

**IMPROVING ASYLUM PROCEDURES
COMPARATIVE ANALYSIS AND RECOMMENDATIONS
FOR LAW AND PRACTICE**

**KEY GENDER RELATED
FINDINGS AND
RECOMMENDATIONS**



**UNHCR research project
on the application of key provisions of the
Asylum Procedures Directive in selected Member States**

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Translations: all English translations of national legislation, decisions and reports are unofficial translations by the researchers unless otherwise indicated. References to *acquis* instruments, where in English in quotation mark, are quoted from the English language official versions of those instruments.

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Introduction

In the exercise of its supervisory role under Article 35 of the 1951 Convention relating to the Status of Refugees, and with generous support from the European Refugee Fund, UNHCR has undertaken a wide-ranging comparative analysis of the transposition of key provisions of the Asylum Procedure Directive (APD) into national law by selected European Union (EU) Member States, and the practical application of those provisions¹.

Based on that analysis, UNHCR published its findings and recommendations in March 2010. These aim to assist Member State authorities in the interpretation and application of the Directive, as well as to inform discussions and work towards strengthening and improving asylum procedures across the European Union.

The issues of guarantees for a gender sensitive approach did not fall within the thematic scope of this research as a specific topic of focus. Nevertheless, in the context of the research, some very limited information emerged regarding the treatment of gender. This information derived primarily from desk research undertaken by the National Project Officers, or was provided by national stakeholders.

Gender related findings and recommendations set out in brief in the report have been collated in this report. They relate mainly to the following Articles of the APD and the relevant thematic areas of focus for the research:

- Article 12 - Opportunity for a personal interview (Section 4)
- Article 13 - Requirements for a personal interview (Section 5)
- Article 23 - Examination procedure, including prioritized and accelerated procedures (Section 9)
- Articles 32 & 34 - Subsequent applications (Section 14)

The sections above refer to the various chapters of the detailed research on key asylum procedures, Part 2 on the CD Rom also available on the internet at <http://www.unhcr.org/4ba9d99d9.html>.

This document should be read in conjunction with the main report, which provides more details on the findings and more in-depth analysis. The main report also contains in appendix the text of the Council Directive 2005/85/EC of 1 December 2005 on minimum standards and procedures for granting and withdrawing refugee status, OJ L 326/13 (Asylum Procedures Directive or APD), and a list of abbreviations and relevant definitions.

¹ UNHCR, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice. Key Findings and Recommendations, March 2010, <http://www.unhcr.org/4ba9d99d9.html>.

Opportunity for a personal interview

Article 12 APD sets out the general requirement that applicants for asylum, subject to some exceptions, must be given the opportunity of a personal interview on their applications for asylum with a person competent under national law.

The key gender related findings in this section pertain to who conducts the personal interview and the opportunity for adult dependants to have a personal interview.

Who conducts the personal interview?

'Personal interview' is not defined in Article 12 or in Article 2 of the Directive which sets out definitions. In reality, applicants for international protection in EU Member States may be interviewed by different authorities.

In most Member States surveyed, the personal interview is conducted by an employee of the determining authority. At the time of this research, however, one Member State provided for interviews to be conducted, not by an individual employee, but by a panel of nominated members. In Italy, personal interviews should, by law, be conducted by a panel of four members of the Territorial Commissions (the determining authority) composed of:²

- an official of the prefecture acting as President;
- a senior official of the state police;
- a representative of the state towns and local autonomies conference; and
- a representative of UNHCR.

This panel is responsible for the examination of the application, including not only the conduct of the personal interview, but also obtaining relevant COI and other evidence and the issue of the decision.³ Due to a significant increase in the number of applications for international protection at the beginning of 2008 and an insufficient number of Territorial Commissions to examine the increased number of applications, during the time of this research, all the personal interviews observed were conducted by one member alone or two members together in order to facilitate the simultaneous conduct of interviews and thereby increase the number of interviews conducted.⁴ There is no specialized training for members on recruitment to the Commissions and the competence of the members to conduct interviews varies greatly depending on their professional background, preparation for their task and personal attitudes. This means that the conduct of an interview by only one or two members of the Commission, rather than the full composition of four members, is significant for the quality of the personal interview and the outcome of the procedure in terms of the decision.

² Article 4 (3) of the d.lgs. 25/2008.

³ If there is no consensus on the decision, there is a vote. If the vote does not produce a majority decision, the vote of the President prevails.

⁴ Of the 20 interviews observed, 15 were conducted by one member and 5 were conducted by two members (I/02/M/GAM, I/03/M/NIG, I/04/F/NIG, I/13/F/CAM, I/15/M/NIG).

In the context of the current legislative provisions for Territorial Commissions, UNHCR considers it crucial that interviews are conducted by the full composition of members sitting as a panel, and that decisions are taken in plenary. UNHCR recognizes that the conduct of a personal interview by a committee or panel may strengthen the impartiality and objectivity of the interview as well as the consequent decision-making. It may also constitute a useful monitoring and quality control tool.

However, UNHCR is also aware that a panel of interviewers may be viewed as intimidating and counter to creating an environment which builds trust and is conducive to open disclosure. It is also more difficult to achieve gender-appropriate interviews. Furthermore, it may be more difficult to ensure a coherent line of questioning. In those Member States that conduct personal interviews by committee, measures are needed to ensure appropriate training and flexibility to ensure that the atmosphere is conducive to open disclosure in all circumstances.

Recommendations

Where personal interviews are conducted by committee, it is essential that all members possess the requisite knowledge and training, and are also able to recognise when it would be more appropriate that the personal interview is conducted by one member only.

Opportunity for adult dependants to have a personal interview

Article 12 (1) APD provides that “*Member States may also give the opportunity of a personal interview to each dependant adult referred to in Article 6 (3)*” APD. This is a permissive clause.

UNHCR considers that it is crucial to ensure that dependant adults understand⁵:

- the grounds for qualification for refugee and subsidiary protection status;
- the criteria for a derivative status;
- their right to make an independent application for international protection if they believe that they have independent grounds for qualification;
- the confidentiality of the asylum procedure; and
- their right to request that any interviews are conducted by an interviewer, assisted by an interpreter when necessary, of the sex preferred by the applicant and without the presence of other family members.⁶

⁵ Paragraph 3.2.6 of UNHCR Procedural Standards for RSD under UNHCR’s Mandate, 1 September 2005.

⁶ Some individuals who have experienced persecution or serious harm may not have disclosed the details of the harm to family members and may be reluctant to initiate an independent application or have a personal interview out of concern that the information they provide will be heard by or shared with their family members. This may be particularly relevant for individuals who have experienced gender-related persecution or sexual violence: Paragraph 3.2.6 of UNHCR Procedural Standards for RSD under UNHCR’s Mandate, 1 September 2005.

As such, the determining authority should ensure that it meets with each dependant adult individually, in private and without the presence of other family members, to ensure they understand the above-mentioned grounds and procedures for qualification for international protection and to offer each dependant adult the opportunity of a personal interview without the presence of family members. In particular, personnel of the determining authority should be aware that in certain cultures or family units, women who have grounds to apply for international protection may be reluctant to make an independent application or request a personal interview or may be discouraged from doing so and, therefore, gender and culturally sensitive communication is required.⁷ It is also UNHCR's position that if, at any stage of the asylum procedure, any information provided by either the principal applicant or the dependant adult, or gathered independently by the determining authority, indicates that the dependant adult may have independent reasons for international protection, this should be further examined in a separate personal interview with the dependant adult.

