noted that the list differs from that of women applicants. Indeed, gender-related claims include male applicants fleeing persecution on sexual orientation or gender identity grounds, ‘honour’ crimes, sexual violence, etc.<sup>[65]</sup> and not all women applicants mention gender-related persecution.

[64] These percentages are calculated by reference to the total number of decisions granting refugee status and of decisions granting subsidiary protection, not on the basis of gender-disaggregated data relating to the total decisions taken in 2011, because this data is not available. The total percentage of 19.6% is the result of positive decisions for women out of the total of positive decisions (men and women). Source: Italian Ministry of Interior.

[65] In 2009, men represented 83% of applicants with a claim based on sexual orientation and gender identity, 56% of those with a claim based on ‘honour’ crimes and 32% of those with a claim based on domestic violence. They represented less than 10% in other gender-related categories.

Although the need for statistics on asylum applications and the outcome of decisions including gender-specific information has been recognised since 1985, and despite being an obligation under EU law, **Romania** does not publish gender-disaggregated statistics on asylum applications, outcomes of asylum claims at first instance and at appeals nationally, but only makes this data available to Eurostat. **Belgium, France,**<sup>[66]</sup> **Hungary, Italy, Malta and Spain** do not publish their gender-disaggregated statistics at appeal nationally. These countries are encouraged to start collecting and disseminating gender disaggregated statistics nationally as soon as possible. The UNHCR Guidelines on the Protection of Refugee Women (1991) underlined the need for a demographic profile of the refugee population.

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[66] On the number of appeals allowed.



Table 3: The top ten countries of origin for women asylum seekers

	UK (2010)	SWEDEN (2010)	SPAIN (2010)	MALTA (2009/10)	ITALY (2011) <sup>[67]</sup>	HUNGARY (2010)	FRANCE (2010)	BELGIUM (2010)
	Zimbabwe (1,098)	Serbia (3,087)	Cuba (189)	Somalia	Nigeria (1,871)	Serbia/ Kosovo (90)	Russia (1,467)	Kosovo (734)
	Pakistan (818)	Somalia (2,178)	Nigeria (135)	Nigeria	Somalia (217)	Afghanistan (59)	DRC (1,449)	Russia (718)
	China (632)	Iraq (729)	Colombia (52)	Eritrea	Eritrea (202)	Serbia/ Kosovo (Roma) (45)	Kosovo (1,417)	Serbia (578)
	Nigeria (555)	Eritrea (710)	DRC (31)	Ethiopia	Ghana (166)	Serbia (Roma) (18)	China (1,039)	Macedonia (478)
	Iran (523)	Kosovo (669)	OPTs (25)	Syrian Kurds	Tunisia (143)	OPTs (10)	Armenia (816)	Guinea (470)
	Sri Lanka (433)	Iran (473)	Algeria (24)	Syria	Ethiopia (113)	Vietnam (9)	Sri Lanka (703)	Armenia (467)
	Somalia (330)	Macedonia (431)	Ivory Coast (19)	Pakistan	Bosnia- Herzegovina (112)	Iraq (6)	Haiti (645)	DRC (424)
	Eritrea (306)	Russia (402)	Cameroon (15)	Morocco	Syria (102)	China/Hong Kong (5)	Guinea (555)	Iraq (254)
	The Gambia (286)	Afghanistan (356)	Morocco (13)		Ivory Coast (100)	Georgia (5)	Georgia (440)	Afghanistan (220)
	Afghanistan (253)	Mongolia (331)	Guinea (10)			Russia (5)	Nigeria (369)	Rwanda (183)

[67] Source: Italian Ministry of Interior.

## V. GENDER GUIDELINES

### *i. Introduction*

Since neither the Refugee Convention nor the UNHCR Handbook<sup>[68]</sup> – which provides State authorities with guidance on the interpretation of the Refugee Convention and the refugee status determination procedure – are gender-sensitive, the need to develop gender guidelines has been recognised by international institutions, advocacy organisations and various national governments.

The UNHCR has specifically developed a series of documents to assist national authorities in considering gender-related asylum claims inclusively. In 1991, the UNHCR Executive Committee (ExCom) first issued formal recommendations regarding expansion of the refugee definition to include individuals who have experienced sexual violence or other gender-related forms of persecution.<sup>[69]</sup>

In 1995, the Beijing Platform for Action further urged States to recognise as refugees women whose claims are based on gender-related persecution, to promote efforts by States to develop gender guidelines, and to disseminate and implement the gender guidelines of the UNHCR. In 1996, the European Parliament passed a Resolution recommending that Member States adopt guidelines on women seeking asylum as agreed by the UNHCR.<sup>[70]</sup> In 1998, the PACE urged Member States “to adopt criteria and guidelines dealing with women seeking asylum, in order to enhance a gender-sensitive approach and ensure women’s specific needs are met”.<sup>[71]</sup> In 2000, the Special Rapporteur on Violence against Women reiterated that government bodies must “adopt and implement guidelines recognising gender-related persecution as a basis for women to claim refugee status”.<sup>[72]</sup>

The UNHCR issued more comprehensive guidelines in 2002 entitled “Guidelines on International Protection: Gender-related persecution within the context of Article

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[68] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1, Reedited Geneva, January 1992, UNHCR 1979.

[69] Office of the United Nations High Commissioner for Refugees, *Guidelines on the Protection of Refugee Women*, U.N. Doc. ES/SCP/67 (1991).

[70] European Parliament, Resolution on the Council Resolution on minimum guarantees for asylum procedures (5585/95 – C4-0356/95), A4-0315/96, 14 November 1996.

[71] Parliamentary Assembly of the Council of Europe, Recommendation 1374 (1998) on the Situation of Refugee Women in Europe, para. vi (i).

[72] R. Coomaraswamy, 'Integration of the human rights of women and the gender perspective, violence against women': UN doc. E/CN.4/2000/68, 29 February 2000, para 122(f).



1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees.”<sup>[73]</sup> These guidelines, commonly known as the UNHCR Gender Guidelines, indicate that the definition of a refugee should be interpreted in a manner having regard to gender dimensions. This is important because gender is not explicitly included in the five Convention grounds for refugee protection.

Further, the UNHCR has also developed guidance on defining a particular social group,<sup>[74]</sup> the principle of internal relocation,<sup>[75]</sup> victims of trafficking and persons at risk of being trafficked,<sup>[76]</sup> Female Genital Mutilation (FGM),<sup>[77]</sup> and is currently revising its Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity.<sup>[78]</sup> Throughout the present report, these documents are referred to as the UNHCR gender-relevant guidelines.

Edwards has noted that the UNHCR Gender Guidelines “unintentionally reinforce the perception of refugee women as principally social and cultural in nature” and emphasises the reliance on the ground of particular social group to the detriment of women who are considered “less than political in nature, and certainly less political than their male counterparts.”<sup>[79]</sup> This particular emphasis on certain aspects of women’s lives has resulted in a focus away from the areas of women’s lives that they share with men. UNHCR Gender Guidelines however recognise that “making generalisations about women or men is not helpful and in doing so, critical differences, which may be relevant to a particular case, can be overlooked”.

The UNHCR gender-relevant guidelines have wide international recognition and address different areas of the refugee status determination procedure which are particularly relevant to asylum seekers with gender-related claims. Using the UNHCR gender-relevant guidelines on International Protection would ensure that the EU Directives and the Refugee Convention are interpreted in a manner that bridges the protection gap for asylum seeking women in the EU.

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[73] UN Doc. HCR/GIP/02/01, 7 May 2002.

[74] UNHCR Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.

[75] 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, July 2003.

[76] UNHCR Guidelines on International Protection: “The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked”, 2006.

[77] UNHCR Guidance Note on Refugee Claims relating to Female Genital Mutilation, May 2009.

[78] UNHCR Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity, November 2008.

[79] Edwards, 2010, p. 27.

However, in 2004 it became apparent that the UNHCR Gender Guidelines had not been incorporated into domestic legislation/policies in 42 European countries.<sup>[80]</sup> UNHCR's 2004 comparative analysis of gender-related persecution in asylum legislation and practice in Europe recommends that States "should produce clear guidance on procedural and substantive issues relevant to gender-related persecution" which should draw on and reflect the principles and standards in the UNHCR Gender guidelines.<sup>[81]</sup> The report further suggests that the guidance should apply to first instance decision-makers and at appeal and be non-discretionary. The implementation of the guidance should be reviewed by Member States every two years.

Gradually, countries have started developing their own gender guidelines and gender-sensitive tools in harmony with the UNHCR standards. Nevertheless, gender guidelines are non-binding documents and their implementation remains either inadequate or non-existent in most of the European countries in this study.

## *ii. Implementation of UNHCR Gender Guidelines*

### *Translation of UNHCR Gender Guidelines*

The UNHCR Gender Guidelines (2002) were initially adopted in English. They have been translated into all national languages under this comparative research (i.e. Dutch, French, Hungarian, Italian, Romanian and Spanish) except into Maltese and Swedish.

### *Dissemination of UNHCR Gender Guidelines*

The UNHCR Gender Guidelines are generally disseminated (in hard and/or electronic copy) to first instance and appeal authorities, NGOs and other actors involved in asylum procedures in **Belgium, Hungary, Italy, Romania, Spain and Sweden**. In **Malta**, even if they are not disseminated in the same way, legal NGOs assisting asylum seekers in their claims usually rely on them in their daily work.

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[80] **Crawley and Lester**, *Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe*, 2004, p. 22. <http://www.unhcr.org/40e071354.html>.

[81] **Crawley and Lester**, *Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe*, 2004, p. 127.





**Good practice:** In Belgium, the UNHCR Gender Guidelines are systematically disseminated by the first instance authority to all agents. They are distributed in printed version and included in a "Gender Vademecum".



**Good practice:** In Italy, the UNHCR Gender Guidelines are widely disseminated by UNHCR as an effective member within the Territorial Commissions.



**Good practice:** The UNHCR office in Spain widely distributes the UNHCR Gender Guidelines in workshops, seminars and at ports of entry for asylum seekers.

### Reliance on UNHCR Gender Guidelines and other gender-relevant guidelines

First instance and appeal authorities in most of the countries covered in this comparative study declare that they rely on UNHCR gender relevant guidelines. Practice is not consistent, however. In **Belgium**, several national stakeholders (authorities, lawyers, advocates) affirmed that the UNHCR Gender Guidelines represent in practice a major guidance document at all stages of the asylum determination procedure. In **Sweden**, according to the Swedish preparatory works relating to gender-related persecution (documents preceding the current Swedish Aliens Act (2005:716) that are also influential on decisions made at the Migration Board and at the migration courts),<sup>[82]</sup> the UNHCR Handbook, guidelines and conclusions by the UNHCR Executive Committee constitute a source of guidance in the context of refugee status determination. However, research indicated a lack of knowledge and/or implementation of the guidelines among staff at the Swedish Migration Board.<sup>[83]</sup> Similarly, in the UK, the first instance authority rarely refers to them and practice by the courts is variable. In France, despite the fact that determination authorities (first and second instance) both maintained that decision-making relies on UNHCR Gender Guidelines, in practice not one decision referring to or implementing recommendations from these guidelines was encountered.

[82] See for example prop. 2005/06:6, p.8; prop. 1996/97:25, p. 97; prop. 2004/05:170, p. 94.

[83] See for example Feijen Liv & Frennmark, Emelia, *Quality in Swedish Asylum Assessments: A study of the Migration Board's investigations and decisions concerning international protection*, UNHCR, 2011, p. 131, 142-147 and the footnote below regarding the implementation of guidelines (Original title: *Kvalitet i svensk asylprövning: En studie av Migrationsverkets utredning av och beslut om internationellt skydd*); Maite Zamacona Aguirre, *Guidelines for investigating and assessing women's protection needs*, Swedish Red Cross, 2008 (Original title: *Riktlinjer för utredning och bedömning av kvinnors skyddsbehov. Ett fungerande verktyg?*); Swedish Refugee Advice Center, *Recommendations for an asylum process characterised with gender equality*, February 2008 (Original title: *Rekommendationer för en jämställd asylprocess*).

### UNHCR Guidelines and jurisprudence

UNHCR gender-relevant guidelines have been cited in appeal decisions in **Belgium, Spain, Sweden** and the **UK**. In **Spain**, the UNCHR Gender Guidelines are expressly referred to in the judgments of the Spanish Supreme Court, e.g. 15<sup>th</sup> June 2011, which ratifies a National Court Judgment of 13<sup>th</sup> January 2009 by granting asylum to an Algerian woman victim of gender violence. In **Sweden**, the Migration Court of Appeal has stated that the UNHCR conclusions relating to refugee status determination should be considered “important sources of law”.<sup>[84]</sup> Yet the UNHCR Gender Guidelines are explicitly referred to in only one judgment delivered by the Migration Court of Appeal.<sup>[85]</sup> However, that judgment does not refer systematically to the guidelines in relation to all criteria of the Convention refugee definition. In the **UK**, there are cases where judges have directly relied on and adopted UNHCR guidance and other cases where the guidelines were said to be of little assistance. For example, Baroness Hale in the House of Lords referred to the UNHCR Guidelines on Gender-Related Persecution with regards to sexual violence and rape of women being used to further the objective of destroying ethnic identity.<sup>[86]</sup> She referred to the fact that “the UNHCR Guidelines recognise that punishment for transgression of unacceptable social norms imposed upon women is capable of amounting to persecution”.<sup>[87]</sup> She also made reference to the UNHCR Guidelines regarding cumulative discrimination that may amount to persecution and discrimination by the State by failing to protect certain individuals as significant to gender-related claims.<sup>[88]</sup> The Court of Appeal was directed by counsel for the appellant to Baroness Hale’s opinion in the case of *Hoxha* regarding “the potency of discrimination against women as an engine of persecution”.<sup>[89]</sup>

Regarding other UNHCR gender-relevant guidelines, the Upper Tribunal in the **UK** noted the UNHCR Guidelines on Trafficking that “women may feel ashamed of what has happened to them or may suffer from trauma caused by sexual abuse and violence”.<sup>[90]</sup> The Tribunal also noted that “it is unlikely that the appellant would have been in a situation where only female officials would have been present and

[84] Migration Court of Appeal, MIG 2006:01.

[85] Migration Court of Appeal, UM 7851-10/MIG 2011:8, published April 21, 2011. For a discussion on the status and use of international Act in Swedish jurisprudence, see Stern, Rebecca, 'Folkrättens roll i vägledande migrationsrättslig praxis', Svensk juristtidning., 2010:(95):4 s. 358-374, 2010.

[86] *Hoxha & Anor v Secretary of State for the Home Department* [2005] UKHL 19 (10 March 2005), para. 31.

[87] *Ibid.*, para. 32.

[88] *Ibid.*, para. 35.

[89] *Amare v Secretary of State for the Home Department* [2005] EWCA Civ 1600 (20 December 2005), para. 23.

[90] *AZ (Trafficked women) Thailand CG* [2010] UKUT 118 (IAC) (23 April 2010), para. 48.

[91] *Ibid.*, para. 116.



we find that the presence of male officials would have made it even less likely that she would have felt able to disclose her problems to the authorities. We note that the [Asylum Policy Instruction] gender guidelines advise Home Office caseworkers that such an applicant's failure to disclose information relating to her claim should not automatically count against her as there may be many reasons for this including feelings of guilt and shame".<sup>[91]</sup> Further, the Asylum and Immigration Tribunal made reference to the UNHCR Trafficking Guidelines describing them as "informative" but considered them of little assistance in deciding whether "former victims of trafficking" or "former victims of trafficking for sexual exploitation" are capable of being members of a particular social group (PSG). In this case, the Tribunal also considered the UNHCR Guidelines on PSG and on Gender-Related Persecution but disagreed with UNHCR's suggestion that "a particular social group is a group of persons who either share a common characteristic other than their risk of being persecuted or who are perceived as a group by society".<sup>[92]</sup>

### *iii. Adoption of national Gender Guidelines*

In this comparative study, **Malta, Romania, Sweden** and the **UK** have adopted gender specific guidelines on international protection. **Belgium** and **Italy** do not have gender specific guidelines but have developed alternative guidance material. **France, Hungary** and **Spain** have neither national gender guidelines nor alternative gender-specific guidance. However, in **Spain**, the national representation of the UNHCR has developed a specific brochure.

#### Countries with gender-specific guidelines

In **Romania**, there are gender guidelines on how to determine gender asylum claims for the Romanian Immigration Office. They are implemented for training and as guidance by interview offices. They are not legally binding.

In **Sweden**, the Swedish Migration Board issued gender guidelines in 2001 (women)<sup>[93]</sup> and in 2002 (LGBT-persons). These guidelines were revised in 2006, 2009 and 2010 and contain recommendations aimed at informing the staff in the Migration Board on how to investigate and decide gender-related cases. They are not legally binding, and various research has revealed problems indicating a lack of implementation of

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[92] SB (PSG, Protection Regulations, Reg 6) Moldova CG [2008] UKAIT 00002 (26 November 2007), para. 110.

[93] Swedish Migration Board, *Gender-Based Persecution: Guidelines for Investigation and Evaluation of the Needs of Women for Protection* (March 2001).

national and UNHCR guidelines.<sup>[94]</sup> There are also the Swedish preparatory works which elaborate on the issue of gender-related persecution. Preparatory works are considered important sources of law and as such are binding on Swedish courts and authorities. The preparatory works discussing gender-related persecution are thus guiding decision-makers at the Migration Board and the migration courts.<sup>[95]</sup>

In the UK, the UK Border Agency's (UKBA) Gender Guidelines, entitled *Asylum Instruction on Gender Issues in the Asylum Claim*, were adopted in March 2004 and then revised in 2006 and September 2010. They are not legally binding. It should be noted that guidelines in the UK have been adopted as a result of NGO advocacy and their revision in 2010 was also subject to consultation with civil society. However, numerous research projects have highlighted problems of implementation of these guidelines<sup>[96]</sup> and they do not include important procedural aspects which are found in the UNHCR Gender Guidelines.<sup>[97]</sup>

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[94] See for example: Feijen Liv & Frennmark, Emelia, *Quality in Swedish asylum assessments: A study of the Migration Board's investigations and decisions concerning international protection*, UNHCR, 2011, p. 25, 88-89, 65-71, 30, 73-79, 103, 97-101, 114-115, 109, 113, 131, 134-137, 140-159, 163-164, 168, 176-177, 192-196, 186-187, 200. (Original title: *Kvalitet i svensk asylprövning: En studie av Migrationsverkets utredning av och beslut om internationellt skydd*); Maite Zamacona Aguirre, *Guidelines for investigating and assessing women's protection needs*, Swedish Red Cross, 2008 (Original title: *Riktlinjer för utredning och bedömning av kvinnors skyddsbehov. Ett fungerande verktyg?*); Maria Bexelius, *Asylum law, gender and politics – a handbook on gender equality and women's rights*, Swedish Refugee Advice Center, Stockholm 2008. (Original title, in Swedish: *Asylrätt, kön och politik – en handbok om jämställdhet och kvinnors rättigheter*); Swedish Refugee Advice Center, *Recommendations for an asylum process characterised with gender equality*, February 2008 (Original title: *Rekommendationer för en jämställd asylprocess*); Maria Bexelius, *Swedish Law and Practice, and Gender Persecution: Summary Conclusions and Comments*, unpublished document, January 2006; Heaven Crawley and Trine Lester, *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe*, Geneva: UNHCR, 2008 (N.B. see paragraphs referring to Sweden); Maria Bexelius, *Refugee Women – an analysis of Swedish asylum politics from a gender perspective 1997-2000*, Swedish Refugee Advice Center, Stockholm 2001 (Original title: *Kvinnor på flykt – en analys av svensk asylpolitik ur ett genusperspektiv 1997-2000*); Maria Bexelius, "Gender-based violence within the meaning of persecution", in *International Conference on Refugee Women Fleeing Gender-Based Persecution. Conference Proceedings*, Canadian Council for Refugees (red.), Montréal, May 4-6, 2001, p. 84-89. Opinion of the Parliamentary Assembly Committee on Equal Opportunities for Women and Men on Gender-related claims for asylum, Doc. 12359, 24 September 2010, para. 9.

[95] SOU 2004:31 *Flyktingskap och könsrelaterad förföljelse* (Eng: *Refugee status and gender-related persecution*); Prop. 2005:06/6 *Flyktingskap och förföljelse på grund av kön eller sexuell läggning* (Eng: *Refugee status and persecution on account of gender and sexual orientation*); Bet. 2005/06:SFU4 *Förföljelse på grund av kön eller sexuell läggning* (Eng: *Persecution on account of gender or sexual orientation*).

[96] *Asylum Aid, Unsustainable: The quality of initial decision-making in women's asylum claims*, January 2011; *Asylum Aid, Lip service' or implementation? The Home Office Gender Guidance and women's asylum claims in the UK*, March 2006. *Yarl's Wood Detained Fast-Track Compliance with the Gender API: A Report by the NAM Quality Team*, Home Office August 2006. *Bail for Immigration Detainees (BID), Refusal Factory: Women's experiences of the detained fast track asylum process at Yarl's Wood Immigration removal centre, BID*, 2007. Human Rights Watch, *Fast-Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK*, February 2010.

[97] *Crawley and Lester, Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe*, 2004, p. 31.



In the UK, the Immigration Appellate Authority also published its own gender guidelines in 2000.<sup>[98]</sup> However, in September 2006, the new Asylum and Immigration Tribunal (AIT) declared that these gender guidelines were not the policy of the AIT.<sup>[99]</sup> When the AIT was replaced by the First and Upper Tier Tribunal Immigration and Asylum Chambers (IAC) in February 2010, the Practice Direction on Child, vulnerable adult and sensitive witnesses was extended to the IAC. In October 2010, the IAC issued a Joint Presidential Guidance Note on *Child, vulnerable adults and sensitive appellant* (Note no 2).

### Countries with alternative gender-specific guidance material

The **Belgian** authority has adopted a series of instructions and operational notes that aims at giving guidance to officers when examining gender-related asylum claims. They are not legally binding and not public. As of 2011, five operational notes had been adopted: two on asylum claims based on FGM, one on forced marriage, one on sexual orientation and gender identity and one on asylum claims based on rape. Besides, a specific instruction note addresses the implementation of the concept of membership of a Particular Social Group.

In **Italy**, the National Commission for the right to Asylum published guidelines providing information on the criteria for the recognition of the refugee status in 2005, which included for the first time a paragraph dedicated to gender-related persecution.<sup>[100]</sup> In July 2001, the Equal Opportunities Department has issued guidelines on female genital mutilation. Those are not legally binding.

Finally, it should be noted that the UNHCR in **Spain** has developed a specific brochure entitled “Gender based persecution and asylum” to inform and provide guidance to identify gender asylum claims.<sup>[101]</sup> This brochure is not legally binding.

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The UNHCR gender-relevant guidelines, including the UNHCR Gender Guidelines adopted in 2002, are key elements for the promotion of gender-sensitivity in refugee status

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[98] N. Berkowitz and C. Jarvis, *Asylum gender guidelines* (Immigration Appellate Authority, 2000).

[99] Note from C. M. G. Ockleton, Deputy President, *Asylum and Immigration Tribunal*, Issue 17 (2006), 25. The Immigration Appellate Authority was the Asylum and Immigration Tribunal's predecessor.

[100] *Linee Guida per la valutazione delle richieste di riconoscimento dello status di rifugiato* - Ministero dell'Interno edited by Vice Prefetti Denozza/Sonnino.

[101] *La persecucion por motivos de genero y el asilo*

determination systems. Their impact is however limited in practice due to their non-binding character. The same observation can be made regarding national non-binding gender guidelines adopted in **Romania**, **Sweden** and the **UK** or alternative gender-sensitive guidance documents adopted in **Belgium** and **Italy**. Although gender guidelines or instructions may significantly enhance gender awareness among national stakeholders, their implementation in practice is often lacking.

In **Belgium**, **Spain**, **Sweden** and the **UK**, some appeal decisions mention UNHCR gender-relevant guidelines, consequently making their recommendations binding by jurisprudence.

Furthermore, it should be highlighted that other European countries adopted national guidelines (i.e. the Netherlands<sup>[102]</sup> and Norway<sup>[103]</sup>). Under German immigration law applicants can be recognised as refugees if they fear persecution “solely on account of sex.”<sup>[104]</sup> While Canada,<sup>[105]</sup> the United States of America<sup>[106]</sup> and Australia<sup>[107]</sup> adopted gender guidelines in the 1990s, European countries are gradually developing such guidance.

It is recommended that all European countries should adopt and implement specific national gender guidelines in order to provide guidance to officers when examining gender-related asylum claims and promote the inclusion of a gender-sensitive perspective in asylum procedures. Countries that have already adopted such guidelines should ensure their implementation. EASO should also develop EU-wide gender guidelines and/or promote examples of national good practice at the European level.

[102] **Netherlands Aliens Act Implementation Guidelines** (*Vreemdelingencirculaire*) 1994. Immigration and Naturalization Service (IND), Work Instruction no. 148: *Women in the asylum procedure*, 1997.

[103] **European Council on Refugees and Exiles**, *Norway, European asylum systems: legal and social conditions for asylum seekers and refugees in Western Europe* (2000).

[104] **German Immigration Act**, Section 60(1), 2005.

[105] ‘**Guidelines for women refugee claimants fearing gender-related persecution**’, Canadian Immigration and Refugee Board, 1993.

[106] ‘**US Gender AI, consideration for asylum officers adjudicating asylum claims from women**’, United States Immigration and Naturalization Service, Office of International Affairs, May 1995.

[107] ‘**Refugee and humanitarian visa applicants: guidelines on gender issues for case owners**’, Australian Department of Immigration and Multicultural Affairs, 1996.



## VI. REFUGEE STATUS DETERMINATION PROCESS

### *i. Introduction*

This section of the report examines the main elements of the refugee status determination process from a gendered perspective. It will start by examining the extent to which countries recognise gender-specific forms of harm in legislation and practice as amounting to persecution, whether the member States implement a gender-sensitive interpretation of the five Convention grounds, whether they recognise gender-related persecution by non-State actors and access to protection in the country of origin, how they reference the concept of safe country of origin, and finally what credibility and evidence issues are at stake in these types of claims.

In **Belgium, France, Hungary, Italy,**<sup>[108]</sup> **Malta, Romania, Spain** and the **UK**, national authorities do not give reasons for positive decisions. It is therefore difficult to understand whether gender-related violence is recognised as persecution, how the causal nexus is applied and on which Convention ground(s) the asylum claim is allowed. **Sweden** is the only country where first instance and appeal authorities give reasons for positive decisions. This gives applicants an understanding of why they have been granted international protection and ensures the asylum process is more transparent.

### *ii. Legal Framework*

In 2009, the Special Rapporteur on Violence against Women recognised that “work remains to be done to establish gender as independent grounds for claiming asylum as a refugee”.<sup>[109]</sup> In 2010, the PACE Committee on Migration, Refugees and Population published a report on gender-related claims for asylum recognising that specific attention must be paid to such claims to ensure effective protection in Member States.<sup>[110]</sup> In October 2010, the PACE adopted a Resolution recommending a series of measures to Council of Europe Member States to ensure that proper account is taken of the gender dimension when asylum applications are being assessed.<sup>[111]</sup>

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[108] The good practice of giving reasons for positive decisions is currently being taken into consideration by the Territorial Commissions, but it is still not in force.

[109] Ertürk, Y. *15 years of the United Nations Special Rapporteur On Violence Against Women, Its Causes and Consequences*, United Nations May 2009.

[110] Committee on Migration, Refugees and Population in the Parliamentary Assembly of the Council of Europe, Gender-related claims for asylum, Doc. 12350, 26 July 2010.

[111] Resolution 1765 (2010).

In July 2011, the Committee of Ministers of the Council of Europe replied noting that the implementation and monitoring of measures from their recommendation on the protection of women against violence had already yielded relevant information and that current work might draw on PACE's proposals.<sup>[112]</sup> However, the Committee of Ministers' Recommendation on the protection of women against violence<sup>[113]</sup> does not deal specifically with women asylum seekers. The reply fails to address PACE's recommendations regarding a set of guidelines to ensure that gender-related persecution is adequately taken into account in national asylum procedures, and the need to develop gender-sensitive training programmes and tools for those involved in asylum procedures.

The European Commission published its recast Qualification Directive proposal in 21 October 2009.<sup>[114]</sup> In September 2010, Asylum Aid, the European Women's Lobby and ILGA-Europe wrote to the LIBE Committee Rapporteur with recommendations to ensure the recast Qualification Directive was gender-sensitive.<sup>[115]</sup> There were positive outcomes from the LIBE Committee in terms of gender-sensitivity but despite this there was limited improvement in the actual compromise text agreed upon in July 2011.<sup>[116]</sup> Most of the amendments that had been included in the text from the European Parliament in the Orientation Vote relating to gender or minors were removed. The amendment to article 10(1)(d) to make the two limbs of particular social group clearly alternatives and the recital (15) referring to equality between men and women have not been adopted. The recast Directive continues to recognise non-State agents as actors of protection (article 7); in terms of vulnerable persons the text now adopts the terminology of "mental disorders" instead of the Commission's "mental health problems" and the Parliament's "mental health illnesses" (articles 20 and 30). Article 8(3) on the availability of internal protection notwithstanding technical obstacles to return has been deleted and Article 20 on the specific situation of vulnerable persons now includes victims of trafficking.

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[112] Reply from the Committee of Ministers to Gender-related claims for asylum: Recommendation 1940 (2010), Doc. 12687, 18 July 2011.

[113] Council of Europe, Committee of Ministers, Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence.

[114] <http://www.statewatch.org/news/2010/sep/eu-com-minimum-standards-protection-com-551.pdf>.

[115] Asylum Aid, the European Women's Lobby and ILGA-Europe, 'Gender-sensitive amendments to the qualification directive'

[116] <http://www.statewatch.org/news/2011/jul/eu-council-qualification-ten-12337-rev1-11.pdf>. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARG+PE-469.705+01+DOC+PDF+V0//EN&language=EN&>.





The recast Qualification Directive has now been adopted by the Council and the European Parliament<sup>[117]</sup> and was published in the Official Journal in December 2011.<sup>[118]</sup> The UK, one of the countries in this comparative research, will not be opting-in to the recast Directive and will thus continue to be bound by the 2004 Qualification Directive.

### *iii. Interpretation of persecution*

This section considers the interpretation of persecution and the extent to which gendered forms of violence, specifically FGM, forced marriage, domestic violence, rape and sexual violence, 'honour' crimes, discrimination, and sexual exploitation associated with trafficking, are recognised as constituting persecution within the meaning of the Refugee Convention. There is no definition of persecution in the Refugee Convention.

Female applicants may be subjected to the same forms of harm than male applicants but they may also face forms of persecution specific to their sex, such as sexual violence, dowry-related violence, female genital mutilation, domestic violence, and trafficking.<sup>[119]</sup>

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.<sup>[120]</sup>

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[117] Directive of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 2009/0164 (COD).

[118] Directive of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 2009/0164 (COD).

[119] UNHCR Guidelines on International Protection: Gender-related Persecution. HCR/GIP/02/01, 2002, para. 3.

[120] UNHCR Guidelines on International Protection: Gender-related Persecution. HCR/GIP/02/01, 2002, para. 9.

The Qualification Directive provides that acts of persecution can, inter alia, take the form of acts of a gender-specific nature.<sup>[121]</sup> This is the only reference to gender in relation to persecution found in the Qualification Directive and consequently provides minimal guidance to member States. It is unsurprising therefore that the implementation of this provision varies significantly amongst the member States researched. In April 2011, an EU Directive on Trafficking was adopted which introduces common provisions taking into account the gender perspective.<sup>[122]</sup>

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence requires parties to take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of the Refugee Convention and as a form of serious harm giving rise to subsidiary protection.<sup>[123]</sup> In 2006, the European Parliament passed a Resolution on the role and place of immigrant women in the EU<sup>[124]</sup> noting that “the gender dimension has not been systematically taken into account either at the level of harmonised policies or at the level of data collection”<sup>[125]</sup> and therefore urging the Council and the Commission in the CEAS framework to include the risk of FGM as a ground for asylum in accordance with the UNHCR Guidelines on gender-related persecution.<sup>[126]</sup>

One of the main obstacles in recognising gender-specific forms of harm as amounting to persecution is that some member States still consider gender-based violence as “private”. Gender-based violence occurring in the private sphere may be more difficult to evidence, creating credibility issues for asylum seekers with gender-related claims. This research shows that each country has a different gender-sensitive approach in interpreting persecution in accordance with the Refugee Convention.

In the UK, the Immigration Appeal Tribunal in a case heard in 2004 cited the Immigration Appellate Authority Asylum Gender Guidelines that “certain forms of harm are more frequently, or only, used against women or affect women in a manner which is different to men. These include, but are not limited to, for example, sexual violence, societal and legal discrimination, forced prostitution, trafficking, refusal

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[121] Article 9(2)(f).

[122] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, article 1.

[123] Article 60(1).

[124] European Parliament resolution on women's immigration: the role and place of immigrant women in the European Union (2006/2010(INI)).

[125] *Ibid.*, para. H.

[126] *Ibid.*, para. 34.



of access to contraception, bride burning, forced marriage, forced sterilization, forced abortion, (forced) female genital mutilation, enforced nakedness/sexual humiliation”.<sup>[127]</sup> The Asylum Instruction on *Gender* states that:

*NB, although Article 9 (2)(f) was not transposed into UK law by the 2006 Regulations and changes to Immigration rules, the UK Border Agency accepts that acts of a gender-specific nature, other than sexual violence, may also constitute persecution. Whether a particular action amounts to persecution requires the decision-maker to reach a judgement in each case.*

In **Hungary**, the only indication that international protection is interpreted in a gender-specific way is contained in the following provision:

*The social standing, personal circumstances, gender and age of the person applying for recognition shall be examined to establish whether the acts which have been or could be committed against the person applying for recognition qualify as persecution or serious harm.*<sup>[128]</sup>

In **Italy**, article 7(f) of the Qualification Decree specifically states that acts of persecution can include acts of a gender-specific or child-specific nature in accordance with the Qualification Directive. In **Belgium**, article 48/3 para. 2(f) of the Aliens Act also refers to the wording of the Qualification Directive.<sup>[129]</sup>

In **Romania**, article 9 of the Gov. Ordinance no. 1251/2006 includes gender-specific and child-specific types of harm within the definition of persecution.

The **Spanish** Supreme Court<sup>[130]</sup> and the National Audience<sup>[131]</sup> cited that “gender-based persecution may include those asylum applications relating to sexual violence, domestic and family violence, punishments by transgressing moral values and customs among other, and of course, the assumption of forced marriage and female genital mutilation, as are serious acts of specific persecution based on sex which inflict severe suffering and harm, both mental and physical, which are manifestations of persecutions by State agents or individuals”.

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[127] NS (Social Group, Women, Forced marriage) Afghanistan CG [2004] UKIAT 00328 (30 December 2004), para. 76.

[128] Section 90 of the Governmental Decree implementing the Asylum Act.

[129] It should be noted that the French version of the Belgian law refers to the wording of the Qualification Directive (2004) which does not mention “gender” but “sex”.

[130] Judgment 13<sup>th</sup> December 2007.

[131] Judgment 13<sup>th</sup> January 2009.

#### *iv. Forms of Persecution*

##### *Female Genital Mutilation (FGM)*

FGM comprises all procedures involving partial or total removal of the external female genitalia, or other injury to the female genital organs, carried out for traditional, cultural or religious reasons.<sup>[132]</sup>

The future risk of being subjected to FGM may be considered a risk of being subjected to a form of persecution in **Belgium, France<sup>[133]</sup>, Hungary, Italy, Spain, Sweden** and the **UK**.

Although in general the OIN in **Hungary** considers the risk of being forced to undergo FGM as constituting a risk of persecution, in two cases the OIN has argued that FGM is a tradition and thus a less severe form of harm, or that the age of the applicant no longer puts her at high risk. Overall it has failed to consider how women may be affected by her refusal to submit to the practice. In **Spain**, only four of the fourteen judgments of the Spanish Courts analysed granted international protection to women fleeing persecution to prevent FGM.<sup>[134]</sup> The **Spanish National Court** also considers the age of the applicant to determine the risk of FGM, finding that a 30 year old woman was no longer at risk.<sup>[135]</sup> The **Spanish Supreme Court** found that the risk of FGM to Nigerian women was only present until the birth of their first child.<sup>[136]</sup>

In **Belgium, France, Spain<sup>[137]</sup>** and in the **UK**, FGM may amount to persecution even though the practice is criminalised in the country of origin but the law is not implemented in practice.

[132] UN High Commissioner for Refugees, *Guidance Note on Refugee Claims relating to Female Genital Mutilation*, May 2009.

[133] Not for girls born in France.

[134] Spanish National Court Judgments, 8th October 2008, and 25th February 2009 and Spanish Supreme Court Judgment, 6th October 2006.

[135] Judgment of 23rd November 2005.

[136] Spanish Supreme Court, 6th October 2006, 11th May 2011.

[137] Spanish Supreme Court Judgment, 11th May 2009, established that "as stated by UNHCR certainly some States have adopted rules that prohibit FGM but the penalties are minimal and despite the ban some of these States still practice it on regularly".



In Malta, Romania, and France in certain circumstances, FGM is not considered as serious harm amounting to persecution. In France, asylum seekers who claim asylum due to a fear of suffering FGM and who were born in France are since 2009, if given leave to remain, granted subsidiary protection as a matter of policy. In Malta the practice is unclear and in Romania FGM can be considered as a form of serious harm.

In France, Hungary, Italy, Malta, Romania, Spain and Sweden, past FGM is not considered as amounting to persecution in itself. In Italy, this depends on the individual facts of the case and past-FGM does not result in an automatic refusal of the application. In Belgium, however, past FGM may be recognised as part of a future risk when associated with other types of harm such as forced marriage. In the UK past FGM is not generally considered as a future risk of persecution but this can be rebutted by objective evidence/expert reports in particular circumstances where for example FGM was part of a ritual for the applicant to become a *soweï* (a woman responsible for performing FGM)<sup>[138]</sup> or if there is also a risk of forced marriage or where FGM has been performed but the applicant is at risk of having the procedure re-done after the birth of a child.



**Good practice:** In the UK, the Asylum Instruction on Gender notes that “FGM, for example, is widely practised in some societies but it is a form of gender-based violence that inflicts severe harm, both mental and physical, and amounts to persecution.”<sup>[139]</sup>



**Bad practice:** French authorities have an ambiguous position in this matter. Although several decisions recognise that FGM amounts to persecution,<sup>[140]</sup> in 2009 the appeal jurisdiction ruled that daughters who were born in France would only qualify for subsidiary protection, and that their parents would not qualify for any protection given that the risk to see their daughter being subjected to FGM against their will is not directed against them. In practice, most FGM-related claims are now interpreted both at first and second instance level in the frame of subsidiary protection. This is mainly due to a lack of gender-sensitivity in the interpretation of Convention grounds.

[138] *FB (Lone women, PSG, internal relocation, AA (Uganda) considered) Sierra Leone* [2008] UKAIT 00090.

[139] *Asylum Instruction on Gender Issues in the Asylum Claim*, September 2010, para. 2.2.

[140] In accordance with a decision by the CRR (former appeal authority) on 18th September 1991.



**Bad Practice:** The Spanish Asylum Authorities (OAR) do not grant asylum to Somali women who have suffered FGM and have undergone reconstructive surgery in Spain and/or have serious physical or psychological symptoms, although UNHCR support these cases. Instead, the OAR grants subsidiary protection to Somali women because of the armed conflict.

### Forced marriage

In Belgium, France, Italy, Malta, Romania, Spain,<sup>[141]</sup> Sweden and the UK<sup>[142]</sup> forced marriage may amount to persecution.

In France, the mere fact of being married to a man against one's will does not amount to persecution. Only a behaviour of opposition or/and its consequences are considered as persecution or serious harm.<sup>[143]</sup> However, practice shows that decisions both at first and second instance may arbitrarily grant refugee status or subsidiary protection for a similar type of claim. In the UK, this is not always recognised because of the manner in which applicants phrase and articulate the issue (by not necessarily using the words 'forced marriage' for example). In Sweden forced marriage is not always recognised as amounting to persecution in practice.

In Spain only four of the twenty judgments of the Spanish Courts analysed granted refugee status or subsidiary protection to women fleeing persecution in case of forced marriage.<sup>[144]</sup> Spanish jurisprudence only grants protection to women younger than 25<sup>[145]</sup> and refuses claims where COI does not suggest forced marriages take place in the area of origin.<sup>[146]</sup> However there is some positive jurisprudence where the Spanish National Court has accepted that older unmarried women are at risk of forced marriage<sup>[147]</sup> and that forced marriage can amount to persecution even if the practice is banned but where the State is unable to provide protection.<sup>[148]</sup>

[141] STS 15 September 2006.

[142] *FB (Lone women, PSG, internal relocation, AA (Uganda) considered) Sierra Leone* [2008] UKAIT 00090.

[143] *CRR, SR, Mlle T.*, n°519 803, 29th July 2005.

[144] Spanish Supreme Court Judgment, 28th February 2006, 23rd June 2006, 15th September 2006.

[145] Spanish National Court, Judgment of 15th March 2005.

[146] Spanish National Court Judgment, 31st March 2005.

[147] Spanish National Court Judgment 25th February 2009.

[148] Spanish Nacional Audience Judgment, 21 June 2006, case of a Nigerian woman. Spanish Supreme Court Judgment, 11th May 2009.



### Domestic violence

Domestic violence may be considered as a form of persecution in **Belgium**,<sup>[149]</sup> **Hungary**, **Italy**, **Romania**, **Spain**,<sup>[150]</sup> **Sweden**<sup>[151]</sup> or the **UK**.<sup>[152]</sup> However, in practice, domestic violence is often interpreted as a form of serious harm leading to the grant of subsidiary protection. There are also often difficulties of evidencing that the domestic violence took place. In the **UK**, decision-makers do not always appreciate that where there had been one incident of physical violence in the relationship (irrespective of other forms of psychological abuse), this could amount to persecution. In **Sweden**, domestic violence is not consistently considered a form of persecution in practice.