Recommendations

Member States should ensure that not only principal applicants but also dependant adults understand the grounds for qualification for refugee and subsidiary protection status. States should give the opportunity of a personal interview to each dependant adult and ensure that they have the opportunity to raise any protection needs they may have in their own right. The offer of a personal interview should be made to each dependant adult in private. The APD should be amended accordingly, in line with the practice prevailing in many Member States.⁸

If, at any stage of the asylum procedure, information provided by either the principal applicant or the dependant adult, or independently gathered by the determining authority, indicates that the dependant adult may have his/her own reasons for international protection, this should be further examined in a separate interview with the dependant adult.

This personal interview of dependant adults should take place without the presence of family members.

Requirements for a personal interview

The personal interview is an essential and crucial component of the procedure to determine whether a person is a refugee or qualifies for subsidiary protection status. It is UNHCR's position that all principal adult applicants must have the opportunity to

⁷ Paragraph 3.2.6 of UNHCR Procedural Standards for RSD under UNHCR's Mandate, 1 September 2005.

⁸ This is proposed in recast Article 13 (1): APD Recast Proposal 2009.

present their application in a comprehensive manner in a personal interview with a qualified interviewer and, where necessary, a qualified interpreter.⁹ In order to be effective, the personal interview must be conducted in a manner and in conditions which are conducive to the most complete and accurate disclosure by the applicant of the reasons for the application for international protection.

The presence of family members during the personal interview

It is UNHCR's view that any preliminary interview and the personal interview with the principal applicant should not be conducted in the presence of family members unless there are compelling reasons to indicate that this would not be appropriate or constructive.¹⁰ Similarly, it is UNHCR's position that any interview of adult family members/dependants should be conducted separately and confidentially.¹¹

Article 13 (1) APD provides that *"a personal interview shall normally take place without the presence of family members unless the determining authority considers it necessary for an appropriate examination to have other family members present"*.

Only five Member States of focus in this research have fully and explicitly transposed or reflected Article 13 (1) APD in national legislation, regulations or administrative provisions. These are Germany¹², Greece¹³, Italy¹⁴, Spain¹⁵ and the UK.¹⁶ In two Member States, Article 13 (1) APD is not explicitly transposed or reflected, but there

⁹UNHCR, *Executive Committee Conclusion on Refugee Status Determination*, 12 October 1977, No. 8 (XXVIII) - 1977, and *Executive Committee Conclusion on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV)- 1983. See also UNHCR Procedural Standards for Refugee Status Determination under UNHCR's Mandate, 1 September 2005. See section of this report on the right to the opportunity of a personal interview for dependants and unaccompanied and separated children.

¹⁰ See Paragraph 4.3.13 of UNHCR Procedural Standards for RSD under UNHCR's Mandate, 1 September 2005.

¹¹ Paragraph 3.2.6 of UNHCR Procedural Standards for RSD under UNHCR's Mandate, 1 September 2005. Some individuals who have experienced persecution or serious harm may not have disclosed the details of the harm to family members and may be reluctant to initiate an independent application or have a personal interview out of concern that the information they provide will be heard by or shared with their family members. This may be particularly relevant for individuals who have experienced gender-related persecution or sexual violence

¹² Section 25 (6) APA: *"The interview shall not be open to the public. It may be attended by persons who show proof of their identity as representatives of the Federation, of a Land, the United Nations High Commissioner for Refugees or the Special Commissioner for Refugee Matters at the Council of Europe. The head of the Federal Office or his deputy may allow other persons to attend."* The Handbook *"Interview"* (one of the so-called "Quality Handbooks") explicitly advises that, as a rule, spouses should be interviewed separately (2.5.4 "Separate interviews of spouses", page 13). According to the BAMF, this rule is also followed in practice, unless otherwise explicitly requested by the applicant.

¹³ Article 10 (6) PD 90/2008.

¹⁴ Article 13 (1) d.lgs. 25/2008.

¹⁵ Article 17.4 of the New Asylum Law states: *"The application will be formalized by way of a personal interview which will always be individual. Exceptionally the presence of other family members may be required if this is considered absolutely necessary for the adequate formalization of the application."*

¹⁶ Immigration Rule 339NB.

is an absence of legislation permitting the presence of adult family members during the personal interview. These are Bulgaria¹⁷ and the Czech Republic.¹⁸

Recommendation

Member States should ensure that the personal interview takes place without the presence of family members, unless the determining authority considers their presence necessary for an appropriate examination.

Conditions of confidentiality

The confidentiality of the personal interview, and indeed of all procedures, is essential to creating an environment of security and trust for applicants. Article 13 (2) APD requires that interviews “*take place under conditions which ensure appropriate confidentiality*”. This should be interpreted as applying both to the spaces and physical conditions in which personal interviews take place as well as to the persons who participate in or are present during the interview.

One quarter of the Member States in this research have transposed Article 13 (2) APD in national provisions. Half have legislation requiring non-disclosure of information, but this legislation does not address the physical conditions in which interviews take place. Observation of interviews revealed that six of the Member States surveyed ensured, in practice, that personal interviews were conducted under physical conditions which ensured confidentiality. In several others, however, interviews did not take place in privacy or without interruptions. In three states, UNHCR observed interviews which took place simultaneously in one space with numerous people unconnected to the interview being present, raising serious questions about confidentiality, among other things.

Recommendation

Member States must ensure that all personal interviews are conducted in physical conditions that ensure confidentiality i.e. in private rooms and in the presence of only those persons who are permitted by law to attend. The interview proceedings should not be audible or visible to persons who are not involved in the interview.

Conditions conducive to an effective personal interview

Article 13 (3) APD requires Member States to 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.¹⁹ There are a

¹⁷ Article 63a of LAR does not provide for the presence of family members.

¹⁸ Article 9 ASA provides for exemption from general provisions regarding the oral hearing in the CAP. The Act on Asylum does not however regulate who may be present at the oral hearing.

¹⁹ Article 13 (3) 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.*”

number of steps which should be taken by Member States in order to ensure compliance with Article 13 (3) APD. This section discusses two specific aspects raised by Articles 13 (3) (a) and (b) APD, regarding the competence of the interviewer and the competence of interpreters.

Competence of interviewers

The personal interview is an essential part of the examination of the application for international protection. The task of the interviewer is hugely challenging and complicated, and s/he bears a heavy burden of responsibility. S/he has to conduct a personal interview which establishes, as far as possible, all the facts relevant to determining whether a person is a refugee or qualifies for subsidiary protection status according to law. This requires interviewers to have both specific knowledge and specific skills. This also requires an understanding of applicants' particular circumstances and any special needs.²⁰

Article 13 (3) (a) APD requires Member States to "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, insofar as it is possible to do so". In this regard, Article 8 (2) (c) APD is also relevant as it requires that the personnel examining applications has the knowledge with respect to relevant standards applicable in the field of asylum and refugee law.

UNHCR is of the view that the above two mentioned provisions of the APD mean that, at a minimum, Member States should ensure that interviewers are competent *inter alia* to recognise and take account of factors such as the applicant's age, gender, culture, education and any other vulnerabilities for the purposes of the interview.