**Good Practice:** In **Belgium**, while the CGRS had rejected in 2006 the claim of a woman based on "private" abuses, the appeal body ruled that domestic violence inflicted on a woman by her husband represents persecution within the meaning of the Refugee Convention.<sup>[153]</sup> In 2008, the CCE further ruled that domestic violence is "physical or mental violence" directed towards women "because of their sex" and should be interpreted as persecution within the meaning of the Geneva Convention. In a recent case, the CCE ruled that the alleged abuses were "sufficiently serious due to their nature and their repetition" to be considered as persecution under the Geneva Convention.<sup>[154]</sup> Therefore, in that particular case, even if the CGRS was reluctant, the appeal body considered that domestic violence amounted to persecution.



**Bad Practice:** In **France**, domestic violence may be considered as a form of serious harm and lead to subsidiary protection mostly if the claim mentions another type of violence such as a forced marriage<sup>[155]</sup> or opposition to social mores.<sup>[156]</sup> Indeed, the research shows that French authorities consider domestic violence rather as a private type of violence rather than amounting to persecution.

[149] CPRR n°06-0817/F2548, 14<sup>th</sup> December 2006.

[150] Spanish Supreme Court Judgment 15th February 2207, 15th September 2006, 31st May 2005. STS 14 December 2006.

[151] See for example MIG 2008:39.

[152] *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL 20, 25 March 1999.

[153] CPRR n°06-0817/F2548, 14th December 2006.

[154] CCE n°53.497, 30th June 2010.

[155] CNDA, BA, n°09 023 070, 17<sup>th</sup> November 2010.

[156] CNDA, n°09 006 617, 26<sup>th</sup> October 2010.

**Hungary Case Study:** A Lebanese woman fled from her Palestinian husband, claiming that she was a victim of domestic violence and that her husband did not let her work. The OIN examined whether she could obtain protection from the police. Ultimately, the OIN granted her refugee status, relying on COI reports showing that there was no effective protection from the State available in cases of domestic violence.

### Rape and sexual violence

Rape and sexual violence may be considered as amounting to persecution in some countries such as **Belgium, Hungary, Italy, Malta, Romania, Spain,**<sup>[157]</sup> **Sweden** and the **UK**.

In the **UK** this is reflected in the Asylum Instruction on *Gender*. In **Sweden** when the sexual violence is perpetrated in a non-custodial setting by a State agent, perpetrators are often considered as acting in individual capacity and the violence is not considered as State persecution. Also rape and sexual violence are not always recognised as amounting to persecution in practice.



**Bad Practice:** In **France**, the OFPRA and the CNDA interpret that rape may amount to serious harm or persecution depending on the context of the application. Non-governmental respondents and legal practitioners revealed that rape and sexual violence are so frequently mentioned that they are usually not believed both by OFPRA officers and judges. In fact, the interpretation remains generally at the officer's or judge's discretion. In cases based on the ground of political opinion, for instance, Guinean and Ethiopian women frequently state that they were raped in detention. Yet, a non-governmental respondent confirmed that OFPRA reports show that these statements are not considered as torture or as inhuman or humiliating treatment used to "break" women but rather "as elements independent from the rest of the story". Rape is therefore rarely considered as a gender-specific type of persecution.

### 'Honour' crimes

Some countries in this study, such as **Belgium, Hungary, Italy, Romania, Sweden** and the **UK** recognise 'honour' crimes as a form of persecution. In **France**, although 'honour' crimes may be considered a form of serious harm and lead to the grant

[157] STS 15 February 2007.





of subsidiary protection, mainly in situations of adultery or sexual relations before marriage, when different forms of violence are cumulated (sexual violence, forced marriage...) 'honour' crimes can also amount to persecution.

In the UK, if there is a risk of death because applicants are perceived as having offended the 'honour' of their families or communities then this will be recognised as persecution.<sup>[158]</sup> It may be more difficult to show that 'honour' crimes (as opposed to 'honour' killing) amount to persecution and will often depend on the particular facts of a case. In Sweden, despite the recognition of 'honour' crimes as serious harm amounting to persecution, there are still decisions indicating that these cases are not consistently recognised.

**Hungary Case Study:** An Azerbaijani and a Syrian woman alleged that during their stay outside of their countries of origin, they gave birth to babies from extramarital sexual relations. They can no longer return to their home countries because their families and the whole society would no longer accept them. They feared being subjected to 'honour' killings because of transgressing the rules of Islam. In the cases of these two women, the OIN considered that there is no State protection since the local authorities refuse to interfere in such cases. The OIN found that the situation of women, who breached the rules of Sharia, is so severe – because of their isolation in society and the fact that they can be subjected to 'honour' killings – that it can amount to persecution. Therefore, the OIN recognised both women as refugees.

### Trafficking and forced prostitution or forced labour

In Belgium, a recent decision by the CCE recognised that slavery “is officially forbidden through all international human rights standards” and constitutes a “sufficiently serious act” to be considered as persecution.<sup>[159]</sup> Alleged elements of prostitution and trafficking have to be sufficiently serious due to their nature and their repetition to be considered as persecution. It has also been recognised that prostitution may amount to persecution, interpreted as “physical and mental violence directed towards women because of their sex”. In Italy, some victims of trafficking are provided protection under the Refugee Convention. In the UK, the Asylum Instruction on *Gender* recognises that “forced recruitment of women for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence and/or abuse and may amount to

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[158] See for example, Operational Guidance Note on Iraq, December 2011, para. 3.9.

[159] CCE, n°69.071, 14th June 2011. Within the meaning of article 48/3 §2 of the Aliens Act.

persecution. In addition, trafficked women may face serious repercussions upon their return to their home country, such as reprisals or retaliation from criminals involved in trafficking rings or individuals, or discrimination from their community and families. Trafficked women may also face real possibilities of being re-trafficked". The Tribunal accepted that a risk of (re-)trafficking amounts to persecution.<sup>[160]</sup> It is also generally accepted that being held in servitude for the purpose of forced labour amounts to persecution.

On the other hand, **Spain** does not recognise trafficking and forced prostitution as forms of persecution. In **Spain**, human trafficking is considered an insufficient form of harm to amount to persecution. Asylum claims based on trafficking are therefore not considered under the Refugee Convention and victims of trafficking must apply for leave to remain under the immigration law. However, according to UNHCR between January 2009 and April 2011, there were only 19 applications on the basis of trafficking and only one was issued with a one year residence permit on humanitarian grounds. The Spanish Supreme Court has established specific forms of persecution such as severe and constant abuses and harassment.<sup>[161]</sup> In **Sweden**, despite the recognition of several forms of gender-based violence as serious harm amounting to persecution, there are still decisions that do not recognise forced prostitution, social ostracism and subsequent violations of the right not to be subjected to gender-based discrimination in combination with the right to an adequate standard of living as well as the right to physical and mental integrity as amounting to persecution.

**Spain Case Study:** A pregnant Nigerian woman was identified as a victim of trafficking when she applied for asylum in 2010. Despite a favourable report from UNHCR, the authorities rejected her application because of the inconsistency of the information she provided and the fact that she could not evidence the persecution. She was deported to Nigeria despite the fact that both UNHCR and the NGO Women's Link Worldwide repeatedly raised their concerns of the risks of deporting her.

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[160] SB (PSG, Protection Regulations, Reg 6) Moldova CG [2008] UKAIT 00002 (26 November 2007).

[161] STS 10 November and 9 September 2005, 22 December 2006.



### Forced sterilisation and abortion

In France, discrimination may amount to persecution or serious harm only if the applicant can prove personal threats. For example, in the case of a Chinese mother of two fleeing the one-child policy in China, the court ruled that “the legislation on birth control in China, being general and non discriminatory, is not sufficient to justify the grant of refugee status”.<sup>[162]</sup> In Sweden, the preparatory works state that forced sterilisation and forced abortion may amount to persecution.<sup>[163]</sup> In the UK, the Court of Appeal has accepted that forced sterilisation and forced abortion may constitute persecution.<sup>[164]</sup>

### Discrimination

In France, discriminatory legal norms and punishment may also amount to persecution. According to the CNDA, discrimination may also amount to persecution when it is “serious and repeated”. In Italy, discriminatory legal norms may also amount to persecution. There is no specific mentioning of gender discrimination in the Swedish preparatory works.<sup>[165]</sup> However, in considering the general statement that discrimination may amount to persecution in itself or on cumulative grounds, and that persecution shall be interpreted with a gender perspective, one might conclude that the preparatory works allows for discrimination on account of gender, sexual orientation or gender identity to amount to persecution.<sup>[166]</sup> There is to date no known decision recognising that gender discrimination by State or non-State actors may be considered serious harm amounting to persecution, either in itself or on cumulative grounds. In the UK, the Asylum Instruction on *Gender* states that “a discriminatory measure, in itself or cumulatively may amount to persecution depending on the facts of the case”.

#### **Italy Case Study: Women standing up for Women's Rights**

G is from Burundi and is the daughter of a Rwandan woman and a Burundi man. Her mother died in 1994 during the genocide and her father in 2000. When her father died he left her the house, but a non-written, traditional belief imposes that women cannot own anything. Thus, her stepmother's sister and her husband,

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[162] CE, MC, n°103 546, 29<sup>th</sup> December 1993.

[163] Prop. 2005/06:6, p. 22-23.

[164] Liu v Secretary of State for the Home Department [2005] EWCA Civ 249 (17 March 2005).

[165] Prop. 2005/06:6, p. 22-23.

[166] Prop. 2005/06:6, p. 10, 22.

who was in the army, pressed her to leave the house. The man often came to her house together with other soldiers, threatening her and trying to force her to leave the country because she was "half-blood". They told her that if she did not leave the country, they would make her disappear and nobody would care about it. They harassed her for months and she decided to live with some friends of her father. G issued a civil suit to be officially recognised as the formal owner of the house. At the same time, the friends who gave her the accommodation tried to reinstate her in the registry with a false date of birth, so that she was considered an adult and entitled to become the legal owner of the house.

In the meantime she started her activities in favour of women's rights. In Burundi sexual violence is widespread and in general women do not report it because of fear and shame. She travelled around the country to support women and persuade them to go to *Médecins Sans Frontières* to receive medical and psychological assistance. Supporting women to get access help was looked at in a bad light in Burundi. The treatment of women in Burundi is appalling as they suffer from violence and cannot report it or even talk about it. If they talk about it, they have their tongues cut and, sometimes, when they gave birth to a baby girl, they may have their arms cut by their own husband as well. In addition, social habits demand that they do not play any role in society and that they are completely subdued to their husband. G's activities were known in Burundi and she was repeatedly threatened. When she tried to talk with soldiers and police about sexual violence they told her that if she continued her activities she would be treated like the women she was trying to defend.

Her situation got worse when the civil suit concerning the house ended with a decision declaring her to be the sole owner of the house. Soldiers continued to threaten her. In 2009, she was riding a motorbike when a soldier came beside her, hit her and made her fall down on the ground. She was brought to the hospital. Later she was threatened again with death. She understood she had to leave the country because of the threats she was subjected to as a non-Burundian, as a woman owning a property, and as an activist. She arrived in Italy in 2009 and she was recognised as a refugee under the Refugee Convention.

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Whether gender-based violence is interpreted as amounting to persecution differs between the countries researched. There are also inconsistent policies and practice within individual countries. Despite clear guidance from UNHCR that rape, FGM, domestic violence and trafficking are acts which may amount to persecution, and the



binding Qualification Directive which recognises that acts of a gender-specific nature may amount to persecution, the practice of some member States is still consistently poor. France, for example, generally fails to recognise gender-related claims made by women (FGM, forced marriage, domestic violence, rape and ‘honour’ crimes) and Spain fails to recognise trafficking as a form of persecution. As examples of good practice, Belgium and the UK recognise slavery; Italy, Malta and the UK recognise trafficking; and Italy, Sweden and the UK recognise forced abortion and forced sterilisation as forms of persecution. Obtaining evidence may be a particular obstacle in recognising that domestic violence or ‘honour’ crimes for example are widespread.

Considering forms of harm taking place between individuals, often in the home or within the community should always be considered within the framework of the Refugee Convention, gender-based violence occurring in the private sphere are also human rights violations which may amount to persecution.

#### *v. Gender related persecution by non-State actors*

This section examines the extent to which the countries covered in this study recognise that non-State agents can be actors of persecution under the Refugee Convention when the State is unwilling or unable to provide protection. Due to established gender roles in numerous societies, women are more often at risk of harm at the hands of non-State actors such as their families and communities. Forms of violence such as domestic violence, ‘honour’ crimes, trafficking and FGM are generally perpetrated by non-State actors and affect women disproportionately. There are several problems facing asylum seekers with gender-related claims who fear persecution from non-State actors, including the need to show that State protection is not available. Where the risk of persecution emanates from non-State actors, asylum seekers will be required to show that the State is unwilling or unable to provide protection. This effectively adds another element to evidence in asylum cases where the State is not the persecutor. This also raises issues linked to asylum seekers’ ability to access State protection. Member states should consider applicants’ personal circumstances in considering whether they can effectively access State protection, which also requires gender-relevant country of origin information.<sup>[167]</sup>

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[167] See section VI, viii. Country of Origin Information.

Article 6 of the 2004 EU Qualification Directive established that there must be an absence of State protection for non-State agents to be actors of persecution. All the countries in this study recognise that non-State agents may be considered actors of persecution when there is an absence of State protection and have thus correctly transposed this provision into national law.<sup>[168]</sup>

In all the countries in this study, namely **Belgium, France, Hungary, Italy, Malta, Romania, Spain, Sweden** and the **UK**,<sup>[169]</sup> there is no requirement *per se* to seek State protection in the country of origin before fleeing persecution from non-State actors. However, respondents highlighted the difficulties in collecting supporting evidence that State protection was not available, in particular in domestic violence cases. Although not a legal requirement as such, in **Belgian, French, Hungarian** and **UK** practice, there is a need to explain why the applicant did not seek State protection before fleeing as this is a significant issue that needs to be addressed in the asylum claim. The **Swedish** Migration Court of Appeal has indirectly indicated that a reasonability analysis should be made and that relevant information on the effectiveness of State protection is decisive. There are cases where State protection is considered inadequate.<sup>[170]</sup> Nevertheless, the requirement to seek protection before fleeing is often phrased as an automatic requirement without any reasonability analysis on the basis of country of origin information relevant for the applicant. Similarly, there is often a lack of an intersectional analysis recognising the specific problems women, not least lesbian, minority groups, or poor women may have to access effective and durable State protection. Gender-related asylum claims in **Sweden** are often rejected with reference to the availability of State protection.



**Good practice:** **Belgian** authorities usually take into account difficulties faced by women in accessing protection in their countries of origin. For instance, they commonly consider that isolated Guinean woman cannot be protected in their country.<sup>[171]</sup> The appeal jurisdiction has also recognised “theoretical or illusory protection” and “de facto impunity” in **Albania** for instance.<sup>[172]</sup>

[168] In the **UK**, see *Secretary of State For The Home Department, Ex Parte Adan R v. Secretary of State For The Home Department Ex Parte Aitseguer, R v. [2000] UKHL 67* (19 December 2000).

[169] *Bagdanavicius & Anor, R (On the Application of) v Secretary of State for the Home Department [2003] EWCA Civ 1605* (11 November 2003). *Horvath v. Secretary of State For The Home Department [2000] UKHL 37* (6 July 2000).

[170] See for example, Migration Court of Appeal, MIG 2011:6, 9 March 2011.

[171] CPRR n°02-0579, 9th February 2007; CCE n° 29.226, 29th June 2009.

[172] CCE n°45.742, 30th June 2010.



**Good practice:** In Italy, the presence of UNHCR as an effective member within the Territorial Commissions has triggered an improvement regarding the correct interpretation of non-State actors of persecution. In the practice of the Territorial Commissions, women asylum seekers who fled gender-related persecution from non-State actors are not systematically required to have sought protection from the police or other authorities prior to fleeing their country of origin in order to prove that the authorities are unable or unwilling to provide this protection. If the national authorities know about the presence of police offering protection to women and the asylum-seeking women did not make use of these services, the Commissions ask for reasons but this does not constitute a reason to deny the grant of protection. In this case, the Commissions will therefore take into account the information provided by country of origin information considered reliable, together with information provided by the applicant.

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It is important to note, especially in gender-related asylum claims, that applicants encounter numerous difficulties in proving the lack of protection by their own States, in particular when they have not sought protection before fleeing. This is often linked to the absence or scarcity of country of origin information relevant to gender.<sup>[173]</sup> In practice, this significantly affects asylum seekers with gender-related claims who need access to international protection.<sup>[174]</sup> Persons at risk of persecution by non-State actors have more difficulty getting refugee status than those at risk of persecution in the so-called public sphere. This may affect women and LGBT people to a larger extent than heterosexual men as the former more often fear persecution by non-State actors.

Decision-makers at all stages of the asylum procedure should be careful not to place a higher burden of proof on asylum seekers at risk of persecution from non-State actors. Applicants' personal circumstances should be carefully considered to assess whether they would be able to access and benefit from effective State protection. National authorities should also ensure that country of origin information is available on the effectiveness of State protection.

[173] See Section viii, Chapter VI.

[174] As mentioned before, in Sweden, there are important problems in relation to State protection because of the introduction of additional requirements.

### *vi. Interpretation of the Convention Grounds*

The UNHCR Guidelines on Gender-Related Persecution note that although gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence or dictate the reasons for persecution and as such there is no need to add an additional ground to the Refugee Convention definition.<sup>[175]</sup> A gender-sensitive interpretation should be given to each of the Convention grounds and an asylum claim may be based on one or more of the Convention grounds. For example asylum seekers fearing persecution for having transgressed social or religious norms may have a claim for asylum under the Convention grounds of religion, political opinion or membership of a particular social group (PSG).<sup>[176]</sup>

The parties to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence shall ensure that a gender-sensitive interpretation is given to each of the Convention grounds.<sup>[177]</sup> **France, Spain and Sweden** signed the Convention on 11 May 2011. The **UK** announced its intention to sign the Convention on 8 March 2012.

In **Romania**, gender is specifically mentioned as a ground for persecution in the Gov. Ordinance 1251/2006 for the approval of the methodological norms in applying Asylum law.

In **Belgian, French, Hungarian,**<sup>[178]</sup> **Italian, Maltese, Spanish, Swedish** and **UK** legislation gender is not mentioned as a separate ground for persecution.

In **Italy**, a relevant provision which is applicable in the context of the *non-refoulement* principle<sup>[179]</sup> states that “people who may be persecuted for, among other reasons, their *sex* cannot be returned to their country of origin”.<sup>[180]</sup>

The research demonstrates that gender-based persecution is predominantly interpreted within the parameters of the PSG ground in all of the countries considered. In all the countries in this comparative analysis, the Convention ground of particular

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[175] UNHCR Guidelines on International Protection: *Gender-Related Persecution*, 2002, para. 6.

[176] UNHCR Guidelines on International Protection: *Gender-Related Persecution*, 2002, para. 22-23.

[177] Article 60(2).

[178] Act LXXX of 2007 on Asylum.

[179] Article 33 of the Refugee Convention.

[180] Article 19 of the Immigration Law (286/98).





social group is disproportionately used in gender-related cases compared to the other Convention grounds. When a person is considered to have a well founded fear of gender-based violence or punishment by the State or a non-State actor due to transgression of gendered social norms of law, PSG is almost exclusively the Convention ground applied, although the PSG is often neither properly analysed nor defined.<sup>[181]</sup>

In Malta, women who have suffered from gender-based violence (such as within the domestic context), have been granted subsidiary protection only because their persecution was seen in the context of generalised violence (e.g. Somali women). One of the difficulties is that gender alone may not be enough for the applicability of the particular social group, which means that international protection is not granted. Unless the reasons for persecution include gender in addition to another ground, there is a restrictive interpretation.

In the Swedish preparatory works, it is stated that all five Convention grounds may be relevant for analyses of gender-related claims.<sup>[182]</sup> However, the definition and interpretation of the concept of particular social group are extensively discussed, while the concept of political opinion or religious opinion is discussed as well, but to a lesser extent. In Swedish cases where protection is granted, the Migration Board and the courts often fail to identify the link to any of the Convention grounds, and thus grant subsidiary protection instead of refugee status.<sup>[183]</sup>



**Bad practice:** In France, authorities are reluctant to consider gender as a Convention ground. In the context of this research, the first instance authority explained that subsidiary protection "introduced a fundamental change in asylum policy and practice" as it "led to a differentiated protection granted for the same threat". This consequently made "grounds of threats secondary with respect to the risk of being exposed to serious harm". This statement raises concerns about the effective primacy of the examination of Convention grounds before considering subsidiary protection as an alternative when examining gender-related asylum claims. In practice, when subsidiary protection is granted, the risk of violence in case of return to the country of origin is identified, while the specificities of threats experienced by women seeking asylum are not.

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[181] This problem is partly illustrated by two judgments from the Migration Court of Appeal in Sweden: MIG 2008:39 (woman from Albania, application denied), MIG 2011:8 (woman from Somalia, refugee status).

[182] Prop. 2005/06:6, p. 22, 23, 27.

[183] This is illustrated by the judgment from the Migration Court of Appeal MIG 2011:6.



**Bad Practice:** Recent research in the UK demonstrated that if more than one Convention ground was engaged, only the non-gender related Convention ground was given appropriate consideration in women's asylum cases.<sup>[184]</sup>

### Causation

According to the UNHCR Guidelines on Gender-Related Persecution, the element of causation is met when membership of a PSG, political opinion or any of the other Convention grounds is the reason for the persecution. The Convention ground must be a relevant contributing factor, although it need not be the sole or dominant cause of the persecution.<sup>[185]</sup> The UNHCR Guidelines state that, in the context of persecution by non-State actors, the Convention ground may be linked to either the motivation of the persecutor(s) or the absence of State protection.<sup>[186]</sup> Both links may exist at the same time, but it is not necessary in order to qualify for refugee status.

This is the criteria followed by the UK where the element of causation is met when the Convention ground is an effective cause for the persecution<sup>[187]</sup> and the nexus can be linked to either the motivation of the persecutors or to the absence of State protection in cases of non-State agents of persecution. It need not be both.<sup>[188]</sup> Where persecutory conduct has more than one motive, it is sufficient that one of these motives is a Convention ground.<sup>[189]</sup> Similarly, in France, the Conseil d'Etat ruled in 1998 that the link between persecution and Convention grounds need not to be made explicit by the asylum seeker.<sup>[190]</sup>

In Spain, the OAR has stated that it is difficult to disaggregate data according to the Convention grounds, in particular because in many cases there is more than one reason for persecution.<sup>[191]</sup>

[184] *Asylum Aid, Unsustainable: the quality of initial decision-making in women's asylum claims*, January 2011.

[185] *UNHCR Guidelines on International Protection: Gender-Related Persecution*, 2002, para. 20.

[186] *UNHCR Guidelines on International Protection: Gender-Related Persecution*, 2002, para. 21. This is also reflected in the recast EU Qualification Directive (article 9(3)).

[187] *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 17.

[188] *Sivakumar, R (on the application of) v Secretary of State for the Home Department* [2003] UKHL 14 (20 March 2003).

[189] *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006.

[190] *CE, SSR, B., n°168 335, 27th April 1998.*

[191] See also *Spanish Ombudsman, Informe Anual a las Cortes Generales año 2010*, pp. 401-404.



**Bad Practice:** In Sweden, the interpretation of the preparatory works on the causal link requirement has introduced an additional criterion. If the reason behind the inability of the State to offer protection is a lack of resources or inefficiency that cannot by itself be linked to one of the Convention grounds.<sup>[192]</sup>

There is no basis in the UNHCR Guidelines or any other UNHCR documents to declare that a person at risk of persecution in the so-called "private sphere" shall be disqualified from refugee status merely because the origin of persecution is a non-State actor and the State's lack of protection is considered to result from a lack resources or efficiency.<sup>[193]</sup>

Although it is difficult to say in the absence of explicit reasoning in case law, this sequence in the preparatory works may well be one factor explaining why cases of gender-related persecution are disproportionately granted subsidiary protection instead of refugee status.

### *Particular Social Group (PSG): law, policy and practice*

*The UNHCR Guidelines on PSG state that "a Particular Social Group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights".<sup>[194]</sup>*

*If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart.<sup>[195]</sup>*

[192] Prop. 2005/06:6, p. 28.

[193] The UN Special Rapporteur on Violence against Women has criticised Sweden in this respect and has stated that such interpretation of the law, "which would introduce a double persecution requirement", and would diverge from the UNHCR gender guidelines. (see A/HRC/4/34/Add.3, para. 67).

[194] UNHCR Guidelines on International Protection: "Membership of a particular social group" (HCR/GIP/02/02, 7 May 2002), para. 11.

[195] UNHCR Guidelines on International Protection: "Membership of a particular social group" (HCR/GIP/02/02, 7 May 2002), para. 13.

The Qualification Directive defines a PSG as following:

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

*members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society; 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 be considered, without by themselves alone creating a presumption for the applicability of this Article,<sup>[196]</sup>*

The interpretation provided by the UNHCR Guidelines on Particular Social Group is a non-cumulative interpretation of the immutable characteristics and the social perception approaches that broadens the applicability of the definition of a “particular social group”. The Guidelines state in terms of gender that:

*This definition includes characteristics which are historical and therefore cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.<sup>[197]</sup>*

The improvements within the recast Directive in terms of gender-related claims are fewer and less significant than those for which the European Parliament Rapporteur and NGOs had hoped for. However, recital (29) of the recast Qualification Directive states that:

[196] Article 10(1)(d). 2004/83/EC.

[197] UNHCR Guidelines on International Protection: “Membership of a particular social group” (HCR/GIP/02/02, 7 May 2002), para. 12.



*It is equally necessary to introduce a common concept of the persecution ground 'membership of a particular social group'. For the purposes of defining a particular social group, issues arising from an applicant's gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation, forced abortion, should be given due consideration insofar as they are related to the applicant's well-founded fear of persecution.*

Article 10(1)(d) of the recast Qualification Directive states that:

*[...] Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group might be considered, without by themselves alone creating a presumption for the applicability of this Article.*

### Legislation

In all the countries in this comparative research, gender-based persecution is almost always considered under the Convention ground of membership of a particular social group as defined in the Qualification Directive.

In **Belgium**, the interpretation of the definition of a PSG appears irregular. Indeed, both limbs can be considered cumulatively or independently. While the legislation provides a cumulative approach,<sup>[198]</sup> jurisprudence seems to be more flexible by referring to either one or both elements of the definition.

In **France**, asylum authorities tend to limit the definition of a PSG by adopting a cumulative approach to PSG and requiring that applicants made their opinion/behaviour public,<sup>[199]</sup> resulting in a non gender-sensitive approach and leaving some women applicants unprotected. Yet an innovative trend in French jurisprudence may develop after the Conseil d'Etat relied on the definition of a PSG under article 10(1) (d) of the Qualification Directive for the first time in 2010.<sup>[200]</sup> This definition could

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[198] Article 48/3 4 of the Aliens Act.

[199] The definition of a PSG was specified in a ruling by the Conseil d'etat (1997) which ruled that a social group is a group of individuals who are likely to be exposed to persecution for reasons of common characteristic that define themselves in the eyes of authorities and the society that would be encouraged or tolerate by the authorities.

[200] CE, M. Akhondi, n°323 669, 14th June 2010 and CE, M. Habibi, n°323 671, 14th June 2010.

facilitate the identification of PSGs on the basis of sex or gender, in line with the Qualification Directive and UNHCR guidelines. However, in practice judges refer to this new definition inconsistently and continue to insist that the two limbs of PSG are met.

According to the **Hungarian** Asylum Act, a group shall be considered to form a particular social group where, in particular:

- a) 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, or*
- b) that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.*

In **Italy**, the legislation sets out that a particular social group is defined by an innate and unchanging characteristic or by the perception of the surrounding society or sexual orientation.<sup>[201]</sup> The Eligibility Commissions recognise the alternative approach to PSG. Furthermore, belonging to a particular social group is always interpreted as encompassing gender and sexual orientation.

In **Malta**, the legislative provisions provide that:

*[...] Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic or sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in Malta; gender related aspects might be considered without by themselves alone creating a presumption for the applicability of this subparagraph.<sup>[202]</sup>*

In **Malta**, the eligibility authorities consider that for a particular social group to exist there must be both an immutable characteristic and the group must be perceived as being different from the rest of society.

In **Romania**, article 10(1)(d) of the Qualification Directive is transposed into national legislation word by word. In practice, the two limbs are interpreted as alternatives.

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[201] Article 8 of the Qualification Decree 251/07.

[202] Subsidiary regulation (Regulation 18 Legal Notice 243/2008) to the Refugees Act, dealing with procedural standards in the Refugee Status Determination.



In Spain, gender is explicitly mentioned as a form of particular social group in the legislation.<sup>[203]</sup> The law specifically includes in the definition of a PSG “the people that flee from their country of origin, due to the prevailing circumstances in those countries, because of a well-founded fear of persecution or for reasons of gender and/or age”. The interpretation of this article has developed to include women as a PSG.

In the UK, the definition of PSG in the Qualification Directive is transposed literally, although the words “in particular” were replaced with “for example”.<sup>[204]</sup> All UKBA Asylum Instructions, including that on *Gender*, interpret the immutable characteristic and the social perception/recognition approaches as being cumulative.

Swedish legislation contains a revised refugee definition specifying that a refugee is an alien who is outside the country of nationality “because he or she feels a well-founded fear of persecution on grounds of race, nationality, religious or political belief, or on grounds of gender, sexual orientation or other membership of a particular social group”.<sup>[205]</sup> Gender is thus recognised as an example of what may form the basis of a particular social group. The amended legislation was preceded by preparatory works discussing various aspects of gender-related persecution. In Sweden, preparatory works are considered important sources of law and as such are binding on Swedish courts and authorities. Therefore, the Swedish preparatory works relating to gender-related persecution (hereafter the Swedish preparatory works) are guiding decision-makers at the Migration Board and the migration courts.<sup>[206]</sup> The preparatory works refer to the UNHCR Guidelines by concluding that a correct interpretation of the concept of belonging to a PSG encompasses gender as well as sexual orientation, and that women and LGBTI-persons may be examples of such groups. The immutable characteristic and the social perception approaches are considered alternatives.<sup>[207]</sup>



**Good Practice:** The Hungarian and Italian legislation implementing the Directive fully complies with the interpretation provided by the UNHCR on the non-cumulative interpretation of the approaches. It broadens the applicability of the definition of particular social group.

[203] Spanish Asylum Regulation 12/2009.

[204] Regulation 6(1)(d) of the Refugee or Person in Need of International Protection Regulations 2006.

[205] Swedish Aliens Act (2005:716), Chapter 4, Section 1.

[206] SOU 2004:31 Flyktingskap och könsrelaterad förföljelse (Eng: Refugee status and gender-related persecution); Prop. 2005:06/6 Flyktingskap och förföljelse på grund av kön eller sexuell läggning (Eng: Refugee status and persecution on account of gender and sexual orientation); Bet. 2005/06:SfU4 Förföljelse på grund av kön eller sexuell läggning (Eng: Persecution on account of gender or sexual orientation).

[207] Prop. 2005/06:6, p. 25-26.

### Interpretation

This comparative analysis reveals a large divergence of interpretation among the countries analysed.

In **France**<sup>[208]</sup> and **Malta**, gender alone may not be enough for the applicability of a particular social group.

In **Romania**, gender can be a ground for persecution and women can form a PSG. The jurisprudence of the **Spanish** Supreme Court has established that “women constitute a particular social group within the framework of asylum”.<sup>[209]</sup> The **Belgian** appeal jurisdiction also ruled that, in particular societies, “a social group may be defined on the basis of immutable and innate characteristics such as sex”.<sup>[210]</sup>

In **Sweden**, the PSG is often not properly analysed or identified. There are reasons to believe that many RSD-officers at both the migration courts and the migration board have problems analysing the PSG in gender-related asylum claims cases. However, compared to the practice in other countries, the fact that women can form a PSG is a welcome development.

In the **UK**, even though there is a significant amount of case law on the interpretation of PSG in the context of gender-related claims, recent research highlighted that UKBA case owners appeared reluctant to engage with the Convention ground of PSG.<sup>[211]</sup> The highest judicial authority<sup>[212]</sup> in the UK made it clear that the two limbs of PSG in article 10(1)(d) should be alternatives<sup>[213]</sup> and adopted the definition given by UNHCR. However, in the same year, the Asylum and Immigration Tribunal<sup>[214]</sup> failed to apply the judgement that the two limbs of Article 10(1)(d) are alternatives.<sup>[215]</sup> Other immigration judges in the Tribunal and the UKBA in its Asylum Instruction

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[208] In 2004, in the case of a Syrian Kurdish woman fleeing forced marriage and domestic violence, the CNDA refused to recognise “people of the female sex” as a PSG because they do not constitute “a circumscribed and sufficiently identifiable group of persons” CNDA, Mlle H, n°433 535, 20th December 2004.

[209] E.g. Judgements 31 May 2005, 7 July 2005, 10 November 2005, 28 February and 23 June 2006, 15 September 2006, 6 October 2006, 15 February 2007.

[210] CPRR, no 01-0668/F1356, 8th March 2002.

[211] Asylum Aid, *Unsustainable: the quality of initial decision-making in women's asylum claims*, January 2011.

[212] The Supreme Court, previously the House of Lords.

[213] *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department [2006] UKHL 46*, 18 October 2006, para. 15.

[214] Now the Immigration and Asylum Chamber.

[215] SB (PSG - Protection Regulations - Reg 6) Moldova CG [2008] UKAIT 00002, para. 69.





on *Gender Issues in the Asylum Claim* have followed this interpretation. The House of Lords also accepted UNHCR's approach to gender according to which "sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men".<sup>[216]</sup> Lord Bingham said that if Article 10(1)(d) "were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority".<sup>[217]</sup>



**Good Practice:** The research undertaken in Belgium shows that both first and second instance authorities adopt a gender-sensitive approach in interpreting persecution within the meaning of the Refugee Convention. The Gender Unit within the CGRS aims to enhance and harmonise the assessment of gender-related claims in Belgium. The CGRS has adopted a specific instruction note addressing the use of the particular social group concept in the assessment of asylum claims.



**Good Practice:** In the UK, the highest judicial authority has fully endorsed the UNHCR Guidelines on PSG and clearly stated that the two limbs of the PSG definition are alternatives, otherwise "it propounds a test more stringent than is warranted by international authority".<sup>[218]</sup> The judgment also sets out that the Qualification Directive and any national regulations adopted to transpose it should be interpreted in accordance with the UNHCR Guidelines on PSG.<sup>[219]</sup> Romania and Sweden, the two limbs are also interpreted as alternatives in practice.

[216] UNHCR Guidelines on International Protection: "Membership of a particular social group", 2002, para. 12 and *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 15.

[217] *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 16. For more information about the Tribunal's approach in SB (Moldova) see C. Querton, *The interpretation of the Convention ground of 'membership of a Particular Social Group' in the context of gender-related claims for asylum: A critical analysis of the Tribunal's approach in the UK*, Refugee Law Initiative, Working Paper No. 3, January 2012.

[218] *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 16.

[219] *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 118.

**Hungary Case Study:** An Afghan woman arrived in Hungary to join her husband via the family reunification procedure. They later divorced, leading to the loss of the woman's residence permit. She applied for asylum and was recognised as a sur place refugee by the OIN because, as a "repudiated" woman, she could face persecution if returned to Afghanistan. Although it is unclear on which Convention ground refugee status was granted because positive decisions by the OIN are not reasoned, this is an example of good practice by the Hungarian national authorities.

## JURISPRUDENCE

**Belgium:** In 2002, in the case of a young Cameroonian woman fleeing a forced marriage and domestic violence, the CCE ruled that the concept of PSG experienced a "significant jurisprudence change over the last few years" and tends to admit that "a social group may be defined on the basis of immutable and innate characteristics, such as sex".<sup>[220]</sup> In this case, despite the CGRS refusing protection to the applicant and arguing that private persecution could not be interpreted in the meaning of the Geneva Convention, the CCE considered that "the young age" of the applicant as well as "the considerable weight of traditions regarding marital status of women in Cameroon" and "the failure of authorities with regards to protection and repression" allowed the recognition of the PSG of **Cameroonian young women**. Accordingly, the appeal body frequently refers to this concept and identifies for example the PSG of **young women**,<sup>[221]</sup> the PSG of **young Guinean women**<sup>[222]</sup> or the PSG of **Macedonian women**.<sup>[223]</sup>

Other PSGs were recognised by the CCE: **women victims of trafficking**<sup>[224]</sup> (2004), **divorced Iranian women**<sup>[225]</sup> (2009), **women who do not want to comply with strict Islamist mores**<sup>[226]</sup> (2008), **isolated women**<sup>[227]</sup> (2004 and 2008). In recent years, the CCE recognised "**women**" as a PSG with no explicit reference to any age or country of origin limitation: for example, in the case of a Russian woman who was victim

[220] CPRR n° 01-0668/F1356, 8th March 2002.

[221] CPRR n°02-2230/F1623, 25th March 2004.

[222] CPRR n°0579/F2562, 9th February 2007; CCE n°29.226, 29th June 2009.

[223] CCE n°49.821, 20th October 2010.

[224] CPRR n°03-0582/F1611, 5th February 2004.

[225] CCE n°35.751, 11th December 2009.

[226] CCE n°16.886, 2nd October 2008.

[227] CPRR n°03-1524/E520, 25th February 2004; CCE n°15.552, 2nd September 2008; CCE n°16.056, 18<sup>th</sup> September 2008.



of domestic violence<sup>[228]</sup> (2008), in the case of an Albanian woman who was victim of domestic violence<sup>[229]</sup> (2010) or in the case of a Guinean woman who was victim of a forced marriage and feared a re-circumcision<sup>[230]</sup> (2011). Most importantly, a recent CCE decision regarding a Macedonian woman victim of prostitution maintained that a "social group of women" can be recognised when interpreted under article 10(1)(d) of the Qualification Directive, even though the Aliens Act has not transposed it entirely.<sup>[231]</sup>

Recently, in a case lodged by a Nigerian woman, the CCE identified the PSG of individuals considered as slaves "when this status is passed on from generation to generation and constitutes a social caste within the Nigerian society".<sup>[232]</sup> Finally, Belgian authorities also recognise the PSG of homosexuals in several countries.

**France:** The PSG of women/parents refusing FGM was recognised in 2001<sup>[233]</sup> but was only explicitly mentioned in 2004,<sup>[234]</sup> in a claim made by a woman from the Ivory Coast of Bambara ethnicity, in which the judge further considered the risk of persecution "despite the existence of a legislation prohibiting the practice". In 2009, the CNDA examined jointly four FGM-related applications and restricted the scope of the 2001 jurisprudence by ruling that only individuals who expressed their opposition to FGM, and consequently transgressed social norms, could be identified as members of a PSG. Consequently, since then, the Sissoko jurisprudence can only be applied to newly arrived parents accompanied by their daughters whom they want to protect from FGM, while women and their daughters who were born in France, are no longer considered members of a PSG and are refused refugee status.<sup>[235]</sup> Once again, this decision illustrates that French asylum authorities purposefully seek to limit the definition of a PSG.

In 2004 and 2005, two major decisions recognised women fleeing a forced marriage as a PSG "considering that, in the current conditions prevailing in [Pakistan and] in some rural areas of the Eastern part of Turkey], the attitude of women who refuse a forced marriage is seen as a transgression of social mores and prevailing standards by

[228] CCE n° 13.874, 9th July 2008.

[229] CCE n° 45.742, 30th June 2010.

[230] CCE n° 60.622, 29th April 2011.

[231] CCE n° 49.821, 20th October 2010.

[232] CCE n° 69.071, 14th June 2011.

[233] In December 2001, the appeal body delivered a major decision, in the case made by a husband and wife from Mali (M. and Ms. Sissoko), ruling that parents who oppose the practice of FGM on their daughters could be considered as members of a PSG, CRR, SR, *Sissoko*, n° 361 050, 7th December 2001.

[234] CRR, *Mlle B.*, n° 452 011, 21st September 2004.

[235] See Chapter VI, section iii Interpretation of persecution.

authorities and society, these women being exposed to serious violence inflicted with the general assent of the population; that authors of 'honour' crimes are rarely sued and only get minor penalties from lower tribunals".<sup>[236]</sup>

In 2009, in a case based on forced marriage in the rural areas of the Eastern part of Turkey, the Conseil d'Etat ruled that the applicant "was confronted to a private conflict which does not qualify the membership of a social group victim of persecution within the meaning of Article 1 of the Geneva Convention".

The CNDA also recognised the PSG of women fleeing 'honour' crimes<sup>[237]</sup> (2006, Kurdish women in Turkey), women fleeing humiliating or degrading widowhood rites<sup>[238]</sup> (2007, Nigeria), women who gave birth to albino children<sup>[239]</sup> (2006), people persecuted because of their sexual orientation for instance homosexuals in Algeria, Uganda, Senegal, Cameroon, Russia, Afghanistan or transsexuals in Algeria.

The CNDA highlighted that an innovative trend in the French jurisprudence may arise since the Conseil d'Etat recently relied on the definition of a PSG stated in article 10(1)(d) of the Qualification Directive.<sup>[240]</sup> Contrary to the above-mentioned jurisprudence, this definition does not refer to persecution but stresses "innate and immutable characteristics", which could facilitate the identification of PSGs on the basis of sex or gender, in line with the Qualification Directive and UNHCR guidelines.

**Hungary:** A Kenyan woman claimed asylum because she claimed that, according to the advice of the council town elders, she needed to have sexual relations with her uncle in order to break the trend of continuous deaths in her family. When she refused to continue the ritual after one of her family members died, her uncle pricked her ear with a stinging plant, locked her into a room and threatened her. As a result she fled to Nairobi and her uncle sent her threatening letters. Her uncle also lodged a complaint with the police accusing her of theft, further adding to her fears of returning. The OIN refused her asylum claim on the basis that the violent behaviour of the uncle did not amount to persecution under to the Refugee Convention. In the appeal procedure, the Metropolitan Court stated that sexual violence is clearly accepted as a form persecution. However, the Court agreed with the OIN that the applicant could not be considered a member of a particular social group because she was not persecuted because of her status as a woman. The Court held

[236] CRR, SR, *Mlle N.*, n°444 000, 15th October 2004; CRR, SR, *Mlle T.*, n°519 803, 29th July 2005.

[237] CNDA, *Mlle SA.*, n°544 746, 16th January 2006.

[238] CRR, *Mlle DA.*, n°552 043, 2nd March 2007.

[239] CNDA, *Mlle TM.*, n°453 852, 29th September 2006.

[240] CE, *M. Akhondi*, n°323 669, 14th June 2010 and CE, *M. Habibi*, n°323 671, 14th June 2010.



that victims of sexual violence are not exclusively women and her uncle did not force her to have sexual relations because she is a woman, but because of **"tradition and personal reasons"**. The Metropolitan Court confirmed the OIN's rejection of her asylum application.

**Sweden:** The Migration Court of Appeal has applied the Convention ground of particular social group in two cases which regard gender-related persecution. The first concerns a woman and her two children from Albania, claiming a risk of gender-based violence by her ex-husband and his relatives without the State being willing or able to protect her.<sup>[241]</sup> The second concerns a Somali woman who claimed a risk of gender-based violence by her relatives supported by Al Shabaab, due to her having transgressed gendered social norms by having extra-marital sexual relations and giving birth to a child outside marriage. In both cases, the court did not explain exactly how the concept of PSG should be defined in relation to her claim, but concluded that she, as a woman, would be subjected to persecution **"because of gender"**.<sup>[242]</sup> The first applicant's asylum claim was rejected with reference to the existence of an internal flight alternative, whereas the second was granted refugee status.

**UK :** The courts and Tribunals in the UK have found the following PSG to exist:

- Women in Pakistan;<sup>[243]</sup>
- (Intact) women in Sierra Leone;<sup>[244]</sup>
- Women in the Ivory Coast;<sup>[245]</sup>
- Women in Somalia;<sup>[246]</sup>
- Women in Afghanistan;<sup>[247]</sup>
- Women in Bangladesh;<sup>[248]</sup>
- Women charged with committing adultery in Pakistan;<sup>[249]</sup>

[241] MIG 2008:39, 21 November 2008.

[242] MIG 2011:8, 21 April 2011.

[243] *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL 20, 25 March 1999.

[244] *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006.

[245] *MD (Women) Ivory Coast CG* [2010] UKUT 215 (IAC).

[246] *HM (Somali Women, Particular Social Group) Somalia* [2005] UKIAT 00040.

[247] *NS (Social Group – Women – Forced marriage) Afghanistan CG* [2004] UKIAT 00328.

[248] *SA (Divorced woman – illegitimate child) Bangladesh CG* [2011] UKUT 00254(IAC).

[249] *KA and Others (domestic violence – risk on return) Pakistan CG* [2010] UKUT 216 (IAC).

- Women who have committed adultery from Punjab, India;<sup>[250]</sup>
- Women in Kenya (and particularly Kikuyu women under the age of 65);<sup>[251]</sup>
- Women in Liberia belonging to those ethnic groups where FGM is practiced;<sup>[252]</sup>
- Women (at risk of FGM) in Sudan;<sup>[253]</sup>
- Young Iranian women who refuse to enter into arranged marriages;<sup>[254]</sup>
- Lesbian women in Albania;<sup>[255]</sup>
- Women who do not conform to the heterosexual narrative and perceived as lesbians in Jamaica;<sup>[256]</sup>
- Former victims of trafficking in Moldova;<sup>[257]</sup>
- Former victims of trafficking in Nigeria;<sup>[258]</sup>
- Former victims of trafficking in Thailand;<sup>[259]</sup>
- Former victims of trafficking in Albania;<sup>[260]</sup>
- Former victims of trafficking in China.<sup>[261]</sup>

The House of Lords recognised that it is possible for individuals who share a past experience, such as being the **victims of sexual violence**, to show they are linked by an immutable characteristic which is capable of being independent of the persecution and the cause of their current ill-treatment.<sup>[262]</sup> This was followed in more recent Tribunal decisions.<sup>[263]</sup>

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[250] *BK (Risk – Adultery –PSG) India CG* [2002] UKIAT 03387.

[251] *P & Anor v Secretary of State for Home Department* [2004] EWCA Civ 1640.

[252] *SK (FGM – ethnic groups) Liberia CG* [2007] UKAIT 00001.

[253] *FM (FGM) Sudan CG* [2007] UKAIT00060.

[254] *TB (PSG – women) Iran* [2005] UKIAT 00065.

[255] *MK (Lesbians) Albania CG* [2009] UKAIT 00036.

[256] *SW (Lesbians – HJ and HT applied) Jamaica CG* [2011] UKUT 00251(IAC).

[257] *SB (PSG – Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002.

[258] *PO (Trafficked Women) Nigeria CG* [2009] UKAIT 00046. Note that this case has partly been overturned by the Court of Appeal in *PO (Nigeria) v Secretary of State for the Home Department* [2011] EWCA Civ 132 but on other issues not concerned with PSG.

[259] *AZ (Trafficked women) Thailand CG* [2010] UKUT 118 (IAC).

[260] *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC).

[261] *HC & RC (Trafficked women) China CG* [2009] UKAIT 00027.

[262] *Hoxha & Anor v Secretary of State for the Home Department* [2005] UKHL 19 (10 March 2005), para. 37. The case of Hoxha concerned the persecution of Mr Hoxha and the B family by Serbian soldiers or policemen because they were Kosovan Albanians and Mr B was suspected of involvement with the KLA. Mrs B was raped in front of her husband, her sons and twenty to thirty of their neighbours.

[263] *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC), para. 166.



Several of the countries researched, **Belgium, France, Romania, Spain, Sweden** and the **UK**, recognise that women can constitute a PSG. **Hungary** and **Italy** are examples of good practice as their national legislation clearly provides for an alternative approach to the two PSG limbs. In practice, **Romania** and **Sweden** interpret the two limbs of PSG as alternatives. In **Belgium**, even though the legislation is not clear, the jurisprudence has adopted an alternative approach of the two PSG limbs. UK jurisprudence from the highest judicial authority is also an example of good practice where the UNHCR Guidelines were relied on to ensure a gender-sensitive interpretation of the Qualification Directive. In **France** and **Malta** however, gender alone may not be sufficient for the applicability of the particular social group Convention ground.

It is essential for decision makers at all instances to adopt a gender-sensitive interpretation of the Convention ground of particular social group to ensure that asylum seekers who fear persecution because of their gender are provided with international protection. Member States should follow UNHCR Guidelines on the interpretation of PSG and rely on those when implementing the Qualification Directive. The UNHCR Guidelines should be relied on more extensively to ensure the protected characteristics and the social perception approaches are considered alternatives and not cumulative. It would not be in accordance with international authorities to adopt a more stringent interpretation of PSG in comparison to the other Convention grounds.

#### *Other Convention grounds: policy, practice and binding court decisions*

This section outlines the extent to which gender-related claims have been mainstreamed into the Convention grounds of political opinion, race, nationality and religion in the countries covered by this study.

### Political Opinion

The UNHCR Gender Guidelines state that “under this ground, a claimant must show that she has a well-founded fear of being persecuted for holding certain political opinions (usually different from those of the Government or parts of the society), or because the holding of such opinions has been attributed to her. [...] This may include an opinion as to gender roles. It would also include non-conformist behaviour which leads the persecutor to impute a political opinion to her. In this sense, there is not as such an inherently political or an inherently non-political activity, but the context of the case should determine its nature.”<sup>[264]</sup>

Following the membership of a PSG, political opinion is the most common Convention ground recognised in gender-related asylum claims.

In **Belgium**,<sup>[265]</sup> **Hungary**, **Italy**, **Malta**, and the **UK**, gender based persecution is occasionally interpreted under the ground of political opinion. On the contrary, in **France**, **Spain**, and **Sweden**, authorities generally fail to implement a broad gender-sensitive definition of political opinion.

In **France**, there appears to be a worsening of practice in this type of claims. For instance, even if some Algerian, Afghan, or Iranian women threatened for living a “Western” way of life or for defending women’s rights were granted refugee status on political opinion ground in the late 1990s and early 2000s,<sup>[266]</sup> nowadays this type of interpretation is no longer observed. At best, women fleeing such situation would rather be granted subsidiary protection.

In **Hungary**, imputed political opinion is rarely recognised as a ground for persecution by the OIN. Only in the cases of politically-active asylum applicants did the OIN assess that the ground for persecution was the political opinion of the person in question.<sup>[267]</sup>

In **Sweden**, even if the preparatory works outline some examples of how the concept of political opinion may be interpreted from a gender perspective, decision-makers

[264] UNHCR Guidelines on International Protection: Gender-related Persecution. HCR/GIP/02/01, para. 32.

[265] Mostly in cases of FGM. CCE n°29.110, 25th June 2009; CCE n°29.108, 25th June 2009; CCE n°29.225, 29th June 2009; CCE n°29.224, 29th June 2009.

[266] CRR, SR, 22 juillet 1994, 237939, Mlle E. ; CRR, 17 juin 1999, 333013, Mlle N. ; CRR, 27 janvier 2005, 460177, Mme X. ; CRR, 18 février 1999, 325055, Mme S. ; CRR, 9 janvier 2004, 421757, Mme M.

[267] 3.K.30.117/2010/12, Metropolitan Court of Budapest, 18 April 2011





at all instances almost systematically fail to encompass a broad gender-sensitive definition of political opinion and religious opinion which includes opinions on gender roles expressed verbally or by transgression of gendered social norms or laws.<sup>[268]</sup> The current gender guidelines, issued by the Swedish Migration Board, also do not observe the need for a gender-sensitive interpretation of political opinion.

Although there are cases where women had political opinions imputed to them as a result of family association,<sup>[269]</sup> it remains a problem in France, Hungary, Sweden and the UK that many women experience difficulties in obtaining refugee status if they themselves have not been involved in organised political activities or if they have only been active in so-called “low level” politics. The theoretical acknowledgement that women, as a result of traditional gender roles, are less likely than men to hold high profile positions in political parties, and may be involved in other forms of formal and informal politics, is not reflected in asylum practice.

In the UK, there are few reported court determinations that suggest the other Convention grounds are interpreted in a gender-sensitive manner.<sup>[270]</sup> However, the Asylum Instruction on *Gender* states that “non-conformist opinions or behaviour may in certain circumstances be the expression of a political opinion or may result in a woman having a political opinion attributed to her whether she holds one or not. For instance, opposition to institutionalised discrimination against women in society or expressing views in opposition to the predominant social or cultural norms may be seen to constitute a political opinion. Non-conformist behaviour in certain cultures such as refusing to wear a veil, pursuing an education or choosing a partner could also lead to a woman having a political opinion attributed to her”.

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[268] In the judgments from the Migration Court of Appeal concerning the issue of gender-related persecution, the court has consistently avoided mentioning the possibility to apply a gender-sensitive interpretation of political or religious opinion. Similarly, no such interpretations are known to have been made by the migration courts. The Migration Board has published one decision concerning a Somali woman who, by behaviour and clothing, had transgressed the gender discriminatory norms in society and therefore feared persecution from the Islamist group Al Shabab. She was thus considered having been imputed a political and religious opinion as regards gender roles, and was granted refugee status. (Decision from the Swedish Migration Board, dated June 30, 2010. Available at: <http://www.migrationsverket.se/lifos/dok.do?dokn=23108&mode=index>.)

[269] This is illustrated by a judgment from the Migration Court of Appeal concerning an Ethiopian woman who claimed a risk of persecution on account of both her actual political opinion (due to her involvement in an opposition party) and imputed political opinion (due to her father's involvement in the previous regime). The applicant stated that she had been subjected to previous persecution, including rape by military officers during a search in her family's house. The Migration Court of Appeal denied her refugee status, by supporting the Migration Board's assessment that her own activities were too “low level” to expose her to a risk and by concluding that the sexual violence was not linked to her actual or imputed political opinion. The court's conclusions were not explained by reference to any analysis on the basis of relevant country of origin information, or the Swedish preparatory works and/or the UNHCR gender guidelines. Migration Court of Appeal, UM 61-06. Furthermore, the court also concluded that the acts of sexual violence were characterized as acts committed by “individual state officials” and thus not condoned by the state, which is why the court found that there were neither obstacles for the applicant to approach the Ethiopian authorities for assistance nor any heightened risk of future abuses. The appeal was rejected.

[270] *FB (Lone women, PSG, internal relocation, AA (Uganda) considered) Sierra Leone [2008] UKAIT 00090 (27 November 2008).*

Occasionally, as experienced in Italy and France, the recognition of refugee status is based on multiple grounds of persecution. For instance the acknowledgment of sexual orientation or gender identity may be interpreted also as political opinion or asylum seekers may be at risk of persecution because it conflicts with religious norms. It can also occur that other Convention grounds prevail on gender, such as the political role of the claimant. In Italy, for example, membership in a movement for the rights of LGBTI or the case of a Somali woman involved in a campaign against female genital mutilation in Somaliland considered by the Territorial Commission in Rome, were allowed on the grounds of both political opinion and particular social group.



**Good practice:** In several cases in 2009 of Guinean parents seeking to protect their daughters from FGM, the Belgian appeal jurisdiction ruled that “the claimant can maintain with legitimacy that [she/he] fears persecution, in the sense of the Geneva Convention, for reasons of political opinion expressed through [her/his] opposition to the traditional practice of circumcision on [her/his] youngest daughter, the custom being considered as an almost compulsory social practice necessary to be recognised as a woman in the Guinean society and which is practically impossible to avoid; when opposing to this tradition ancient of several centuries and difficult to resist to, the claimant is effectively ostracized from the society”. Those parents were granted refugee status on the ground of political opinion.<sup>[271]</sup>

## JURISPRUDENCE

**Belgium:** In 2003, in the case of an Albanian woman fearing persecution from mafia groups, the CCE ruled that the opposition expressed though action or word to non-State actors’ acts may have an implicit political dimension and should be interpreted under the ground of political opinion.<sup>[272]</sup> In 2009, the CCE further stated that this ground was initially conceived in a broad sense, both the Qualification Directive and the Belgian legislation confirming this provision, and quoted UNHCR Gender Guidelines to apply a gender-sensitive interpretation of the political opinion ground to asylum applications lodged by parents opposing FGM on their daughters.<sup>[273]</sup>

[271] CCE n°29.110, 25th June 2009; CCE n°29.108, 25th June 2009; CCE n°29.225, 29th June 2009; CCE n°29.224, 29th June 2009.

[272] CPRR n°01-0721/F1512, 23d May 2003.

[273] CCE n°29.110, 25th June 2009; CCE n°29.108, 25th June 2009; CCE n°29.225, 29th June 2009; CCE n°29.224, 29th June 2009.



**UK:** FB was a 16 year old girl when she claimed asylum in the UK. Her mother had been a soweï in Sierra Leone, one of the women who were responsible for undertaking FGM on young girls. When FB was 16 she underwent FGM and was also told she was expected to become a soweï and replace her mother. She was also expected to marry the local chief who was a much older man with four wives. The Asylum and Immigration Tribunal<sup>[274]</sup> considered that there was no imputed political opinion ground where the appellant had “been identified as one who has rejected the traditional and customary ways of her village” because the connection between these political strands and her opposition to becoming a soweï and to entering a forced marriage was too far removed.<sup>[275]</sup> The Tribunal concluded that FB was a member of a PSG because of her resistance to accepting the prevailing cultural norms in her own rural society.

## Religion

*The UNHCR Gender Guidelines note that “in certain States, the religion assigns particular roles or behavioural codes to women and men respectively. Where a woman does not fulfil her assigned role or refuses to abide by the codes, and is punished as a consequence, she may have a well-founded fear of being persecuted for reasons of religion. Failure to abide by such codes may be perceived as evidence that a woman holds unacceptable religious opinions regardless of what she actually believes.”<sup>[276]</sup>*

There may be some overlap between the grounds of political opinion and religion in gender-related claims for asylum.<sup>[277]</sup> This is particularly the case in countries where there is little separation between religious and State institutions, laws and doctrines.

In Sweden, even though the preparatory works outline some examples of how the concept of religious opinion may be interpreted from a gender perspective, the current guidelines do not observe the need for a gender-sensitive interpretation of religious opinion.

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[274] Now the Immigration and Asylum Chamber.

[275] FB (*Lone women, PSG, internal relocation, AA (Uganda) considered*) Sierra Leone [2008] UKAIT 00090 (27 November 2008). A soweï is a person who practices FGM.

[276] UNHCR Guidelines on International Protection: Gender-related Persecution. HCR/GIP/02/01, para. 25.

[277] UNHCR Guidelines on International Protection: Gender-related Persecution. HCR/GIP/02/01, para. 26..

In France, Sweden<sup>[278]</sup> and Hungary gender-related claims are rarely mainstreamed into the concept of religion.

In France, again a worsening of practice can be observed. For instance, even though some Algerian women threatened by radical Islamists groups for being “emancipated”<sup>[279]</sup> or a Mongol woman threatened by her family for refusing a forced marriage<sup>[280]</sup> were granted refugee status on religion ground in the late 1990s and early 2000s, nowadays women fleeing such situation would at best be granted subsidiary protection. In France, there are major difficulties in the recognition of religion as a Convention ground in gender-related asylum claims. Even though Pakistani women who refuse to wear the veil may be identified as fearing persecution under the religion ground, persecution feared by Turkish women for instance may rather be recognised for reasons of transgression of mores (PSG) than for religious reasons. French authorities fail to apply a gender-sensitive interpretation of the Convention ground of religion, as defined in the UNHCR Gender Guidelines.

In Italy and Spain there is some overlap between the grounds of religion and political opinion in gender-related claims. Gender-related claims are rarely mainstreamed into the concept of religion but into the realm of imputed political opinion. For instance, the Spanish Asylum Office granted asylum on political ground to a Palestinian woman from Gaza threatened by the authorities for refusing to wear the veil, as her failure to conform with religious behavioural codes to women was interpreted as holding an unacceptable political opinion.

In the UK, the Asylum Instruction on *Gender* states that “where the religion assigns particular roles or behavioural codes to women, a woman who refuses or fails to fulfil her assigned role or abide by the codes may have a well founded fear of persecution on the ground of religion”.

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[278] In the judgments from the Migration Court of Appeal and the migration courts concerning the issue of gender-related persecution, the court has consistently avoided mentioning the possibility to apply a gender-sensitive interpretation of political or religious opinion.

[279] CRR, 30 janvier 1997, 297541, Mlle K.; CRR, 4 février 2003, 402412, Mme K.

[280] CRR, 16 juin 2004, 463659, Mme O.



### Nationality

The UNHCR Gender Guidelines state that “nationality is not to be understood only as “citizenship”. It also refers to membership of an ethnic or linguistic group and may occasionally overlap with the term “race”. In many instances the nature of the persecution takes a gender-specific form, most commonly that of sexual violence directed against women and girls”.[281]

### Race

The UNHCR Gender Guidelines state that “race for the purposes of the refugee definition has been defined to include all kinds of ethnic groups that are referred to as “races” in common usage”.[282]

**Hungary Case Study:** Unaccompanied minor girls from Somalia claimed that in their country of origin they were subjected to FGM and sexual abuse. They said that some men from another clan abducted them, raped them and forced them into slavery. They went through FGM at a very early age. The OIN granted them refugee status based on grounds of race because they belonged to an ethnic minority.

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The research highlights that most gender-related claims for asylum, namely where asylum seekers have a well-founded fear of persecution because of their gender, are being recognised under the Convention ground of particular social group. The sheer amount of jurisprudence relevant to gender under the PSG ground compared to the other grounds is stark. Very few instances were identified of gender-related cases allowed under the Convention grounds of race, nationality, political opinion and religion. This would mean that countries who fail to interpret PSG in a gender-sensitive manner, such as **France, Malta** and national authorities and lower courts in the **UK**, are much less likely to grant protection to asylum seekers who fear persecution on account of their gender. Most of the countries analysed in this study, including **Belgium, France, Romania, Spain, Sweden** and the **UK**, recognise women as forming a PSG, sometimes coupled with restrictive factors such as the type of harm feared.

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[281] UNHCR’s Guidelines on International Protection : Gender-related Persecution. HCR/GIP/02/01, para. 27.

[282] UNHCR’s Guidelines on International Protection : Gender-related Persecution. HCR/GIP/02/01, para. 24.

Some good examples of a gender-sensitive interpretation of the ground of political opinion were observed in **Belgium, Italy and Spain**.

### *vii. Credibility and evidence*

In asylum cases, credibility is an essential issue because corroborative evidence is often unavailable. During the refugee status determination process, national authorities and appeal bodies must make credibility assessments. If an applicant's credibility is accepted, her account of events and evidence will be believed and relied on in the decision-making process. UNHCR has stated that "the relevant facts of the individual case will have to be furnished in the first place by the applicant himself. It will then be up to the person charged with determining his status (the examiner) to assess the validity of any evidence and the credibility of the applicant's statements".<sup>[283]</sup>

When an asylum claim is based on gender-related issues, credibility becomes even more crucial since gender-related persecution is often difficult to prove. Applicants usually find difficulties to gather enough material to evidence their claims and the consistency of their account throughout the asylum process may be lacking due to trauma and Post Traumatic Stress Disorder (PTSD).

UNHCR and European standards on credibility indicate that the examination of applications take into account the problems asylum seekers may have in submitting evidence, and ensure that interviewers are competent to consider the personal and general circumstances surrounding the application, including the applicant's culture or vulnerability. Interviewers should look to gain the confidence of applicants, as they may feel apprehensive towards authority.<sup>[284]</sup>

The assessment of credibility is often at the core of asylum refusals in **Belgium, France, Hungary, Malta, Romania, Spain, Sweden, the UK and Italy**. This section will consider the burden and standard of proof in asylum claims and whether these are lowered in the case of vulnerable asylum seekers or asylum seekers with gender-related claims, the effect of late disclosure of rape and sexual violence on the

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[283] Paragraph 195 of the UNHCR Handbook.

[284] Article 4 Qualification Directive, Paragraphs 195-205 of the UNHCR Handbook, article 13 (3)(a) of the Procedures Directive.



assessment of credibility, and the correlation between trauma and Post-Traumatic Stress Disorder (PTSD) symptoms and asylum seekers' ability to discharge the burden of proof. This section will also consider whether decision-makers take into account applicants' demeanour in assessing the credibility of their claim and the need to provide medical or other objective evidence in support of asylum claims.

### **Burden and Standard of proof**

To be granted international protection, an asylum claim must be credible. Generally, the duty is on the applicant to substantiate her claim with as much evidence as possible. The standard of proof in all the countries covered in this study is the same for all types of claims and gender-related asylum claims do not benefit from a more lenient assessment of credibility. This may be problematic because of the particular difficulties in providing evidence of certain types of harm such as domestic violence or forced marriage. Considering that a claim for asylum can rarely be completely substantiated by evidence, the standard of proof should not be too high. This is not always the case however. In **Italy** and **Malta**, cases of gender-related violence, of trauma or rape and vulnerability benefit from a more lenient assessment of credibility.

Some countries have provisions in place to apply the benefit of the doubt to applicants, such as **Italy**, **Sweden** and the **UK**. However, the high standard of proof is a major obstacle for asylum seekers with gender-related claims to gain international protection.



**Good Practice:** In **Italy**, even in the absence of a standardised burden of proof, the vulnerability of women seeking asylum in cases of gender-related violence is taken into account and may lower the standard of proof. Furthermore, in practice, if the Territorial Commission does not have sufficient evidence to grant refugee status or subsidiary protection, it will nonetheless tend to grant humanitarian protection to women, women with children, or women in a vulnerable condition.<sup>[285]</sup>



**Good Practice:** In **Malta**, where the standard of proof is generally high, it seems, however, that in cases of severe trauma, rape, or vulnerable women, the burden of proof is lowered.



**Good Practice:** The **Swedish** preparatory works, as confirmed by decisions of the Migration Court of Appeal, states that many asylum claims may not be substantiated by documentary or other evidence. Therefore, the standard of proof shall not be too high. The applicants' statements may thus be accepted if

[285] On the basis of art. 5. co 6 of Immigration Law 286/98.

they appear credible and plausible.<sup>[286]</sup> Applicant should be given the benefit of the doubt if she has made an honest effort to support the statement with documentary evidence and the general credibility of the applicant's claim is not questioned. However, in practice, the standard of proof is generally high, including in gender-related claims for asylum.

The Italian Qualification Decree places the burden of proof on the claimant, but also requires the Territorial Commissions to cooperate with the claimant in examining all the elements to evaluate the asylum claim.<sup>[287]</sup> In this regard, a recent Court decision has established that both the Territorial Commission and the Judge have a duty to play an active role in researching all relevant information concerning the situation and the law system of the claimant's country of origin.<sup>[288]</sup> This system is particularly appropriate for gender-related persecution cases, where it is often difficult to provide a strong evidence base.



**Bad Practice:** In the UK, recent research has shown that in women's asylum claims there was a failure to consider the claim as a whole, including a tendency to disproportionately rely on irrelevant or peripheral facts of the claim and a failure to apply the lower standard of proof. There was also a focus on past events rather than the risk of future persecution. The assessment of credibility was at the core of the decisions to refuse the claims.<sup>[289]</sup>

In Sweden the specific evidential problems arising in gender-related claims are seldom recognised, let alone analysed or discussed. The Migration Court of Appeal has not made any gendered analysis in relation to credibility and evidential problems, nor has it referred to UNHCR Gender Guidelines in order to provide guidance to lower instances.<sup>[290]</sup> Despite guidance and positive case law from the Migration Court of Appeal in Sweden, the standard of proof is generally high. Furthermore, the applicant is often given a disproportionate burden of proof as it is commonly disregarded that, according to the UNHCR et al, the burden of proof can shift between the applicant

[286] See for example Prop. 1996/97:25, s. 98.

[287] Art. 3, 1 Qualification Decree, Decreto legislativo 19 novembre 2007, n. 251.

[288] Cass. S.U.civ. 27319/2008; as far as the same argument please refer also to: Cass. Civ. Sez.I 19187/2010 that confirms the co-operation duty of the judge.

[289] Asylum Aid, *Unsustainable: the quality of initial decision-making in women's asylum claims*, 2011, pp. 51-59.

[290] However, it may be noted that the Migration Court of Appeal has in some cases considered some asylum claims credible, without written evidence and without all aspects being regarded as credible (see for example MIG 2011:6, MIG 2008:39, MIG 2011:8)





and the State in the course of the asylum process and that the adjudicator shares the duty to ascertain and evaluate all the relevant facts. Difficulty in obtaining written evidence is often disregarded, as well as the effects of trauma on the ability to give a detailed, chronological, precise and consistent account of events. It is also generally disregarded that contradictions and inconsistencies should be put to the applicant. Recent research indicates that women have more difficulties having their experiences of previous persecution accepted as credible, compared to men. In the same research more women than men reported experiences of physical or sexual violence. However, the experience of previous abuses did not seem to lower the burden of proof on the part of the applicant in the course of assessing the risk of persecution upon return.<sup>[291]</sup>

In the UK, it is established that where certain conditions are met aspects of asylum seekers' statement need not be supported by documentary and other evidence. These conditions include that the person has made a genuine effort to substantiate the asylum, humanitarian protection or human rights claim; that all material factors at the person's disposal have been submitted and if not a satisfactory explanation has been given; that the person's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the person's case; that the person has claimed protection "at the earliest possible time unless the person can demonstrate good reason for not having done so"; and that the general credibility of the person has been established.<sup>[292]</sup> In Hungary, these elements consist of the applicant's credible and coherent statements and all documentation and evidence at her disposal. It very rarely happens that the asylum seeker can give documents or evidence, but it is enough that she makes a genuine effort to substantiate her application and that her statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the asylum case.



**Good Practice:** In the UK, the Asylum Instruction on Sexual Orientation states that "the credibility of an individual's claim and the degree of risk on return should primarily be tested by a sensitive enquiry into the applicant's realisation and experience of sexual orientation or gender identity, both in the country of origin and in the UK."<sup>[293]</sup>

[291] See for example UNHCR Quality Initiative Report written by Feijen and Frennmark, *Kvalitet i svensk asylprövning* (2011), p. 134-136.

[292] Paragraph 339L of the Immigration Rules (HC 395).

[293] UKBA Asylum Instruction on Sexual Orientation Issues in the Asylum Claim, June 2011, p. 10.



**Good Practice:** A relevant decision by the Belgian appeal authority in 2008 established that consideration of the substance of the claim should never be excluded even if there are doubts about some events or if the credibility of the claimant is challenged.<sup>[294]</sup>

### *Late Disclosure of Information*

Asylum seekers who do not disclose all elements of their claim at the beginning of the procedure may find that decision-makers hold this against them and their credibility are negatively affected as a result. However, there may be a number of reasons why asylum seekers do not disclose certain events at the first opportunity, including instances of rape and sexual violence. Feelings of shame or fear of authorities, being traumatised or not knowing that this is relevant to an asylum claim are some of the many reasons why asylum seekers do not immediately disclose sensitive information about the harm they have suffered and from which they are seeking protection.

The proposed article 2(d) of the recast Procedures Directive states that an “applicant in need of special procedural guarantees means an applicant who due to age, gender, sexual orientation, gender identity, disability, serious physical illness, mental illness, post traumatic disorders or consequences of torture, rape or other serious forms of psychological, physical or sexual violence is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive”.<sup>[295]</sup>

According to the proposed article 24 of the recast Procedures Directive, “Member States shall ensure that applicants in need of special procedural guarantees are identified in due time [...] Member States shall take appropriate measures to ensure that applicants in need of special procedural guarantees are granted sufficient time and relevant support to present the elements of their application as completely possible and with all available evidence”.

In the UK, the Asylum Instruction on *Gender* states that “while the substantive asylum interview represents the applicant’s principal opportunity to provide full disclosure of all relevant factors, the disclosure of gender-based violence at a later stage in the determination process should not automatically count against her or his credibility. There may be a number of reasons why an applicant may be reluctant

[294] CCE 31st January 2008.

[295] Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), Brussels, 1 June 2011.



to disclose information, for example feelings of guilt, shame, and concerns about family ‘honour’, or fear of traffickers or having been conditioned or threatened by them”. However, the asylum procedure generally does not enable women to disclose sensitive information about rape and sexual violence.

In **Belgium, France, Hungary, Italy, Malta, and Romania**, late disclosure of rape or sexual violence does not necessarily have a negative impact on the assessment of credibility but since credibility is one of the major elements taken into account in asylum claims, inconsistencies in asylum seekers’ claims may result in negative credibility findings. In **France** and **Spain**, legal practitioners highlighted that the comprehension and interpretation of the reasons for late disclosure varied significantly among national authorities and judges.

Furthermore, in **Belgium**, as asylum seekers are not required to give oral evidence at appeal, this might further limit asylum seekers’ opportunities to disclose rape and sexual violence. In **Spanish** practice, late disclosure of information negatively affects the credibility of applicants without taking into account their psychological situation.



**Good practice:** In **Belgium**, in case of late disclosure of rape or sexual violence, as provided for in the Gender Operational Notes, CGRS agents generally offer asylum seekers the opportunity to explain the reason why they did not talk about it. If their answers are coherent and plausible, which is often the case according to the CGRS, the delay does not necessarily have a negative impact on the assessment of the credibility of the claim.



**Good Practice:** In **Sweden**, the SMB guidelines include some evidential aspects in relation to gender-related claims, i.e. the fact that LGBT-persons may have difficulties speaking about their sexual orientation or gender identity early in the process, that women may have difficulties speaking about rape or other experiences of gender-based violence, and that women and LGBT-persons may have difficulties supporting their claim with documentary evidence.<sup>[296]</sup> As for claims specifically relating to sexual orientation and gender identity, the Migration Board’s legal department has also issued a policy statement claiming the need for decision-makers to be conscious about the difficulties regarding early disclosure and common evidential problems. However, in practice, there are several evidentiary problems in relation to gender-related claims.

[296] Migrationsverket, Utlänningshandboken, chapter 40.1-2. See also Migration Court of Appeal, UM 7851-10, dated April 21, 2011. and MIG 2008:39.

In Belgium, France, Hungary, Romania, Sweden and the UK, late disclosure of acts of harm would not be considered credible unless the applicant provides acceptable justification for the late disclosure. In Hungary, the principle of *non-refoulement* would always be assessed in relation to the new elements submitted at a later stage. In UK practice however, late disclosure of sexual violence often negatively affects the assessment of credibility.

**Italy Case Study:** A homosexual boy from Afghanistan was rejected by his family. Being homosexual in Afghanistan is considered a crime punishable by death penalty. Nevertheless, some senior supervisors from the local Mosque discovered his sexual orientation. They denounced him to the police, who started looking for him. When he heard that three other homosexual friends had been arrested, he went home to take some money and leave the country, but his father found him and started beating him with a stick, kicking and punching him all over his body, until he almost killed him. Despite his bad physical condition, he managed to escape from Afghanistan and he reached Greece, then Italy. He was immediately transferred to a Centre for Kidney Transplant because of the severe nephritic insufficiency he was suffering from caused by the assault by his father.

Being ashamed of his sexual orientation, he declared only later the real reason of persecution before the Eligibility Commission without compromising the final decision. He obtained refugee status in Italy on the basis of his sexual orientation.

**Romania Case Study:** An eligibility officer considered that the statements of a Somali woman according to which a man who belonged to a majority clan obliged her to marry him otherwise she would be killed, were found as not being credible. On appeal in the court, the judge found the statement as being credible. In the same case, the eligibility officer considered that FGM, which was invoked only in front of the court was not credible due to the fact that she had the opportunity to relate this episode in the administrative procedure. During the court hearing, the judge considered that this statement was credible although this issue had only been raised in court. The judge reasoned that the appellant had answered only the questions which were addressed to her and that the eligibility officer, knowing the general country of origin information and the fact that about 98% of the Somali women face FGM, should have asked her about it.



**UK Case Study:** A 36 year old asylum seeker from Turkey was so terrified of her husband's violence that she did not dare disclose information about his abuse to officials when she claimed asylum in 2009. She explained that she might have done so if she had trusted someone more – but there was never any opportunity to build up such trust with any of the officials.

### *The effect of trauma on credibility*

Many asylum seekers who qualify as refugees are in a state of fear and most have undergone traumatic experiences. Trauma may seriously affect a person's ability to give an accurate and chronological account of events without discrepancies.<sup>[297]</sup> Those who experience gender-related persecution may often suffer from PTSD and trauma. The UNHCR Note on the Burden and Standard of Proof in Refugee Claims states that:

Obviously the applicant has the duty to tell the truth. In saying this though, consideration should also be given to the fact that, due to the applicant's traumatic experiences, he/she may not speak freely; or that due to time lapse or the intensity of past events, the applicant may not be able to remember all factual details or to recount them accurately or may confuse them; thus he/she may be vague or inaccurate in providing detailed facts. Inability to remember or provide all dates or minor details, as well as minor inconsistencies, insubstantial vagueness or incorrect statements which are not material may be taken into account in the final assessment on credibility, but should not be used as decisive factors.<sup>[298]</sup>

The United Nations Committee Against Torture has stated that “complete accuracy is seldom to be expected by victims of torture”.<sup>[299]</sup>

In the UK, the Asylum Instruction on *Gender* recognises that “women who have been sexually assaulted and/or who have been victims of trafficking may suffer trauma. The symptoms of this include persistent fear, a loss of self-confidence and self-esteem, difficulty in concentration, an attitude of self-blame, shame, a pervasive loss of control and memory loss or distortion. Decision-makers should

[297] J. Herlihy and S. W. Turner, 'The Psychology of Seeking Protection', *International Journal of Refugee Law*, 2009, 21(2), p.173.

[298] Para. 9.

[299] *Alan v. Switzerland*, CAT/C/16/D/21/1995, UN Committee Against Torture (CAT), 8 May 1996, para. 11.3.

be aware of this and how such factors may affect how a woman responds during interview”. However, asylum authorities usually do not take into account how trauma would affect the evidence given. In France, despite the fact that according to the OFPRA, protection officers “are aware that asylum seekers are more or less in capacity to spontaneously talk or to enter into detail about some elements of their claim”, the research showed significant divergences in the behaviour of OFPRA officers during interviews.

In Romania, trauma is taken into account when assessing credibility but it is very difficult to ensure this because although medical evidence can be provided by the Cordelia Foundation, the reports are not always accepted as conclusive. Spanish authorities rarely ever consider trauma when assessing credibility. In these cases, it is essential to provide psychological reports but authorities often limit themselves to the grant of humanitarian protection.



**Good Practice:** In Hungary and Italy, national authorities recognise that some applicants may not be able to or dare not talk about traumatic events due to their trauma and PTSD. National authorities claim that the mere fact that the applicant is reluctant to give details about sexual assault and talk openly about it is not considered to her disadvantage.

In Hungary and Malta, first and second instance bodies do not ask precise details of rape or sexual violence in asylum hearings/interviews.

In Sweden, Migration Court of Appeal judgments show disregard to the fact that trauma, arising from for example gender-based violence, influences the ability of applicants to give their statements immediately and in a chronologically, detailed, precise and coherent manner, without any contradictions. The Court has not yet acknowledged that for example women and LGBT-persons fearing gender-related persecution commonly reveal new aspects of their claim late in the process, or introduce completely new gender-related circumstances late or even after the final judgment. These problems continue to exist despite the fact that Sweden has repeatedly been criticised by the UN Committee Against Torture for its failure to make proper credibility assessments which take into account the psychological effects of torture and trauma upon applicants’ ability to present their claim. Furthermore, in November 2011 Sweden was criticised by the UN Human Rights Committee in relation to the issue of late disclosure of a person’s sexual orientation.



The manner in which the symptoms of trauma are considered by asylum authorities shows a divergence in practice, even within some countries. The extent to which the symptoms of trauma and PTSD are taken into account in the assessment of credibility varies significantly, even within each Member State.

It is recommended that decision-makers are further informed on the consequences of gender-related violence, including symptoms of trauma, and trained on how these may affect asylum seekers' ability to give a consistent account of events.

### *Demeanour*

In the UK, the Asylum Instruction on *Gender* notes that “interviewers should be sensitive to the fact that gender and cultural norms may play an important role in influencing demeanour, for example, how a woman presents herself physically at interview e.g. whether she maintains eye contact, shifts her posture or hesitates when speaking. Demeanour alone is an unreliable guide to credibility”. Nevertheless, the research highlighted a case where the refusal letter from the UKBA to a trafficking victim from Thailand stated that she had shown no emotion in relation to the death of her mother and her case in general. Another legal representative referred to a determination in which the immigration judge disbelieved a victim of rape because at the hearing she had been “feisty”.

Some **Hungarian** judges interviewed for the research stated that they were relying on their feelings of whether someone is credible or not and that they take into account the non-verbal communication of applicants at hearings. One judge stated that if an applicant presents her narrative too aggressively, acting in a very offensive way, it might be a sign that she is not telling the truth.

In **Italy** and **Malta**, national authorities would never base a decision on the demeanour of the applicant so, for example, the lack of emotions shown by women and other demeanour at the asylum interview do not have a negative impact on the credibility assessment.

### *Evidence*

Even if decision-makers at all levels have some understanding that material evidence should not be a requirement to substantiate asylum claims, countries such as **Belgium**, **France** and **Sweden** often expect asylum seekers to demonstrate the

veracity of their claim and provide extensive evidence. Thus, the **Belgian** national authority maintains that if a claim lacks material evidence, CGRS agents “have the right to expect precise, circumstantiated, coherent and plausible oral declarations” from the applicant. For instance, women who report a forced marriage and cannot provide civil documents (photos or statements may be considered as well) will usually be questioned about their husbands’ physical and psychological characteristics, job, family or wealth and on the reasons why their families chose that man. If the applicant fails to answer such questions “in detail”, the CGRS will generally not consider the claim as credible. In **France**, the practice by judges in the CNDA was said to vary greatly in this regard.

In **Belgium**, according to a Conseil d’État ruling,<sup>[300]</sup> authorities should consider medical reports as evidence in cases based on FGM. Nevertheless, in general, the CGRS insists on the fact that a medical report does not systematically prove past persecution as it does not provide any information about the context and reasons of the violence suffered. In **France**, medical reports constitute crucial pieces of evidence in FGM cases; if no medical report is provided (report of FGM for the mother and the daughter not being subjected to FGM), protection will not be granted.

**Hungarian** authorities usually request medical evidence provided by gynaecologists in FGM cases. In the cases consisting of rape, the OIN does not systematically request a gynaecological examination of the applicant, but requests it only in cases where a woman is deemed not to be credible. In **Italy**, **Malta**, **Spain** and the **UK**, in gender-related asylum claims, such as rape cases, national authorities do not require compulsorily medical evidence. In cases of torture, the **Maltese** Refugee Commissioner may refer asylum seekers to an appropriate medical board to assess the nature and extent of torture.

Despite having a dedicated Psychological Support Unit, in charge of evaluating medical and psychological reports within the first instance authority in **Belgium**, the research shows that CGRS decisions often fail to take into account psychological reports provided by women applicants as relevant elements in their asylum application. Those documents seem to be most commonly considered, nonetheless, by the appeal body.

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[300] CGRS activity reports 2009 and 2010





**Bad Practice:** In Belgium and France, an extension of subsidiary protection status on the basis of a risk of FGM is dependent on a yearly medical examination of minors to demonstrate that they have still not undergone the procedure. In France, several of the women asylum seekers interviewed for this research felt that being examined to provide a medical report was like an “act of aggression” and a “cultural shock”.