Several surveyed Member States have transposed Article 13 (3) (a) APD, requiring states to "*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, insofar as .. possible..*". Several have done so partially, and others have not.

Recommendation

Member States must ensure that national legislation, regulations or administrative provisions require that interviews are conducted by qualified interviewers, who have knowledge of the relevant international and national laws, and have been trained to conduct interviews in the context of asylum procedures, and are competent to take into account the personal and general circumstances surrounding the application.

²⁰ See paragraph 190 of UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, 1991.

Qualifications and training of interviewers

In UNHCR's view, the recruitment and retention of highly qualified and skilled interviewers and decision-makers is essential for an effective procedure and sustainable first instance decisions.

UNHCR recommends that a university degree in a related field is the desirable minimum educational qualification for the recruitment of interviewers and decision-makers.²¹ UNHCR also believes that before carrying out personal interviews, interviewers should receive comprehensive and specialist training which includes, as a minimum for a gender sensitive approach, identification of applicants with special needs; interviewing and questioning techniques, including age, gender, cultural, educational and trauma sensitivity; Issues of confidentiality, impartiality, and objectivity; and creating conditions conducive to communication and appropriate conduct.

Recommendations

UNHCR recommends that all Member States develop and deliver a compulsory specialized training programme for every newly recruited interviewer upon recruitment and prior to conducting personal interviews, in order to ensure compliance with Article 13 (3) (a) and Article 8 (2) (c) APD.

Interviewers should receive initial training which includes, as a minimum:

- **International refugee and human rights law, and the applicable national laws, regulations and administrative provisions;**
- **Access to/research into country of origin information (COI), evaluation and application of COI and other evidence;**
- **Identification of applicants with special needs;**
- **Interviewing and questioning techniques, including age, gender, cultural, educational and trauma sensitivity;**
- **Working effectively with and managing interpreters;**
- **Issues of confidentiality, impartiality, and objectivity;**
- **Creating conditions conducive to communication and appropriate conduct;**
- **Structuring the personal interview, establishing the relevant facts and the assessment of credibility.**

There should also be some form of external quality assurance for the training.

Training for interviewing children

Personal interviews of children should be conducted in an age-appropriate manner taking into account the maturity and emotional development of the child and any

²¹ Paragraph 4.2.1 UNHCR Procedural Standards for RSD under UNHCR's Mandate, 1 September 2005.

other special needs. States therefore must ensure that the authorities conducting personal interviews have this specialized staffing capacity.

During UNHCR's research, only some determining authorities reported that they ensure that the personal interview of children is conducted by specially trained interviewers. In one state, good practice is exemplified by a unit of personnel specifically trained to deal with applications of unaccompanied children. It is of concern that in the other Member States in this research, UNHCR was informed that interviewers are not specifically trained to interview children. In order to ensure compliance with Article 13 (3) (a) and Article 17 (4) (a) APD, the determining authority must ensure that all interviews of children are conducted by personnel with specialist knowledge and training.

Recommendations

All determining authorities should ensure that there is specific training on interviewing children and that sufficient numbers of interviewers are available, of both sexes, who are specially trained to conduct interviews of children.

Determining authorities must ensure that all interviews of children are conducted by interviewers who have been specially trained and have the necessary knowledge regarding the psychological and emotional development and behaviour of children.

The APD should be explicit in providing that all interviews of children – not just unaccompanied children – are conducted by a person who has the necessary knowledge of the special needs of children.

Training for interviewing persons with special needs

Member States should ensure that they have mechanisms in place to identify and assist, at the earliest possible stage of the asylum procedure, applicants who are vulnerable or have special needs. With regard to the personal interview, this is essential to ensure that any necessary referrals and assessments are carried out promptly in order to determine whether applicants are physically and mentally fit for the personal interview and to inform any decision regarding the scheduling of the personal interview.

Moreover, early identification of applicants with special needs is crucial in order to assign responsibility for the conduct of the personal interview to an appropriate interviewer who has the requisite specialized knowledge, training and experience. As such, it is important that the personnel of the competent authorities that conduct registration procedures or preliminary/screening interviews are trained to identify and refer as necessary applicants who may have special needs; and that there are sufficient trained personnel who are designated and qualified to conduct the preliminary or screening interviews of applicants with special needs.

However, it should be acknowledged that for a number of reasons, including shame or lack of trust, applicants may be hesitant to disclose certain experiences immediately. This may be the case, amongst others, for persons who have suffered torture, rape or other forms of psychological, physical or sexual violence. Special needs resulting from such experiences may therefore go undiscovered at the early stage of the procedure.

Later disclosure of such experiences should not be held against applicants, nor inhibit their access to any special support measures or necessary treatment.

Occasionally an applicant's special needs may not become apparent until the personal interview. Therefore, it is important to ensure that all personnel who conduct personal interviews are able to identify applicants who have special needs, and are able to take appropriate measures as necessary. Moreover, the determining authority should have designated interviewers who have the requisite specialized knowledge, training and experience to conduct the interview of applicants with special needs.

Article 13 (3) (a) APD requires Member States to ensure that the person who conducts the personal interview is sufficiently competent to take account of the applicant's vulnerability. This provision states that "*Member States 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 ... vulnerability, insofar as it is possible to do so*". It is UNHCR's view that applicants who may be vulnerable include²²:

- Victims of torture, sexual violence and persons suffering post-traumatic stress disorder;
- Women with special needs;
- Children under the age of 18;²³
- Elderly applicants;
- Applicants with a disability; and
- Applicants with mental or physical health problems.

Member States must ensure that the competent authorities designate and train sufficient staff to conduct the interviews of vulnerable applicants and ensure that the interview of an applicant with special needs is conducted by a trained and qualified interviewer.

UNHCR was informed by the determining authorities in Belgium²⁴, the Czech Republic,²⁵ Finland,²⁶ Italy,²⁷ Germany,²⁸ the Netherlands²⁹ and the UK³⁰ that they

²² Paragraph 3.4.1 of UNHCR Procedural Standards for RSD under UNHCR's Mandate, 1 September 2005.

²³ See above.

²⁴ In Belgium, Article 4 of the Royal Decree of 11 July 2003 concerning the CGRA provides that the case

manager should take into account the specific circumstances of the case.

provide specific training for interviewers. By contrast, UNHCR was informed that there is no compulsory specialist training on applicants with special needs provided in Bulgaria,³¹ France, Greece,³² Slovenia and Spain.³³

Recommendations

In order to ensure compliance with Article 13 (3) (a) APD, Member States must ensure that training on the identification of applicants who may be vulnerable or who have special needs is included as part of a compulsory initial training programme for all interviewers and that existing interviewers receive appropriate training.

Member States must also ensure that a sufficient number of interviewers are specifically trained to conduct the interview of applicants with special needs.

Specialist knowledge of countries of origin and cultural factors

Article 13 (3) (a) APD also requires Member States to ensure that the person who conducts the interview is sufficiently competent to take account of the applicant's cultural origin.³⁴ This is important not merely to help the interviewer understand the context in which any alleged persecution or serious harm was perpetrated, but also

²⁵ According to Head of Asylum Procedure Unit, interview of 7 April 2009. Although, it was noted that at the time of the UNHCR research, there was no specialized staff to deal with vulnerable applicants at the inland reception centre (Vyšni Lhoty).

²⁶ Training on special needs is offered on a regular basis and on request by decision-makers/interviewers.

²⁷ The training courses organized by the National Commission each year since 2005 have included a session on the consequences of trauma and a specific training event on interviewing victims of torture and violence took place in spring 2009 with the participation of medical experts as trainers. Moreover, the National Commission has promoted and funded a project that provides for the creation and training of a network of experts in the public sector for the identification and certification of victims of trauma.

²⁸ In addition to the specialized staff for unaccompanied children, there is specially trained staff for interviewing persons persecuted on grounds of gender as well as victims of torture and traumatized asylum seekers. On its website the determining authority states that this staff requires considerable sensitivity as well as psychological skills and needs special personal support (www.BAMF.de).

²⁹ The KLC does offer an optional training module on trauma. Newly recruited IND civil servants receive initial materials on traumatized persons and sometimes an expert may be invited to give a lecture. Later, interviewers can opt to participate in a follow-up course.

³⁰ Although UNHCR is not aware of any specific training relating to issues of gender.

³¹ Note that training on applicants with special needs has been provided in the past.

³² This is not in compliance with national legislation. Article 10 (8) (a) of PD 90/2008 sets out a provision which demands that police officers who conduct the asylum interview be trained on special needs of women, children and victims of violence and torture.

³³ Ad hoc training may have been undertaken by some interviewers in Bulgaria, France and Italy. And in the Netherlands, there is an optional module as part of the training programme but there are no specially trained staff on dealing with sexual violence.

³⁴ "Member States shall ensure that a 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".

for understanding the applicant's background, as well as his/her demeanour and communication in the personal interview.

UNHCR has been informed that in a few Member States, personnel of the determining authorities who are responsible for the examination of the application specialize in particular countries and regions of origin. In Belgium, Finland and France,³⁵ personnel are assigned to specific geographic units. As such, they receive specific training on the relevant countries of origin, and gain an in-depth familiarity with the relevant country of origin information which is periodically updated.³⁶

In the Netherlands, interviewers do not specialize in particular countries or regions of origin, but UNHCR was informed by the determining authority (IND) that the National Knowledge and Learning Centre (KLC) organizes so-called "theme-specific" days for example on regions of origin.

In Germany, UNHCR was informed by the determining authority that in practice, every adjudicator has specialist knowledge with regard to those countries s/he constantly deals with.³⁷ This may lead to a specialization in a group of countries (for instance Ethiopia, Eritrea, and Somalia). Interviews of applicants from countries of origin where only a relatively small number of applicants originate from, are conducted by a few branch offices only, in order to ensure specialist knowledge of these countries of origin.³⁸

However, in the other Member States of focus, training with regard to specific countries of origin and cultural factors appears to be limited or non-existent at the time of writing.³⁹

³⁵ With the exception of personnel who conduct interviews at the border.

³⁶ Eligibility and admissibility officials who conduct personal interviews in the regular procedure in Spain are also assigned specific countries of origin. However, this is not the case for officials who conduct the application interviews nor for the eligibility and admissibility officials who conduct the application interviews at Madrid Barajas airport.

³⁷ The determining authority stated that the high quantity of applications does not allow for the specialization of adjudicators in one particular country. According to the BAMF, all adjudicators have thorough knowledge of the main countries of origin and almost all adjudicators conduct interviews of applicants from these countries. The lawyers consulted by UNHCR in the framework of this study, confirmed knowledge of the adjudicators on the respective countries of origin, however, all criticized the lack of sensitivity for cultural factors (X1, X2, and X3).

³⁸ However, concerns have been raised with regard to those persons who have registered with a specialized NGO as torture victims and therefore their applications are not further distributed to another branch office, but stay in the city where they have requested asylum, in order to ensure their medical treatment there. Thus, these persons might not be interviewed by a staff member with special knowledge with regard to his/her country of origin, but by someone who needs to acquire that knowledge.

³⁹ In Bulgaria, according to the determining authority specialization by countries of origin has been in existence in the past; cultural factors were also included as part of different trainings. The practice was terminated in order to avoid any possible corruption, and in the Czech Republic following a decrease in the number of applicants, the previous staff specialization in particular countries of origin and specialized COI workshops have been suspended. Interviews with Employee A (18 February 2009), C (28 January 2009), D (22 December 2008), and E (13 February 2009).

Recommendations

In order to ensure compliance with Article 13 (3) (a) APD, Member States should ensure that the relevance of cultural factors for communication, including issues relating to the status of women, customs and education, and the demeanour of the applicant during the personal interview be an integral part of a compulsory initial training programme for all interviewers upon recruitment.

Member States should also offer ongoing training on specific countries and regions of origin through, for example, workshops and meetings for interviewers.

Competence of interpreters

UNHCR supports the requirement in Article 13 (3) (b) APD that applicants receive the services of an interpreter, whenever necessary, during the personal interview, as well as the requirement that the interpreter must be able “*to ensure appropriate communication between the applicant and the person who conducts the interview*”. UNHCR has already noted its concern that the APD refers to a language which the applicant ‘*may reasonably be supposed to understand*’ and reiterates that the language used must be language which the applicant understands. This is a prerequisite for a fair procedure and when it is not fulfilled, any evidence gathered in the course of the personal interview may be unreliable.

Seven Member States of focus in this research have transposed or reflected this Article in national law, while four have not. In one state, an interpreter is required for an interview to be conducted, but if no interpreter is available, the claim may be determined nevertheless; a practice which does not appear to fulfil the requirements of Article 10 (1) (b) APD.

Recommendations

Member States should have national legislation, regulations or administrative provisions which require that applicants receive the services of a qualified interpreter whenever the competent authority calls upon the applicant to communicate with the authority and appropriate communication cannot be ensured without such services. This should include any initial or screening interview and the personal interview. The APD should be amended to this effect.

Article 13 (3) (b) APD should be amended to require that communication take place in a language which the applicant understands and in which s/he is able to communicate.

Availability of interpreters

Competent authorities need to have access to a sufficient number of interpreters covering the main languages spoken and understood by applicants for international

protection.⁴⁰ According to the research, in some Member States, the determining authority employs interpreters, while others use independent service-providers or agencies. Several Member States face shortages of interpreters in particular languages or locations. Some states have addressed this challenge by using interpreters via video conference, which appears to have yielded positive results.

Recommendation

States should seek to ensure that they have sufficient qualified interpreters of both sexes for all the main languages of applicants. In the absence of a qualified and trained interpreter who speaks the language of the applicant, determining authorities should seek to establish agreements with other determining authorities whereby interpreters in other EU Member States are used via video link. The European Asylum Support Office could have a facilitative role to play in this regard.⁴¹

Qualifications of interpreters

Within the scope of this research, UNHCR was not able to establish comparatively the qualifications required of interpreters by Member States, as some states use outside service providers, and the time constraints for this research did not allow UNHCR to interview these service providers. However, UNHCR notes that the Czech Republic⁴² has national legislation which requires interpreters to have undertaken training whenever possible; and the Czech Republic and Slovenia⁴³ have national legislation requiring interpreters to have experience of interpreting. Whereas, in France, for example, the qualifications and skills required of interpreters are part of the contract with the service provider and in the Netherlands, an agency under the responsibility of the Ministry of Justice is tasked with ensuring that interpreters on the register have the necessary skills.⁴⁴ However, in a number of Member States, it

⁴⁰ Note that the competent authorities also need to take steps to identify both male and female interpreters so that, as far as possible, there is the capacity to conduct gender-sensitive interviews.