The research shows that French asylum authorities often refuse to grant refugee status to women fleeing forced marriage on the basis of a lack of credibility and evidence of their claim. Whereas the CNDA identified the PSG, some cases were rejected on the basis that “neither the documents supporting the case nor the declarations made in the public hearing” could establish the alleged facts. It should be noted that women may specifically fail to provide civil documents as they may have no juridical status in a patriarchal country of origin. Moreover, both the OFPRA and the CNDA frequently refuse to recognise the transgression of social norms by concluding that the “consequences of the forced marriage are limited to the family”.<sup>[301]</sup>

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The assessment of credibility is central to the decision-making process in all the countries researched. Asylum seekers with gender-related claims encounter numerous obstacles in this area. These include a high standard of proof, a failure to apply the benefit of the doubt, a reliance on the need to provide material evidence in support of the claim and the failure to consider the effects of trauma and PTSD. In Italy and Malta, the standard of proof is lowered in cases of severe trauma, rape or vulnerability. The benefit of the doubt was effectively applied in Italy. In most countries late disclosure of information does not necessarily have a negative impact on the assessment of credibility although in Spain and the UK late disclosure of rape and sexual violence generally has a negative impact on asylum seekers’ credibility and authorities fail to take into account psychological reasons for it. In Hungary and Romania, decision-makers tend to take into account the effect of trauma on asylum seekers’ ability to give a consistent account of events. In Sweden, however, this is often disregarded. In Hungary, some judges stated that they relied on applicants’ demeanour to establish their credibility whereas national authorities in Malta would never do so. In Belgium and France, the extension of subsidiary protection status for girls at risk of FGM is dependent on a yearly medical examination.

[301] OFPRA decision n°091200664, 27th April 2010.

### *viii. Country of Origin Information*

There are specific challenges when seeking country of origin information (COI) relevant to gender-related claims because amongst other things the forms of persecution women suffer from are often hidden and take place in private. There is simply less public information about gender-related persecution and it is therefore more difficult to access. This is why even statistics published in the public domain may not accurately reflect the real extent of the problem. COI is crucial also to determine the risk of persecution, the absence of State protection in non-State actors' cases, and whether an internal flight alternative is a viable option. There are also problems linked to the absence of specialised sources of information which may be relevant for gender-related claims.

The Qualification Directive states that the assessment of asylum claims should take into account "all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied."<sup>[302]</sup>

The Procedures Directive adds that an appropriate examination should be carried out and to that end "member States shall ensure that precise and up-to-date information is obtained from various sources, such as the UNHCR, as to the general situation prevailing in the countries of origin of applicants for asylum."<sup>[303]</sup>

The draft recast Procedures Directive includes that member States shall ensure that "the personnel examining applications and taking decisions are instructed and have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, child or gender issues."<sup>[304]</sup>

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[302] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, Article 4(3)(a). 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, Article 4(3)(a).

[303] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Article 8(2)(b). European Commission, Amended Proposal for a Directive of the European Parliament and of the Council on Common Procedures for granting and withdrawing international protection status (recast), 2009/0165 (COD), COM(2011)/319 final, Article 10(3)(b).

[304] Article 9(3)(d).



The UNHCR Gender Guidelines acknowledge that it is important “to recognise that in relation to gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution. 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.”<sup>[305]</sup>

In **Belgium**, all CGRS agents have access to specific notes on COI (on FGM, forced marriage, domestic violence, sexual violence etc) that should be taken into account when assessing gender-related claims. However, the research shows that CGRS agents sometimes fail to implement the guidance notes in practice.

In **Belgium**, **France** and **Hungary**, first instance officers and judges are specialised by regions, and therefore should have a good knowledge of the political, social and historical context of claimants’ country of origin. However, there was no evidence of systematic consideration of gender-specific cultural practices or COI in the decision making process in **France**.

COI reports produced by national authorities in **Belgium** and **Italy** are not publicly available whereas in **Romania**, **Sweden** and the **UK** they are publicly available. In **France**, some reports are available on the OFPRA’s website. **Hungary**, **Malta** and **Spain** do not produce their own COI reports but in **Hungary**, national authorities can answer case-specific queries. COI researchers in **Hungary**, **Sweden** and the **UK** are not specifically trained on gender issues. There are real language barriers for judicial authorities in **Spain** to access gender-relevant COI as most COI sources are in English.

**Belgian** COI reports cover gender-specific information such as the status of women in the country, social mores, FGM prevalence, discriminatory laws, and may be gender-specific themselves (for instance a report on circumcision in Guinea). In addition, the appeal body may monitor the relevance of COI used by the CGRS. By way of example, the CCE cancelled a CGRS decision for a lack of gender-related COI and required the CGRS to further research on particular risks of sexual violence in the case of a female Roma in Macedonia.<sup>[306]</sup> In **Hungary**, according to some judges interviewed for this research, COI query responses produced by the OIN do not show the whole picture and are often

[305] 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, 7 May 2002, para. 37.

[306] CCE n°46.380, 15th July 2010.

inaccurate. In **Sweden**, decisions often fail to adequately refer to country of origin information relevant for gender-related claims. Furthermore, research has identified numerous problems with the availability of LGBT information in COI available, not least in relation to lesbian women. The report also criticised the knowledge of COI staff, the choice of reports included in the database, the content of the reports and the analysis of COI in decisions taken by the Migration Board and the courts. Generally, there is also a lack of information about women's rights abuses.<sup>[307]</sup> In the **UK**, COI reports often report the human rights conditions in a specific country from a male perspective and there is often only a short section addressing women's issues.<sup>[308]</sup> A recent thematic review of the UKBA COI Service reports identified a number of gaps in the information on women and gender issues, including for example information necessary for the assessment of an internal flight alternative, health, internal/regional differences, and the risks on return and noted that in many reports the information on women and/or gender issues is not corroborated.<sup>[309]</sup>

Sometimes a lack of information on gender-related persecution in a specific country is regarded as a lack of evidence of persecution. This was observed in **Hungary, Malta, Spain, Sweden** and the **UK**. There have been a number of cases in **Malta** concerning FGM and LGBT issues where the lack of specific information regarding the practice was interpreted as an absence of such persecution. In **Hungary**, according to one of the judges interviewed for this research, the lack of gender-specific COI in a given country is regarded as a lack of evidence of persecution. However, other judges stated the opposite. According to the OIN, the authority is aware that in some cases COI is incomplete and this is not held against the asylum seeker. The **Italian** Territorial Commissions do not consider the lack of information on gender-related persecution in a specific country as a lack of evidence of persecution.

In **Romania**, asylum seekers can contact one of the three documentation centres available at the Romanian Immigration Office - Department of Asylum and Integration, the Jesuit Refugee Service or the Romanian National Council for Refugees. Difficulties for asylum seekers to instruct their own experts or to gather COI on gender-related issues were identified in **Belgium, France, Malta, Sweden** and the **UK** for example due to the limited availability of legal aid. In the **UK**, recent research on the quality of decision-making

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[307] Gradin and Sörberg, *Unknown people, The vulnerability of sexual and gender identity minorities and The Swedish Migration Board's Country of Origin Information system*, Zie, January 2010.

[308] B. Collier, *Country of Origin Information and Women: Researching gender and persecution in the context of asylum and human rights claims, Asylum Aid, 2007*, p. 11. See also Nina Allen, *Analysis of the coverage of gender issues in country of origin information reports produced by COI Service for the Advisory Panel on Country Information*, August 2007.

[309] Heaven Crawley, *Thematic review on the coverage of women in Country of Origin Information (COI) reports*, prepared for the Independent Advisory Group on Country Information (IAGCI), September 2011, pp. 136 and 142.



in women's asylum claims found that "in most cases there was a significant failure to identify and consider COI that was relevant and appropriate, especially in relation to gender-related claims, and the choice of COI referred to in refusal letters was selective".<sup>[310]</sup>

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Belgium, France and Hungary are the only countries researched where decision-makers are specialised in certain geographical regions. This may assist a better informed process, particularly for gender-related claims where COI is more difficult to identify and access. It is essential that national authorities who produce COI reports or respond to case specific queries are specifically trained on researching gender-specific COI and understand why and how this is necessary for an objective refugee status determination process. Decision-makers at all instances should not conclude that the lack of information regarding gender-based violence implies that past persecution did not take place or that there is no future risk of persecution as was observed in Hungary, Malta, Spain, Sweden and the UK. They should be made aware of the difficulties in collecting reliable gender-relevant information. Finally, when gender-relevant COI is available, decision-makers should not rely on this selectively but make full use of the information available.

### *ix. Internal flight alternative*

If the asylum authorities have established that an asylum seeker has a well-founded fear of being persecuted in their country of origin, they may nonetheless deny asylum, because the applicant could live safely in another part of the country and is therefore not in need of international protection. This is called the internal flight alternative (also referred to as "internal relocation alternative" or "internal protection alternative").

The Qualification Directive states that "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 reasonably be expected to stay in that part of the country". To this effect "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" and this "may apply notwithstanding technical obstacles to return to the country of origin".<sup>[311]</sup>

[310] Asylum Aid, *Unsustainable: The quality of initial decision-making in women's asylum claims*, January 2011, p. 59.

[311] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country

According to Article 8 of the recast Qualification Directive,<sup>[312]</sup> which EU member States will have to implement by December 2013 (except the UK) “Member States may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she:

(a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or

(b) has access to protection against persecution or serious harm as defined in Article 7; and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.

2. In examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering serious harm, or has access to protection against persecution or serious harm in a part of the country of origin 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 in accordance with Article 4. To that end, Member States shall ensure that precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office.

The UNHCR Guidelines on Internal Flight or Relocation Alternative state that:

14. Where the risk of being persecuted emanates from local or regional bodies, organs or administrations within a State, it will rarely be necessary to consider potential relocation, as it can generally be presumed that such local or regional bodies derive their authority from the State. The possibility of relocating internally may be relevant only if there is a clear evidence that the persecuting authority has no reach outside its own region and that there are particular circumstances to explain the national governments failure to counteract the localised harm.

nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Article 8.

[312] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.



25. The personal circumstances of an individual should always be given due weight in assessing whether it would be unduly harsh and therefore unreasonable for the person to relocate in the proposed area. Of relevance in making this assessment are factors such as age, sex, health, disability, family situation and relationships, social or other vulnerabilities, ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, educational, professional and work background and opportunities, and any past persecution and its psychological effects. In particular, lack of ethnic or other cultural ties may result in isolation of the individual and even discrimination in communities where close ties of this kind are a dominant feature of daily life. Factors which may not on their own preclude relocation may do so when their cumulative effect is taken into account. Depending on individual circumstances, those factors capable of ensuring the material and psychological well-being of the person, such as the presence of family members or other close social links in the proposed area, may be more important than others.

29. The socio-economic conditions in the proposed area will be relevant in this part of the analysis. If the situation is such that the claimant will be unable to earn a living or to access accommodation, or where medical care cannot be provided or is clearly inadequate, the area may not be a reasonable alternative. It would be unreasonable, including from a human rights perspective, to expect a person to relocate to face economic destitution or existence below at least an adequate level of subsistence. At the other end of the spectrum, a simple lowering of living standards or worsening of economic status may not be sufficient to reject a proposed area as unreasonable. Conditions in the area must be such that a relatively normal life can be led in the context of the country concerned. If, for instance, an individual would be without family links and unable to benefit from an informal social safety net, relocation may not be reasonable, unless the person would otherwise be able to sustain a relatively normal life at more than just a minimum subsistence level.

To determine whether an asylum seeker may reasonably be expected to live in another area, certain criteria should be considered. As a starting point, there should be no risk of persecution or serious harm in the proposed area of relocation and State protection should be available there.<sup>[313]</sup> The personal circumstances of the applicant should be taken into account including:

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[313] Council Directive 2004/83/EC, Article 8 and Directive 2011/95/EU, Article 8.

"Age, sex, health, disability, family situation and relationships, social or other vulnerabilities, ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, educational, professional and work background and opportunities, and any past persecution and its psychological effects."<sup>[314]</sup>

This section examines if the countries researched consider gender-related issues when assessing internal flight alternatives (IFA) and, if so, in which cases gender aspects are taken into consideration.

In Hungary, the legislation elaborates on the internal flight alternative, stating that:

*The applicant can be reasonably required to return to the part of the country concerned – with regard also to his/her personal circumstances – if*

- a) the applicant can access that part of the country in a lawful, safe and practical way,*
- b) the applicant has family relations or cousinship in the given part of the country or if the applicant's basic subsistence and accommodation are ensured by any other means, and*
- c) there is no threat that the applicant will suffer persecution or serious harm or other serious infringement of human rights in that part of the country, irrespective of whether these are connected with the reasons for fleeing presented in his/her application. [...]*

*(3) When the provisions of Subsection 2 are applied the refugee authority shall assess in particular the applicant's health, need for special treatment, age, gender, religious affiliation, nationality and cultural ties as individual circumstances.*<sup>[315]</sup>

In the UK, the Asylum Instruction on Gender contains a section on Internal Relocation and sets out the specific considerations to be taken into account in gender-related cases, including that:

*In certain countries, financial, logistical, social, cultural and other factors may mean that women face particular difficulties. This may be particularly the case for divorced women, unmarried women, widows or single/lone parents, especially in countries where women are expected to have male protection.*

[314] 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, 23 July 2003, para. 25.

[315] Section 92 (2) of the Governmental Decree implementing the Asylum Act.





Decision-makers in Belgium,<sup>[316]</sup> France,<sup>[317]</sup> Hungary, Spain,<sup>[318]</sup> Sweden,<sup>[319]</sup> and the UK do not always consider gender-related issues when assessing the viability of internal flight alternatives. In France and Italy, the concept of IFA is rarely relied on by decision-makers.

In Hungary, according to the OIN and judges interviewed for this research, decision-makers always take into consideration the personal situation of the applicant and the circumstances of the whole case. Nevertheless, there are cases where the asylum claim was rejected because of an internal flight alternative, but the gender aspects were not duly taken into consideration.

**Hungary Case Study:** A Cameroonian woman claimed that after her father's death, her relatives wanted her to marry the leader of the village in exchange for her family's debt. Before the marriage she would have had to undergo FGM. In fear of FGM and forced marriage, she fled her country of origin. The authority examined if the applicant would have had the possibility to find a safe place to live inside her country of origin. Relying on available country of origin information, the asylum authority established that FGM is practiced in 3 of Cameroon's 10 districts, and that Cameroon is party to several international Conventions protecting the rights of women and children, so an internal protection alternative was available. The authority examined the personal circumstances of the applicant and found that the applicant was well-educated and she spoke several languages. The OIN was also of the opinion that she would be able to take care of her own living and housing in another part of the country. Her claim for protection was rejected.<sup>[320]</sup>

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[316] In some cases, the fact that a woman could survive in a place for a few weeks may be considered as an IFA, disregarding any trauma caused by specific gender-based violence (such as FGM, forced marriage and sexual violence). See CGRS decision, 11th January 2010, confirmed by CCE n°42.488, 27th April 2010.

[317] In France, internal flight alternative is rarely used by asylum authorities although the research highlighted some examples of cases where the IFA assessment failed to consider the specific status of women in Nigeria (CNDA, ME., n°643 667, 2nd September 2010) or the high prevalence of sexual violence in Kinshasa, DRC.

[318] Supreme Court Judgment of 23 September 2011 and National Audience Judgment of 16 June 2010, cases of Nigerian women fleeing forced marriage.

[319] See for example MIG 2008:39.

[320] 106-2-7.063/20/2006-M., Office of Immigration and nationality, 14 July 2006.

In Malta, if decision-makers consider that single women or women with children are unable to relocate internally, humanitarian protection is generally granted. This status is granted on the basis of applicants' vulnerability but without any concrete evaluation or understanding of the internal flight alternative concept.

In Sweden<sup>[321]</sup> and the UK,<sup>[322]</sup> despite the fact that authorities have stated that the applicant's gender has to be taken into account when assessing the viability of an internal flight alternative, in practice authorities sometimes fail to consider gender-related issues. In the UK, there is an Asylum Instruction on *Internal Relocation* from 2007 but no reference is made to gender in the policy guidance.<sup>[323]</sup> In Sweden, it should be noted that for some specific countries, such as Afghanistan and Somalia, an internal flight alternative is generally considered unreasonable for single women without a male network. Whereas for other countries, there is often a lack of individual assessment of relevance and reasonability from a gender perspective.

**UK Case Study:** A young woman claimed asylum in 2010 because she fears her daughter will be subjected to FGM if returned. The UKBA refused her claim on the basis that she could internally relocate and that her daughter was so young she had not established private and family life rights in the UK. The immigration judge then refused her appeal, agreeing with the UKBA that she could relocate and noting that she now had acquired secondary level qualifications which would help her re-settle in her home country. The UKBA and the Tribunal failed to consider the fact that she came to the UK when she was 14, has now spent all her adult life in the UK and has no ongoing ties with her home country. As a young woman of 23 with a 20 month old child, she explained that the UKBA and the immigration judge had made too many assumptions about the conditions in her country of origin without truly knowing what it is like there.

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[321] The Swedish preparatory works specifically address the specific problems single women may have relocating to another part of country of origin and the Migration Court of Appeal has stated that the applicant's sex/gender should, among some other characteristics, be taken into account in the context of an assessment of the existence of an internal flight alternative.

[322] There is often a failure to appreciate the personal characteristics of asylum seekers, including such factors as children, health or the visibility of separated women. If the issue of gender is specifically mentioned in the Operational Guidance Note for that country, decision makers might make reference to gender but otherwise generally no consideration is given to gender issues.

[323] UKBA, Asylum Instruction on internal relocation, 2007



**Good Practice:** Italy has not transposed article 8 of the Qualification Directive into the Italian Qualification Decree. Although in practice, the Territorial Commissions may ask women seeking asylum why they cannot relocate, it is not considered in any way prejudicial to their asylum claim.

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The concept of IFA should be used sparingly by decision-makers. A thorough analysis is required when relying on it to refuse the grant of refugee status. In practice more guidance and a more extended analysis of applicants' gender are needed in all the countries to ensure that internal flight alternative is a viable and safe option. France and Italy should be highlighted as examples of good practice as decision-makers very rarely consider IFA as prejudicial to the outcome of asylum claims. Applicants' gender should be taken into account but also their age, children, languages, education, marital status, health, disability, social or other vulnerabilities, professional and work background and opportunities, as well as any past persecution and its psychological effects.

## *x. Safe countries*

This section provides information about reliance on the concept of safe countries in the process of refugee status determination and whether this practice differentiates between the risk of harm to men and women.

While Belgium<sup>[324]</sup> and Malta<sup>[325]</sup> have a list of safe countries, they do not include gender specific differences.

On the other hand, France<sup>[326]</sup> and the UK<sup>[327]</sup> have gender-specific differences in their lists of safe countries. In France, since 2010, Mali is not considered a safe country for women due to the high prevalence of FGM and because the majority of asylum claims

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[324] Albania, Bosnia-Herzegovina, Macedonia, Kosovo, Serbia and India.

[325] [http://www.mjha.gov.mt/MediaCenter/PDFs/1\\_chapt420.pdf](http://www.mjha.gov.mt/MediaCenter/PDFs/1_chapt420.pdf).

[326] Armenia, Bangladesh, Senegal.

[327] Section 94 of the Nationality, Immigration and Asylum Act 2002. The only domestic remedy against a certification of an asylum claim is to lodge a judicial review of the decision before the High Court. The current list (as of February 2011) includes Albania, Bolivia, Bosnia Herzegovina, Brazil, Ecuador, Ghana (men only), Gambia (men only), India, Jamaica, Kenya (men only), Kosovo, Liberia (men only), Macedonia, Malawi (men only), Mali (men only), Mauritius, Moldova, Mongolia, Montenegro, Nigeria (men only), Peru, Serbia, Sierra Leone (men only), South Africa, South Korea and Ukraine.

made by Malian women relate to FGM.<sup>[328]</sup> In the UK, the differentiation within the list is often not in accordance with jurisprudence or even UKBA policy. For example, despite Albania being on the list of designated countries, the courts have recognised that former victims of trafficking from Albania are members of a PSG and may have a well-founded fear of persecution on return. Jamaica is also on the list for both men and women despite jurisprudence and policy recognising that LGBT people are at risk of persecution in Jamaica.

**Hungary, Italy, Romania, Spain and Sweden** do not use official lists of safe countries, although **Hungary, Romania and Spain** apply the concept of safe countries on a case-by-case basis without taking gender aspects into consideration. In **Sweden**, the Migration Board and the courts may consider an asylum claim to be manifestly unfounded from which gender-related claims are not exempted.

Asylum seekers in **Belgium and France** are routed through an accelerated procedure if they come from a “safe country”. In the UK, if asylum seekers come from a “safe country”, their asylum claim may be certified as clearly unfounded<sup>[329]</sup> and they lose their in-country right of appeal to the Tribunal. Furthermore, evidence suggests that the list of safe countries influences national authorities’ decision to route asylum seekers into the detained fast-track, which as described below limits applicants’ ability to have their claims determined fairly.<sup>[330]</sup> In **Sweden**, asylum seekers whose claims are declared manifestly unfounded are denied legal aid, routed through the accelerated procedure and denied a suspensive appeal.<sup>[331]</sup> In **Spain**, asylum applications from safe countries<sup>[332]</sup> can be declared inadmissible.

The Refugee Commissioner in **Malta** has a policy of granting an individual interview to all applicants, including those from listed safe countries. This applies for men and for women, and may be identified as a good practice.

[328] Armenia, Bangladesh, Benin, Bosnia-Herzegovina, Cabo-Verde, Croatia, Ghana, India, Macedonia (ARYM), Mali (men only), Mauritius, Moldova, Mongolia, Montenegro, Senegal, Serbia, Tanzania, Ukraine. The Conseil d’Etat removed Albania and Kosovo from this list on 26.03.2012.

[329] The case of *Thangarasa, R. (on the application of ) v Secretary of State for the Home Department* [2002] UKHL 36 (17 October 2002) established that “a manifestly unfounded claim is a claim which is so clearly without substance that it is bound to fail”.

[330] See Chapter VII, section vii Accelerated and Prioritised Procedures.

[331] In 2010 out of 31,256 decisions in individual cases 5,094 cases were assessed to be manifestly unfounded (16% of all claims). The majority of these applicants originated from Serbia (3,747), but also asylum seekers from countries such as Iraq, Iran and Uzbekistan.

[332] According to Article 27 of Council Directive 2005/85/CE.



In Hungary, if asylum seekers come from a “safe country” they will not be admitted to the in-merit phase of the procedure. In practice, the OIN is rejecting asylum applications from asylum seekers, including single mothers with children, who have been in Serbia before coming to Hungary without considering any gender-related aspects. A recent field mission to Serbia demonstrated that reception capacity is very limited (the two existing accommodation centres for 200 asylum seekers are full, leaving hundreds of asylum seekers<sup>[333]</sup> on the street), the recognition rate is extremely low (only five persons were granted subsidiary protection, and no refugee status was granted in the last four years), and no integration perspectives exist.<sup>[334]</sup>

**Hungary Case Study:** A single mother with two children from Afghanistan was not accepted into the in-merit procedure based on the safe third country rule, because they came through Serbia. She appealed the decision, but she was not successful.<sup>[335]</sup> In the judgement there is not a single sentence to indicate that her status as a single mother with children was taken into consideration. The OIN's decision only lists that Serbia joined all relevant international Conventions, that it adopted an Asylum Act in 2008, and that there is a procedure for granting international protection in Serbia, and that the Hungarian Ministry of Foreign Affairs considers Serbia as a safe country for an asylum seeker.

Belgium, France, Malta and the UK, rely on official safe countries list to declare cases manifestly unfounded. Within these countries only France and the UK establish some differentiation of risk between men and women. Whereas Hungary, Romania and Spain do not have official lists, authorities still apply the concept on a case by case basis with no or little reference to gender.

It is recommended that the safe country practice be discontinued as asylum seekers are consequently not guaranteed a fair examination of their asylum claim. However, whilst the practice remains, the recognition that women or LGBT claimants may not be safe in the listed countries should be encouraged.

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[333] In first half of 2011, more than 900 asylum seekers applied for asylum in Serbia.

[334] The Hungarian Helsinki Committee, *Serbia as a Safe Third Country: A Wrong Presumption*, September 2011.

[335] 3.Kpk.21120/2011/3, Csongrád County Court, 14 June 2011.

	BE	FR	HU	IT	MT	RO	SP	SW	UK
List of Safe Countries	Albania, Bosnia-Herzegovina Macedonia Kosovo Serbia India	Armenia Bangladesh Benin Bosnia-Herzegovina Cabo-Verde Croatia Ghana India Macedonia Mali (men only) Mauritius Moldova Mongolia Montenegro Senegal Serbia Tanzania Ukraine	Case-by-case basis	No List	Australia Iceland Benin India Botswana Jamaica Brazil Japan Canada Liechtenstein Cape Verde New Zealand Chile Norway Croatia Senegal Costa Rica Switzerland Gabon Ghana Uruguay	Case-by-case basis	Case-by-case basis	No List	Albania Bolivia Bosnia-Herzegovina Brazil Ecuador Ghana (men only) Gambia (men only) India Jamaica Kenya (men only) Kosovo Liberia (men only) Macedonia Maliawi (men only) Mali (men only) Mauritius Moldova Mongolia Montenegro Nigeria (men only) Peru Serbia Sierra Leone (men only) South Africa South Korea Ukraine



## *xi. Audits*

In the UK, in June 2011, the UKBA's Quality Audit and Development Team (QADT) undertook a thematic review of gender issues in asylum claims. The thematic review concluded that "some areas of the decision making process are not always easily identified as areas of concern because of the current auditing criteria and marking standards used in the audit process." The thematic review revealed that some trafficking cases were found not to engage the Refugee Convention and that some case owners did not consider whether the persecution was on the ground of membership of a particular social group. Alternatively, they found case owners concluding that the applicant was not a member of a particular social group without any reasoning. The QADT found that if there was more than one Convention ground at play, case owners sidelined the gender-related grounds. There was also a lack of investigation in cases involving domestic violence and whether an applicant's gender would affect her ability to seek State protection. Although country of origin information was identified, case owners failed to evaluate that information and how it related to the case.

In Belgium, the Gender Unit at the determination authority monitors decisions delivered at the initial level. There is also a monitoring of the implementation of Belgian law stipulating that the refugee status may be granted "for reason of the sex" by the Ministry of Equal opportunities as required by the 2010-2014 new action plan to fight against domestic violence and other types of violence within the family adopted in November 2010.

In Sweden, the Swedish Migration Board sometimes undertakes internal audits on different issues, not specifically in relation to gender aspects, but these are generally not made public.

Finally, national representations of the UNHCR have also undertaken audits of decisions and determination procedures under Quality Initiative Projects in Hungary,<sup>[336]</sup> Sweden<sup>[337]</sup> and the UK.<sup>[338]</sup>

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[336] UNHCR, 'Central, Eastern Europe aim to improve refugee status decisions', September 2008

[337] Feijen, Liv & Frennmark, Emelia, *Kvalitet i svensk asylprövning: en studie av Migrationsverkets utredning av och beslut om internationellt skydd*, UNHCR, Stockholm, 2011.

[338] UNHCR 1st (March 2004–January 2005), 2nd (February 2005–August 2005), 3rd (September 2005–February 2006), 4th (March 2006–December 2006), 5th (February 2007–March 2008), 6th (April 2008–March 2009) Quality Initiative Project Reports; UNHCR 1st Quality Integration Report (August 2010).



**Good Practice:** In Belgium, the CGRS created a Gender Unit in 2005. It is composed of a coordinator and reference persons in each geographical section. The Gender Unit aims at improving and harmonising the assessment of gender-related asylum application. In 2010, members of the Gender Unit participated in many discussions and exchanges forums (UNHCR, EU national asylum authorities, representatives of Belgian NGOs). These activities allow the CGRS to develop an expertise in handling gender-related asylum applications.





## VII. ASYLUM PROCEDURES

### *i. Introduction*

Procedural issues have an important impact on the determination of asylum claims. National procedures should allow asylum seekers to present all the elements of their claim. How are asylum seekers informed about international protection and procedural issues? What are the timeframes for the asylum procedures and are they appropriate? Are any special provisions for vulnerable persons foreseen? How are interviews conducted? Those questions are all the most crucial in the context of gender-related asylum claims. Indeed, the UNHCR Gender Guidelines underline that:

Persons raising gender-related refugee claims, and survivors of torture or trauma in particular, require a supportive environment where they can be reassured of the confidentiality of their claim. Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared. They may continue to fear persons in authority, or they may fear rejection and/or reprisals from their family and/or community.<sup>[339]</sup>

This section considers the extent to which gender-sensitivity is observed in national procedures at the first and second instance level (timeframes, access to information, identification of special needs, interviews).

### *ii. International and European Legal Framework*

The Geneva Convention does not provide explicit international legal norms on asylum procedures. In the 1990s, at the UN level, some of the strategic objectives adopted by the Beijing Platform for Action included providing protection for refugee women.<sup>[340]</sup> It referred to refugee determination procedures, stating that women and men should have equal access to and treatment under refugee determination procedures. The CEDAW Committee has specifically called on governments to implement gender-sensitive asylum procedures.<sup>[341]</sup>

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[339] UNHCR Guidelines on international protection: *Gender-related persecution within the context of Article 1<sup>(2)</sup> of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, §35, p. 8.

[340] Beijing Declaration and Platform for Action': UN doc. A/CONF. 177/20, 17 October 1995, Strategic Objective E. 5, paras 147h, 147i and 148.

[341] Alice Edwards, *Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women*, Legal and Protection Policy Research Series.

At the EU level, the European Union adopted in 2003 the Procedures Directives laying down minimum standards in the framework of the CEAS. The practice of each Member State regarding procedural issues should therefore be in conformity with EU law.

The UNHCR considers that the current Procedures Directive does not always ensure fair and accurate outcomes and that in allowing for exceptions, derogations and discretion the Procedures Directive has created protection gaps potentially in breach of international and European law. UNHCR's particular gender-related findings have highlighted the need for reform of the law and practice to ensure the gaps are filled.<sup>[342]</sup> The gender-related findings focused mainly on the opportunity and requirements for a personal interview, the examination procedure, including prioritised and accelerated procedures, and subsequent applications.

The European Commission's proposal for a recast Procedures Directive of June 2011 contained several gender-sensitive provisions, including the identification of applicants in need of special procedural guarantees because of their gender, sexual orientation and gender identity.<sup>[343]</sup> These applicants would consequently benefit from article 24 of the recast Procedures Directive which provides that Member States shall ensure that applicants are identified in due time and take appropriate measures to ensure applicants are granted sufficient time and relevant support to present the elements of their application as completely as possible and with all available evidence. The provision refers to the identification mechanism in article 22 of the recast Reception Directive.<sup>[344]</sup> Other provisions may have a relevant impact on gender sensitivity such as the requirement to take into consideration gender issues in the examination of applications<sup>[345]</sup> and ensuring that personal interviews take into account gender issues, providing ("wherever possible") interviewer and interpreter of the same sex.<sup>[346]</sup> The recast Procedures and Reception Conditions Directives have however not yet been agreed.

The need for Member States to provide a procedure for the identification of vulnerable asylum seekers so that their special needs can be addressed was highlighted at a

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[342] UNHCR, *Improving Asylum procedures: Comparative Analysis and Recommendations for Law and Practice. Key Gender Related Findings and Recommendations*, March 2010, p. 38.

[343] Article 2(d) states that "applicant in need of special procedural guarantees" means an applicant who due to age, gender, sexual orientation, gender identity, disability, serious physical illness, mental illness, post traumatic disorders or consequences of torture, rape or other serious forms of psychological, physical or sexual violence is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive". See also recital (25) and article 15.

[344] On this issue see ILGA-Europe Policy paper on the recast of the EU asylum Procedure and Reception Directives, July 2011.

[345] Article 10(3)(c).

[346] Article 15(3).



Ministerial conference in 2010.<sup>[347]</sup> The non-identification of vulnerable asylum seekers may affect the fairness of the asylum procedure and the likelihood that their need for international protection is recognised. It has been highlighted that an early identification and adequate follow-up for traumatised asylum seekers is key to address their special needs. It was also noted that the current EU legislative framework only addresses these issues in a very limited manner and that the “recast of the Directives offer the possibility to lay down on a harmonised basis national identification procedures as well as commonly agreed principles which guarantee a high quality and efficient assessment of asylum claims submitted by traumatised asylum seekers”.<sup>[348]</sup>

### *iii. Border Procedures*

In all the countries covered by this comparative study, asylum seekers have the possibility to claim asylum at the border, in accordance with article 35 of the current Procedures Directive. However, national procedures at the border and the level of gender-sensitivity applied by stakeholders differ among countries.

	BE	FR	HU	IT	MT	RO	SP	SW	UK
Possibility to claim asylum at the border	X	X	X	X	X	X	X	X	X
Specific procedure at the border	X	X	X <sup>[349]</sup>			X	X		
Information mainly provided by NGOs in practice		X		X	X		X		
Systematic interviews at the border	X	X		X	X		X		X <sup>[350]</sup>
Specific provisions for women or victims of GBV				X					

[347] Ibid.

[348] Myrthe Wijnkoop and Erick Vloeberghs, “Traumatized asylum seekers: A vulnerable group asylum seekers with special needs in the asylum process, Ministerial Conference “Quality and Efficiency in the Asylum Process”, 13-14 September 2010, Brussels.

[349] Only at the airport.

[350] Asylum seekers may have their asylum screening interview at the border.

### *Timeframes and detention of asylum seekers at the border*

In Italy, Malta<sup>[351]</sup> and Sweden no specific border procedure is in place. If an asylum claim is made at the border, the applicant shall be granted access to the territory and his/her claim shall be assessed under the same condition as an in-country procedure. In the UK, applicants shall be screened at the port of entry and routed into the standard procedure or the Detained Fast Track process under the same condition as in the in-country procedure. On the other hand, a specific accelerated procedure is applied in Belgium, France, Romania and Spain. Asylum seekers shall be heard by the national authority within a few days after arrival and shall be detained at the border or in transit zone while their request is being processed (except families with children in Belgium). In Hungary even though there is no accelerated procedure at the border, there is a transit detention centre at the airport where asylum seekers can remain up to 8 days. Within this transit zone, the deadline for pre-admissibility procedure is shorter than for the in-country procedure.

### *Access to information at the border*

The current Procedures Directive obliges Member States to “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”.<sup>[352]</sup> In France, Italy, Malta and Spain, practice shows that information on asylum procedures is mainly provided by NGOs. Consequently, there is a risk that in the absence of NGOs asylum seekers may not be properly and “immediately informed of their rights and obligations”.<sup>[353]</sup> It is however essential that women are given information about the status determination process as they may not be aware that gender-based violence may substantiate an asylum claim. This is especially true in the context of specific border procedures where shorter timeframes may apply.

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[351] In Malta, “border” means airport. Most asylum seekers coming to Malta do so by boat and thus apply for asylum once on the territory. In Malta, all asylum seekers are detained at arrival until the end of the asylum procedure (except vulnerable cases).

[352] Article 6(5).

[353] Article 35(3)(b).



**Good practice:** In Italy, interviews conducted with asylum seekers in this research showed that, generally, at Fiumicino airport (Rome) information was orally provided by police officers and concerned the very basic issues of the asylum claim. Information provided both by the police and personnel of the NGO at the airport has always been provided in a language that the person could understand, thanks to interpreters.



**Bad practice:** In France, according to the law, each detained person in transit zone should be individually informed about the asylum procedure. However, a specialised NGO declared that many asylum seekers at the French border<sup>[354]</sup> are generally not informed or do not understand what they are told by border police agents. Besides, the NGO declared that the national authority at the border failed to consider the specificities of gender-related asylum claims (persecution by non-State actors, no clear political aspects in the claim) and often decides these claims as “manifestly unfounded”. Applicants with gender-related claims may consequently be returned to their country of transit/origin with no substantive examination of their asylum claim.



**Bad practice:** In Spain, information about the asylum procedure at the border is usually provided by police agents. Asylum seekers arriving to the Spanish territory at the sea border and detained in detention centres shall be informed of the asylum procedure through an informative brochure. However, no institution is in charge of explaining information orally and ensuring that asylum seekers have understood the procedure, let alone gender-specific issues.

### *Gender sensitive provisions and identification of special needs at the border*

None of the countries covered in this study have specific provisions or policies for women or specific identification process of victims of gender-related persecution at the border, except in Italy.<sup>[355]</sup>

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[354] More than 90% of asylum claims lodged at the French border is made at Roissy airport (Paris).

[355] For findings related with interviews, please see Chapter VII, section vi.



**Good practice:** according to Italian law, women victims of violence or people who have suffered from torture should benefit from services at the border (including legal and social support, generally provided by NGOs). Even though there is no comprehensive set of rules on this issue, in practice all services at the border are more sensitive towards women and their circumstances. In particular, the police at Fiumicino airport (Rome) declared that greater attention to the needs of women is necessary as sometimes the asylum request may hide human trafficking. If the situation of the woman is not carefully assessed, there is a risk that in the future the border becomes a preferred “way of access” to Italy for traffickers.

Moreover, the number of asylum claims submitted in-country indicates that there are many entries through unofficial borders (e.g. Lampedusa Island). In Lampedusa, a project called “Praesidium” has been developed by the Italian Ministry of Interior, the UNHCR and its partners, the IOM, the Italian Red Cross and Save the Children with the objective of providing information and legal aid to newcomers regarding the asylum procedures and the identification of vulnerable cases.

**Hungary Case study:** A woman from Kosovo declared: “When we arrived in Hungary, the police was rude with us. They checked us and we had to take off our clothes. For me, as I am an old woman, this was very embarrassing”.

Overall, the lack of gender-specific information provided to women at the border as well as the implementation of accelerated procedures with limited timeframes may impede some women victims of gender-related persecution in accessing asylum procedures or in having a fair assessment of their claim.

#### *iv. In-Country Procedures*

Regarding in-country procedures, the degree of gender-sensitivity applied in the countries researched is variable. While some of them have adopted gender-sensitive policies, others remain relatively blind to gender issues. Similarly, although some good practices can be identified, further efforts should be encouraged to make these more systematic.



	BE	FR	HU	IT	MT	RO	SP	SW	UK
Deadline for claiming asylum	X				X		X		
Gender-sensitive flexibility for "late" application reported			X <sup>[356]</sup>	X	X		X		
Written information include gender relevant issues	X <sup>[357]</sup>		X <sup>[358]</sup>				X	X	X <sup>[359]</sup>
Screening/ admissibility procedure			X				X	X	X

*Timeframes for lodging an asylum claim and flexibility*

Women and victims of gender-based violence in general may not be aware that they can claim asylum on gender-related grounds. They may also face difficulties in talking about the persecution they have suffered. Consequently, the obligation to claim asylum within a specific deadline may impede some women to access asylum procedures.

For instance, in the UK, legal representatives noted that some asylum seekers had been trafficked and held in captivity for domestic servitude or sexual exploitation purposes and thus could not claim asylum immediately. Some women did not immediately claim asylum and stayed within abusive relationships because they feared becoming destitute. Certain women did not claim asylum immediately because they did not know of the right to claim asylum or were unaware that gender-related violence may be relevant to a claim for asylum.

[356] According to the national authority; but contradictory jurisprudence.

[357] Publication of a gender-specific leaflet by the national authority.

[358] Leaflets developed by NGOs.

[359] But no information about how gender may be relevant to the substance of an asylum claim in national authorities' leaflet.

In France, Hungary, Italy, Romania, Sweden and the UK<sup>[360]</sup> there is no deadline by which an asylum seeker has to claim asylum after entering the territory. However, in most of them, the credibility of the asylum claim may be questioned if he/she failed to claim asylum “without delay”<sup>[361]</sup> and has no reasonable explanation for the delay. Although, generally speaking, the delay in claiming asylum cannot be the sole reason for refusal, it will impact on claimants’ credibility in general.



**Bad practice:** Legal provisions in the UK require the national authority to take certain behaviour or actions of the applicant to be “damaging for the claimant’s credibility”, including not claiming asylum as soon as reasonably practicable. Research by Asylum Aid showed that when refusal letters in women’s asylum claims considered delay in claiming asylum at the beginning of the refusal letter, this adversely affected any subsequent analysis of the credibility of the claim.<sup>[362]</sup>



**Bad practice:** According to the Hungarian first instance authority, special circumstances (including gender) of the applicant are taken into account when deciding whether to reject international protection because of the delay in claiming asylum because there is a case-by-case examination of the claim. There is a judgement, however, where the late submission of the asylum application affected the case. The Court stated that “[i]f a person decides to flee his/her country, he/she asks for protection as soon as he/she gets to a safe country. If the applicant does not do so, he/she can be considered as not really in need of international protection”.<sup>[363]</sup>

On the other hand, in Belgium, Spain, and Malta, asylum claims must be submitted to the national authority respectively within 8 days, 1 month and 60 days of entry to the territory. In Malta, late applications, evaluated on a case-by-case basis, are generally rejected on procedural grounds (time limits) and not on substantive ground, thereby preventing an appeal (they would be automatically rejected). However, if a female asylum seeker applied after the deadline or with any delay, gender aspects are taken into consideration in practice, even though the law does not foresee any gender specific provisions. Besides, numerous judgements delivered by the Spanish

[360] In the UK, asylum support may be refused if the asylum seeker failed to claim asylum within 3 days of arrival on the territory (except for children).

[361] According to article 11(2)(a) of the Procedures Directive.

[362] Asylum Aid, *Unsustainable: The quality of initial decision-making in women’s asylum claims*, 2011, pp. 58-59.

[363] Metropolitan Court of Budapest, 18th April 2011, K.30.117/2010/12.