⁴¹ The 6th GDISC conference on 28 October 2009 noted that the Interpreters' Pool Project should be transferred to the European Asylum Support Office.

⁴² According to Section 4 of Act No. 36/1957 Coll. on Experts and Interpreters, an interpreter may be appointed if: "a) s/he is a Czech citizen, b) s/he has necessary knowledge and experience from the field (language) in which s/he is to function, especially one who has completed specialized training on the expert (interpreter) activities, in case there is such training available for the field (language) in which s/he is to function; c) has such personal abilities that allow for presumption that s/he can do the expert (interpreter) activities properly; d) agrees with his/her appointment."⁴² [Precondition a) can be pardoned].

⁴³ Art. 11(5) IPA. In Article 11 (3) IPA there is a list of requirements which interpreters must fulfil including evidence of a command of Slovene and the other language and evidence of previous experience of interpreting and knowledge of the corresponding translations of professional terms which are used in international protection procedures. Also, national legislation gives priority to interpreters who have a broad general education, in particular in the field of anthropology, culture, political science, and sociology, and is also familiar with the actual political situation and culture in the state of the language which is the subject of interpretation; and knows the corresponding translations of professional terms which are used in procedures for obtaining international protection.

⁴⁴ Bureau beëdigde tolken en vertalers (BTV), www.bureaubvtv.nl.

was reported that no specific professional qualifications are required for interpreters (Belgium, Bulgaria, Finland,⁴⁵ Germany⁴⁶, Greece and Italy).

UNHCR is concerned to note that there is no official procedure for the recruitment of interpreters in Greece, nor job description setting out minimum qualifications. UNHCR was informed that in ADA, in Athens, prospective interpreters submit a *Curriculum Vitae* and are recruited without any interview to assess their suitability for the job.⁴⁷ Moreover, the Asylum and Security Departments outside Athens confront severe shortages of interpreters and reportedly use any available interpreter who can understand applicant's language.⁴⁸

Recommendation

Competent authorities should, as a matter of good practice, aim to use professionally trained and qualified interpreters. Where this is not possible, the authorities should ensure that interpreters have at least adequate interpreting skills. These include:

- **A competent command of the relevant languages;**
- **The ability to accurately and faithfully interpret what is said by the interviewer and applicant without omission, addition, comment, summarizing or embellishing;**
- **The need to use the same grammatical person as the speaker;**
- **Note-taking skills; and**
- **Gender, age and cultural sensitivity in interpretation.**

Training for interpreters

Interpreters should receive appropriate training before interpreting personal interviews in the asylum procedure.⁴⁹ In order to perform their task effectively, professionally and ethically, interpreters must be aware of the purpose of their work in relation to the mandate of the determining authority, the international protection framework and the purpose of the personal interview specifically. Interpreting personal interviews requires knowledge of the terminology that is most frequently and commonly used in personal interviews.

⁴⁵ In practice, the determining authority in Finland strives to use only interpreters with official degrees in translation but this is not always possible with regard to the rarer languages.

⁴⁶ Asylum law does not contain any requirements in this regard. The determining authority informed UNHCR that in practice, it seeks to use interpreters with an official degree, however, this is not always possible, especially with regard to rarer languages. According to stakeholder X2, the low payment for translation services seems to be a problem in this regard. This was confirmed by an interpreter (INTX).

⁴⁷ Interview with interpreter in ADA (S5)

⁴⁸ Interview with S6 and S14.

⁴⁹ See '*Interpreting in a Refugee Context – Self-study Module 3*', UNHCR, 1 January 2009. This UNHCR self-study module is designed to familiarize interpreters with the principles and techniques of interpretation and assist UNHCR staff and partners in the field who frequently use the services of interpreters, in designing and conducting their own training sessions.

Moreover, interpreters should receive guidance on the need for impartiality and neutrality in their role, and the duty of confidentiality. Training should also cover all relevant aspects of professional conduct including the need to be respectful, refrain from providing advice on the case or procedures to the interviewer or applicant, and not take on tasks that are unrelated to the role of an interpreter.

Across the 12 Member States of focus in this research, the provision of training for interpreters is, at best limited, and in many cases non-existent.

In a significant number of the Member States of focus in this research, the determining authorities do not organize any training for interpreters.⁵⁰ In Finland, steps are being taken to address the deficit in training. Following a joint ERF funded project involving the Immigration Services and the NGO Refugee Advice Centre, an extensive guide which includes guidance on the role and conduct of interpreters has been published. Training for interpreters, on the basis of these guidelines, was planned to commence in autumn 2009.

Exceptionally, in Belgium, interpreters who interpret personal interviews with unaccompanied children receive the same training as case managers conducting the interviews with unaccompanied children; and for other interpreters, voluntary training sessions are offered by the CGRA. Moreover, the CGRA is currently working with its best interpreters on a list of essential refugee terms and accurate translations. In the Czech Republic, the service-provider provides interpreters with a dictionary of basic terms used in the asylum procedure.⁵¹

Some initiatives have also been taken in Bulgaria,⁵² France, Italy and Spain. It should be noted that in France, the service providers do offer specific training sessions for interpreters, and the determining authority OFPRA has informed UNHCR that it plans to participate in some of the training sessions organized by these service providers in the future.⁵³ In Italy, the service provider, in cooperation with UNHCR and the CTRPIs, also recently organized training sessions for interpreters in 2008 and February 2009. 80 interpreters working in the different CTRPIs across Italy participated in the latter training session. Finally, in Spain in 2008, the Ministry of Interior, on the initiative of OAR's Interpreters Service, organized a one day training course for the interpreters of the service provider. More recently, UNHCR together with the Bulgarian Helsinki Committee held a training session for interpreters in Bulgaria.⁵⁴

⁵⁰ Bulgaria, the Czech Republic, Finland, Germany, Greece, the Netherlands, and Slovenia. No information for the UK. The determining authority in Germany reported that a new attempt will be undertaken to train interpreters, since more and more translating services are offered to the BAMF. According to the BAMF, former attempts to provide training have failed as the time allocated for the training meant unpaid working time for the interpreter.

⁵¹ According to the Head of Asylum Procedures, interview of 7 April 2009.

⁵² In Bulgaria, UNHCR organized training for interpreters in 2003 and 2006 covering the need for faithful interpretation, impartiality, gender, age and cultural sensitivity and obligations of confidentiality.

⁵³ Interview with the Head of Interpretation Service of OFPRA.

⁵⁴ 27 November 2009.

Recommendations

UNHCR recommends that all Member States develop and deliver a training programme for interpreters engaged in the asylum procedure. Interpreters should receive specific training on interpreting personal interviews in the asylum procedure, and recruitment should be conditional upon completion of training. Training should cover a code of conduct for interpreters and include:

- the framework of international protection and the purpose of the personal interview;
- the importance of faithfully interpreting what is said by the interviewer and applicant;
- impartiality, neutrality, objectivity, and confidentiality;
- the role and conduct of the interpreter in the personal interview; and
- gender, age and cultural sensitivity in interpretation.