Supreme Court established that the delay of more than a month to file an application for asylum should not, by itself, make unlikely the persecution alleged, including in gender-related claims.<sup>[364]</sup>

### Access to information

In all the countries covered in this comparative study, asylum seekers receive written information (leaflets) from authorities regarding international protection, the national asylum procedure, rights and obligations for asylum seekers and refugees. It should be noted that gender-relevant information is seldom provided by authorities. In **Belgium**, **Sweden** and the **UK**, however, a particular attention is given to inform applicants on confidentiality issues, on separate interviews (without the presence of family members) and on the importance of claiming asylum in their own right. If implemented in practice, those are positive measures recommended by the UNHCR.

On the contrary, in **Malta** and **Romania** for instance, women accompanied by men are usually jointly informed by authorities and information on gender issues is not given particular importance. In the absence of this type of information and in the absence of separate interviews, some women accompanied by men may not be aware that gender-based violence may substantiate their claim and remain dependent upon their husband's application. NGOs, legal representatives and sometimes the UNHCR (as it is the case in **Malta** or **Spain**) often try to fill this gap by developing specific brochures (in **Hungary**<sup>[365]</sup> or **Sweden**<sup>[366]</sup>) or organising separate information sessions and individual gender-sensitive counselling (in **Malta** or **Romania**).



**Good practice:** The Belgian national authority has developed a gender-specific brochure entitled "Women, girls and asylum in Belgium: information for women and girls seeking asylum", available in 7 languages. This brochure provides specific information on rights and obligations as an asylum applicant: right to ask for a female interviewer and interpreter, right to have an individual interview, right to be given "all the time required" to explain all the reasons for fearing to return in the country of origin, right to have a break during the interview, access to child care

[364] Cases of Nigerian women fleeing FGM, 6th October 2006 and 2008; case of a Somali woman fleeing violence and sex abuses, 9th September 2005.

[365] Tyhe Hungarian Helsinki Committee has developed a leaflet which is distributed in reception centres or immigration jails. It mentions not only that applicants have the right to request a female interviewer and interpreter (as in the brochure developed by Hungarian authorities) but also that gender-based violence may substantiate a claim for protection.

[366] The Swedish Refugee Advice Center has developed a leaflet in 12 languages for women asylum seekers (see [www.sweref.org](http://www.sweref.org)). The Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights has developed a leaflet for LGBTI-persons who seek asylum.

during the interview, possibility to be accompanied by a lawyer and/or a person of confidence during the interview and flexibility in fixing the date of the interview for pregnant women. The brochure also gives information on particular issues which could be relevant for women: pregnancy, contraception and other bodily matters, health and well being issues, violence within the family, abuses and exploitation. The brochure is not publicly available. It was updated in 2011 after the national authority conducted a survey with female asylum seekers, refugees and relevant NGOs to assess the impact of the brochure. In practice however, the distribution of this brochure at registration or during the interview is not systematic.

In the UK, the leaflet distributed to asylum seekers by the national authority includes information about the possibility to request a male or a female case owner and the fact that the applicant's preference will be asked during the screening interview. Women who are dependants are informed that they can claim asylum in their own right in private at the Asylum Screening Unit, in accordance with the 2010 Asylum Instruction on *Gender Issues in the Asylum Claim*. Besides, the leaflet informs applicants that their claim will remain confidential meaning that the national authority will not inform their country of origin that they have claimed asylum. At the time of writing<sup>[367]</sup> the national authority was revising its leaflet to include information about domestic violence and trafficking as well as general gender issues following the revised 2010 Asylum Instruction on *Gender Issues in the Asylum Claim*. However, the national authority does not explicitly inform women that gender-based violence may be relevant in a claim for asylum.

In Sweden although the fact sheet distributed to asylum seekers mentions gender and sexual orientation as examples of what can form the basis of a particular social group, this document lacks several gender aspects: examples of what may constitute gender-related persecution and information relating to women's rights during the asylum process for example. Nevertheless, the Migration Board has published a leaflet in six languages to inform LGBT-persons who seek asylum about their rights during the process.<sup>[368]</sup> At the Application Unit, asylum seekers are heard separately and shall be informed about the right to request a female interpreter, case owner and legal representative. However, the reason for having this choice is not always properly explained.

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[367] April 2012.

[368] Swedish Migration Board, *Information for gays, lesbians, bisexuals, and transgender persons*, July 2011; Swedish Migration Board, *Seeking Asylum in Sweden*, November 2010.



In Italy, the national authority usually informs women of their rights to be assisted by a female interpreter. However, this is not always applied at all the stages of the procedure. An important role is played by NGOs or specialised services in providing information about the relevance of gender-based violence. This information does not always have a gender focus and asylum seekers may not have immediate access to this type of information. On the basis of the practice observed women declare a lack of comprehensive information especially at the Immigration Police Headquarters. When information is given, husbands are considered the main interlocutors.

**Hungary Case study:** Even though married applicants/couples shall be informed that they are allowed to ask for separate decisions in their cases, and shall provide a written approval if they want their cases to be decided together, there are cases where Afghan women claimed that only their husbands were informed about the asylum procedure.

### Screening/admissibility procedures

A screening/admissibility procedure for asylum seekers is implemented in **Hungary, Spain, Sweden** and the UK.<sup>[369]</sup> Asylum seekers are generally asked questions regarding their personal details, history and documentation, health, family background and basis of their claim for asylum.

In **Spain** there are two types of admission procedures, within the territory and at border posts or in Detention Centres. The procedure includes a decision on whether the claimant is eligible to enter the territory in order to apply for asylum (*admisión a tramite*). At this stage, the UNHCR can ask to prolongue the period of decision and/or provide an opinion on the claim. In reality few decisions are positive, even when a favourable opinion from UNHCR has been provided. During the period of examination of the claim at the borders posts facilities or within the detention centres, the asylum seeker remains there. Admission to process requests within the territory must be resolved within one month of submission.

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[369] There is also an admissibility procedure in Italy which is applied only where the claimant makes a second asylum request without bringing any new elements to the application or in cases where the claimant has already been granted refugee status.

In Sweden, asylum seekers must make their claim at one of the Application Units.<sup>[370]</sup> Applicants will generally be asked the initial questions in a separate room, not in the waiting hall. After the initial registration and brief interview process, the applicant will be called to attend the asylum interview.

In the UK, the Asylum Screening Unit in Croydon (South London) is the only place in the country where asylum seekers can claim asylum. Many problems have been reported about the practical difficulties faced by women asylum seekers, including those with children, who have had to travel long distance, without financial support, to arrive early enough at the Unit to be screened on the same day.<sup>[371]</sup> The interviewing officer and the interpreter at the Asylum Screening Unit are behind glass screens and communication is facilitated through the use of a microphone. This often means that other people waiting at the Asylum Screening Unit can hear the interviews which seriously affect asylum seekers' privacy and confidentiality and their ability to disclose sensitive information.

**UK Case Studies:** An asylum seeker from Kenya who had suffered from domestic violence, described her screening interview in 2009 as "a horrible day I'll never forget". "It's like a place you've gone, you are wrong and [...] you're not welcome that's the impression yes you are not welcome with your stories here. [...] Nobody seems to believe what you are saying".

A 29 year old refugee from Vietnam and a victim of trafficking for sexual exploitation claimed asylum in the UK in 2010. She described her asylum screening interview as terrifying. Frightened that she might be detained, she brought her two and three year old children with her to the Asylum Screening Unit in Croydon, including her sick daughter. She explained to officials that she had been brought to the UK to work as a prostitute, but she was especially embarrassed to talk about this in front of other Vietnamese people in the queue. When her interpreter, apparently also very stressed, shouted at her speak more loudly, she was so scared she burst into tears.

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[370] In Stockholm (Solna/Arlanda), Malmö, Gothenburg or Norrköping.

[371] As of May 2011 a system of appointments is in place whereby asylum seekers are asked to make an appointment before being screened.



## v. Accelerated and prioritised procedures

Member States may use accelerated procedures if it is deemed that claims are misleading or manifestly unfounded. Those imply shorter deadlines to decide and to appeal against decisions and may also imply restricted procedural safeguards or reception conditions for asylum seekers. On the other hand, prioritised procedures may be used for vulnerable persons presenting obviously founded claims.

In accordance with the current Procedures Directive, accelerated procedures may be implemented for applications from certain countries of origin (i.e. so called “safe countries of origin”), applications that are “manifestly unfounded” or made by people who represent a threat to national security or public order. Accelerated procedures may also be implemented when applications are made in detention or when it is made by EU citizens. Timeframes differ between Member States.<sup>[372]</sup>

	BE	FR	HU	IT	MT	RO	SP	SW	UK
Accelerated procedures	X	X	X		X <sup>[373]</sup>	X	X		X <sup>[374]</sup>
Prioritised procedures for vulnerable groups			X	X	X		X		

It should be noted that in France and the UK<sup>[375]</sup> asylum claims in the accelerated procedure which are certified as clearly unfounded<sup>[376]</sup> will be denied a suspensive appeal. Sweden does not apply the concept of accelerated procedures. However, if an application is considered manifestly unfounded the applicant will not receive a legal representative and will be denied appeal with a suspensive effect. Such cases are likely to be handled faster than “normal” cases. In the UK, legal aid in the Detained Fast Track is only guaranteed at the initial stage but not for appeals.

[372] Please refer to Annex 3 of the report (Countries Fact Sheets) for further details.

[373] By law, accelerated procedures applied for manifestly unfounded applications but not used in practice.

[374] In the UK, there are two types of accelerated procedures. In the detained Fast Track, the only criterion for routing is whether the claim can be subject to a quick decision. The Detained Non-Suspensive Appeal (DNSA) process where applications can be certified as clearly unfounded (including those from nationals of countries designated by the Home Office as generally safe for return). The estimated time scale between entry into the DNSA and decision is between 10 to 14 days.

[375] UKBA, *Detained Fast-Track Processes*, March 2011

[376] According to the list of safe countries of origin.

*Accelerated procedures and gender-related claims*

Accelerated procedures have a negative impact on gender-related asylum claims because shorter timeframes make it difficult for women to disclose sexual violence or rape and to gather expert country or medical evidence. However, **none** of the countries implementing accelerated procedures explicitly excludes gender-related claims for asylum from routing into such procedures.

In the UK, there are exclusion criteria to the Detained Fast Track which include women who are 24 weeks pregnant or more, families and unaccompanied asylum seeking children, applicants with extremely serious physical or psychological impediments and those with independent evidence of torture. However, gender-related claims are regularly routed into the Detained Fast Track.



**Bad practice:** In the UK, the decision to route a claim into the accelerated procedure (Detained Fast Track) is taken immediately after the screening interview. About one third of women who are refused at the initial stage in the Detained Fast Track are not granted legal representation at appeal because it is not deemed that they pass the legal aid merits test. Detention itself also makes it more difficult for asylum seekers to prepare their case, gather evidence and establish a relationship of trust with their legal representative.<sup>[377]</sup> UNHCR expressed concern, in its Fifth Quality Initiative Project report,<sup>[378]</sup> at the lack of appropriate training for decision-makers in the Detained Fast Track process who lacked an understanding of gender-related aspects of asylum claims. For example, a number of decisions taken in the Detained Fast Track did not identify the Convention grounds from a gender perspective or failed to properly consider women's access to effective State protection. UKBA case workers in the Detained Fast Track also failed to adequately assess the viability of an internal flight alternative in relation to women asylum seekers' ability to survive economically. UNHCR observed cases presenting complex gender-related issues that were routed into the Detained Fast Track without justification and which were clearly unsuitable for the Detained Fast Track.

[377] Human Rights Watch, *Fast-Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK*, February 2010.

[378] UNHCR, Quality Initiative Project, Fifth Report to the Minister, March 2008.



### *Prioritised procedures for vulnerable applicants*

In Hungary, Italy, Malta and Spain, priority procedures are implemented for vulnerable persons with specific needs. In Italy, applications can be submitted to a priority examination by the national authority when the claimant is considered vulnerable, especially in gender-related cases (victims of torture, rape or severe psychological, physical or sexual violence for instance).<sup>[379]</sup>



**Good practice:** Officers from the first instance authority in Spain affirmed that, since January 2011, gender-related asylum claims are prioritised.

### *vi. Women and victims of gender-based violence: a vulnerable group with special procedural needs?*

Special procedural provisions may allow traumatised and/or vulnerable applicants to talk about their fears and to gather the necessary evidence for their case. In that regard, policies and practice are not consistent regarding women and victims of gender-based violence. It should be noted that a distinction can be made between a state of vulnerability and a situation of vulnerability.<sup>[380]</sup> Women asylum seekers are not necessarily vulnerable *per se* but might find themselves in a situation of vulnerability through the asylum system where for example they are detained or are refused accommodation and support.

None of the countries in this study have specific provisions in national legislation that recognise “women” and/or “victims of gender-based violence” *per se* as part of vulnerable group with special procedural needs. However, in Belgium, Hungary, Italy, Malta, Spain, Sweden and the UK, policy or administrative instructions recognise that gender-related claims for asylum may warrant specific procedural consideration. In these countries, gender – even if not considered as a cause of vulnerability itself – shall be considered as a cause of vulnerability where associated to other particular conditions (for example torture, rape or other psychological, physical or sexual violence) and shall constitute a right to benefit from special procedural guarantees. In Romania, gender-sensitivity can be observed in practice.

[379] Procedure Legislative Decree 25/08.

[380] Laurence Debauche-Discart, *Asylum seekers with special needs*, Ministerial Conference “Quality and Efficiency in the Asylum Process”, 13-14 September 2010, Brussels.

The Hungarian national authority explained: “[i]n case the applicant who lodged a gender-related asylum claim is also a victim of torture, rape or any other serious form of psychological, physical or sexual violence, she/he is considered as a person requiring special treatment, and as a result the asylum authority conducts the procedure with regard to her/his special needs”. In Italy, for instance, in cases where evidence clearly demonstrates that a vulnerable applicant has all the requirements to obtain refugee status, the national authority may decide not to summon him/her to the hearing and deliver a positive decision based on statements made to the police and documents handed over by the applicant. Vulnerable asylum seekers may also ask for the postponement of their interview or hearing for medical reasons, which usually needs to be certified by a doctor. In some cases, it may happen that the authority carries out a very simple interview to avoid re-traumatisation of vulnerable women. Furthermore, identified vulnerable asylum seekers can have access to specialised psychological care and can be supported by specialised personnel (psychologists, social workers, NGO staff) during the substantive interview.<sup>[381]</sup> It should be underlined, however, that considerations granted to gender issues during the asylum procedure ultimately relies on the sensitivity of the officer and not on formal rules provided by Italian law. Furthermore, identified vulnerable asylum seekers in Malta may see their claims prioritised. They may also ask for the postponement of their substantive interview in order to further prepare their claim (by meeting their legal representative, preparing their statement or gathering further evidence). Yet flexibility in timeframes is difficult to obtain in practice. In Sweden, the preparatory works mention that investigations in gender-related asylum claims must be completed taking into account the difficulties for applicants to speak about their experiences of gender-based violence, not least in front of an official. They also highlight that women may have specific difficulties due to their fear of social ostracism and of further violence if the information about their experiences is leaked to relatives and others. They mention the national authority’s guidelines and the need to use such, referring to the content of the guidelines as regards the need for separate interviews and the possibility to ask for a case worker, legal representative or interpreter of a specific sex.

Finally, in Romania, female asylum seekers may be considered as part of a vulnerable group with special procedural needs in practice, and it is usually recommended that female interviewers, interpreters, lawyers and judges deal with gender-related cases. However, the lack of specialised and sufficient female staff makes it difficult to implement.

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[381] Procedure Legislative Decree 25/2008.





**Good practice:** In Malta, if trauma affects an asylum seeker in a way that the interview could be jeopardised, the national authority may issue a humanitarian protection status and postpone the substantive interview. It is important to say, however, that this happens only in case of evident trauma, which is implemented at the discretion of the authorities.



**Good practice:** In the UK, the screening review undertaken by the national authority during 2011 took gender issues into account. The Asylum Screening Unit appointed a women's champion in December 2011 and a trafficking champion in the summer 2011, managers who are the focal points for these issues.

The national authority now provides women interviewing officers at the Asylum Screening Unit for women asylum seekers although this cannot always be guaranteed as this is subject to staff availability.

**Italy Case study:** F. is an orphan from Sierra Leone. An uncle asked her to live with him and forced her to work in his farm. He repeatedly raped her. Once, she managed to hit him on his head with an iron bar. After he came back from the hospital, he suddenly died. He belonged to a rebel group, and its members wanted to sacrifice and kill her after seven days. They kept her in an underground hole. For days, they did not give her something to eat or drink. Finally, a friend of her father that was hunting nearby heard her screaming. He rescued her and, while the rebels were tailing them, he put her on a cargo ship leaving from Cotonou. She finally arrived in Naples. In Italy, she was supported by psychological and psychiatric specialists. Because of the traumatic event she experienced, she was not able to tell her own story logically, following a chronological development. The specialists recognised her situation was critical and asked the national authority to delay the substantive interview, supporting the request with medical evidence. The authority proved to be sensitive and accepted to delay the interview by one month. This procedural flexibility allowed F. to be psychiatrically supported before being heard on her case.

*Identification procedure*

In **Malta**, there is in theory a vulnerable assessment procedure foreseen at the beginning of the asylum procedure. According to the legislation, “the function of the [Agency for the Welfare of Asylum Seekers] shall be the implementation of national legislation and policy concerning the welfare of refugees, persons enjoying international protection and asylum seekers. In the performance of its functions, the Agency shall: provide particular services to categories of persons identified as vulnerable according to current policies.”<sup>[382]</sup> Victims of gender-based violence or trafficking shall be identified through referrals from NGOs and other actors. However, no specific gender-sensitive identification methods are used. Besides, the lack of technical expertise, staff and effective outreach procedure makes the implementation of this procedure challenging in practice. Vulnerable asylum seekers still have the possibility to highlight trauma or gender-related issues when completing the preliminary questionnaire together with an officer of the national authority. Nevertheless, NGOs confirm that the assessment of vulnerability, even if foreseen by law, is not systematically undertaken in practice.

In **Spain**, the screening interview is meant to identify victims of trafficking and other vulnerable categories but there is no formal identification and referral process. In particular, officers from the national authority who interview applicants at the time of filing the application are not sufficiently trained and do not have a formal protocol for referral. In relation to victims of trafficking, an officer from the first instance authority stated that since early 2011 they have started to inform police agents in cases where signs were detected. Since the implementation of this channel with a specialised police unit, the national authority has activated an informal referral mechanism, even when these cases are detected during the procedure at the border. The UNHCR’s presence during all phases of the procedure tries to compensate for deficiencies in the system’s ability to identify vulnerable people and those in need of international protection. However, since the approval of the New Asylum Act in Spain, the UNHCR’s report is not binding.

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[382] Legal Notice 205 of 2009 establishing the Agency for the Welfare of Asylum Seekers



In the UK, the screening interview may identify victims of trafficking and the health check at the emergency accommodation could highlight any special needs of applicants. Identified victims of trafficking may be referred to the National Referral Mechanism (NRM) with the applicant's consent. The competent authority in the NRM will make a reasonable grounds decision on whether she is a victim of trafficking, and if this is accepted she will be granted a one-year residence permit. However, the limited amount of information asked during the screening interview and the lack of privacy at the Asylum Screening Unit means asylum seekers are unable to disclose their specific needs. Asylum Process Guidance on Trafficking notes that: "There are many barriers for victims to come forward such as the fear of reprisals against them or their families, fear of removal and/or being treated as an immigration offender, or the situation of dependency in which they find themselves. As a result when deciding whether someone may be a potential victim of trafficking, staff should not rely on the applicant to explicitly identify themselves as a victim of trafficking. [...] Where appropriate, Screening Officers should make use of the individual Screening Rooms available". However, in practice, it appears that victims of trafficking are not properly explained the implications, consequences and the purpose of being referred to the National Referral Mechanism. Neither is it certain that they are always asked consent before being referred into the NRM.



**Bad practice:** In the UK, advocates and legal representatives noted that it was very rare to see disclosure of rape, trafficking or even self-identification by vulnerable asylum seekers at the Asylum Screening Unit. This was confirmed by asylum seeking women, interviewed for this research, who said they were held back from talking to interviewing officers at the Asylum Screening Unit because of the lack of privacy. Interviewing officers and interpreters are behind glass screens and communication is facilitated through the use of a microphone. However, this often means that other people waiting in the waiting room can hear the questions asked and asylum seekers were able to hear what the person next to them was saying. A legal representative, interviewed for this research, noted the lack of privacy at the Asylum Screening Unit is one of the main reasons why asylum seekers are unable to disclose their specific needs.

In Hungary, according to a Gov. Decree, it is the responsibility of employees (case owners, social workers) of the Asylum authority to identify persons requiring special treatment in the asylum proceedings. Despite this, the absence of identification does not bear any legal consequences for the national authority. Therefore, the identification depends solely on whether a case owner or social worker detect that an asylum seeker has special needs.

**Hungary Case study:** A Nigerian woman in Debrecen open reception camp declared: "I once collapsed while cleaning. Only after this event did a social worker refer me to the psychiatrist of the Cordelia Foundation. I now visit them once a week and I feel it is very useful".

### *vii. Interviews*

Article 12 of the Procedures Directive sets out the general requirement that asylum seekers, subject to some exceptions, must be given the opportunity of a personal interview with a person competent under national law.

In order to ensure that gender-related claims are properly considered during interviews, several provisions are recommended by the UNHCR: giving asylum seekers the choice to have interviewers and interpreters of a preferred sex, conducting separate interviews (without the presence of male family members or children), creating an open and reassuring environment to establish trust and help disclosure of sensitive and personal information, insisting on confidentiality issues, considering cultural or religious factors (knowledge of gender relevant COI), asking appropriate questions (not male-oriented), understanding the consequences of gender-based violence on applicants' behaviour and mental health, being responsive to the trauma and emotion of claimants and stopping interviews if necessary, and finally inviting to additional interviews in order to obtain all the necessary information (particularly for victims of sexual violence or other forms of trauma). This section studies the extent to which interviews are gender-sensitive in the countries researched.



	BE	FR	HU	IT	MT	RO	SP	SW	UK
Possibility to choose sex of interviewer/interpreter	X	X	X	X	X	X	X	X	X <sup>[383]</sup>
Choice systematically asked	X							X <sup>[384]</sup>	X <sup>[385]</sup>
Child care available	X								X <sup>[386]</sup>
Access to psychological support prior to interviews	X		X	X		X			X <sup>[387]</sup>
Possibility to be accompanied by a third person	X			X			X <sup>[388]</sup>	X <sup>[389]</sup>	X
Guidelines on gender-sensitive interviews	X	X <sup>[390]</sup>	X <sup>[391]</sup>		X	X		X	X

### *Gender of staff*

According to the legislation and/or practice observed in **all** the countries researched, women can request to be interviewed by a female officer and interpreter at least for the substantive interview. Nevertheless, the preference is systematically asked before the substantive interview in **Belgium, Sweden** and the **UK**. In other countries, such as **Hungary**, the information leaflet given to asylum seekers includes the right to request a female interviewer and interpreter. In countries where the preference is not systematically asked, even if the possibility exists, it is essential that women are informed about it.

[383] Only for the substantive asylum interview.

[384] Question asked at the Asylum Screening Unit for the substantive asylum interview.

[385] Only for the substantive asylum interview.

[386] Except in London.

[387] In theory this available at any time but asylum seekers are unlikely to access psychological support prior to their interviews due to dispersal policies.

[388] Only a lawyer.

[389] Not a legal right. The applicant needs to ask the interviewer at the Migration Board, who will decide on whether a third person may attend the interview.

[390] No specific guidelines adopted, but authorities use UNHCR's documents also related to interviews techniques.

[391] No specific guidelines adopted but authorities use UNHCR's Gender Guidelines.



**Good practice:** In Hungary, according to Section 66 of the Governmental Decree implementing the Asylum Act, if this does not hinder the completion of the procedure and the asylum seeker requests it, an interpreter of the same sex shall be used, and the case shall be handled by an officer of the same sex as the asylum seeker. If the asylum seeker declares that he/she suffered harm or humiliation relating to his/her gender status, it shall be compulsory to designate an official of the same sex for his/her case, if requested by the person.



**Good practice:** In Italy, article 12 of the Procedure Decree foresees that asylum seekers have the possibility to be interviewed by a member of the Territorial Commissions of the same gender. Article 13 foresees that for the substantive asylum interview, pregnant women and victims of rape, or persons who suffered from serious forms of psychological, physical or sexual violence have the possibility to be assisted by supporting personnel (psychologists, legal consultants, etc.).



**Bad practice:** A study published in 2009 by the French representation of the UNHCR mentioned that “at no stage of the procedure are women informed of their right to request to be interviewed by a woman and be assisted by a female interpreter”.<sup>[392]</sup> This was confirmed by this research which shows that the majority of female asylum seekers encountered were not informed of the possibility to choose an interviewer of the same sex for their substantive interview. Furthermore, several stakeholders providing legal or social assistance to asylum seekers were not aware of this possibility either.

When a preference is expressed regarding the sex of the interviewing officer, all the countries try to meet applicants’ choice “as far as possible”, depending on availability of female staff. In practice, authorities may face difficulties in respecting their choice (Hungary and Romania). The requirement would be more difficult (or even impossible) to meet for interpreters, especially when rarely spoken languages are concerned (this was reported in Belgium, France, Hungary, Romania and the UK). In Italy, if a female interpreter is not available, claimants’ consent would be asked.

When women seeking asylum are questioned about their preference, it is of utmost importance to explain the reasons for this. In the UK, even though the choice of the sex of the interviewer is systematically given to asylum seekers, research into the quality of initial decision-making in women’s asylum claims showed that the amount

[392] UNHCR, *Les femmes en quête d’asile et réfugiées en France*, Jane Freedman, June 2009, p. 21.



of requests in the research sample was small because some women seeking asylum explained that when asked they did not understand the full implication of the request and did not want to appear “difficult”.<sup>[393]</sup>

It should be noted that at the border, at the screening/admissibility interview or at any other interview with police/Immigration staff, such requirements cannot always be guaranteed in several countries, including France, Italy and the UK.

### Women and family members

In all countries researched, asylum seekers, including women accompanied by men, shall be interviewed individually, except in the case of dependants without claims in their own right in the UK. However, practice in France, Spain and Sweden shows that men may be perceived as the “main applicant” and would in such cases be interviewed first and for a longer time, in practice limiting the possibilities for women to reveal all aspects of their claim.

The most important thing is that, ahead of the substantive interview, women are informed about asylum procedures separately from men and that it is made clear to them that they might have additional grounds for their claim related to gender. If they are clearly aware of it and they want to be interviewed separately, they should be able to do so.

On the other hand, child care is hardly ever provided by national authorities during substantive asylum interviews. This is only the case in Belgium and the UK (except in London).<sup>[394]</sup> In Belgium, a specific room with a youth worker is provided both in the Immigration authority building (where applicants register their asylum claims) and in the determination authority building. The child care service is available for children between one and eleven years-old. Therefore, interviews can be carried out in a less stressful environment, as parents are not distracted or constrained by their children. However, women asylum seekers in the UK explained that they were not always aware of child care facilities during substantive interviews.

Where child care is not provided in France, Hungary, Italy, Malta, Romania, Spain and Sweden, children often attend their (single) mothers’ interviews. This situation may be very stressful both for the mother and the children. Presenting all aspects of the claim, including gender-related aspects, may become more difficult for mothers.

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[393] Asylum Aid, *Unsustainable: the quality of initial decision-making in women’s asylum claims*, January 2011, pp. 35-36.

[394] The asylum Instruction on *Gender* states that UKBA regional offices must have their own arrangements to ensure that children are not present during interviews.



**Good practice:** Spanish Asylum Law expressly recognises the Administration's duty to take all measures to ensure that, where necessary, in the interview applicants are given a special treatment due to their sex or other circumstances provided in the law, which are considered in vulnerable situation, such as minors, unaccompanied minors, disabled, elderly, pregnant women, single parents with children, persons who have suffered torture, rape or other serious forms of psychological or physical harm, and sexual victims of human trafficking. Besides, the High Spanish Court highlighted in its judgment of 17th May, 2011,<sup>[395]</sup> about the relevance to make a personal interview with the Instructor when there is a doubt about the credibility and there are not valid questionnaires about nationality in the specific case.

**France Case Study:** A young single mother who attended her substantive interview with her seven year-old son explained: "He heard it all. At one point, he asked if he could go out because what he heard was too hard for him".

### Medical/psychological assistance before the interview

In all the countries covered in this study, medical/psychological assistance is not the responsibility of the determination authorities and is rather provided by specialised NGOs or specialised staff in reception centres.

In **Belgium, Hungary, Italy and Romania**, asylum seekers – and especially vulnerable women – can generally benefit from medical/psychological assistance before the substantive interview. This is however not systematic in practice, for example if adequate information has not been provided or if access to these services is full or in the absence of specialised staff in one of the reception centre. In **Hungary**, assistance is provided by the Cordelia Foundation,<sup>[396]</sup> but this can only happen if asylum seekers are placed in an open reception centre and if, at the pre-admissibility stage of the procedure, they are actually given by national authority officers the information sheet listing NGOs. In **Italy**, asylum seekers that have been subjected to severe trauma can be addressed to the NIRAST network (Italian network for asylum seekers victims of torture), where specialised psychological and psychiatric services are offered. There are several specialised services in all the countries under research,

[395] Appeal n° 4920/2009.

[396] [www.cordelia.hu](http://www.cordelia.hu)





often run by NGOs.<sup>[397]</sup> In Malta, access to specialised medical/psychological support shall, in theory, happen before the substantive interview, but actually this is not always guaranteed because the two are not seen to be related.

In France, Sweden and the UK,<sup>[398]</sup> access to specialised medical/psychological assistance before the interview is generally not provided due to time constraint and/or poor access to these services.



**Good practice:** in Belgium, the national authority created a Psychological Support Unit in charge of providing advice and expertise on some applicants' mental health. Such examination can only be requested by case owners if they consider that the applicant is not able to express him/herself clearly. This procedure does not intend to provide assistance to asylum seekers but rather to facilitate the consideration of psychological issues in the determination process by case owners who are not themselves psychologists and may face difficulties in assessing psychological issues.

### Presence of third person during the interview

In Belgium, Italy, and the UK,<sup>[399]</sup> asylum seekers have the possibility to be accompanied by a lawyer or by a person of their choice during the substantive interview. In Spain and Sweden,<sup>[400]</sup> they have the right to be accompanied by a lawyer/legal representative only. This provision helps asylum seekers, and especially women, to feel more comfortable and confident to talk about their story in details. Consequently, this is as a positive measure for victims of gender-based violence.

### Knowledge and understanding of gender relevant COI

The Swedish preparatory works and the Asylum Instruction on *Gender* in the UK note as a key point that an understanding of COI relating to the position of women is essential to the effective conduct of interviews and to making correct decisions.

[397] Naga, *Medici contro la tortura*, San Gallicano Hospital, etc.

[398] A service provider in initial accommodation explained how some GPs refused to make referrals to specialist services because asylum seekers would be dispersed to another region within 3 weeks and they believed it would make more sense for the person to start the treatment once they were settled in their dispersal accommodation.

[399] However, as this is not covered by legal aid, this rarely happens in practice.

[400] A legal representative appointed by the Migration Board is always present during the substantive interview, unless the application is considered manifestly unfounded, is handled under the Dublin regulation or asylum is likely to be granted immediately.

However, legal representatives felt that in practice interviewers in the UK were not always familiar with the country history, politics and gender issues.

In **Belgium, France and Hungary**, interviewing officers are specialised by country/region of origin of applicants. Although they might generally be aware of the COI before the interview, it was observed that they were sometimes not familiar with the most recent COI or about the status and roles of women in a specific country or in specific communities.

### *Gender-sensitive interviewing methods*

The existence of guidelines or administrative instructions on gender-sensitive interviews was reported in **Belgium, Malta,**<sup>[401]</sup> **Romania, Sweden** and the UK.<sup>[402]</sup> In accordance with the UNHCR Gender Guidelines, these policy guidance documents usually highlight the necessity to create a reassuring environment that will help establish trust between the interviewer, the interpreter and the applicant and should help the disclosure of sensitive and intimate information. They also stress the importance of being aware of gender-related issues and of understanding gender-relevant country of origin information, including conditions of women in the society, in order to conduct adequate interviews.

The **Hungarian** authority does not have separate guidelines about gender-sensitive interviews, but it uses the UNHCR Guidelines on International Protection. They affirmed: “In case of potential victims of gender-based violence, the interview methods are adapted. The interviewer and interpreter try to remain neutral, compassionate and objective during the interview. The interviewer tries to create an environment that helps the claimant to open up and makes sure that the applicant is able to present her/his case with minimal interruption. During the interview, the decision-maker avoids body languages or gestures that may be perceived as intimidating or culturally insensitive/inappropriate”.

In practice, although some examples of gender-sensitive interviews were observed – for example in **Belgium, Italy, Malta, Romania, Sweden** and the UK – from a general perspective, this comparative research also highlighted a lack of gender-sensitivity during interviews in most of the countries researched. Interviews are usually not conducted in a trustful atmosphere, but rather in a confrontational manner. Very

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[401] Authorities indicated the existence of such guidelines but, on the basis of the information provided by other sources, these are not published or disseminated.

[402] UKBA Asylum Instruction on *Gender Issues in the Asylum Claim*, 2010.



limited consideration is given in practice to difficulties encountered by traumatised victims of gender-based violence who are unable to reveal experiences immediately, chronologically, consistently and without contradictions or lapses in their memory. The feeling of shame and guilt that applicants may feel is generally not adequately taken into account and interviewing officers regularly ask inappropriate questions. Similarly, a general lack of knowledge of gender issues and gender-relevant country of origin information was reported. Overall, gender-sensitivity was inconsistently observed during interviews with asylum seekers.



**Good practice:** In Belgium, at the first instance level, officers should inform women that any confidential and intimate elements they might have kept secret until then and which would affect them and their family (a rape for instance) will be taken into consideration but will not be mentioned in the decision or in any official document.



**Good practice:** In Italy, no guidelines or protocols/files exist regarding gender-sensitive interviewing methods. However, several documents have been published with the collaboration of the national authority. For example "Desmos" are publications and specific papers on different issues regarding, among others, victims of torture, women and minors. These papers were edited by the Italian Council for Refugees (CIR) and promoted by the National Commission for the Right to Asylum and the Italian Home Office. Moreover, there is also a document entitled "Interviewing asylum seekers", edited by the Italian representation of the UNHCR on the basis of the Training Module on Interview Techniques edited by UNHCR-Geneva with a specific section dedicated to women.

**France Case Study:** The interpretation services are not appropriate at the first instance level and often impede the smooth development of the substantive interview. A woman interviewed for this research declared: "The interpreter interrupted me all the time. He didn't give me the opportunity to express myself as I wanted to". Another woman explained: "I felt like I was living the same persecution; the interpreter behaved like the army in my country". Even more strikingly, we were informed that a Persian interpreter mixed up "paedophile" with "homosexual" during an interview, which resulted in the application of a mother fleeing her partner to protect her daughter from sexual abuse being rejected.

### Gender-sensitive questions during interviews

The interview structure may be problematic when questions about identity and travel routes, and information about punishment for giving false evidence, are raised before the questions in relation to the asylum claim, thus making it more difficult to create a trustful atmosphere.

In Italy, while conducting the interview, in cases of evident trauma, i.e. clear evidence of suffering which is certified by medical documentation, no specific details of rape or sexual assault are demanded in practice. In the UK, the Asylum Instruction on *Gender* states that “for victims of rape or sexual violence, it is not necessary to obtain precise details about the act itself. However, information should be obtained about the events leading up to and following the assault, the context in which it took place as well as the motivation of the perpetrator (if known)”. In practice however, detailed and inappropriate questions are often asked during asylum interviews. The same observations were made in Belgium where interview reports showed that inappropriate questions may be asked to victims of sexual abuses: “how were you dressed?”, “how many pockets did he have?” In Sweden, there is generally a lack of gender-sensitive questions. The questions usually do not consider how gender norms influence applicants’ reasons for seeking asylum.

**Italy Case Study:** A Congolese woman who suffered from rape in her country of origin and was evidenced by a medical report was interviewed by the Italian Territorial Commission in Rome. However, during the interview she was unable to explain her own situation, because she could not stop crying. In this case the Territorial Commission only asked general questions on her social and family conditions without asking any information related to the violence.

**UK Case Study:** A 32 year-old victim of trafficking for sexual exploitation from Nigeria, was asked how many men she had slept with and whether she enjoyed working as a prostitute during her substantive interview.

### Further evidence and additional interviews at the first instance

In Belgium, Hungary, Italy, Spain, Sweden, and the UK, after their interview, asylum seekers have the possibility (in a limited timeframe) to send further evidence to the national authority before the decision is made.



**Good practice:** In Italy, Sweden and the UK, a transcript from the interview will always be provided after the interview, and the applicant will be given a deadline to make any comments or corrections after having read it. The legal representative normally has about 2 weeks in Sweden and 5 days in the UK to submit this together with submissions to the national authority. In Italy, a transcript of the interview is provided on the same day of the interview. The transcript is read by the interpreter, to allow the applicant to make corrections, if any.

This provision is not gender-specific but may have a positive indirect impact on gender-related claims by giving further opportunity to evidence the claim and check if all relevant information has been included in the transcript.



**Good practice:** In Spain, after the interview, asylum seekers have the possibility to send the case owner further evidence (legal, psychological and social reports for instance). Those reports are taken into consideration in practice and may be used to re-assess the case, to ask for a second interview or to change the decision proposed by the national authority.

In all the countries researched, additional interviews at the first instance may be arranged (to collect further information, to investigate new information that has come to light or because there has been a significant amount of time since the last interview), but are seldom used in practice.



**Good practice:** The UNCHR in Spain can ask the Eligibility Commission to postpone a decision in order to conduct a second interview, compile evidence/reports/statements or due to the psychological situation of the applicant.



**Bad practice:** In France, some interview transcripts highlighted that even in cases of interruption for medical or psychological reasons (applicant feeling sick, fainting, crying), the national authority may not invite the applicant for an additional interview. International protection may be refused with no further investigation. It should be noted that insufficient capacities and resources as well as time pressure at the French national authority induce the development of this type of bad practice.

*viii. Subsequent applications*

	BE	FR	HU	IT	MT	RO	SP	SW	UK
Gender-sensitive definition of “new elements”	X		X	X <sup>(403)</sup>				X <sup>(404)</sup>	
Restriction of procedural guarantees	X <sup>(405)</sup>		X					X <sup>(406)</sup>	X <sup>(407)</sup>
Claims made by previous dependents as subsequent claims	X	X	X	X	X		X		

Article 32 of the current Procedures Directive allows Member States to register subsequent applications that “shall be subject first to a preliminary examination as to whether, after the decision [to refuse protection] has been reached, new elements or findings relating to the examination of whether [the applicant] qualifies as a refugee”.<sup>[408]</sup>

Subsequent applications may concern in particular women and victims of gender-based violence (victims of trafficking for instance) because of late disclosure due to feelings of guilt and shame, a lack of information, or because of asylum procedures that are not gender-sensitive.

In all the countries researched, in accordance with the current Procedures Directive, subsequent claims for asylum may be submitted if the applicant presents “new elements” and will generally be examined under shorter timeframes. However, the interpretation of “new elements” differs between Member States, and only a few of them apply a flexible definition that could be qualified as gender-sensitive.

[403] In practice.

[404] According to the Swedish preparatory works. However, in practice it is very difficult.

[405] After a third application.

[406] No right to legal representation and no right to appeal with suspensive effect.

[407] If the further submissions are not considered by the UKBA to amount to a fresh claim, applicants may apply for judicial review of the decision because there will no substantive right of appeal against the decision. If the UKBA considers that the further submissions amount to a fresh claim but refuse the claim, applicants have a right of appeal to the First-tier Tribunal.

[408] Procedures Directive, article 32(3).



**UK Case Study:** An asylum seeker from Turkey claimed asylum in 2009 and did not initially disclose everything because she was afraid her husband would harm her. When she made a fresh claim for asylum on the basis of all the facts of her case, she was invited for a second interview by the national authority. This rarely happens in practice but this would give her the opportunity to disclose important information at a later stage.

### *Gender-sensitive definition of “new elements”*

In Belgium, Hungary, Italy and Sweden, late disclosure with a good explanation of the reasons why such elements were not mentioned during the first procedure can be accepted. In these countries, the interpretation of what constitutes “new elements” can be rather flexible and thus indirectly gender-sensitive. In Sweden, it is nonetheless extremely difficult to have a subsequent claim accepted, including in gender-related claims as shown in a judgement by the Migration Court of Appeal.<sup>[409]</sup> There is generally a need to support the introduction of a new element with written documentation, and according to the law there is a need to show a “valid excuse” for why this element was not introduced before.<sup>[410]</sup> If a valid excuse is not considered to exist, the application may be dismissed despite the prevalence of a risk of torture upon return. In Italy, “new elements” are generally accepted through a gender-sensitive approach.

In France, the national authority applies a restrictive definition of “new elements” and gender-related aspects that were not mentioned in the first claim (rape, sexual violence) will not be taken into consideration to justify a subsequent claim. In the UK, late disclosure of rape or sexual violence will not generally be considered significantly different because although it has not already been considered, taken together with the previously considered material, it is often not considered to create a realistic prospect of success.<sup>[411]</sup>



**Good practice:** In Sweden, late disclosure because of a lack of knowledge that FGM constitutes a legitimate claim for asylum has been accepted as a subsequent claim in a judgement by the Migration Court of Appeal.<sup>[412]</sup>

[409] Migration Court of Appeal, UM 218-06.

[410] Section 12, §19, Swedish Aliens Act (2005:736).

[411] Paragraph 353 of the Immigration Rules (HC 395).

[412] Migration Court of Appeal, UM 7731-08.

**Italy Case Study:** A Togolese asylum seeker lodged his first application for different reasons than his sexual orientation and he was refused asylum. He submitted a subsequent application on the basis of his sexual orientation and he was admitted to the asylum procedure.<sup>[413]</sup>

### *Restriction of procedural guarantees and reception conditions*

Furthermore, in some countries, applicants making a subsequent claim may see their procedural guarantees and reception conditions restricted. For instance, in **Hungary**, subsequent claims do not have a suspensive effect on the execution of a decision of expulsion (if the authority decided that the prohibition of *refoulement* was not applicable). The **Hungarian** legislation states that asylum seekers making subsequent claims are also not entitled to the reception conditions. In **Belgium**, access to reception conditions will be limited after the third application. In the **UK**, the amount of support given to asylum seekers with subsequent claims is less than for those with initial claims and is also dependent on certain conditions. If not recognised as amounting to a fresh claim there is no right of appeal with a suspensive effect.

### *Claims made by previous dependants*

In **Malta**<sup>[414]</sup> and the **UK**, when women claim asylum in their own right after having been refused asylum by the authorities as the dependants of their husbands' or other relatives' claim, they will be considered under the procedure for initial claim. This is a positive practice as this generally means that the regular procedure will apply and that access to procedural guarantees and reception conditions will be ensured. On the contrary, this type of claim will be considered as a subsequent claim in **Belgium**, **France**, **Hungary**, **Italy** and **Spain**.

## *ix. Dublin*

None of the countries researched foresees a specific policy for women asylum seekers under the Dublin procedure. However, in **Italy**, practice shows that in most cases of women who suffered gender-related violence, the sovereignty clause of the Dublin regulation is usually applied by Italian authorities. Generally speaking, the clause is

[413] "Arcigay Nazionale", March 2012.

[414] According to the research, this would "most probably" be the case, but it could also be considered as a subsequent application in certain circumstances. No further details could be collected.





applied thanks to the support of NGOs. Similarly, in **Sweden**, the research highlighted one example where the sovereignty clause was applied in relation to a single woman who had been subjected to rape in Greece and resulted in Sweden examining her claim. This, however, was a rare exception.

**Italy Case Study:** A Pakistani woman, in an extremely fragile state, was a victim of rape in her country of origin who did not want to be transferred to Sweden under the Dublin regulation. After some months of suspension, the Italian Dublin Unit finally accepted responsibility for this case. The sovereignty clause was applied on the basis of the vulnerability of the woman, certified by a doctor. She finally obtained refugee status in Italy.

## *x. Appeals*

	BE	FR	HU	IT	MT	RO	SP	SW	UK
Possibility to adjourn hearings	X	X	X	X	X	X	X	X	X
Possibility to request in camera hearings	X	X	X	X <sup>(415)</sup>	X	X <sup>(416)</sup>	X		X
Possibility to request "all female" courts									X
Child care available									
Separate appeals for dependents	X	X		X	X	X		X	

### Oral evidence

The presence of the appellants before the Court and providing oral evidence is generally compulsory in **France** and **Hungary**. However, exceptions can be observed in case of incapacity to speak because of trauma. For example, in **Hungary**, hearings can be made shorter and conducted with more breaks and minutes of the hearing

[415] Possible but not a regular practice.

[416] All courts hearings are held in private.

will mention that applicants are traumatised. On the contrary, oral evidence is not compulsory in **Belgium, Italy, Malta, Romania, Spain, Sweden**<sup>[417]</sup> and the UK. Even if this may have negative consequences on the outcome of the decision (credibility issues) if the Court is not sensitive to trauma issues, this can be seen as a positive practice in order to avoid re-traumatisation.



**Good practice:** In **Belgium**, victims of gender-based violence are generally heard with empathy from judges. They can take note of psychological and medical reports. Judges regularly refer to gender-relevant country of origin information to understand the context of the claim.



**Good practice:** In **Malta**, if asylum-seekers are traumatised, the appeal authority very rarely requires oral hearings. Sometimes, asylum-seekers may also present an affidavit (sworn statement) instead.

### Possibility to adjourn hearings

Adjournments to appeal hearings are possible in **all** the countries researched (in order to gather further evidence, for medical reasons) even though no specific gender-related reasons are foreseen.

### Possibility to request in camera hearings

If issues to be discussed are sensitive, *in camera* hearings are possible in **Belgium, France, Hungary, Italy**,<sup>[418]</sup> **Malta, Spain** and the UK. In **Romania**, all court hearings are held in private. However, in **Sweden**, no experience of *in camera* hearings was observed in sensitive cases.

### Gender of judges

It is possible to request “all female” courts for appellants only in the UK. However, the Immigration Appeal Tribunal noted in 2003 that there was nothing in the Procedure Rules nor in the Immigration Appellate Authority Asylum Gender Guidelines requiring the Tribunal to grant requests for “all female” courts.<sup>[419]</sup> It should be noted

[417] Unless an oral hearing has been requested by the Court.

[418] But not a regular practice.

[419] *M. v. Secretary of State for the Home Department (Sierra Leone)* [2003] UKIAT 00121 (30 October 2003).



that having a female judge is not *per se* beneficial for women asylum seekers, as gender-sensitivity or reference to negative stereotypes in some cases do not depend on the sex of the judge.

In **Malta**, it was reported that members of the Appeals Board and of the Courts are all men.

### Child care

In all the countries researched, there is no child care available during appeal hearings.

### Appeals from initially dependent women

In **Hungary, Spain** and the **UK**, a dependent woman cannot appeal separately if the claim was refused. She would have to initiate an asylum claim in her own right. In other countries, individual claims being compulsory for all adults, even if women have “linked” their claim to their husbands’ they will be allowed to appeal separately. At this stage, it is important to remind the dependant that gender-related grounds can substantiate asylum claims.

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There is obviously a long way to go before national asylum procedures are fully harmonised at the European level. Indeed, the variety of provisions from one country to the other may entail protection gaps. This is particularly true regarding gender-sensitive procedural issues. **Belgium, Sweden** and the **UK** – as well as to some extent **Hungary, Italy, Malta** and **Spain** – can in some respects be identified as examples of good practice.

The level of gender-relevant information provided to asylum seekers also diverges from one country to the other. A gender-specific brochure has been developed only by the CGRS in **Belgium**. The role of NGOs and the UNHCR in providing such information is often essential to fill information gaps as observed in **Hungary, Malta, Spain, Romania, Sweden** and the **UK**.

Although in European law women and victims of gender-based violence are not considered *per se* as being part of a vulnerable group, **Belgium, Hungary, Italy, Malta, Romania, Spain, Sweden** and the **UK** recognise in law and/or practice that they may warrant specific considerations. Priority at the first instance level, flexibility in timeframes in order to encourage disclosure of information, access to medical and/or psychological care before the interview or to gather evidence for their case, greater attention to women at the border in order to identify victims of trafficking,

interviews by officers and interviewers of a preferred sex, child care available during interviews. However, the comparative analysis highlighted that provisions foreseen by law or recommended in guidelines are not always respected in practice. Member States should therefore make efforts in monitoring the implementation of gender-sensitive provisions.

Severe difficulties were also reported for women and victims of gender-based violence when making subsequent claims. In practice, most of the national authorities apply a definition of “new elements” that has a negative impact on this type of claim. However, subsequent claims based on late disclosure (because of trauma, lack of information or pressure from traffickers) were reported in **Belgium, Hungary, Italy and Sweden**.

All EU Member States should adopt and implement procedural guarantees including:

- Advising dependants of the right to claim asylum in their own right in private;
- Making information about gender specific asylum policies and procedures available to asylum seekers;
- Offering asylum seekers a choice of gender in relation to interviewers and interpreters;
- Ensuring interviews are gender sensitive to address their special needs.

Further, the EASO should promote the implementation of existing UNHCR Guidelines and standards on gender-sensitive asylum systems. On the basis of this comparative research and all documentation available, the EASO should adopt best practices guidelines on gender-sensitive asylum systems.



## VIII. TRAINING OF INTERVIEWERS, DECISION-MAKERS AND LEGAL REPRESENTATIVES

Article 13(3)(a) of the Procedures Directive states that:

*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"; in particular, they shall "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 this regard, article 8(2)(c) is also relevant as it requires that the personnel examining applications has knowledge of the relevant standards applicable in the field of asylum and refugee law. As such, the current Directive does not explicitly impose any gender-relevant competence or knowledge in training provided to decision-makers. This section considers to what extent decision-makers at the first and second instance level and legal representative are trained on gender issues.

### *i. Interviewing officers and decision-makers at the first instance level*

	BE	FR	HU	IT	MT	RO	SP	SW	UK
Compulsory gender specific training	X				X				X <sup>(420)</sup>
Gender-specific training internally provided		X		X			X	X	
Ad hoc gender-specific training by UNHCR and/or NGOs	X	X	X	X	X	X	X	X	X

Training on gender issues for officers who conduct interviews and make decisions is compulsory in **Belgium, Malta** and in the **UK**. In **Belgium**, a Royal Decree<sup>[421]</sup> states

[420] The mandatory one day gender training for all first instance decision makers was being piloted between January and April 2012.

[421] Royal Decree published on 11th July 2003 and amended on 18th August 2010, Article 3.

that officers must be trained on how to run asylum interviews and intercultural communication as well as on specific needs of vulnerable groups. That is why, since 2009, officers at the first instance shall attend general training on the inclusion of a gender perspective in the procedure as well as specific training on FGM providing information on relevant cultural, medical and social aspects that need to be taken into account during interviews and when assessing this type of claim. Besides, the 2010-2014 National Action Plan on domestic violence calls for the implementation of training on FGM for interpreters. In **Malta**, a compulsory training module on gender issues has been developed (as part of a general training) for officers who conduct interviews and make decisions. In the **UK**, a one day compulsory training on gender for all decision-makers is currently being piloted. Once all decision makers have been trained, the course may be integrated into the Foundation Training for new staff.

National authorities may also organise *ad hoc* non-compulsory training in **France**, **Italy**, **Spain** and **Sweden**. In **Spain**, in 2011 the national authority organised one training session on gender issues for decision-makers. However, no continuous training is provided. In **Sweden**, the preparatory works emphasise the importance of case workers being given the necessary and relevant training regarding the specific problems which are associated with persecution on account of gender and sexual orientation, and that this specific knowledge is required in order to be able to address these problems. There is indeed internal training on gender issues available for officers but it is not compulsory for all case workers. However, the project “Shorter Wait” has severely limited the possibility to arrange gender training. There has even been a long period when such training was not held at all. However, during the LGBT-project “Beyond Border”, the Migration Board organised training for staff on issues relating to gender and sexual orientation. There are also *ad hoc* gender-specific training sessions organised by NGOs.

Finally, national authorities in **Belgium** and **France** mentioned that they would soon offer the possibility to attend the European Asylum Curriculum (EAC) session “Interviewing Vulnerable Persons” that includes particular attention on victims of trauma and trafficking. In addition, in **France**, the National Action Plan “Women, Peace and Security” foresees a specific training on UNHCR Gender Guidelines before 2013.

However, in **Hungary**, **Italy**, **Malta** and **Romania**, training is not compulsory and often depends on individual NGOs and/or UNHCR initiatives and available funding.



**Good practice:** According to the UNHCR in **Malta**, training for the office of the Refugee Commissioner is organised, including one specifically on gender. Members of the office always attend, although there are usually only one or two members from the Refugee Appeals Board.



**Good practice:** In 2010–2011, the **Swedish** Red Cross has, in the context of an ERF–project to which the Migration Board, the migration courts and the Border Police were partners, arranged gender training for employees of the projects partners as well as for legal representatives. During the same period the Migration Board ran the project “Beyond Borders” which included training for staff on issues relating to gender and sexual orientation.



**Bad practice:** In **France**, specific training on FGM used to be offered to officers by a specialised NGO. However, the national authority has suspended it since then.

## *ii. Judges*

	BE	FR	HU	IT	MT	RO	SP	SW	UK
Compulsory training on gender issues									X <sup>(422)</sup>
Gender specific training by UNHCR and/or NGOs			X		X	X			

In the **UK**, before being able to sit, immigration judges receive training in equality issues and their importance in how hearings are conducted and decisions are made. Immigration judges have also received regular continuation training which has included issues which predominately affect women, such as domestic violence and rape. It should be noted that, in **Sweden**, there is no specific internal gender training for judges, however introductory training is arranged for new employees and includes, to some extent, gender aspects.

[422] Equality training and domestic violence and rape covered in training.

In **Hungary**, some judges attended a training session organised in 2009 by the Hungarian Helsinki Committee, but no further specific training has been carried out. In **Malta**, even though judges are invited to attend UNHCR training, little participation is observed. Indeed, involving judges in training activities is sometimes difficult (extremely difficult in **Italy**). In **Romania**, such training is usually organised by NGOs or UNHCR depending on available funds.

### *iii. Legal representatives*

In all the countries researched, various organisations, such as NGOs and/or UNHCR, provide *ad hoc* gender-specific training for legal representatives.



**Good practice:** In Romania, people working for refugee NGOs receive special training on gender issues. Usually one or two persons are appointed as focal point on the topic and participate at training organised by NGOs and/or UNHCR.



**Good practice:** The Swedish Red Cross arranged gender specific training sessions for legal representatives in the context of an ERF-project 2009-2011.

**France Case Study:** A legal practitioner working in a reception centre explained: "When we are confronted to stories mentioning rape or sexual violence, we improvise and we do not search any further [...] Sometimes we do not know the whole story. We are not psychologists! Besides, we are three legal practitioners working in the same room, so when applicants tell us their story, it is not confidential. It is especially difficult for women when men or people from their community are around".

European law does not impose gender-specific training for officials, judges and legal representatives. Nevertheless, examples of good practice can be highlighted in **Belgium**, **Malta** or the **UK** where training on gender issues is compulsory for first instance decision-makers. *Ad hoc* training is also organised at the first instance level in **France**, **Italy**, **Spain** and **Sweden**. National representations of the UNHCR and national NGOs also offer training on gender issues to officials, judges and legal representatives.

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It is recommended that specific training on gender issues is provided to initial decision-makers and judges. National authorities should also ensure that all training is gender mainstreamed. Furthermore, legal representative should also have access to specific training on gender issues on a regular basis.

EASO should promote the development of good practice in terms of gender-specific training at the EU level. EASO should also include a gender-specific module in the European Asylum Curriculum and ensure the EAC and all training materials are gender mainstreamed.

## IX. RECEPTION CONDITIONS FOR WOMENASYLUM SEEKERS

### *i. Introduction*

This section examines the situation of women asylum seekers and victims of gender-based violence in national reception systems in order to identify any examples of gender-sensitive provisions and practice.

	BE	FR	HU	IT	MT	RO	SP	SW	UK
Gender ratio of staff available									
Identification of reception needs	X			X	X		X	X	X
Standard operating procedure in case of GBV				X		X			X <sup>[423]</sup>
Internal complaint mechanisms in case of GBV	X					X		X	X
Separation between men and women (bedroom)	X	X	X	X	X	X	X	X	X
Centres solely for women				X	X				
Gender-specific training of reception staff	X			X <sup>[424]</sup>					

### *ii. International and European Legal Framework*

The UNHCR has noted the divergence in terms of conditions of reception and that these discrepancies need to be addressed both through further legislative amendments and through practical cooperation at the EU level.<sup>[425]</sup>

The parties to the Council of Europe *Convention on Preventing and Combating Violence against Women and Domestic Violence* “shall take the necessary legislative or other measures to develop gender-sensitive reception procedures and support

[423] In cases of domestic violence.

[424] Not systematic.

[425] UNHCR's Recommendations to Poland for its EU Presidency, July–December 2011, p. 5.



services for asylum-seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international protection”.<sup>[426]</sup>

The current Reception Conditions Directive contains provisions for persons with special needs, also referred to as “vulnerable persons”. Article 17(1) of the current Reception Conditions Directive contains an open definition of vulnerable persons: “Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, 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”.

Women and victims of gender-based violence are therefore not systematically considered as vulnerable persons covered by the Directive (except for pregnant women and mothers with young children). However, the persecution they experienced often includes torture, rape, serious psychological, physical or sexual violence, possibly leading to post-traumatic disorders. At the same time, women asylum seekers may face harassment in reception centres. For this reason they will often have special reception needs.

### *iii. Identification of special reception needs*

Several countries allow for the identification of special reception needs, such as **Belgium** in its legislation and **Italy**, **Sweden** and the **UK** through practice. The definition of vulnerable groups with special needs generally corresponds to that of the current Reception Conditions Directive.

In **Belgium**, a specific procedure for the identification of special needs is set out in the Reception Law.<sup>[427]</sup> It requires that the national authority provides “adapted accommodation” to each asylum seeker. To that end, asylum seekers are received at a Dispatching Department where they are asked a few questions. The procedure is very brief and lasts a few minutes. They shall be attributed a specific accommodation corresponding to their specific situation (single persons, families, health, language). However, a representative from authorities explained that, in the context of the current reception crisis, it is sometimes difficult to meet special needs. Furthermore, a Royal

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[426] Article 60(3).

[427] Reception Law, 12th January 2007.

Decree<sup>[428]</sup> determines specific rules for the assessment of the individual situation of residents in open centres. It states that the specific needs of asylum seekers must be examined within the first 30 days after arrival, and then throughout the procedure, in order to find out whether support provided meets these needs. If it is not the case, a request can be submitted to the national authority for assignation in another reception centre. Finally, Belgian legislation requires reception centres to sign agreements with specialised institutions and organisations in order to meet special reception needs of vulnerable groups. For example, cooperation can be established between a reception centre and a specialised centre for women victims of gender-based violence in order to make available a limited number of beds for asylum seeking women.

In Sweden, during registration at Application Unit and at the following meeting at the Reception Unit an interview shall be conducted with the presence of an interpreter. During this interview, there is a possibility to identify if asylum-seekers have special needs. However, there is no specific procedure in place to facilitate the detection of victims of gender-based violence.

In Italy, asylum seekers are screened when they arrive in the allocated reception centre in order to detect vulnerabilities or medical needs. If so, referrals to specific services are carried out. Women can be addressed to the NIRAST network (Italian network for asylum seekers victims of tortures) where specialised psychological and psychiatric services are offered or to other dedicated services. In addition, women can also be referred to another accommodation system in order to be placed in a centre for women (see below). However, there is no standardised procedure and, in practice, it may happen that special needs are not raised at this stage. This is particularly true in overcrowded camps (centres for the reception of asylum seekers, CARA), such as the one in Crotone (South Italy) where the number of asylum seekers can reach 1,000.

In the UK, asylum seekers have an opportunity to raise their specific needs when they claim asylum during the screening interview or while applying for asylum support and accommodation. If they need both, they are referred to the routing team which allocates the initial/emergency accommodation. At this point there is a Service Commission Form which is sent to the accommodation providers from the routing team, on the basis of the information received at the screening interview. The form asks for special needs and specific requirements. However, some stakeholders expressed concerns at the manner in which the information is presented in the form and the lack of confidentiality. Then, specific needs may also be raised with the organisation providing wraparound services in the accommodation or the onsite medical service.

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[428] Royal Decree of 25th April 2007.



Under UK legislation,<sup>[429]</sup> the national authority must take into account the special needs of asylum seekers and their family members who are vulnerable persons when providing or considering support. However, there is no obligation on the national authority to carry out or arrange for the individual evaluation of a person's situation to determine whether she has special needs.

Further, the research demonstrates that asylum seekers have the possibility to raise specific needs at any stage of the reception process through regular support services available. Yet, it should be noted that in the absence of specific screening of needs assessment, authorities may fail to meet the special reception needs of women and victims of gender-based violence. For example, at the Debrecen refugee camp, in Hungary, in case of need (abuses, harassment) a woman will generally have to explicitly ask for help, otherwise the personnel might not notice so.

#### *iv. Complaint procedure and special mechanisms for victims of gender-based violence in centres*

Article 14(2)(b) of the current Reception Conditions Directive states that “Member States shall pay particular attention to the prevention of assault within the premises and accommodation centres”. There are no gender-specific provisions addressing gender-based violence in centres in the current Directive.

In most of the countries researched, instances of sexual harassment in supported accommodation between male staff and female asylum seekers or between single male and female asylum seekers were reported. This highlights that gender-sensitive complaint procedures and mechanisms are necessary and should be implemented by Member States.

**Hungary Case Study:** A Nigerian woman reported sexual harassment in a community shelter in Nyirbator.<sup>[430]</sup> She claimed a resident and security guards harassed her. She did not report this to the authorities because she was not aware of the existence of any complaint mechanisms. The woman was a victim of trafficking and she received a temporary humanitarian residence permit immediately upon her arrival. She explained: “the police told me that I can stay in the community shelter which is 270 km away. I had to beg at the train station for money to be able to arrive to the shelter”.

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[429] Regulation 4 of the Asylum Seekers (Reception Conditions) Regulations 2005 (SI 2005, No 7).

[430] This community shelter no longer exists as it has been transformed into a jail.



**Good practice:** In Romania, a standard procedure on preventing and addressing sexual and gender-based violence in reception centres is foreseen since, in 2008, the UNHCR, the national authority and NGOs working in the field of asylum signed a cooperation Protocol on this issue. The Protocol also provides a definition of sexual and gender-based violence in accordance with the CEDAW Declaration (1993) and Recommendations of the CEDAW Committee. The standard procedure provides guidelines on appropriate referrals. Personnel from the institutions/organisations part of the Protocol have the responsibility to advise victims about the available specific services. Victims should also report abuses to the officer on duty who has the obligation to refer the case to a doctor, psychologist and to the police (with the victim's consent). In addition, victims will be referred to NGOs as part of the Protocol offering specialised social support and legal assistance.

In Belgium and the UK, internal complaint mechanisms are implemented by the national authorities (yet, those are not necessarily gender-specific). In Belgium, the Reception Law provides an internal complaint mechanism for reception issues. Asylum seekers can refer complaints to the Director of the centre regarding living conditions and the implementation of internal rules and instructions. However, this mechanism is not specific to gender-based violence and the procedure is not made gender-sensitive either. Previous research highlighted that few centres had specific internal instructions to deal with harassment or domestic violence.<sup>[431]</sup> In the UK, one of the organisations providing wrap-around services in the initial accommodation has its own protocol to address gender-based violence. At the national level, the immigration authority is under a duty to investigate if the abuse is reported and the investigation team is trained on issues such as domestic violence.<sup>[432]</sup> Further, a Policy Bulletin gives guidance to staff when they receive a report of domestic violence in connection with an accommodated asylum seeker. This document sets out the role of the accommodation provider including the need to have a statement on domestic violence policy and procedure and the role of the stakeholders providing advice in the accommodation. It sets out the procedure to be followed when a complaint of domestic violence is made including the provision of alternative accommodation. An advocate expressed the opinion that the substance of the Policy Bulletin was good although there were problems with its interpretation and the fact that it fails to cover certain issues such as trafficking.

[431] Nederlandstalige Vrouwenraad, The reception of women in asylum centres; towards a gender-sensitive approach, June 2010.

[432] One of the organisations providing services at the initial accommodation said that some of the UKBA housing officers have now been re-trained on domestic violence issues but that most of them were men.



Furthermore, some countries apply gender-sensitive mechanisms and referrals in case of gender-based violence. For instance, in Italy, vulnerable persons, including women and victims of gender-based violence, may be authorised to stay for a longer period<sup>[433]</sup> in regular accommodation centres. Moreover, in case of gender-based violence, referrals are foreseen in particular to the NIRAST network or to centres for women, part of the national system of protection for asylum seekers and refugees (SPRAR). The SPRAR system is made up of small-scale reception facilities (3,000 places in 2009, including 500 places for vulnerable persons) managed by NGOs under the responsibility of the Ministry of Interior. Asylum seekers are referred to these facilities on a request issued by NGOs, other reception centres, CARAs, local administrative authorities or, in some rare cases, by private individuals. It should be noted that these centres can host the person even after the recognition of the international protection, for a minimum of 6 months starting from the adoption of the positive decision (waiting time under the asylum procedure is excluded). It is also important to underline that in Italy there is a shortage of accommodation for asylum seekers as well as for vulnerable groups. The number of reception centres still remains quite problematic especially in big cities like Rome.



**Good practice:** In France, the Paris regional branch of a refugee NGO (Cimade) created a legal aid service dedicated to migrant and refugee women victims of violence. They also initiated a campaign focusing on "double violence", highlighting the situation of migrant women who suffer from discrimination both because of their origin and their sex.

## *v. Gender-sensitive accommodation provisions*

In all the countries studied, arrangement for separation of men and women is generally respected in collective centres and/or shared accommodation for single persons. In Italy, some small-scale reception centres managed by NGOs under the governance of the Ministry of Interior, i.e. SPRAR centres,<sup>[434]</sup> are for women only. In Malta, there is one open centre reserved for women out of the four open centres on the territory (the Hal Far Reception centre, HFRC).

However, in the UK for instance, there were serious concerns about the arrangements provided for in the initial accommodation where men and women are placed on the

[433] Accommodation is normally provided for a period of six months.

[434] In 2010, SPRAR centres provided 3 000 places, including 501 places dedicated to vulnerable persons.

same corridor and communal female bathrooms have shower cubicles only closed by a curtain. Bedroom doors have locks but if the room is shared then individual asylum seekers may find it difficult to lock the door when they wish to do so. Similarly, in **Hungary**, women who are not detained are placed in the open refugee camp in Debrecen. Single women are accommodated in a separate building (sometimes with families). Even though women can lock the entry of the unit, not all of them are always diligent enough to lock the door. Besides, since there is no overnight security present, the place can be considered as not sufficiently safe for single women.

It should be noted that, in **France**, policy instructions require that pregnant women and mothers (i.e. “vulnerable persons”) should be granted priority access to reception centres and emergency accommodation. In practice, women are usually given priority over men in accessing accommodation. However, due to the lack of supported accommodation in the reception system, single women seeking asylum often have to rely on free public emergency accommodation in hotels. Such type of accommodation, mixing different categories of homeless people, is the cause of specific distress for women who constantly fear violence and sexual assaults. Besides, the research shows that some single women seeking asylum ended up sleeping in the street, in particular in the Paris region.



**Good practice:** in **Belgium**, in 2007, the Red Cross created, in collaboration with the national authority, a specific reception centre for asylum seekers suffering from psychological and mental difficulties (CARDIA). Residents are offered a specific medical and psychological care. In 2010, 22% of the 95 residents were women.



**Good practice:** In **Italy**, projects focusing on women are implemented in some SPRAR centres. In 2010, there were 31 projects for vulnerable categories including places for single women with children and for single women for a total of 501 places. There are 41 projects for women with children and 23 for women on their own, a total of 503 places. In these centres, social, legal and psychological support is provided and women are supported in all activities, including work opportunities. Another good example is a reception centre run by JRS in Rome. It is named “Casa di Giorgia” where women can stay in a very comfortable and protected environment. The social workers try to enhance the personal skills of the women, through various activities, sport, and music.





**Bad practice:** The UK government has cut 50% of the funding for providers of wraparound services in the initial accommodation in 2011 so providers have had to restructure their services. They were already subject of a 17-23% cut in August 2010. This is likely to affect the provision of services they are currently offering, including gender-related services.

**France Case Study:** Many women interviewed for this research experienced extreme conditions or violence after arriving in France. While pregnant women and young mothers may be given priority to obtain a bed in a hotel, they would still face difficulties: no appropriate clothes, food or material (pram, nappies). A woman who was pregnant when she arrived in France confessed: "Before I arrived in France, I had never experienced what it was like to suffer from hunger [...] In Paris, I was hungry, I cried all the time. Neighbours in my hotel brought me apples". Further, several women seeking asylum hosted in public emergency accommodation talked about their "relentless seek of a bed", their fear of other homeless persons accommodated in hotels who "take drugs or whisky", who are "mad" or "violent". A woman explained: "people get down naked; they want to have sex with you; but you cannot call the police".

**UK Case Study:** A 29 year-old asylum seeker from Guinea-Conakry, claimed asylum in 2009. She was dispersed to initial accommodation in Cardiff when she was seven months pregnant. She spent two weeks there. At the time her back was extremely painful because of her pregnancy. She was also hungry because the food was not adequate and she once fainted because she was so hungry.

## *vi. Special accommodation for victims of trafficking*

Examples of good practice were observed in Italy and the UK where special accommodation provisions for asylum seekers who are victims of trafficking are foreseen. When a woman is detected as having been victim of trafficking, the procedure laid down under the Italian Immigration law<sup>[435]</sup> is normally activated. After the issuing of a judicial order, only possible after a witness statement, the victim will be allowed to leave the reception centre and be hosted in a protected centre for victims of trafficking. In the UK, specific services exist and victims of trafficking

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[435] Article 18 of TU 286/98

are given a choice whether to access them. The government awards contracts to providers of safe houses who provide different services including counselling and support from key workers. However, there are real concerns about the limited amount of bed spaces and some providers having conditions of entry such as cooperating with the police and having had a reasonable grounds decision from the competent authority in the National Referral Mechanism.<sup>[436]</sup>

In several countries in this study, secure women's shelters exist and are accessible for victims of trafficking but are not especially reserved to asylum seekers (**France, Malta, Romania, Sweden** and the UK). In **Sweden**, asylum-seeking women would only access shelters in exceptional cases as the Migration Board usually does not pay for shelters. Thus, for economical reasons, the authority generally refers them to other refugee camps in other parts of the country. In addition, most of the countries reported a shortage of available places in women shelters.



**Bad practice:** According to Swedish law and policy, asylum seekers at risk of gender-based violence have less possibilities to access effective protection in women shelters than residents, despite Sweden's international legal obligation to provide protection against gender-based violence to everyone, irrespective of legal status.

On the contrary, several countries, such as **France, Hungary, Italy** or **Spain** recognise the same right as nationals to access effective protection for asylum seeking women.

## *vii. Gender-sensitive services*

### Pregnancy

This comparative analysis reveals that services related with pregnancy of asylum seekers are generally very poor (money, health checks, food, clothes). In the UK, the maternal health outcomes for asylum seeking women are extremely poor. By 2003-5, refugee and asylum seeking women made up to 12% of all maternal deaths despite constituting less than 0.5% of the population. Particular difficulties in accessing effective interpretation were raised in the context of ante-natal services and maternal deaths. In **France**, asylum seekers encounter real difficulties in accessing basic health services in the Paris region, let alone ante-natal and new born health services.

[436] See Chapter VII, section v.



However, in Italy, the National Health Service is based on the principle of “universal entitlement”. The State provides free and equal access to preventive medical care and rehabilitation services to all residents, asylum seekers and refugees included.



**Bad practice:** In the UK, asylum seeking women who are pregnant or new mothers can apply for additional financial support.<sup>[437]</sup> However, these are significantly lower than for mainstream welfare benefits and leave pregnant women and new mothers living in poverty. Besides, the restrictive timeframe for applying for a maternity grant results in asylum seekers missing out on this form of financial support.

**Italy Case Study:** A young woman with a new-born child, interviewed for this research, explained that, as a young mother, she had problems because the social support she was receiving was too basic (food and housing). She found it hard to take care of her baby.

**UK Case Study:** A 39 year-old asylum seeker from the Congo, finds it difficult financially to make ends meet at the end of the week with her child. She tries her best to make do with the minimum. She explained that she does not receive sufficient support to buy nappies, clothes, milk, and food for her child.

### Access to psychological assistance

In France, Hungary, Italy, Romania and Spain, psychological care is mainly provided by NGOs. This is problematic because NGO’s financing often depends on projects and therefore provision of psychological assistance lacks funding stability. In France, there are very long waiting delays (several months) for specialised medical and psychological care. Difficulties in accessing psychological assistance were also observed in Sweden and the UK, despite the need for applicants to substantiate alleged trauma, depression or torture with medical certificates.

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[437] £300 for maternity grant and an addition £3 per week. Children under 1 can apply for £5 extra per week, children aged 1-3 can apply for £3 extra per week.

**UK Case Study:** Several of the women asylum seekers interviewed for this research found the process of claiming asylum very traumatic. A victim of trafficking for sexual exploitation, for example, now receives counselling. She said this is helping her and that she could not have been able to cope without. Another asylum seeker, who claimed asylum because she fears her daughter will be subjected to FGM and has suffered from sexual abuse, is also now receiving counselling. She said that this has helped her and made her better able to deal with the asylum process than before.

### Child care

Child care services for asylum seekers are poor in most of the researched countries. In **Malta** and **Italy** there are public child care centres that refugees can benefit from, but access is limited because the demand is high. In **Sweden**, local authorities provide for child care, when the child is one year of age, if the parent is working, studying or if the child has special needs.

**France Case Study:** A young mother, interviewed for this research, regretted that she could not attend to French courses offered by the reception centre because there was no child care service available.

### Women's activities

Examples of specific women's activities were reported in several countries. Those should be considered as positive measures that could be shared at the EU level. In **Belgium**, several reception centres organise discussion groups for women that may help them to talk about their difficulties and sometimes identify themselves as victims of gender-based violence. The research shows that one accommodation provider employs a female psychotherapist who organises discussion groups for women. Besides, various examples of gender-related initiatives were reported such as specific activities for women (shopping days, cooking, handcraft workshops, baby massage workshops) and child care. Accommodation providers give particular attention to preventing isolation of women and mothers, to encourage solidarity and access to training. Similarly, some reception centres in **France** organise empowerment and leisure activities such as thematic workshops or cultural outings, discussion groups on the role of women in the French society, and education of children. In **Hungary**, women are a highlighted target group in the practice of social workers from an NGO present at the Debrecen refugee camp providing community work and



social assistance for residence. Specific activities for women include for example aerobic clubs, and sewing clubs. Some women hosted in Italy, Sezze Romano (Lazio Region), had developed activities to enhance their independence, i.e. producing small handcraft goods and selling them. In the UK, various organisations that may be funded independently or through local or central government offer some gender-sensitive services such as women's support groups or specialist services for victims of torture.

### *viii. Training of staff*

Few examples of gender-sensitive training of staff in open reception centres were observed. In Belgium, an explanatory note to the Reception Law states that "training shall focus particularly on several specific issues, such as [...] gender-related issues and the reception of vulnerable groups". Specific training on FGM is also offered to Federal staff working in reception centres. Moreover, in June 2011, the Federal Public Health Service, with the collaboration of GAMS Belgium, published a guide (in French) on FGM with the aim to better inform professionals and enhance support they may provide (medical staff, social workers, lawyers, police officers).<sup>[438]</sup> In Italy, the service responsible for the management of the SPRAR at the Ministry of Interior is in charge of training SPRAR centres operators. At the time of writing, gender-related issues were not included in training sessions. However, as this research helped to underline the importance of this issue, the Service declared that it will make efforts to include gender issues in future training sessions. In addition, training for reception centre staff had started in the south of Italy, for example through a project in cooperation with UNHCR, IOM, the Red Cross and Save the Children (Praesidium). This was however just a first step and such initiatives are needed throughout Italy.

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Belgium can be highlighted as an example of good practice as it provides a screening of special reception needs. Italy, Sweden and the UK also provide opportunities for asylum seekers to raise their special needs at the beginning of the procedure. However, none of the countries in this study organise a systematic detection of victims of gender-based violence.

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[438] SPF Santé publique, Sécurité de la Chaîne alimentaire et Environnement et GAMS Belgique, Mutilations Génitales Féminines : guide à l'usage des professions concernées, 2011.

**Belgium** and the **UK** implement internal complaint mechanisms in supported accommodation, even though those are not necessarily gender-specific. **Italy** also applies gender-sensitive mechanisms and referrals for women and victims of gender-based violence. Further, special accommodation provisions for victims of trafficking are implemented in **Italy** and the **UK**. **Italy** and **Malta** have reception centres only for women. The separation of single men and single women is indeed a necessity to prevent sexual harassment and stress for women.

The research demonstrates appalling conditions for many asylum seekers, especially vulnerable persons such as women and victims of gender-based violence. Pregnant women and mothers of young children usually live in very poor conditions, being denied access to adequate medical care and material support (additional money, appropriate clothes, food). Besides, difficulties in accessing psychological care were especially reported in **France**, **Sweden** and the **UK**.

A special effort should be made in order to ensure that the specific reception needs of vulnerable persons are identified and addressed. Member States should also keep in mind that as far as families are concerned women are usually in charge of children. Therefore, the absence of child care has a direct impact on women's lives and their ability to have a fair examination of their asylum claims.

Finally, reception staff should be adequately informed and trained on gender issues, such as in **Belgium**.

It is recommended that Member States:

- Consider women and victims of gender-based violence as vulnerable asylum seekers;
- Ensure vulnerable asylum seekers are offered adapted accommodation;
- Ensure vulnerable asylum seekers are identified early in the asylum procedure;
- Provide appropriate security and complaints mechanisms in reception/ accommodation;
- Develop standard operating procedures in all cases of sexual and gender-based violence;
- Provide appropriate psychological assistance and support.



## X. DETENTION CONDITIONS OF WOMEN ASYLUM SEEKERS

### *i. Introduction*

Detention conditions of asylum seekers are regulated by the current Reception Conditions Directive adopted in 2003.

Asylum seekers can be detained at arrival on the territory or during the processing of their claim or after their claim has been refused. Policies differ among the countries researched:

	BE	FR	HU	IT	MT	RO	SP	SW	UK
Detention at the border	X	X	X		X	X		X <sup>(439)</sup>	X
Detention during asylum procedures			X		X			X <sup>(440)</sup>	X
Statistics on gender of staff available	X	X						X <sup>(441)</sup>	
Special provisions for vulnerable groups	X <sup>(442)</sup>		X <sup>(443)</sup>	X <sup>(444)</sup>	X			X <sup>(445)</sup>	X <sup>(446)</sup>
Systematic medical screening	X		X			X	X		X
Internal complaint mechanisms	X		X			X		X <sup>(447)</sup>	X

[439] It is possible, but not common practice.

[440] It is possible, but not common practice.

[441] Not public but may be available upon request.

[442] Victims of trafficking.

[443] Unaccompanied minors cannot be detained according to the law.

[444] Victims of trafficking, *ad hoc* procedure in Ponte Galeria operated by "Be Free".

[445] Minors.

[446] Unaccompanied children and young persons under the age of 18 (but see 55.9.3 above); the elderly, especially where significant or constant supervision is required which cannot be satisfactorily managed within detention; pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this (but see 55.4 above for the detention of women in the early stages of pregnancy at Yarl's Wood); those suffering from serious medical conditions which cannot be satisfactorily managed within detention; those suffering serious mental illness which cannot be satisfactorily managed within detention. In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act; those where there is independent evidence that they have been tortured; people with serious disabilities which cannot be satisfactorily managed within detention; and persons identified by the Competent Authorities as victims of trafficking. Chapter 55 UKBA Enforcement Instructions and Guidance.

[447] Pending.

Separation between men and women (bedrooms)	X	X	X	X	X	X	X	X	X
Detention centres solely for women (and families)			X						X
Gender-specific training of staff	X				X				

### *i. Gender of staff ratio*

Statistics were only provided in **Belgium** and **France** where female staff in detention centres represented respectively 40 % and 34 %. In **Romania**, even though no statistics were communicated, few female staff was generally reported. Apart from specific detention centres only for women, men represent the high majority of detainees in detention centres. Detention is therefore generally a male environment. That is why a specific assessment of the situation of women in that environment is necessary.

In the **UK**, the UKBA Detention Service does not have a policy on male/female staffing ratios. None of the stakeholders contacted for this research knew what the gender of staff ratio was in the Immigration Removal Centres. HM Chief Inspector of Prisons recommended that there should be a considerably higher proportion of female staff at Yarl's Wood IRC,<sup>[448]</sup> because “the proportion of male-to-female residential staff was too high for a predominantly female establishment, at around 50/50”.<sup>[449]</sup> More specifically, the issues identified were that “for a largely female population, the proportion of male residential staff was too high. Staffing levels were low, particularly at night, and sometimes male officers were left to manage units alone”<sup>[450]</sup> and that “there were too few female staff for a largely female establishment, and detainees complained that staff often entered rooms too quickly after knocking”.<sup>[451]</sup>

### *ii. Identification of vulnerable groups with special needs*

Some countries foresee special provisions for vulnerable groups<sup>[452]</sup> ranging from special support in detention to the release of detainees. The definition of vulnerable groups generally corresponds to the current Reception Conditions Directive.

[448] HM Chief Inspector of Prisons, Report on an announced inspection of Yarl's Wood Immigration Removal Centre, 4-8 July 2011, para. 2.22.

[449] *Ibid.*, para. 2.20..

[450] *Ibid.*, HE.23.

[451] *Ibid.*, para. 2.17.

[452] See Chapter VII - Asylum Procedures and Chapter VIII - Reception Conditions.





In **Belgium**, even if there is no provision for the identification of special needs in detention centres, a special identification process is implemented by the national authority in order to detect victims of trafficking. To that end, any declaration or indication of trafficking issues should be reported to the central administration. Detention centres are also required to work in partnership with specialised NGOs on trafficking issues. Similarly, in **Italy**, even if there is no systematic screening organised at the national level, there is one operated in Ponte Galeria. This *ad hoc* screening is operated by an NGO specialised in the protection and defence of trafficked women. In **Malta**, government policy requires that vulnerable migrants should not be detained; as a consequence, after the first screening interview they should be released and accommodated in open centres. Those include for example mothers with children. Particular attention is also given to the detection of trafficked women. However, in practice, in the absence of any specific assessment procedure, the detection of vulnerable cases may not be systematic.



**Good practice:** in **Italy**, not only detention is rarely used, but, notwithstanding the national legislation, the detention of particularly vulnerable women can be avoided if an NGO, in cooperation with a medical doctor, submits a request certifying this vulnerability. Furthermore, according to the law, pregnant women cannot be detained.

Further, in Ponte Galeria, “Be free” operators are skilled in detecting victims of trafficking or violence. In the detention centre, they try to detect victims of trafficking and vulnerable situations, suggesting the most appropriate path to the victims. Depending on their personal history they may suggest to submit an application for asylum or to ask for protection under article 18 of the Italian immigration law which provides a specific protection status for victims of trafficking. Most of the clients of “Be Free” are Nigerian women victims of trafficking or women at risk of being subjected to FGM.