With regard to the personal interview of children, Member States should engage to the extent possible interpreters who have specific training on interpreting for children.

Member States should produce a glossary of essential and frequently used terminology in the main languages of applicants for international protection.

EU guidelines should be developed, potentially under the auspices of the EASO, which set out the minimum desirable qualifications and minimum training required for interpreters in the asylum procedure.

Other appropriate steps which should be taken to ensure effective personal interviews

In addition to ensuring the competence of the interviewer and the interpreter, UNHCR considers that Article 13 (3) APD requires Member States to take further appropriate steps in order to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. Of relevance to this report are some specific measures for applicants with special needs.

Specific measures to address special needs

Member States should have measures and procedures in place to identify, as early as possible in the procedure, and refer as appropriate, applicants who have special needs. An initial or screening interview and reception procedures may provide an opportunity to identify applicants who have special needs. However, an applicant's special needs may not become evident until during the personal interview.

Interviewers should be aware that the following are applicants who may be vulnerable or have special needs which need to be taken into account during the personal interview:

- Victims of torture, sexual violence and persons suffering post-traumatic stress disorder;
- Women with special needs;
- Children under the age of 18;
- Elderly applicants;
- Applicants who have a disability; and
- Applicants with mental or physical health problems.

Before initiating the personal interview, interviewers should ask whether the applicant feels physically and psychologically fit for the personal interview.⁵⁵ If the applicant indicates that s/he does not feel well, the interviewer should ask follow-up questions to assess the nature of the problem. Similarly, if after initiating the personal interview, the interviewer has reasons to doubt whether the applicant is fit for the personal interview, the interview should be suspended. In both cases, the interviewer must assess whether or not it is appropriate to proceed with the personal interview or whether other action is required, for instance, a referral to a medical expert and/or counselling and support services.⁵⁶ This requires determining authorities to have appropriate referral processes in place. Women who have or may have experienced sexual or domestic violence may require referral as necessary, and steps should be taken to seek to ensure a gender-sensitive interview.⁵⁷

The determining authorities of only a few Member States were reported to have guidance in place regarding the treatment of persons with special needs: Belgium, Finland⁵⁸ and the UK.⁵⁹ However, UNHCR, within the scope of this research, was not able to assess the quality of these guidelines or the extent to which they are implemented in practice.⁶⁰

UNHCR was informed by the determining authority in Belgium that it has a 'gender cell', comprising a coordinator and a case manager in each geographic section. The coordinator ensures that the case managers have appropriate guidelines for the

⁵⁵ UNHCR was concerned to observe that at ADA in Athens, Greece, interviewers routinely stated in writing in the record of the interview that the applicant was in good health and physical condition without having asked the applicant about his/her health.

⁵⁶ Paragraphs 205, 208 and 212 of UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, 1991.

⁵⁷ See sub-section below for further information.

⁵⁸ Administrative Asylum Guidelines and the guide produced following the ERF-funded joint project of the Immigration Services and Refugee Advice Centre both provide guidance on interviewing persons with special needs.

⁵⁹ The API on Interviewing contains a section on '*Interviewees requiring particular care*'. There is a separate API on *Gender Issues in the Asylum Claim*, October 2006.

⁶⁰ Concerns have been expressed in the UK that guidelines on gender are not followed in practice. See "Lip Service" or implementation? The Home Office Gender Guidance and women's asylum claims in the UK March 2006: UNHCR 4th Quality Initiative Report.

examination of applications by women and ensures that these are implemented and applied in practice. Moreover, s/he ensures that relevant international and national case law relevant to applications by women are distributed to case managers, and that the geographic sections inform the coordinator of their needs with regard to gender.⁶¹

In Germany, specially trained staff interview victims of sexual violence and torture, traumatized applicants, and unaccompanied minors.⁶² Moreover, the determining authority informed UNHCR that all staff conducting interviews has been sensitized to identify indicators that an interviewee has special needs.⁶³

In Italy, the National Commission has facilitated the creation of a network of experts in the public sector to whom the determining authority can refer, when applicants with special needs are identified prior to or during the personal interview.⁶⁴

In the course of this research, UNHCR did observe some interviews where applicants with special needs were treated with sensitivity.⁶⁵ However, UNHCR also audited a record of a personal interview of a female child which revealed a lack of appropriate action. The interviewer was male and the child's father was present as her legal guardian. The applicant asked for her mother to be present instead of her father. She stated repeatedly that she was the daughter of her mother, not her father. The interview only took a few minutes and only four questions were asked. The transcript stated that the applicant was unable to respond to questions and that her father was unable to understand what she was saying. A decision on the application was taken on the basis of this short interview. The interview was not postponed for the applicant to be referred to a medical expert or to a counsellor for an assessment. And the interview was not re-scheduled to take place without the presence of her father.⁶⁶

⁶¹ Presentation of the examination of asylum applications by the CGRA (evaluation of the new asylum procedure before the Senate), March 2009.

⁶² See for instance Internal Guidelines for the Asylum Procedure, under "*Adjudicator with special tasks*" (1/3) – (3/3). It should also be noted that it is standard practice to ask applicants at the outset of the interview whether they feel fit for the interview.

⁶³ The determining authority also informed UNHCR that in case such indicators are identified, the adjudicator shall inform the applicant (again) that specially trained interviewers (so-called "*Sonderbeauftragte*") are available. The conduct of the interview by one of these "*Sonderbeauftragte*" needs to be noted down in the hearing report.

⁶⁴ NIRAST (Network Italiano per Richiedenti Asilo Sopravvissuti a Tortura) project.

⁶⁵ An interview in Bulgaria where the applicant who had mild mental health problems was treated with sensitivity. Similarly, UNHCR observed two interviews in Slovenia where elderly applicants were treated with sensitivity: the interview room was warmed in advance, breaks were offered, a nurse was called to treat an eye complaint and questions were adapted to aid understanding; application No. 2-2009 and 3-2009.

⁶⁶ X008, the Czech Republic.

UNHCR was informed that there are no specific guidelines regarding the treatment of persons with special needs in the Czech Republic, France, Greece,⁶⁷ Italy, the Netherlands, Slovenia, and Spain.

Recommendation

UNHCR recommends that EU-wide guidelines on the personal interview of persons with special needs are adopted and implemented in all Member States. UNHCR would be available to play an advisory role in the elaboration of such guidelines.

Gender-sensitive interviews

The gender of the applicant should be taken into account when assigning a case file to an interviewer and appointing an interpreter. A woman may be reluctant, or find it difficult, to talk about her experiences to a male interviewer and/or through a male interpreter. This may especially be the case where these experiences relate to, for example, sexual violence.

UNHCR's Procedural Standards and guidance on interviewing state that, if at all possible, female applicants should be interviewed by a female interviewer and female interpreter (where an interpreter is required).⁶⁸ Gender-appropriate interviewing will enhance the fact-finding potential of the interview, but this becomes particularly important when the application indicates that gender issues may be raised in the personal interview.

UNHCR has been informed that in no Member State of focus in this research is the provision of a same-sex interviewer and interpreter mandatory. Moreover, the provision of a same-sex interviewer *and* interpreter is not mandatory or automatic, even for applications which raise the issue of sexual violence. Exceptionally, legislation in the Czech Republic does require the provision of an interviewer of the same sex "*for reasons that require special consideration or upon explicit request of the applicant*", but provision of an interpreter of the same sex is conditional upon availability.⁶⁹

UNHCR was informed that in some Member States, the competent authorities formally ask applicants at an initial or screening interview whether they have a

⁶⁷ Article 10 (12) of the law (PD 90/2008) states that "*If, there are strong indications during the interview that the applicant has been submitted to torture, s/he shall be referred to a specialized medical centre, or a doctor or a psychologist of a public hospital, who shall make a report on the existence or not of injuries of maltreatment or of indications of torture.*" However, in practice, it was reported that there is no referral procedure and that the situation is worse since the suspension of operations of the independent and specialist Medical Centre for Rehabilitation of Victims of Torture.

⁶⁸ Paragraphs 2.5.1 and 4.1.1 of UNHCR Procedural Standards for RSD under UNHCR's Mandate, 1 September 2005 and Interviewing Applicants for Refugee Status, 1995.

⁶⁹ Section 23 (3) ASA states that: "*For reasons that require special consideration or upon an explicit request of the applicant for international protection, the Ministry shall arrange that the interview shall be conducted and, if feasible on the part of the Ministry, interpreting shall be provided by a person of the same gender.*" See below – this may not always be implemented in practice.

preference with regard to the sex of the interviewer and interpreter at the personal interview: Belgium, the Netherlands⁷⁰ and the UK.⁷¹ The authorities stated that they seek to satisfy any such request as far as possible.⁷² Moreover, in accordance with Belgian law, if the case manager considers that the persecution alleged by the applicant may be related to his/her sex, at the beginning of the interview, the case manager should check whether the applicant has any objections to the interview being conducted by a person of the opposite sex.⁷³ In the Netherlands, in the personal interviews that UNHCR observed, also at the end of the interview, the applicant was asked whether the sex of the interviewer and interpreter had prevented the applicant from giving a full account. From the templates of the detailed interview, provided by INDIAC, it is standard to raise these questions at the end of the interview.

In Germany, the information leaflet provided to applicants at the outset of the procedure informs female applicants of the possibility to request a female adjudicator and that in such cases the interview will also be carried out with the assistance of a female interpreter (if possible).⁷⁴

The determining authorities of the other Member States of focus in this research reported that, upon request by the applicant (or sometimes upon the request of the

⁷⁰ C3/3.1.1 Aliens Circular is applicable in the regular procedure and provides that a female applicant should be informed about the possibility to be interviewed by a female in the presence of a female interpreter. In observations of initial interviews, UNHCR observed that applicants are asked if they have a preference regarding the sex of the interviewer and interpreter for the detailed interview.

⁷¹ UNHCR 5th Quality Initiative Report paragraph 2.4.31 (March 2008).

⁷² In the UK, the guidelines 'API Conducting the Asylum Interview: *Requests for a Same Sex Interviewing Officer*' states that this request should be accommodated as far as possible, especially if the request has been made in advance of the interview. If an applicant refuses to go ahead without a same-sex interpreter, the interview will only be postponed if a same-sex interpreter could be provided in future, and it is clear that failure to provide such an interpreter would adversely affect the applicant's ability to advance a full and accurate account.

⁷³ Article 15 of the Royal Decree of 11 July 2003 concerning the CGRA states that when there are reasons to assume that the persecution suffered by the applicant is related to his/her gender, the case manager should check whether the applicant has any objections to being interviewed by a person of a different sex. If so, the applicant is assured a hearing by a case manager of the same sex. Article 20 (2) of the Royal Decree also requires the CGRA to take the specific situation of the applicant into account when appointing an interpreter. Article 21 of the Royal Decree states that the applicant can request another interpreter at the beginning of the interview as well as during the interview. If the applicant has a valid reason for requesting another interpreter, the interview will be stopped and will resume with another interpreter or will be rescheduled.

⁷⁴ Information leaflet "*Important Information*". A corresponding remark is also contained in the Internal Guidelines for the Asylum Procedure ("*Female-specific persecution*" (1/1)). The respective paragraph of the English information leaflet reads as follows: "**Notes for women and girls, as well as for the parents of daughters:** *Insofar as may be required by you for personal reasons, the hearing can be carried out or continued by a [...] female decision-maker - as far as possible with the help of a female interpreter. The Federal Office has [...] female decision-makers specially trained in the field of sex-specific violations of human rights (e.g. rape, other types of sexual abuse, impending mutilation of the genitals). If you wish your hearing to be carried out by such a female person, please inform the Federal Office in good time before the hearing*". In both interviews attended by UNHCR in which gender and sexuality issues played a role (rape, homosexuality), the interviewer and the interpreter were of the same sex as the applicant. However, according to stakeholders, the request for an adjudicator of a certain sex is not always satisfied (X2, INTX).

reception centre which accommodates the applicant⁷⁵), the determining authorities would try to appoint an interviewer and interpreter of the same sex: Bulgaria,⁷⁶ the Czech Republic,⁷⁷ Finland,⁷⁸ France, Greece,⁷⁹ Italy,⁸⁰ Slovenia⁸¹ and Spain.⁸² However, UNHCR was not able to verify to what extent applicants are informed of the possibility to request an interviewer and interpreter of the same sex and in some of these States, a lack of female interviewers and interpreters may mean that such a request, even if made, is difficult to satisfy.⁸³

UNHCR observed a significant number of personal interviews in which the interviewer and/or interpreter were not gender-appropriate. For example:

- In two interviews observed by the UNHCR researcher in the Czech Republic, the applicants and interviewers were female but the interpreters were male. Both female applicants claimed to have been subjected to sexual violence and were asked to detail this during the personal interview. They were not asked whether they would prefer a female interpreter and they did not request a female interpreter.⁸⁴

⁷⁵ In France.

⁷⁶ In Bulgaria, Art. 63a (4) LAR.

⁷⁷ Section 23(3) ASA: "*For reasons that require **special consideration** or **upon an explicit request** of the applicant for international protection, the Ministry shall arrange that the interview **shall be conducted and, if feasible on the part of the Ministry, interpreting shall be provided by a person of the same sex.***" Confirmed by the Head of Asylum Procedure Unit, interview 7 April 2009. There was some evidence of this in case file X026, according to which a female applicant who alleged forced marriage requested to be interviewed by a female interviewer. Another interview took place with a female interviewer.

⁷⁸ It is the legal representatives who make the request normally as they meet with the applicant in advance of the interview. There was no evidence in the case files audited of such requests. According to legal representatives interviewed, such requests are informal and thus not registered in the case file.

⁷⁹ In Greece, Article 3 PD 81/09 states that "*If the interview concerns a woman applicant who, due to her experiences or her cultural background, is having difficulties in presenting the reasons for her claim, special attention shall be taken so that the interview is conducted by a specialized woman interviewer in the presence of a woman interpreter.*"

⁸⁰ In Italy, Article 12 (1) of the d.lgs. 25/2008 states that the CTRPI, "*on the basis of a grounded request of the applicant, may decide to run the personal interview in the presence of only one of its members and, if possible, of the same sex of the applicant*".