In the **UK**, there is no specific screening to detect victims of gender-based violence but an instruction document sets out categories of people who would normally be considered “suitable for detention only in very exceptional circumstances”. An independent association visiting detainees has expressed concern that it is not clear what is deemed to be an exceptional circumstance and this lack of definition is problematic. The instruction<sup>[453]</sup> includes within this list pregnant women (unless removal is imminent and medical advice does not suggest confinement before the due removal date, or, for pregnant women of less than 24 weeks gestation, at Yarl’s

[453] UKBA, *Enforcement Instruction and Guidance*. Chapter 55, Detention and Release

Wood as part of a fast-track asylum process) and persons identified by the Competent Authorities as victims of trafficking. Indeed, the instruction document on *Identifying Victims of Trafficking* sets out guidance to “be followed during all operations where individuals who may be victims of trafficking are encountered, so that potential victims are handled in a consistent and sensitive manner” and notes that “officers should be aware that victims of trafficking are likely to be classified as vulnerable persons and detention will not normally be appropriate”. However, in practice, victims of trafficking continue to be detained, even when they identify themselves as victims of trafficking.



**Good practice:** In the UK, the Detention Service Operating Standards contain all the standards by which detention centres must operate. Although there are no references to gender-based violence, it includes one page on female detainees:

- Female must only be housed in accommodation certified as suitable
- Women must be informed that they have the right to be examined by a female doctor or nurse
- Women are not required to undress in the sight of another detainee or a male member of staff – except where the woman detainee has consented to be examined by a male doctor/nurse
- Women must be provided with a dedicated female dining area but may wish to eat in association with men if they prefer
- Women must be accompanied by at least one female escorting officer when being escorted to or from the removal centre
- The female population must have equal access to all activities within the centre
- Women must be provided with the option of single-sex gym sessions and other activities appropriate to their needs and interests.
- Female detainees must be involved in the process of identifying activities
- Women and girls must only be searched by a member of staff of the same sex<sup>[454]</sup>

It should be noted that medical screening is foreseen in detention in **Belgium, Hungary, Romania, Spain and the UK**. In **Belgium**, on arrival in the detention centre, a medical “intake” is undertaken. A nurse asks detainees if they have any health problems. Then, a doctor can refer individuals towards specialised external services

[454] UKBA, *Detention Services Operating Standards Manual for Immigration Service Removal Centres*



such as gynaecologists, psychiatrists. In **Spain**, there is a medical examination upon arrival (within 24 hours) to assess possible physical or mental illnesses or a drug addiction, provide adequate treatment and, if necessary, isolation or hospitalisation. If a person is found to have special medical needs, those will be addressed with the medical care system available at the centre (sanitary department of the police) or through referrals to hospitals. Women in late stages of pregnancy are not detained in **Spain**. In the **UK** on arrival in detention all detainees have to be medically screened within two hours.<sup>[455]</sup> This screening must include an assessment for risk of self harm/suicidal behaviour. They must also have a physical and mental examination by a medical practitioner within 24 hours. This assessment is supposed to identify any immediate healthcare needs, but is also to pick up whether the individual may have been the victim of torture. Detention Centre Rules requires that a doctor shall report to the UKBA “any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention” and any detainee “he suspects of suicidal intentions” or who s/he is concerned “may have been a victim of torture”. NGOs and visitors have reported concerns about the implementation of this rule process,<sup>[456]</sup> highlighting that often, people have been detained despite suffering from obvious injuries and illnesses.

There is no specific screening to detect special and/or medical needs of women and victims of gender-based violence in detention in **France** and **Sweden**. In these countries, no differentiated rules for the treatment of vulnerable women in detention are implemented.

**UK Case Study:** An asylum seeker who was trafficked to the UK to work as a domestic servant claimed asylum in 2009. When she was thrown out by her traffickers, she survived by offering work in exchange for a place to stay. She was raped by someone with whom she was staying and was also forced to engage in prostitution. After escaping she sought help from the police and was subsequently arrested. From the police station, she was transferred to Yarl's Wood Immigration Removal Centre and placed in the detained fast-track.

[455] This is set out in the Operating Standards for Immigration Removal Centres.

[456] The Guardian, *UK 'ignoring' systemic evidence of torture among asylum seekers*, 14 March 2010. See also forthcoming report from Medical Justice, *"The Second Torture": The Immigration Detention of torture survivors*, May 2012.

### *iii. Complaint procedure and mechanisms in case of gender-based violence in detention centres*

Cases of gender-based violence in detention centres were reported in several countries researched. For instance, in the UK, some visitors in detention centres have reported anecdotally about gender-based violence in the centres, including bullying of lesbians in Yarl's Wood Immigration Removal Center (IRC) although the extent of the problem was not known.

Only a few countries provide internal complaint mechanisms (not gender-specific though) such as Belgium, Hungary and the UK. In Belgium, according to a Ministerial Decree,<sup>[457]</sup> all detainees have the right to lodge an individual complaint in closed centres. A specific Commission is in charge of processing such complaints. However, it appears that in practice few residents are aware of this right. Besides, there are no rules or regulations that explicitly include gender-based violence. In Hungary, there is a complaint mechanism allowing victims to report acts of violence to the chief of the jail as well as to start a criminal procedure against perpetrators. In the UK, there are standard complaints procedures in place in the detention centres for detainees to report general complaints to the management. In Yarl's Wood IRC use is also made of country focus groups to address specific problems. However her Majesty's Inspectorate of Prisons noted issues around the lack of specific policies to address the needs of women in Dungavel IRC<sup>[458]</sup> as visitors reported that women who are bullied and/or the subject of sexist comments are scared to report it in case they are transferred to another centre.



**Good practice:** Upon arrival in a detention centre in Belgium, residents must attend the "intake" procedure which includes a systematic interview conducted by administrative staff in charge of social support in the centre. Detainees shall receive a brochure on their rights and duties in the centre as well as medical, psychological, social, moral, philosophical and religious support available. They shall also receive a brochure with information about appeals, complaint mechanisms and legal advice.

[457] Ministerial Decree of 23d January 2009, amended on 30th June 2010.

[458] HM Chief Inspector of Prisons, *Report on an announced inspection of Dungavel House Immigration Removal Centre*, 21 – 25 June 2010, para. HE. 21, HE. 42, 4.20 and 10.30.



In other countries, there seems to be no specific complaint mechanism available to asylum seekers apart from lodging a complaint to the police. In practice, asylum seekers may not wish to do so, even when violence could be substantiated, because they fear that the procedure could have a negative impact on their asylum claim. At the time of writing, a pilot project in **Sweden** is working on initiating complaint mechanisms in case of gender-based violence.

#### *iv. Detention conditions*

##### *Separation of men and women*

The separation of men and women in detention centres aims to prevent cases of sexual harassment or violence. In **all** the countries researched, even if men and women may be detained in the same detention centres, they are usually placed in separate units or corridors. Some centres are also solely for women and families/couples (Békéscsaba immigration jail in **Hungary** or Yarl's Wood Immigration Removal Centre in the **UK**). In that case, single women and families are usually not detained in the same unit/building.

In **Hungary** the separation of women and men in detention is a legislative obligation. It should be noted that in **Romania**, male and female detainees are in separate rooms where they have a bath and shower inside. Besides, in Békéscsaba immigration jail in **Hungary**, single women are detained together with families. The regime in this jail is less strict than in other immigration jails for single men. The corridors are not locked during the day and women and families can move freely in the court yard. Only during the night are the doors of the corridors locked, but not the doors in the rooms.

However, women and men may meet in common areas during day time for meals, recreational activities (TV, computers, sports, yard) in **France, Hungary, Romania, Spain, Sweden** and the **UK**.

In the **UK**, despite the fact that the detention service operating standards states that "female detainees must only be housed in accommodation certified as suitable", there are concerns about holding women in short term holding facilities, where often they are held in the same area as men. The family unit in Yarl's Wood IRC is separated from the rest of the centre and meals are taken separately but some recreational activities are held jointly.

Gender -sensitive social support

In Belgium, even though the national authority pays particular attention to special needs of women in detention, the research shows that very often they do not have access to appropriate underwear or maternity clothes.



**Good practice:** There are educators dedicated to cultural and educational activities in all detention centres in Belgium. Language courses are organised by a teacher and other staff members can organise games and arts or handcraft sessions for detainees. Although those are not gender-specific provisions, they are still good examples that could be shared in order to enhance the well-being of detainees.



**Good practice:** The Swedish Migration Board is at the time of writing running a pilot-project focusing on improving women's conditions in detention following a pre-study published in 2010 on the basis of observations in Märta Detention Centre. The report stated: "During a close study of the women's corridor, the project noted that the lack of clear planning and consistency in the interior created a volatile environment for the women to stay in. In longer interviews with the detained women, they expressed psychosocial needs, such as being able to be active, to withdraw from other detainees, and all of them talked about the stress of being in detention. [...] We found e.g. that the case officers do not have uniform procedures for identifying vulnerability among the women. The working tools appeared to be both outdated and too general to be used in detention operations. Consequently the project considers that there is a risk that cases of vulnerability are processed inadequately, inefficiently, and at worst, can result in unnecessary and prolonged suffering for the woman. [...] Women are in minority at the detention centre and detention operations are mainly adapted to men's needs and interests, women are therefore likely to become even more vulnerable in detention. The pre-study showed that some of the women had experienced traumas as a result of being detained, examples of such cases were assault, attempted rape and prostitution. [...] Some women expressed in their interviews with the project's health planner that they had not sought care in their home country, nor in Sweden, because of fear and poor accessibility".<sup>[459]</sup> Gender-issues in detention are therefore identified by the national authorities and should be addressed shortly.

[459] Migrationsverket, *Att vara kvinna och sitta i förvar* (In English: The Swedish Migration Board, *To be a woman detained*, published 2010-12-10, p. 8-9.



## *v. Gender-sensitive health services*

### Medical care

In **Belgium**, the medical “intake” should allow detainees to receive adequate medical care. Strong cooperation between detention centres and nearby hospitals was reported. Nevertheless, research led by a women’s NGO revealed that some women had a negative opinion of medical care services mentioning: “inadequate care, dissatisfaction with its nature and organisation, long waiting times, superficial checkups, lack of understanding of the reason when no medication is prescribed, absence of a relationship of trust with nurses”.<sup>[460]</sup> In **France**, humanitarian assistance is provided by the Red Cross at the airport. In practice, the research shows that medical care only addresses emergencies; medical staff only puts clients on medication or intervenes “if necessary”. However, in detention centres, nurses are present every day and a doctor shall visit once a year. In **Hungary**, according to the asylum seekers detained, health assistance provided in the Békéscsaba immigration jail is of better quality than in some other jails. A nurse is present 24 hours a day and a general physician for adults and a paediatrician visit the jail twice a week. In **Italy** there are different medical services within the centres but no information is available. In **Malta**, although access to medical care in detention is a legislative obligation, the dense population of detention centres often lead to poor sanitation conditions in practice. In general, a doctor and a nurse are present in each detention centre once a day for some hours. In **Romania** medical care is also provided in detention centres by male doctor and a female nurse.



**Good practice:** In the UK, the detention service operating standards state that women must be informed that they have the right to be examined by a female doctor or nurse.

### Pregnancy issues

In all the countries researched, pregnant women shall be given particular attention and special care. In practice, this is particularly the case in **Italy**, **Malta**, **Romania** and the **UK**. Similarly, in **Belgium**, an inquiry report on closed centres published by the federal Ombudsman in 2009<sup>[461]</sup> revealed that in some centres pregnant women

[460] *Nederlandstalige Vrouwenraad*, p. 75.

[461] Federal Ombudsman, *Investigation sur le fonctionnement des centres fermés gérés par l’office des étrangers*, June 2009.

could regularly see a doctor and could be examined by a gynaecologist at least once in some centres and even on a regular basis in one of them. Additionally, the report mentioned that consultations were mostly made by a female gynaecologist in one of the centres.



**Good practice:** In Spain, pregnant women at a late stage of pregnancy are not detained.



**Good practice:** In Yarl's Wood IRC (UK), pregnant women are seen by community midwives and are seen for routine scans or appointments at the hospital.

**Hungary Case Study:** An 8-month pregnant woman, interviewed for this research, detained in Kiskunhalas, saw her detention prolonged; she was only released to a hospital when giving birth to her child. Once she was dismissed from the hospital, she could go to the open refugee reception centre in Debrecen. However, no one came to pick her up and the reception centre is situated more than 200 km away from the hospital. Finally, an interpreter took her and her newborn baby to the centre.

### Psychological care

Many detainees have psychological or psychiatric problems due to previous trauma left untreated, poor detention conditions and/or forced inactivity.

Even if policies and practice may vary from one centre to the other, there is usually psychological support available in detention centres in **Belgium, Hungary, Italy, and Romania**. For instance, in **Romania**, a psychologist is present in the two detention centres and, in **Hungary**, at the Békéscsaba immigration jail, a Cordelia psychiatrist visits the jail once a week, if needed. On the contrary, there is no or limited psychological care in **France, Spain, Sweden, and the UK**.

In **Malta**, there is a section in the psychiatric hospital dedicated to non-nationals where there are also special staff members to support asylum seekers and two cultural mediators. Detention severely affects detainees, resulting in high numbers of attempted suicides and hospitalisation in the Malta psychiatric hospital.





**UK Case Study:** A victim of trafficking for sexual exploitation from Nigeria was detained for one month in Yarl's Wood Immigration Removal Centre. During this time she felt really unwell, and suffered from fainting fits and regular nose bleeds. After seeking care from the nurses in the Immigration Removal Centre, she eventually stopped seeking help because she was always told that there was nothing they could do for her. Commenting on her detention, she said that she never wanted to experience it again, and that the experience was horrible.

### *Interpretation issues*

In Sweden, detainees may always obtain interpreters upon request, at least by phone

Problems with translation during medical and/or psychological appointments were reported in many countries (Belgium, France, Hungary, Spain, and the UK). For instance, in Spain there is no consistent practice regarding the presence of cultural mediators and interpreters in the centres. Research conducted by both the UNHCR in the Canary Islands and the DEVAS research conducted by CEAR attest that there are varying arrangements according to the funding available and depending on the management of the centres. In the absence of interpreters, female or even male co-detainees may be required to interpret for women, including during medical consultations.

### *vi. Training of staff in detention centres and at the border*

Detention officers shall receive training on issues that predominately affect women in Belgium. In France, according to authorities, training provides “a gender approach awareness” but no further details was communicated. In Italy, as concerns training at the border, CIR together with UNHCR have organised some training session with the border police (Border Police at Fiumicino airport, Ancona port, etc.).

There is no specific training available for staff in detention in Hungary, Malta, Spain or Sweden.

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Belgium, Hungary, Italy, Malta and the UK foresee special provisions for vulnerable groups, including victims of trafficking and pregnant women for instance. In the UK, the Detention Service Operating Standards include several provisions for female detainees. Besides, Belgium, Spain and the UK organise a medical screening in detention, thus allowing special medical needs, if detected, to be addressed.

Belgium, Hungary and the UK implement an internal complaint mechanism. It is however not gender-specific. It should be highlighted that Sweden is currently working on initiating mechanisms in case of gender-based violence. For all other countries, in the absence of any internal complaint mechanism in detention, victims must report to the police. This is obviously not a suitable situation.

In all countries in this study, women and men are generally placed in separated buildings or corridors. They may however share common areas. In Hungary and the UK, there are however detention centres solely for women and families/couples.

From a general perspective, the treatment of women and victims of gender-based violence in detention centres is generally not adapted. Although policy and administrative instructions identify and address gender issues in some countries, such references are generally limited. As a consequence, detention conditions are not consistent and safeguards for women's health and well being are poor.

It is recommended that Member States adopt special provisions addressing the needs of women and victims of gender-based violence in detention. They should be identified as vulnerable persons and should benefit from gender-sensitive conditions.



## XI. CONCLUSION AND RECOMMENDATIONS

There is a wealth of international and European standards and recommendations which provide guidance to States in ensuring that asylum seekers with gender-related claims are given a fair determination of their claim and treated with dignity. The interpretation of the Refugee Convention has evolved since it was drafted in 1951 to include broader types of asylum claims and to ensure that all persons who flee persecution because of discriminatory treatment are granted international protection in countries of asylum.

On average one third of asylum seekers in the EU are women. In the countries covered by this study, **Sweden** receives the highest percentage of female asylum applicants (38%) and **Italy** the least (12.1%). In **France**, women beneficiaries of international protection have five times more chance than men to be granted subsidiary protection as a consequence of a non gender-sensitive interpretation of the Refugee Convention grounds. In **Malta** and **Sweden** there is an over-reliance on the grant of subsidiary protection to women asylum seekers. In **Malta**, for example, only 5% of women are granted refugee status.

Harmonised and comparable statistics on migration and international protection, including gender- specific information, are essential for the development and monitoring of EU asylum legislation and policies. EU Member States have a legal and binding obligation to collect and disseminate gender- disaggregated statistics including first instance and final decisions granting or withdrawing refugee status and subsidiary protection. Despite all countries providing this information to Eurostat, only **Sweden** and the **UK** publish gender-disaggregated appeal statistics nationally. **Romania** provides no public gender-disaggregated statistics at first instance or at appeal. **Belgium** is the only country that provides detailed statistics on the different types of persecution in gender-related asylum claims. This practice is to be encouraged in all other EU member States.

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The interpretation, adoption and application of UNHCR Gender Guidelines to ensure women seeking asylum are adequately protected have not yet been implemented across EU Members States. **Belgium** can be highlighted as an example of good practice as the UNHCR Gender Guidelines are systematically disseminated to all officers working at the first instance authority and **Spain** where the UNHCR office distributes the UNHCR Gender Guidelines in workshops, seminars and at ports of entry for asylum seekers. Reliance on the UNHCR Guidelines by national first instance authorities remains

inconsistent however, in most countries covered by this study. Appeal authorities in **Spain, Sweden** and the **UK** have explicitly relied on and endorsed UNHCR Guidelines, a practice which is encouraged in all member States.

**Malta, Romania, Sweden** and the **UK** have adopted their own national gender guidelines to assist decision-makers in ensuring a gender-sensitive interpretation of the Refugee Convention. **Belgium** and **Italy** have developed alternative gender guidance material. **France, Hungary** and **Spain** are encouraged to follow this good practice and provide decision-makers with guidance for deciding gender-related asylum claims and promote the inclusion of a gender-sensitive perspective in asylum procedures. Countries that have already adopted such guidance should ensure its implementation. Despite repeated calls there are no EU-wide gender guidelines which may provide guidance to national authorities on how to decide gender-related asylum claims and ensure the asylum procedure is gender-sensitive. EU-wide guidelines may provide increased harmonisation of gender-sensitive asylum systems in the EU.

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The Refugee Convention needs to be interpreted with a gendered perspective. According to EU legislation it is clear that specific attention must be paid to gender-related claims for asylum to ensure that proper account is taken of the gender dimension.

International and European institutions are increasingly calling on States to ensure that gendered forms of harm such as FGM and domestic violence are recognised as forms of persecution within the meaning of the Refugee Convention. The EU Qualification Directive recognises that gender-specific acts may amount to persecution but practice in each Member State covered in this study varies significantly. **France, Malta** and **Romania** for example do not always accept that FGM may amount to persecution despite clear and repeated statements that FGM is a breach of human rights by international and European institutions. National authorities do not always recognise that asylum seekers who fear forced marriage, domestic violence and ‘honour’ crimes are at risk of persecution. **France**, in particular, does not always recognise forced marriage, domestic violence and rape and sexual violence as amounting to persecution and **Spain** fails to recognise trafficking as a form of persecution. Good practice was also identified during the research, including **Belgium** and the **UK’s** recognition of slavery and forced prostitution as forms of persecution.

All the countries recognise that non-State agents may be considered actors of persecution when there is an absence of State protection in accordance with the



Qualification Directive. Although the need to seek State protection before fleeing the country of origin is not a formal or legal requirement *per se*, asylum seekers who flee persecution from non-State actors will be required to explain why State protection is not available. It was observed that in practice this was a difficult requirement to meet for women and LGBT asylum seekers fleeing gender-related persecution by non-State actors.

Persecution on account of one's gender is predominantly interpreted within the parameters of the particular social group (PSG) Convention ground in all the countries covered in this study. Only **Romania** has passed legislation to include gender as an additional Convention ground. Legislation in **Spain** and **Sweden** explicitly cites gender as an example of what might constitute a PSG. Despite specific guidance on the interpretation of PSG provided by the UNHCR Guidelines on Particular Social Group this study reveals a large divergence of interpretation among the countries analysed. Legislation in **Hungary** and **Italy** explicitly provides that the immutable characteristics and the social perception approaches are alternatives, in accordance with the UNHCR Guidelines on PSG. In **Romania** and **Sweden**, the two limbs are interpreted as alternatives in practice. Women have been found to constitute a PSG in **Belgium**, **France**, **Italy**, **Romania**, **Spain**, **Sweden** and the **UK**. In **Malta** however, gender alone may not be sufficient to find the existence of a PSG and the practice in **Hungary** does not suggest this is the case.

Following the Convention ground of membership of a PSG, political opinion is the most common Convention ground relied on in gender-related asylum claims. Practice in **Belgium** showed examples of good practice but in general there were few indications that the grounds of political opinion or religion were interpreted in a gender-sensitive manner and were found not to be engaged when asylum seekers were at risk of persecution because of their gender. States should ensure a gender sensitive interpretation of political opinion and religion and ensure these are mainstreamed for gender-related claims for asylum, ensuring that the Convention ground of PSG does not become a fall back for all gender-related claims. Asylum seekers who are persecuted for reasons related to gender are members of a particular social group without prejudice to the need to interpret all Convention grounds in a gender-sensitive manner.

The credibility of asylum claims is a crucial issue in all refugee status determination processes. Where the asylum claim is gender-related, credibility issues are further compounded by the difficulties of evidencing gender-specific forms of harm and the absence of State protection. When asylum seekers suffer from trauma as a result of sexual violence or rape this may also affect their ability to provide a coherent and

chronological account of events and may further negatively affect the credibility of their claim. Considering that a claim for asylum can rarely be entirely substantiated by evidence, the standard of proof should not be too high. Italy is an example of good practice in this area where in cases of gender-based violence, asylum-seeking women's vulnerability is taken into account and effectively lowers the standard of proof. In Malta, in cases of severe trauma, rape, or vulnerability, the burden of proof is also lowered.

The research highlighted the differing practice when asylum seekers disclose instances of rape or sexual violence later in the procedure and how this affects the assessment of their credibility. Late disclosure of gender-based persecution should not automatically count against credibility. However, in practice, late disclosure of information often negatively affects the assessment of credibility. The research also demonstrated the failure to make appropriate credibility assessments which take into account the psychological effects of torture and trauma on applicants' ability to present their claims. Other difficulties faced by asylum seekers with gender-related claims were also considered in this study, including the consideration of demeanour by decision-makers and the need for documentary evidence.

The difficulties relating to the availability and accessibility of country of origin information (COI) related to gender issues were also explored in this study. The practice of decision makers specialised in certain countries of origin in Belgium, France and Hungary may provide some solutions. It was observed in Hungary, Malta, Spain, Sweden and the UK that a lack of information on gender-related persecution in a specific country was sometimes regarded by decision-makers as a lack of evidence of persecution. This approach should be curbed and decision-makers should be aware of the difficulties in researching and accessing gender-related COI. A lack of COI should not of itself result in the rejection of asylum claims. Countries which do provide COI reports, such as Belgium, France, Italy, Romania, Sweden and the UK, should ensure their reports contain extensive gender-relevant information and COI researchers should be specifically trained on gender issues.

In France, the concept of internal flight alternative is rarely relied on to refuse refugee status and in Italy the notion has not been transposed into national legislation. Whereas Hungary, Sweden and the UK specifically refer to the need to consider gender issues in the assessment of the viability of internal relocation, in practice many claims for asylum continue to be refused on this basis without a gender-sensitive consideration of the claim. More guidance and an extended analysis of how applicants' gender would affect their ability to relocate are needed in all member States to ensure relocation is considered a viable and safe option.



Reliance on the concept of “safe countries of origin” was considered in this research, including whether the lists of countries differentiated between the risk of persecution to men and women, such as in **France** and the **UK**. Due to the procedural implications of originating from a designated safe country, the practice should be ended although gender-differentiation may in the meantime provide some safeguards for women who fear gender-related persecution. Countries should also consider whether LGBT asylum seekers should be exempt from being considered from certain safe countries of origin.

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There is a long way to go before national asylum procedures are fully harmonised at the European level. Indeed, the variety of provisions from one country to another may entail protection gaps. This is particularly true regarding gender-sensitive procedural issues. **Belgium, Sweden** and the **UK** – and **Hungary, Italy, Malta** and **Spain** to some extent – can be identified as examples of good practice.

The level of gender-relevant information provided to asylum seekers also diverges from one country to the other. A gender specific brochure has been developed only by the CGRS in **Belgium**. The role of NGOs and the UNHCR in providing such information is often essential to fill information gaps as observed in **Hungary, Malta, Spain, Romania, Sweden** and the **UK**.

Although in European law women and victims of gender-based violence are not considered *per se* as being part of a vulnerable group, **Belgium, Hungary, Italy, Malta, Romania, Spain, Sweden** and the **UK** recognise in law and/or practice that they may warrant specific considerations: priority at the first instance level, flexibility in timeframes in order to encourage disclosure of information, access medical and/or psychological care before the interview or gather evidence for their case, greater attention to women at the border in order to identify victims of trafficking, interviews by an officer and interviewer of a preferred sex, child care available during interviews. However, the comparative analysis highlighted that provisions foreseen by law or recommended in guidelines are not always respected in practice. Member States should therefore make efforts in monitoring the implementation of gender-sensitive provisions.

Severe difficulties were also reported for women and victims of gender-based violence when making subsequent claims. In practice, most of the national authorities apply a definition of “new elements” that has a negative impact on this type of claim. However, cases of late disclosure (because of trauma, lack of information or pressure from traffickers) were accepted as subsequent claims in **Belgium, Hungary, Italy** and **Sweden**.

Examples of good practice regarding training can be highlighted in **Belgium, Malta** or the **UK** where training on gender issues is compulsory for first instance decision-makers. *Ad hoc* training is also organised at the first instance level in **France, Italy, Spain** and **Sweden**. National representations of the UNHCR and national NGOs also offer training on gender issues to officials, judges and legal representatives.

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**Belgium** can be highlighted as an example of good practice as it provides a screening of special reception needs. **Italy, Sweden** and the **UK** also provide opportunities for asylum seekers to raise their special needs at the beginning of the procedure. However, **none** of the countries in this study organise a systematic detection of victims of gender-based violence.

**Belgium** and the **UK** also implement internal complaint mechanisms in supported accommodation, even though those are not necessarily gender-specific. **Italy** also applies gender-sensitive mechanisms and referrals for women and victims of gender-based violence. Further, special accommodation provisions for victims of trafficking are implemented in **Italy** and the **UK**. **Italy** and **Malta** have reception centres only for women. The separation of single men and single women is a necessity to prevent sexual harassment and stress for women.

The research demonstrates appalling conditions for many asylum seekers, especially vulnerable persons such as women and victims of gender-based violence. Pregnant women and mothers of young children usually live in very poor conditions, being denied access to adequate medical care and material support (additional money, appropriate clothes, food). Besides, difficulties in accessing psychological care were reported in **France, Sweden** and the **UK**.

A special effort should be made in order to ensure that the specific reception needs of vulnerable persons are identified and addressed. Member States should also keep in mind that as far as families are concerned women are usually in charge of children. Therefore, the absence of child care has a direct impact on women's lives and their ability to have a fair examination of their asylum claims.

Reception staff should be adequately informed and trained on gender issues, such as in **Belgium**.

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Belgium, Hungary, Italy, Malta and the UK foresee special provisions for vulnerable groups in detention, including victims of trafficking and pregnant women for instance. In the UK, the Detention Service Operating Standards include several provisions for female detainees. In addition, Belgium, Spain and the UK organise a medical screening in detention, thus allowing special medical needs, if detected, to be addressed.

Belgium, Hungary and the UK implement an internal complaint mechanism in detention centres. They are not however gender-specific. It should be highlighted that Sweden is currently working on initiating mechanisms in case of gender-based violence. For all other countries, in the absence of any internal complaint mechanism in detention, victims must report to the police. This is obviously not a suitable situation.

In all countries in this study, women and men are generally placed in separated buildings or corridors. They may however share common areas. In Hungary and the UK, there are also detention centres solely for women and families/couples.

The treatment of women and victims of gender-based violence in detention centres is generally not adapted to their needs. Although policy and administrative instructions identify and address gender issues in some countries, such references are generally limited. As a consequence, detention conditions are not consistent and safeguards for women's health and well being are poor.

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Overall, the research has demonstrated that harmonisation of gender sensitive refugee status determination, asylum procedures, reception and detention conditions is far from the reality within the nine EU Member States which have been the subject of this study. Member States have seen progress towards a gender-sensitive interpretation of the provisions of the Refugee Convention in law, jurisprudence and State practice. There is a common understanding that the refugee definition can encompass gender-related asylum claims and that the purpose and object of the Refugee Convention require a gender-inclusive and gender-sensitive approach. However, there are vast and worrying disparities in the way different EU States handle gender-related asylum claims. As a result, women are not guaranteed anything close to consistent, gender-sensitive treatment when they seek protection in Europe. Women seeking asylum are too often confronted with legislation and policy that fail to meet acceptable standards, while even gender-sensitive policies are not implemented in practice.

This comparative report has sought to identify good practice in order to encourage EU Member States to improve the gender-sensitivity of their asylum systems and ensure greater harmonisation across the EU. Specific recommendations have been provided throughout the report. In order to ensure an effective and harmonised protection system in a gender-sensitive manner, the following additional measures are recommended:

1. EU MEMBER STATES SHOULD:

- i. adopt and implement gender guidelines for initial decision makers and judges based on UNHCR gender-relevant guidelines
- ii. recognise in their refugee status determination process that persecution can be gender-specific and that asylum seekers who are persecuted for reasons related to gender are members of a particular social group without prejudice to the need to interpret all Convention grounds in a gender-sensitive manner
- iii. ensure their procedures are gender sensitive, implement CEAS legislation and comply with UNHCR guidelines on gender and related issues by, *inter alia*:
  - ensuring an inclusive interpretation of all the Refugee Convention grounds and all other criteria of the refugee definition
  - ensuring that decision makers at all levels have appropriate guidance and tools to make appropriate and fair decisions on gender-related claims
  - providing gender-specific training to initial decision-makers and judges and ensure all training is gender mainstreamed
  - ensuring gender mainstreaming in quality assurance mechanisms
  - ensuring gender-related country of origin information is made available to all decision-makers
  - advising dependents of the right to claim asylum in their own right in private
  - making information about gender-specific asylum policies and procedures available to women
  - offering asylum seekers a choice of gender in relation to interviewers and interpreters
  - ensuring interviews are gender-sensitive to address their special needs
  - ensuring vulnerable asylum seekers are offered adapted accommodation
  - ensuring vulnerable asylum seekers are identified early in the asylum procedure



- providing appropriate security and complaints mechanisms in reception/ accommodation
  - developing standard operating procedures in all cases of sexual and gender based violence.
  - providing appropriate psychological assistance and support
  - ensuring implementation of CEAS legislation is gender-sensitive
- iv. appoint gender focal points in their national asylum authorities and develop networks to exchange expertise and good practice
- v. make their data collection gender-sensitive by:
- providing publicly sex-disaggregated statistics at all levels of the asylum system in compliance with their legal obligations under Regulation 862/2007
  - providing and enhancing the collection of statistics on selected gender-related issues including types of gender-related asylum claims
- vi. sign and ratify the Council of Europe *Convention on preventing and combating violence against women and domestic violence*
2. THE EUROPEAN COMMISSION SHOULD:
- i. along with **the European Parliament and the European Council** ensure any future CEAS legislation takes gender issues into account
  - ii. make impact assessments of CEAS legislation gender-sensitive
  - iii. ensure that EU legislation on asylum is correctly implemented and consider whether any changes in practice and/or legislation are necessary to ensure the instruments are gender-sensitive
3. THE EUROPEAN COUNCIL SHOULD:
- i. adopt as a priority an Action Plan on Gender Issues in the Common European Asylum System in its next Multi-Annual Programme for Justice and Home Affairs (2015-2019)

#### 4. EASO SHOULD:

- i. promote the implementation of existing UNHCR guidelines and standards on gender-sensitive asylum systems
- ii. in the longer term, should protection gaps be identified, adopt EU best practice guidelines on gender-sensitive asylum systems
- iii. integrate a gender perspective into all aspects of its work programme
- iv. implement the recommendations detailed in *En-Gendering the European Asylum Support Office*<sup>[462]</sup> including:
  - developing gender focal points responsible for coordination of gender mainstreaming in all the activities of the EASO
  - create a gender working party competent to address issues related to women's rights, sexual orientation and gender identity
  - including organisations with expertise in gender, sexual orientation and asylum in the EASO's consultative forum
- v. enhance the collection of statistics, data and country of origin information on selected gender-related issues
- vi. include a gender-specific module in the European Asylum Curriculum and ensure the EAC and all training material are gender-mainstreamed
- vii. ensure the Centre for Information, Documentation and Analysis collates extensive country information relevant to gender issues

#### 5. THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE SHOULD:

- i. promote the importance of gender-sensitive asylum systems in CoE member States, for example by translating a summary of the report of the Committee on Migration, Refugees and Population, *Gender-related claims for asylum* (July 2010)

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[462] [http://www.endfgm.eu/content/assets/Engendering\\_the\\_European\\_Asylum\\_Support\\_Office\\_2011\\_FINAL.pdf](http://www.endfgm.eu/content/assets/Engendering_the_European_Asylum_Support_Office_2011_FINAL.pdf)



**6. THE EUROPEAN INSTITUTE FOR GENDER EQUALITY SHOULD:**

- i. Promote the integration of the gender dimension in all aspects of EU asylum policies

**7. THE UNHCR SHOULD:**

- i. compile all existing legislation, guidelines, guidance notes relating to gender into one accessible format for decision-makers
- ii. translate all UNHCR guidelines on gender and related issues to make them accessible in all EU member States

**8. THE FUNDAMENTAL RIGHTS AGENCY SHOULD:**

- i. undertake research on the reception, detention and integration of women asylum seekers

**9. THE CEDAW COMMITTEE SHOULD:**

- i. adopt the draft *General Recommendation on Gender Equality in the Context of Forced Displacement and Statelessness*

**10. NGOs OPERATING IN THE FIELD OF ASYLUM POLICY SHOULD:**

- i. appoint gender focal points and develop networks to exchange expertise and good practice
- ii. consider strategic litigation in the framework of national and European equality legislation to improve the treatment of and the asylum procedure for women and LGBTI persons seeking asylum
- iii. rely on international human rights instruments, in particular the *UN Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) to promote the rights of women asylum seekers
- iv. liaise and coordinate with civil society operating in the field of women's and LGBTI persons' rights, violence against women and LGBTI persons, equal opportunities and non-discrimination

## ANNEX 1: DEFINITIONS

**Asylum Law:** Provisions that provide that persons who, upon return to their country of origin, would face particular kinds of risk to life or freedom, are protected against return to such country.

**Country of Origin Information:** All relevant facts related to the country of origin of an asylum seeker at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied.

**Discrimination:** To receive less favourable treatment as a result of different measures that lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on the right to earn livelihood, the right to practice religion, or access to normally available educational facilities.

**Female Genital Mutilation:** FGM comprises all procedures involving partial or total removal of the external female genitalia, or other injury to the female genital organs, carried out for traditional, cultural or religious reasons.

**Gender:** The social differences between women and men that are learned, changeable over time and have wide variations both within and between cultures. For example, while only women can give birth (biologically determined) biology does not determine who will raise the children (gendered behaviour).

**Gender Equality:** This means that women and men enjoy the same equality, and that the different behaviour, aspirations and needs of women and men are equally valued and favoured.

**Gender Disaggregated Statistics:** Statistics and data gathered and broken down by sex in order to aid comparison.

**Gender Identity:** A person's experience of gender, which may or not may correspond with the sex assigned at birth, it includes the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

**Gender Impact Assessment:** One of the tools used in gender proofing. It involves an assessment of policies and practices to see whether they will affect women and men differently, with a view to adapting these policies/practices to make sure that any discriminatory effects are eliminated.

**Gender Mainstreaming:** Involves the incorporation of gender considerations into all policies, programmes, practices and decision-making so that at every stage of development and implementation, an analysis is made of the effects on women and men, and appropriate action taken.

**Gender Proofing:** The means by which it is ensured that policies and practices within organizations have equally beneficial effects on men and women.



**Gender-related claims:** Is a term used to encompass the range of different claims in which gender is a relevant consideration in the determination of refugee status

**Gender-Specific Persecution:** The form of persecution experienced is gender-specific or predominantly gender-specific. For example, rape and other forms of sexual violence, domestic violence, crimes in the name of honour, female genital mutilation (FGM), forced abortion and sterilisation.

**Gender-Related Persecution:** The reason for persecution is gender-based, i.e. the applicant fears persecution on account of her or his gender or gender identity.

**Gender sensitivity:** It acknowledges the different roles and responsibilities of women and men in the community and the relationships between them. Men and women are different, therefore their experiences, needs, issues and priorities are different. Strategies are also different to achieve equitable outcomes for women and men.

**Human Trafficking:** Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

**Refugee:** a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it” (Geneva Convention, 1951)

**Persecution:** Threats to life or freedom. Acts which are sufficiently serious by their nature or repetition as to constitute a severe violation of a basic human right.

**Sex:** The biological differences between women and men.

**Sexual Orientation:** A person’s capacity for emotional, affectional or sexual attraction to and intimate relations with, individuals of a different gender (in which case a person has a heterosexual orientation), of the same gender (in which case someone is lesbian or gay) or more than one gender (in which case someone is bisexual).

## ANNEX 2: ASYLUM PROCEDURES FACT SHEETS

### BELGIUM

**Legislation on asylum:** Aliens Act (15th December 1980). A new asylum procedure entered into force in 2007.

**Institutions involved in the asylum procedures:**

- The Aliens Office (*Office des étrangers*, OE) is in charge of the registration and the preliminary examination of asylum applications (Dublin Regulation and subsequent applications).
- The Office of the Commissioner General for Refugees and Stateless Persons (CGRS) is in charge of examining applications, granting or refusing protection.
- The Council for Aliens Law Litigation (*Conseil du contentieux des étrangers*, CCE) is responsible for the examination of appeals against decisions taken by the OE and the CGRS.

**Registration of asylum claims:** At the OE in Brussels within 8 working days of entry into the Belgian territory.

**Screening/admissibility procedure:** None.

The OE registers the claims and proceeds to a short initial interview covering identity, nationality, family and travel route. This interview takes place on the same day applicants register their claim, or within 2 or 3 days. During the interview, the OE hands in an asylum form (questionnaire) that asylum seekers can fill in directly with the OE officer or send it back within 5 days. Applicants will also be photographed and fingerprinted.

Pursuant to article 51/4 of the Aliens Act, the language of the asylum procedure is French or Dutch. Upon registration, the asylum seeker should indicate to the OE whether he/she needs an interpreter. If an interpreter is not required, the OE decides in which language the asylum claim will be examined. These decisions are irrevocable.





## Timeframes

	Hand in application form	First instance decision	Lodge appeal	Appeal decision
Border/detention	5 days	15 days	15 days	5 days
Regular		Within 3 to 6 months	30 days	
Accelerated/ Prioritised - Misleading - EU citizen - Last In, First Out		2 months 5 days 45 days	15 days 30 days 15 days	
Subsequent claim		2 months	30 days	

**Border procedure:** Asylum seekers are questioned by the police about the reasons for entering Belgium and are systematically detained.

**Accelerated/prioritised procedure:** Articles 52, 52/2 and 57/6 of the Aliens Act provides situations in which the determining authority shall take a decision within a shorter time frame: 2 months for subsequent applications or when applications are considered as misleading, 15 days when the application is made in detention, and 5 days when the application is made by a citizen from the European Union (EU). The CGRS may also decide to assess applications within 45 days, according to the LIFO principle (Last In, First Out).

**Appeals:** A negative decision or a decision granting a subsidiary protection issued by the CGRS may be appealed before the CCE either within 15 (accelerated procedures) or 30 days (regular procedure) following the notification of the decision. The CCE reviews the asylum application and may confirm or modify the CGRS decision or cancel the decision and send the application back to the CGRS for further examination. This is known as the full jurisdiction procedure. Applicants have the possibility to lodge a final appeal before the *Conseil d'Etat* that will only examine legal questions.

## Protection status granted in Belgium

	Refugee status	Subsidiary protection
Residence permit	unlimited	1 year renewable (unlimited after 5 years)

**Asylum support:** Article 3 of the Reception Law (12th January 2007) grants asylum seekers the right of access to “reception facilities that guarantees the respect of human dignity”. From article 14 to 35, the Reception Law also guarantees asylum seekers access to material aid: information, interpretation, accommodation, evaluation of specific needs, medical, psychological, social and

legal support, financial assistance and trainings. While article 33 of the Reception Law provides asylum seekers an efficient access to legal aid at the first instance and appeal level, the Aliens Act, article 39/56 and 90, also grants free legal assistance to all applicants at every stage of the asylum procedure and in either procedure (regular and accelerated). Asylum seekers can only benefit from material aid if they accept to stay in the reception facility assigned by the Dispatching Department of Fedasil.

**Reception system for asylum seekers:** Fedasil is responsible for managing the network of open reception centres and private housing for the accommodation of asylum seekers in Belgium. After registration of their application, asylum seekers are received by the Dispatching Department of Fedasil which assigns asylum seekers with a reception facility. In principle, asylum seekers first stay in a collective reception centre managed by Fedasil or the Red Cross for four months. After this period, asylum seekers may be allocated a private dwelling. This system is referred to as “reception in stages”. Private accommodation is taken care of by the Public Social Welfare Centres using local reception facilities or by the NGOs (Vluchtelingenwerk Vlaanderen and Ciré). Since 2009, Fedasil also coordinates emergency shelters for asylum seekers on waiting lists.

**Number of asylum application in 2010:** 19,941

**Number of supported centres/places in 2010:** 21,412 beds (2,514 in emergency accommodation, including 1,209 in hotels, and 18,898 in open centres and private housing)

**Detention system for asylum seekers:** Undocumented migrants applying for asylum at the Belgian border and applicants in the Dublin procedure are systematically detained. Similarly, rejected asylum seekers may be placed in detention. The period of detention should not exceed two months and, in particular circumstances, should not to exceed eight months in total. Administrative detention centres are known as “closed centres” that remain under the authority of the OE. Several NGOs are accredited as “visitors” in closed centres. Accredited organisations have the authorisation to visit every closed centre and interview detained population. There are 6 closed centres in Belgium.



## FRANCE

**Legislation on asylum:** Code of Entry and Residence of Aliens and the Right of Asylum (CESEDA)

**Institutions involved in the asylum procedures:**

- The *Préfectures*, regional delegations of the State administration, are in charge of registering asylum seekers and delivering residence permits.
- The French Office for the Protection of Refugees and Stateless Persons (*Office français de protection des réfugiés et apatrides*, OFPRA) is the authority responsible for the examination of asylum claims, granting or refusing protection.
- The National Court of Asylum (*Cour nationale du droit d'asile*, CNDA) is the responsible jurisdiction for the examination of appeals against decisions delivered by the OFPRA.

**Registration of Asylum claims:** At the *Préfectures*. No specific deadline.

**Screening/admissibility procedure:** None

At the *Préfectures*, applicants must provide a proof of their place of residence and are fingerprinted. The *Préfecture* first examines whether the applicant can be admitted to the French territory. If yes, he/she will be routed into the regular procedure and, if not, he/she will be routed into the accelerated procedure. OFPRA application forms are delivered by *the Prefectures*.

**Timeframes**

	Hand in application form	First instance decision	Lodge appeal	Appeal decision
Border/detention	5 days	96 hours	1 month	/
Regular	21 days	Within 6 months		
Prioritised	15 days	15 days		
Subsequent claim	8 days			

**Border procedure:** Asylum seekers are not authorised to access the territory and may remain in transit zones (*zones d'attente*) for 4 days -and up to 20 days- while the OFPRA examines whether their claim is manifestly unfounded or not. The OFPRA advises the Ministry of Interior which is the competent authority to authorise or refuse access to the territory. When the claim is judged as manifestly unfounded, the person is denied access to French territory and is returned to his/her country of origin if this can effectively be done within 20 days. If the claim is not manifestly founded, the person is allowed to lodge a claim in the territory and receives a *laissez passer* to do so within 8 days.

**Accelerated/prioritised procedure:** Articles L 723-1 and 741-4 of the CESEDA provide that applications should be examined in the accelerated procedure when the applicant is a national of a safe country of origin, represents a serious threat to national security or when the application is considered to be abusive. Applicants will have restricted access to asylum support and be denied a suspensive appeal.

**Appeals:** At the appeal stage, asylum seekers may be assisted by a lawyer under the legal aid system or at their own costs. Asylum seekers are invited to a public hearing but have the possibility to request a closed hearing. The CNDA will review the asylum application and may confirm or modify the OFPRA decision. Asylum seekers have the possibility to lodge a final appeal against a CNDA decision before the *Conseil d'Etat* for legal issues only.

### Protection status granted in France

	Refugee status (Conventional)	Refugee status (Constitutional)	Subsidiary protection
Residence permit	10 years renewable	10 years renewable	1 year renewable

**Asylum support:** Access to social assistance (accommodation, financial support, health care...) depends on asylum seekers' administrative situation and residence permits. Claimants with a temporary residence permit, i.e. in the regular procedure, have the right to be housed in an open centre (*centre d'accueil des demandeurs d'asile*, CADA). They are offered a temporary waiting allowance (*allocation temporaire d'attente*, ATA) before their admission in a CADA. They can also benefit from the Universal Health Cover (*Couverture maladie universelle*, CMU). Once in a CADA, they can benefit from administrative support, social support, health care as well as financial and food aid. However, applicants who are not admitted to the territory, i.e. in the accelerated or Dublin procedure, do not have access to CADAs. They can only be housed, at best, in emergency accommodation, in collective facilities or hotels, and benefit from the State Medical Assistance (*aide médicale d'Etat*, AME) covering limited healthcare.

**Reception system for asylum seekers:** In France, the *Office français pour l'immigration et l'intégration* (OFII) is responsible for the management of the national programme for accommodation of asylum seekers, a network of regional *Plate-formes* (primary reception system through information and orientation) and open reception centres (CADAs). *Plate-formes* offer legal counselling and social counselling – depending on the capabilities of each *Plate-forme* – and also register the application of asylum seekers to supported accommodation. *Plate-formes* and CADAs are mainly run by NGOs. Due to over-demand for the national programme for accommodation of asylum seekers, many individuals are alternatively hosted in emergency accommodation.

**Number of asylum application in 2010:** 52,762

**Number of supported centres/places in 2010:** 279 reception centres / 21,308 beds (without emergency accommodation)



**Detention system:** In France, asylum seekers shall not be detained unless they lodge a claim in detention or at the border (accelerated asylum procedure). Administrative detention centres (*Centres de rétention administrative*, CRA) and waiting facilities at the border (*zones d'attente*, ZA) remain under the authority of the Administrative Detention Office (*Bureau de la rétention administrative*, BRA) of the Ministry of Interior. The BRA signed Conventions with several partners assisting asylum seekers in detention: at the border, with the *Anafé* for legal assistance and the French Red Cross for humanitarian aid; and in detention centres, *La Cimade*, *Ordre de malte*, *Forum réfugiés*, *France terre d'asile* and *Association Service Social Familial Migrants (Assfam)* for legal assistance.

## ITALY

**Legislation on asylum:**

- Legislative Decree No 251/2007 (Qualification Directive, *Decreto qualifiche*)
- Legislative Decree No 25/2008 (Procedures Directive, *Decreto procedure*)
- Legislative Decree No.286/98 Unified Text of Provisions on Immigration and the Status of Foreign Citizens.

**Institutions involved in the asylum procedures:**

- The Border Police Point and Questura, Immigration Office of the Police to lodge the asylum application.
- The Territorial Commission for the Recognition of International Protection is in charge of examining applications, granting or refusing protection.
- The National Commission for the right to asylum is in charge of termination and revocation of international protection status.
- The Civil Court is responsible for the examination of appeals against decisions taken by the Territorial Commission.

**Registration of asylum claim:** At Questura, applicants are asked to fill in the “*Modello per il riconoscimento dello status di rifugiato ai sensi della Convenzione di Ginevra*” (called *Modello C/3* or simply “*verbale*”). No specific deadline.

**Screening/admissibility procedure:** No admissibility/screening procedure is foreseen by law (procedure decree n. 25/2008). The examination on the merit concerning the asylum application is carried out by the Territorial Commission, which is the competent body to declare the application inadmissible. No admissibility assessment is made by the police.

**Timeframes**

	First instance decision	Lodge appeal	Appeal decision
Detention <sup>[463]</sup>	9 days	15 days	1 <sup>st</sup> appeal: 3 months 2 <sup>nd</sup> appeal: 10 days 3 <sup>rd</sup> appeal: 30 days
Regular	33 days	15 or 30 days	
Prioritised - Obviously founded - Obviously founded - Vulnerable applicants - CIE	19 days <sup>[464]</sup>	15 or 30 days 15 or 30 days 15 days	
Subsequent claim	/	15 or 30 days	

[463] Detention is foreseen only for asylum seekers who are notified with an expulsion or rejection (at the border) order.

[464] Shorter than the ordinary procedure, although no timeframe is indicated by law.



**At the border:** The request of international protection is individual and must be presented at the Border Police at the time of arrival at the Italian border. Once the asylum request has been lodged, asylum seekers enter the territory and have access to the procedure (no border procedure). The asylum request is issued after a willing declaration by the person involved. At the border (both airports and ports), fingerprinting and police reports are carried out.

**Prioritised procedure:** The Italian law system does not provide any accelerated procedure to be carried out by the police with reference to the admissibility of the asylum request. The exceptional cases in which the application can be submitted to a priority examination made by the Territorial Commission is if it is deemed manifestly founded or when the applicant situation is considered vulnerable, when the asylum seeker has committed some offences or in case they are notified with an expulsion or rejection order at the border.

**Appeals:** Asylum seekers can appeal against the negative decision of the Territorial Commission. The Civil Court becomes the competent body to examine the case. According to the law, the deadline is within 15 days if the asylum applicants are required to stay in a CIE or in a CARA; on the contrary they have 30 days in all other cases and if they are hosted in a CARA because of accommodation reasons. In order to lodge an appeal, applicants need the assistance of a lawyer. If they cannot afford the legal expenses, they have the right to require the “free legal aid – *patrocinio gratuito*”, meaning that the expenses for their lawyer will be paid by the State.

In the majority of cases lodging an appeal automatically suspends the order to leave Italy. However, the suspension of the order to leave the country is not automatically recognised and asylum seekers have to present a specific request to the judge in the following situations: during the procedure they have been kept in a CIE; during the procedure they were obliged to stay in a CARA since they were stopped because they have avoided or have tried to avoid the controls at the border (or immediately after); the request has received a negative decision because the claim was considered “manifestly unfounded”; they left the CARA without any justified reason; the request has been declared non-admissible.

### Protection status granted in Italy

	Refugee status	Subsidiary protection	Humanitarian protection
Residence permit	5 years renewable	3 years renewable	1 year renewable

**Asylum support:** Asylum seekers’ right of access to social assistance depends on their legal situation and residence permits. The Italian law foresees the right to accommodation to all asylum seekers. Applicants with a Temporary Permit of stay receive health care. Regarding the right to work, at the beginning of the asylum procedure they are not allowed to exercise it. If the decision on their application is not taken within 6 months from the presentation and the delay is not due to their behaviour, the Temporary Permit of stay is renewed for additional 6 months and asylum seekers are allowed to work until the end of the procedure. Moreover underage asylum seekers or asylum seekers’ children have the right to attend public schools, while adult applicants have the right to attend vocational courses.

**Reception system for asylum seekers:** When asylum seekers apply for asylum, the Police gives them a “*cedolino*” which is a document in the form of a strip of paper with the applicant’s picture; it is given to the applicants, after having been at the Questura. On the same paper the future appointments with the Questura are listed. The document also represents an authorisation to stay in Italy during the procedure. In case applicants are addressed to a CARA (Accommodation Centre for asylum seekers) or to a CIE (Identification and Expulsion Centre) they are not given a Temporary Permit of stay. If no places are available in the accommodation system of the SPRAR (Protection System for asylum seekers and refugees) they can be temporarily addressed to a CARA or to a centre for first accommodation (centres where accommodation is provided only for a limited period of time). Accommodation, both in CARA and in SPRAR, is normally foreseen for six months. In the praxis, this period may be extended until the end of the asylum procedure.

**Number of asylum applications in 2010:** 10,050<sup>[465]</sup>

**Number of asylum application in 2011:** 34,117<sup>[466]</sup>

**Number of supported centres and/or places in 2010:** 3,000 beds of which 501 for vulnerable persons<sup>[467]</sup>. 123 Local Authorities, 68 Provinces and 19 Regions involved.

**Detention system for asylum seekers:** In Italy it is not possible to detain asylum seekers, but detention in specific centres called CIE (Identification and expulsion centres) is provided under certain circumstances: if asylum seekers present the application only after having been stopped in irregular conditions; if they have already received an expulsion order; if they enter irregularly with no documents or if they have been condemned for having committed a serious crime. Pregnant women as well as minors cannot be detained in a CIE.

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[465] Source: Eurostat.

[466] According to last statistics released by Ministry of Interior.

[467] According to statistics available in the SPRAR website.





## HUNGARY

### Legislation on asylum:

- Act no. LXXX of 2007 on Asylum (*A menedékjogról szóló 2007. évi LXXX. törvény*)
- Government Decree 301/2007 (XI. 9.) on the execution of the Asylum Act
- Act no. II of 2007 on the Admission and Right of Residence of Third-Country Nationals (*A harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. törvény*) - detention

### Institutions involved in the asylum procedures:

- Office for Immigration and Nationality (OIN), part of the Ministry of Interior (first instance)
- County court of asylum seekers' residence (second instance)

**Registration of Asylum claims:** There are no formal requirements to seek asylum as regards the form, the place and timing of lodging an asylum application: it is valid both in written and oral form and in any language at any public administration body. If the asylum seeker submits the application at another authority, the authority is obliged to register the fact of the submission in its minutes and forward it without delay to the competent authority. There is no specific deadline.

### Timeframes

	First instance decision	Lodge appeal	Appeal decision
Admissibility procedure	up to 30 days (longer in Dublin procedures)	3 days	8 days
Admissibility procedure at the airport	up to 8 days		
In merit procedure	45 + 22 working days	15 days	45 working days

**Screening/admissibility procedure:** The asylum procedure has two parts: the admissibility procedure and the in-merit procedure. In the first interview the asylum seeker has to provide information on his/her personal identity, the route of the flight, connections with smugglers, family members and civil status and a rather brief explanation of the personal flight story, which is not examined in-depth at this stage of the procedure. The admissibility procedure serves to identify whether the applicant is entitled to apply for asylum (if he is not a citizen of an EU Member State and if he has not already been recognised as a refugee by another country), whether the Dublin procedure should start, whether the “third safe country rule” applies and whether the claim is manifestly ill-founded.

**In-merit procedure:** If the case is referred to the in-merit procedure, one or more substantiated interviews take place. In the in-merit procedure the OIN examines if the asylum seekers is entitled to any of the protection statuses. The decision in the in-merit procedure is usually taken between 45 and 90 days.

**Appeals:** In case the asylum seeker does not receive any of the protection statuses or he/she does not agree with the status granted, he/she can appeal the decision within 15 days at the regional court

according to his/her place of residence. Personal hearing at the court is obligatory.

**Border procedure:** If the asylum seeker applies at the airport, the OIN has to finish the admissibility procedure within 8 days. During that time the asylum seeker is kept at the airport. There is no border procedure at the land borders.

**Accelerated/prioritised procedure:** Manifestly unfounded claims can be rejected in admissibility procedure.

**Subsequent asylum procedures:** Asylum seekers can start a new asylum procedure, but only if they can present important new facts or circumstances that were not considered in their previous asylum procedure. Subsequent asylum applications no longer have suspensive effect on the execution of the expulsion, if the Hungarian authority or court in its latest decision decided that the prohibition of refolement was not applicable. Rights to accommodation might also be limited in subsequent asylum procedures.

#### Protection status granted in Hungary

	Refugee status	Subsidiary protection	Tolerated stay <sup>[468]</sup>
Residence permit	indefinite period	5 years	1 year

**Reception and detention system for asylum seekers:** During the asylum procedure, asylum seekers are either detained in immigration jails or placed to the open reception centre in Debrecen. Unaccompanied minors are placed in the children's home in Fót. The maximum duration of immigration detention is 30 days for families with children and 12 months for the others. Unaccompanied minors are exempted from immigration detention if their age is not disputed by the proceeding authorities (the police and the OIN).

**Rights of the asylum seekers:** Right to an interpreter; right to request an interpreter and an asylum officer of the same sex; right to receive a written copy in Hungarian of all decisions taken during the asylum procedure; right to be informed about the content of the decision(s) in the language that asylum seeker understands; right to free legal assistance from a lawyer and/or from a non-governmental organisation; right to contact the UNHCR; right to receive a humanitarian residence permit when the asylum application gets to the in-merit procedure, but only if the asylum seeker is not in detention; right to receive "pocket money" when the asylum application gets to the in-merit procedure and if it is the first asylum procedure and the asylum seeker is not detained and is not staying in a private apartment; right to basic medical care and emergency medical assistance; right to work, but only inside the refugee camp. If the asylum procedure takes longer than a year, the asylum seeker has a right to work outside the camp, but he/she first needs to obtain a valid work permit; children have the right to go to school. If they are present in the country for less than a year, they can attend school if the parents request it.

Number of asylum application in 2010: 2,104

[468] A protection status based on a more general (not individualised) risk of harm in the country of origin.



## MALTA

### Legislation on asylum:

- Relevant Maltese legislation is the Refugees Act (Cap. 420) 25<sup>th</sup> July 2000, *as amended by Act VIII of 2004; Legal Notices 40 of 2005 and 426 of 2007; and Act VII of 2008*
- This Act has recently been amended to transpose the provisions of the Qualification and Procedures Directive.
- Regulation 18, legal notice 243/2008 to the Refugees Act, dealing with procedural standards in the Refugee Status Determination.
- Reception of Asylum seekers (minimum standards) Regulations, Legal Notice 320/2005
- The Immigration Act also features provisions relevant to asylum seekers, such as those relating to reception conditions.

### Institutions involved in the asylum procedures:

- The Office of the Refugee Commissioner's has the responsibility of processing the asylum applications.
- Refugee Appeals Board, where, in the case of a negative recommendation, applicants have the right to appeal against the negative decision.
- AWAS (Agency for the Welfare of asylum seekers) oversees the daily management of accommodation facilities either directly or through subcontracting agreements.

**Registration of asylum claim:** At the Refugee Commissioner asylum seekers asked to fill in the so-called Preliminary Questionnaire, which is the document preceding the formal asylum application form.

**Screening/admissibility procedure:** No admissibility/screening procedure is foreseen by law.

### Timeframes

	Hand in application form	First instance decision	Lodge appeal	Appeal decision
Regular	60 days	Within six months	15 days	Indefinite period
Accelerated/ Prioritised		3 working days		3 working days
Subsequent claim	No time frame	From 3 months to over a year		

**Border procedure:** Most of asylum seekers coming to Malta do so by boat and thus they apply for asylum once they are on the territory. In Malta, by "border", it means at the airport. No admissibility procedure is done at the border.

**Accelerated/prioritised procedure:** The accelerated procedure does exist, but it is never used.

According to the law, as defined in Section 2 of the Refugees Act, this applies in *prima facie* manifestly unfounded applications. No exemptions are foreseen. Nevertheless, asylum claims can be prioritised for vulnerable groups.

### Protection status granted in Malta

	Refugee status	Subsidiary protection	Temporary Humanitarian Protection
Residence permit	3 years renewable	1 year renewable	1 year renewable

**Reception system for asylum seekers/ Asylum support:** Generally speaking, the accommodation system of Malta starts always with the detention (if the asylum seekers enters Malta in an irregular manner). There are 3 closed centres with a capacity of about 2,500 places. There are 4 open centres (there are some 7 centres – Hal Far Hangar, Hal Far Tent Village, Hal Far Open Centre, Hal Far Reception centre – this one is only for women – Marsa Open Centre, Dar il-Liedna (for families and UASC) and Dar is-Sliem (only for unaccompanied minors) with a capacity also of about 2,500 places. The accommodation system is provided and managed by AWAS. This agency guarantees allowance as well. Whoever signs 3 times a week at the centre (thus proving unemployment) gets a monthly financial assistance of around Euro 130. In the initial interview, the screening staff of AWAS (social assistants) should identify vulnerable people and persecution victims, but it is not clear how the first interview is carried out. Accommodation in the open centres is not obligatory. It should serve as a transit centre until the beneficiaries of protection can find employment and are able to rent accommodation. According to Maltese law, (and in line with the EU ‘Refugee Qualification Directive’), refugees and beneficiaries of subsidiary protection are entitled to “access to employment, subject to labour market considerations, core social welfare benefits, appropriate accommodation, integration programmes, State education and training, and to receive core State medical care, especially in the case of vulnerable groups of persons”.

**Detention:** In Malta, asylum seekers arriving in an irregular manner are immediately detained in closed centres since in terms of the Immigration Act, detention is the automatic consequence of a refusal to grant the admission into national territory and are held in facilities situated inside army or police barracks. The centres are administered by a civilian force, established for this purpose, known as the Detention Service (DS) under military control, whose members are recruited from retired members of the security forces. National law does not foresee a time-limit on detention. Detention lasts until an asylum application is determined and a form of protection is granted. Between February and September 2009 there were 8 such facilities in use: four at Safi barracks, two at Lyster Barracks and two at Ta’ Kandja”. Now, in 2012, only the Safi and Lyster Barracks are used. The only exceptions are those who are found to be vulnerable, after an individual assessment of their situation as in terms of government policy vulnerable immigrants are not detained. Within this context, the assessment of vulnerability assumes particular significance.

**Number of asylum application in 2010:** Between 2009 and 2010, 2,561 asylum applications have been submitted.



## ROMANIA

### Legislation on asylum:

- Law no.122/2006 regarding asylum
- Gov.Ord. 44/2004 regarding the social integration of persons with a form of protection
- Law 157/2011 modifying the Law 194/2004 regarding foreigners

**Institutions involved in the asylum procedures:** The Romanian Office for Immigration (RIO) is the authority within the Ministry of Administration and Interior in charge of enforcing the legislation on asylum and immigration law in Romania.

**Registration of Asylum claims:** The competent authorities to receive the asylum application are the branches of Romanian Immigration Office (RIO), the Romanian Border Police, the Romanian Police and National Administration of Prisons at the Ministry of Justice.

### Timeframes

	First instance decision	Lodge appeal	Appeal decision	Submit recourse
Border procedure	3 days	2 days	5 days	/
Regular	up to 30 days	10 days	30 days	5 days
Accelerated/prioritised	3 days	2 days	10 days	/
Subsequent claim	5 days	10 days	30 days	/

**Regular procedure:** The asylum application is analysed on the basis of existing documents that are in the file and the reasons presented, analysed in relation to the concrete situation in the country of origin and in relation to the credibility of the applicant. A first interview will be held, establishing the personal information and that of the family members, the route travelled from the country of origin to Romania, possible asylum applications submitted in third countries or in an EU member State, the identification or travel documents. Asylum seekers will have afterwards an interview made up of a hearing with an official of the RIO. The interview is recorded in writing and will clarify the aspects necessary to analyse the asylum application. If RIO considers necessary there can be supplementary interviews. Within 30 days a decision should be issued either granting refugee status or subsidiary protection; or rejecting the asylum application. In practice, it can take up to 24 months.

**Appeals:** The appeal must be submitted personally, together with a copy of the contested decision, at the Romanian Immigration Office, Directorate for Asylum and Integration or at the local court within 10 days in the normal procedure, within 2 days in the accelerated procedure or within 2 days for the border procedure.

**Recourse:** For normal procedure only: the applicant has 5 days to submit recourse if the appeal was rejected or if he/she does not agree with the form of protection granted, at the Local Court.

RIO has the right to submit a recourse within 5 days. The decision of the Tribunal is definitive and irrevocable.

**Border procedure:** If an application is submitted at the State border checkpoints a decision is issued within 3 days either granting form of protection and access to the country or granting the access to the country and to ordinary asylum procedure or rejecting the application as manifestly unfounded.

**Accelerated/prioritised procedure:** In the accelerated procedure (applied for manifestly unfounded applications; people who are a threat to national security or public order in Romania; people who come from a safe country of origin), after conducting the interview and analysing the reasons claimed the decision is issued within 3 days.

**Subsequent asylum procedures:** Asylum seekers can start a new asylum procedure, but only if they can present important new facts or circumstances that were not considered in their previous asylum procedure. If the new asylum application is admitted the asylum seeker will benefit of the same rights as in the first asylum. If the new asylum application is not admitted, the applicant can submit an appeal within 10 days at the Local Court. The decision of the court is irrevocable.

#### Protection status granted in Romania

	Refugee status	Subsidiary protection	Temporary protection
Residence permit	indefinite period	indefinite period	max. 2 years

**Reception system for asylum seekers:** During the asylum procedure, asylum seekers can be accommodated in one of the 6 reception and accommodation centres for asylum seeker and refugees. Unaccompanied minors can be placed in the children's home.

**Rights of the asylum seekers:** Right to be assisted by interpreter; right to be assisted by a lawyer / legal counsellor; right to be informed, in a language that he/she understand or is reasonably presumed that he/she knows, the rights and obligations; right to contact and be assisted by an official of the UNHCR and/or by a representative of NGOs; right to be housed in the reception and accommodation centres for asylum seeker and refugees; right to receive a monthly allowance of 30 Euros; right to receive free primary medical aid and emergency hospital aid; medical aid and free treatment, in the case of acute or chronic illnesses that imminently endanger the life; access to the labour market: under the conditions stipulated by law for Romanian citizens, after one year since the submission of the asylum application; asylum seekers with special needs have the right to benefit from the adaptation of the accommodation and assistance to suit their special needs in the accommodation centres and have the right to receive adequate medical aid.

**Number of asylum application in 2010:** 885 asylum applications.



## SPAIN

### Legislation on asylum:

- General rights of asylum seekers and migrants are guaranteed by the Spanish Constitution.
- Organic Law 2/2009 (Immigration law) and the Law 12/2009 (Asylum law), complemented by implementing Regulations and Royal Decrees.
- Law 12/2009, of 30 October 2009, governs the right to asylum and subsidiary protection.
- Royal Decree 203/1995 (modified by Royal Decree 2393/2004) transposes into Spanish law the EU Reception Conditions Directive. The regulation to implement the law is pending approval, thus the previous regulation (RD 203/1995) is still temporarily in use, as far as it does not contradict the new law. In case of contradiction, the new law is applied directly.
- Organic Law 4/2000, of January 11th, modified by Organic Law 2/2009, of December 11th (Aliens Law), covers the rights of migrants (including unaccompanied foreign children and trafficking victims).

### Institutions involved in the asylum procedures:

- Asylum Refugee Office (*Oficina de Asilo y Refugio, OAR*), office which falls under the responsibility of the Ministry of Interior. It is assisted by the Interministerial Commission on Asylum and Refugees (*Comision Interministerial de Asilo y Refugio, CIAR*), a body assigned to the Ministry of the Interior. CIAR submits a proposal for a decision to the Ministry of Interior on the basis of the information produced by the applicant, the OAR's report and UNHCR's opinion in addition to information provided by NGOs. The Minister then decides on the outcome of the claim.
- Central Litigious Administrative Court (*Juzgados Centrales de lo Contencioso Administrativo*), National Court of Justice (*Audiencia Nacional*) and High Court (*Tribunal Supremo*).

**Registration of asylum claim:** An asylum seeker may make a claim inside the territory, at OAR premises in Madrid or police stations in other provinces. The person must claim asylum within a month of entering the country or the occurrence of persecution. Asylum applications submitted after a month will be processed in an urgent procedure where the time limits will be halved (3 months). An asylum seeker may make a claim for asylum at entry/border points and Centres of Internment of Migrants, CIEs (for deportation of irregular migrants).

**Screening/admissibility procedure:** There are two types of admission procedure, within the territory and at border posts and Detention Centres for Migrants. Admission to process requests within the territory must be resolved within one month of submission.

**Admissibility procedure:** Decision on whether asylum seekers are eligible to enter the territory in order to apply for asylum. This stage must normally be completed within 4 days from the point of filing the application (UNHCR can ask to prolong this term for 10 days more). The application is examined by the OAR, UNHCR is also informed and can provide an opinion on the claim. The OAR makes a recommendation on whether to admit the applicant to the normal procedure or not and the formal decision regarding the claim is made by the Minister of the Interior.

## Timeframes

	Application at first instance	First instance decision	Lodge appeal	Appeal decision
Border/detention	4 days	8 / 18 days	2 months / 10 days	average in ruling from 1 to 2 years
Regular	1 month	6 months		
Accelerated/Prioritised		months		
Subsequent claim				

**Border procedure:** The admission procedure at border posts and in CIEs should be resolved within 4 days. If rejection applicants can submit a request for review within two days and must be resolved in two days. The four-day period can be extended to ten days due to UNHCR proposal.

**Accelerated/prioritised procedure:** In urgent procedures time limits will be halved (3 months).

**Appeals:** If the application is not admitted, an appeal before the Central Litigious Administrative Court can be lodge within 2 months. The decision of the Central Litigious Administrative Court can be appealed before the National Court of Justice within 2 months. An appeal against a negative decision on the merits of the claim can be filed with the Administrative Chamber of the National High Court. This appeal is not limited to points of law but also extends to the facts, therefore the Court may re-examine evidence submitted at first instance. If the Court finds that the applicant should be granted protection it has the power to grant status to the applicant and it is not necessary to return the case to the Ministry for review. In case of a rejection of the appeal a further onward appeal is possible in front of the Supreme Court, which in case of a positive finding has the power to grant the application with an international protection status.

## Protection status granted in Spain

	Refugee status	Subsidiary protection	Humanitarian Reasons
Residence permit	5 years	5 years	1 year

**Asylum support:** Once the asylum application has been accepted for consideration, the applicant for asylum is documented as such and receives a residence permit for a period of at least 6 months (regular procedure). Free legal aid is available to asylum seekers during all possible stages of the asylum procedure, including a final appeal to the Supreme Court. Asylum seekers have access to health care through the “*tarjeta individual sanitaria*”. Asylum seekers receive a work permit after six months.





**Reception system for asylum seekers:** Asylum seekers who are considered to be in a situation of economic and social vulnerability are housed in CAR (*Centros de Acogida de Refugiados*). Asylum seekers can usually stay for six months in a centre; but this period can be prolonged for another six months or more for social reasons. After that, they have to make their own arrangements regarding accommodation.

Number of asylum application in 2010: 2,785

**Number of supported centres/places in 2010:** 4 CARs are run by the Ministry of Labor and Immigration (2 in Madrid, 1 in Valencia and 1 in Sevilla): 414 beds. Migrants arriving in Ceuta (512 beds) and Melilla (480 beds) are brought to a specific type of centre: the CETI (*Centro de Estancia Temporal de Inmigrantes*). CETIs are open centres for both migrants and asylum seekers. NGOs Reception Centres– Spanish Red Cross, ACCEM, CEAR (624 beds).

**Detention system:** Irregular migrants are led to centres of administrative detention, CIEs (*Centros de Internamiento de Extranjeros*). 9 official CIEs in Spain cover the whole territory, except Ceuta and Melilla which have a special status. Maximum duration of detention in the CIEs was raised from 40 to 60 days in 2009. If the detention has already been ordered when an application for asylum is lodged, the asylum seeker will remain in the CIE until the final decision on the admissibility of the application is taken. This could lead to a situation where the final placement period in the CIE may be increased, effectively making it last 60 days plus the duration of the admissibility procedure.

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**SWEDEN**

**Legislation on asylum:** Aliens Act (2005:716)

**Institutions involved in the asylum procedures:**

- The Migration Board (first instance)
- The Migration courts in Stockholm, Gothenburg and Malmö (second instance)
- The Migration Court of Appeal (third instance)

**Registration of asylum claims:** No specific deadline.

**Screening/admissibility procedure:** Persons wishing to apply for asylum in Sweden will register a claim at one of the application units in Stockholm, Malmö or Gothenburg. The asylum seeker will generally be asked questions regarding travel history, identity documents, health and the basis of their claim for asylum. S/he will be given a leaflet about the asylum process. In the context of this first meeting, the applicant will also be photographed, fingerprinted, informed about the issuing of an identification card and bank card, and they will be asked whether they need accommodation and support. Applicants shall be asked whether they have any special requirements with regard to the sex of the interpreter, legal representative and case worker.

After the screening interview a decision will be made on whether to route applicants into the regular procedure or not. If the former, the applicants will be provided with a legal representative free of charge who will assist the applicant throughout the procedure. Each asylum seeker should be allocated a case owner after the screening interview who will be responsible for their case, including undertaking the substantive asylum interview and making the decision on the asylum claim. Another case owner will be appointed responsible for asylum support and other reception related conditions.

The applicant will be invited for a substantive interview by letter. This will be the opportunity for asylum seekers to explain why they are seeking asylum and establish all the facts of their case.

If the claim is assessed in the regular procedure, the legal representative will write a submission to the Migration Board developing the applicants' reasons for asylum in relation to Section 4 §1-2 (refugee status and subsidiary protection) and Section 5 §6 (exceptionally distressing circumstances) of the Swedish Aliens Act. The case owner will make a decision and send it to the applicant and/or her legal representative. The applicant will be invited for a meeting by letter, when the Migration Board will communicate the decision to the applicant.

Interpreters are generally present during interviews and other appointments with the Migration Board, the courts and the legal representatives.



## Timeframes

	First instance decision	Lodge appeal	Appeal decision
Regular	3 to 6 months	3 weeks	3 weeks
Accelerated/Prioritised	Normally less than 3 months		
Subsequent claim	/		

**Border procedure:** When a person expresses a wish to apply for asylum at the border, s/he is referred by the border police to the Migration Board.

**Accelerated/prioritised procedure:** There is no concept of accelerated procedure in law or policy, but in practice the process will be faster under certain circumstances, e.g. when applications are considered manifestly unfounded, when applications are likely to result in positive decisions or when applications are assessed under the Dublin regulation. Under all such circumstances, applicants are denied legal assistance. Furthermore, if applications are considered manifestly unfounded or concern the Dublin regulation, there is no right to appeal with suspensive effect.

**Subsequent asylum claims:** If a final decision has been made by the Migration Court of Appeal or the court has refused leave to appeal, the case can only be reconsidered in accordance with Section 12 § 18-19 of the Swedish Aliens Act. In case new circumstances of protection character arise after the final decision, the applicant may apply for a re-opening of his or her case. If the application is rejected, the applicant may appeal within three weeks. If the court rejects the appeal, the applicant may apply the Migration Court of Appeal. Leave to appeal is required, as described above. The applicant has no right to legal assistance when making subsequent claims and there is no right to appeal with suspensive effect. If the application is granted, the case is re-opened, a legal representative is allocated and the new claim will be assessed by the Migration Board. There is also a possibility for the Migration Board to make an ex-officio assessment and grant a temporary or permanent residence permit. Such cases are not, if denied, subject to appeal.

**Appeals:** A negative decision issued by the Migration Board may be appealed to the migration courts in Stockholm, Gothenburg or Malmö within three weeks. The Migration Court will confirm or modify the Migration Board decision, or send the case back to the Migration Board for further examination. A judgment issued by the Migration Court may be appealed to the Migration Court of Appeal that may, only under certain circumstances such as where there is a legal matter in terms of principle, grant a leave to appeal and thus assess the asylum application.

## Protection status granted in Sweden<sup>[469]</sup>

	Refugee status	Subsidiary protection	Exceptionally distressing circumstances
Residence permit	Permanent	Permanent	Permanent

[469] Temporary permits may be given, but normally permanent residence permits are applied.

**Asylum support:** The Migration Board provides for financial support, lodging, legal representation, social support, schooling. County Councils are the authorities responsible for providing health care and medical care to asylum seekers as for residents. Asylum seekers also have the right to a free medical examination. Adults are entitled to emergency medical and dental care, or care which “cannot deter”. Children are entitled to the same kind of health care and medical as residents. Asylum seekers are also entitled to gynecological and prenatal care, as well as care in accordance with the Swedish Communicable Diseases Act. The local authorities provide for child care, when the child is 1 year of age, if the parent is working, studying, or if the child has special needs. From 3 years of age every child is entitled to public pre-school for three hours a day. To have the right to work while being an asylum seeker, the applicant must have a certificate exempting from the obligation to have a work permit (AT-UND). Certain conditions must be fulfilled. If the applicant do not have work, lack own savings or income, he or she can apply to the Migration Board to receive a daily allowance.

**Reception system for asylum seekers:** The Migration Board is responsible for the accommodation of asylum seekers in Sweden, normally in rented flats. Asylum-seekers may decide to arrange their own accommodation.

**Number of asylum application in 2010:** 31,047

**Number of supported places in 2010:** 17,754 persons

**Detention system for asylum seekers:** Asylum-seekers may be detained during the processing of their claim, but this is rather unusual. The large majority of those detained have had their applications rejected and are detained in order to facilitate the deportation. The period of detention should not exceed 12 months. Administrative detention centres remain under the authority of the Migration Board. Several NGOs are accredited as visitors in closed centres.



## UNITED KINGDOM

### Legislation on asylum:

- Immigration Act 1971
- Asylum and Immigration Appeals Act 1993
- Immigration and Asylum Act 1999
- Nationality, Immigration and Asylum Act 2002
- Asylum and Immigration (Treatment of Claimants, etc.) Act 2004
- Immigration, Asylum and Nationality Act 2006
- UK Borders Act 2007
- Immigration Rules

### Institutions involved in the asylum procedures:

- UK Border Agency (first instance)
- First-tier and Upper-tier Tribunal, Immigration and Asylum Chamber (appeals)
- High Court, Court of Appeal, Supreme Court (further appeals and judicial review)

**Registration of asylum claim:** As soon as reasonably practicable at the Asylum Screening Unit (ASU) in Croydon or at port of entry.

**Screening/admissibility procedure:** Asylum seekers will be screened and they will be asked questions regarding their travel history and documentation, health, family background, last address and the basis of their claim for asylum. At the ASU they will also be photographed, fingerprinted, issued with an Asylum Registration Card (ARC) and be asked whether they need accommodation and support. Immediately after the screening interview a decision will be made on whether to route applicants into the Detained Fast Track (DFT) process or the regular procedure under the New Asylum Model. Asylum seekers will have a substantive interview about one week after the screening interview. This will be the opportunity for asylum seekers to explain why they are seeking asylum and establish all the facts of their case.

### Timeframes

	First instance decision	Lodge appeal	Appeal determination
Border/detention	Within 6 months	5 days	4 to 6 weeks
Regular		10 days	
Accelerated	2 to 5 days after interview	2 days	/

**Border procedure:** If claiming asylum at port of entry upon arrival, asylum seekers will either be given temporary admission into the UK while the claim is being considered or detained at one of the Immigration Removal Centres. Applicants will be screened at port and the standard of screening including the information sought will differ according to whether they came with their own passports, without passports or false documentation. Alternatively, and if granted temporary admission, they will be asked

to go to the Asylum Screening Unit in Croydon to complete the process. After this screening process they are routed into the standard procedure or the Detained Fast Track process (DFT).

**Accelerated/prioritised procedure:** In the DFT process in operation in Harmondsworth IRC and Yarl's Wood IRC, initial decisions on asylum applications are taken in 2 to 5 days. Once a decision has been reached the applicant has two days to lodge her appeal. There is also a Detained Non-Suspensive Appeal (DNSA) process where applications can be certified as clearly unfounded (including those from nationals of countries designated by the Home Office as generally safe for return). The estimated time scale between entry into the DNSA and decision is between 10 to 14 days.

**Appeals:** Applicants have a right of appeal within the UK and must lodge their appeal within 10 days of the decision (5 days if in detention). The appeal will be considered by an immigration judge of the First-tier Tribunal Immigration and Asylum Chamber. If the appeal is dismissed, it can be appealed to the Upper Tribunal Immigration and Asylum Chamber but only on a point of law. Either party to an appeal can apply for permission to appeal the decision of the First-tier Tribunal to the Upper Tribunal. The initial application must be made to the First-tier Tribunal. If this application is refused then a further application can be made to the Upper Tribunal. If the Upper Tribunal deems that an error of law has been made in the decision of the First-tier Tribunal, it can substitute its own decision in place of it, or order the First-tier Tribunal to rehear the initial appeal. If the Upper Tribunal dismisses the appeal, an appellant may first make an application to the Upper Tribunal for leave to appeal to the Court of Appeal on a point of law. If this is refused, an appellant may make a request for leave to appeal to the Court of Appeal directly. If this is granted, a hearing will take place before the Court of Appeal. A final appeal can then be made to the Supreme Court.

#### Protection status granted in the United Kingdom

	Refugee status	Humanitarian Protection	Discretionary Leave
Residence permit	5 years	5 years	Variable but generally 1 or 3 years

**Reception system for asylum seekers/Asylum support:** Once an asylum claim has been lodged at the ASU, asylum seekers with no alternative source of accommodation can request support and accommodation from the UKBA. If they “appear to the Secretary of State to be destitute” they should be granted temporary support. Asylum seekers are then dispersed to one of the five “initial accommodation” centres around the UK (Section 98 Immigration and Asylum Act 1999). This is provided by the UKBA on a no-choice basis in five locations in the UK and is intended to be for a short period of a few weeks. Voluntary sector providers offer wrap-around independent advice for asylum seekers in this accommodation, and assist them to apply for UKBA dispersal support and accommodation under Section 95 Immigration and Asylum Act 1999.

UKBA should grant Section 95 support if the Secretary of State believes the applicant is “destitute” and has applied for asylum “as soon as reasonably practicable” according to Section 55 of the Nationality, Immigration and Asylum Act 2002. Section 95 support consists of smaller scale



accommodation within the same region, and a low level of financial support. Asylum seekers are entitled to receive Section 95 support whilst their claim for asylum, under both the Refugee Convention and/or Article 3 ECHR is being considered by the UKBA or the courts as long as the appeal was lodged on time. Section 95 support is available until 21 days (if refused) or 28 days (if granted) after the asylum claim is decided/the appeal is dismissed. The only exception is where the asylum seeker has a dependent child in her/his household, and that child was living with her/him before they exhausted their appeal rights. This group will continue to qualify for support for as long as they remain in the UK or until the youngest child turns 18.

If failed asylum seekers are unable to return to their country of origin they may be entitled to support under section 4 of the Immigration and Asylum Act 1999 if they are destitute, meet one of the five criteria for support or are applying for accommodation to support an application for bail from immigration detention.

Number of asylum application in 2010: 17,916

Number of asylum seekers in receipt of section 95 support in 2010: 24,197 (quarterly average)

Number of asylum seekers in receipt of section 4 support in 2010: 5,846 (quarterly average)

**Detention system for asylum seekers:** Women asylum seekers may be detained in Immigration Removal Centres (IRCs) such as Yarl's Wood IRC (single women, couples and families with adult children), Tinsley House IRC (families) and Dungavel IRC (single women and couples). They are also detained in Short Term Holding Facilities (STHF). There are three residential STHF in the UK, at Manchester Airport, Colnbrook IRC and Larne, Northern Ireland.

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