⁸¹ In Slovenia, Article 18 of the IPA (female applicant for international protection) stipulates special provisions on processing female applications: "*(1) Upon her request, a female asylum applicant shall be entitled to have a female person conduct the procedure. (2) The female applicant shall be provided an interpreter, if possible.*"

⁸² Article 17.5 of the New Asylum Law states that "*The administration will adopt the necessary measures to give a different treatment during the interview, when necessary, on ground of the applicant's sex*".

⁸³ In Bulgaria, due to a severe shortage of interpreters, it may be difficult to satisfy such a request with regard to the interpreter. In most of the aliens departments in Greece, there is only one police officer responsible for conducting personal interviews and there is a severe shortage of interpreters. In Greece and Slovenia it was reported that applicants are not routinely informed that they can request an interviewer and interpreter of the same sex.

⁸⁴ Y005 and Y009. It should be noted that in case Y005, a female interpreter who spoke French was initially appointed; but due to the fact that the applicant did not have a sufficient command of French, a male interpreter who spoke Lingala was then appointed. It is recognized that the determining

- Three interviews were observed in Finland in which issues of sexual violence and forced abortions were raised, but neither the interviewer nor the interpreter was of the same sex as the applicant.⁸⁵
- In the UK, UNHCR observed four personal interviews of female applicants where the interpreter was male, and either sexual violence and/or details of sexual activity were discussed.⁸⁶ UNHCR considered that having a male interpreter hindered gender-appropriate interviewing, even where the interviewer was female.
- In Greece, UNHCR observed a total of seven interviews where the applicant was female. In all seven interviews, the interviewer was male.
- In Italy, UNHCR observed an interview in which the male interviewer used inappropriate questioning and an inappropriate tone with a female applicant who may have been a victim of sexual violence. The interpreter intervened and translated the questions more appropriately.

Recommendations

UNHCR recognizes that genuine operational constraints with respect to providing a same-sex interviewer and interpreter may currently exist in some Member States. Member States should seek to ensure their capacity to assign interviewers of the same sex upon request.

Member States should also seek to ensure the availability of sufficient numbers of qualified interpreters of both sexes. In particular, states should identify shortages of female interpreters. In the absence of a qualified interpreter of the same sex in the required location, determining authorities could seek to address this through the use of telephone or video-conferencing. The European Asylum Support Office could have a facilitative role to play in this regard.

EU guidelines should state that all applicants should be informed of their right to request an interviewer and interpreter of the same sex; and all applicants should be routinely asked, in advance of the personal interview, whether they wish to request an interviewer and interpreter of the same sex.

Same-sex interviewers and interpreters should be provided, subject to genuine operational constraints, when requested, and when the application raises gender issues. Where an interview has been arranged that is not gender-appropriate for

authority may have experienced difficulty in finding a female interpreter of Lingala which is a rare language in the Czech Republic.

⁸⁵ Interviews 3, 4 and 5.

⁸⁶ Glaint2.3.09; glaint11.3.09; LIVint13.3.092; GLAJ202.

whatever reason, a mechanism should be in place to allow for the postponement of the interview.

The environment in which personal interviews are conducted

The environment in which the personal interview takes place may have an impact on the effectiveness of the personal interview. A failure to establish an appropriate environment will inhibit disclosure on the part of the applicant.

As such, the personal interview should be free from external noise, other interruptions and distractions. However, during the period of this research, UNHCR witnessed numerous personal interviews that took place against a background of noise, interruptions and other distractions. The following circumstances are cited by way of example:

- In the UK, UNHCR observed the interview of a female applicant whose young baby was present throughout. Rape emerged as an issue in the account and although the baby was too young to understand, UNHCR was concerned that its presence was inhibiting the woman from giving a full account, since she might not wish to exhibit her own distress, in case it upset the baby. Also, the rape account was not pursued at the time when the woman raised it, which meant that the topic had to be returned to later, which appeared to be unnecessarily distressing. The woman became very tired during the interview and although a break was taken, it was clear that the responsibility of caring for the child throughout the three hour interview was affecting her. UNHCR considered that some issues – such as personal circumstances on return - were not fully explored in this interview. UNHCR was also concerned to note that the presence of the child had not been recorded on the interview record.⁸⁷ In the same interview, the interpreter's conduct was not properly controlled as she started to complete what appeared to be a timesheet during the interview. UNHCR concluded that these factors impacted on the effectiveness of the interview in this case.⁸⁸

Recommendation

EU-wide guidelines should set out the conditions in which personal interviews should be conducted.

Prioritized and accelerated examination of applications

Article 23 (3) APD permits Member States to prioritise or accelerate any examination.

⁸⁷ Stakeholder interviewee confirmed that it would not be normal practice to record the presence of family members unless they became distracting.

⁸⁸ LIVint9.3.09.

The only condition established by Article 23 (3) and (4) of the APD is that any prioritized or accelerated examination must be in accordance with the basic principles and guarantees of Chapter II of the APD. UNHCR recognizes and supports the need for efficient asylum procedures, in the interests both of applicants and Member States. However, UNHCR is concerned that Chapter II of the APD permits Member States to derogate from a crucial and basic guarantee of the asylum procedure – the personal interview – on a wide range of grounds. Moreover, excessively short time frames for the examination of an application may nullify and render illusory in practice some of the basic principles and guarantees of Chapter II of the APD, and severely constrain applicants’ ability to fulfil their obligations under the Qualification Directive to submit all elements needed to substantiate their applications.

Use of time limits

UNHCR is concerned that in some Member States, in certain circumstances, the examination of applications is accelerated to such an extent that it renders excessively difficult the exercise of rights conferred by the APD.⁸⁹ Some stakeholders interviewed by UNHCR in this research have expressed the concern that very short time limits do not permit an adequate and complete examination of the application in accordance with Article 23 (2) APD.

The extremely shortened time frame of some accelerated procedures may mean that applicants whose applications are examined in an accelerated manner are significantly disadvantaged, as compared to applicants whose applications are examined within the regular time frames. The following gender adverse factors resulting from extremely short timeframes in accelerated procedures were identified in the course of the research:

- **More difficulty in conducting a gender-appropriate interview.** For example, the short three day time frame for the detained fast track (DFT) procedure in the UK and the 96 hour procedure in France means that the interview date cannot be postponed, if required, in order to satisfy a request for an interviewer and interpreter of the same sex.⁹⁰ In the UK DFT procedure, applicants cannot refuse to comply with the interview summons on the ground that the interview is not gender-appropriate.

⁸⁹ European Community law has established that “the detailed procedural rules governing actions for safeguarding an individual’s rights under Community law (...) must not render practically impossible or excessively difficult the exercise of rights conferred by Community law”: *Unibet vs Justitiekanslern*, C-432/05, European Union: European Court of Justice, 13 March 2007, paragraph 47; and *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, C-33/76, European Union: European Court of Justice, 16 December 1976, paragraph 5.

⁹⁰ In France, such a request is rarely satisfied in any procedure, mainly for practical reasons.

- Some stakeholders in the UK have stated that the accelerated procedures are too quick to allow applicants an effective opportunity to disclose traumatic experiences.⁹¹

Recommendation

The examination of the application must not be accelerated to such an extent that it renders the exercise of rights, including those afforded by the APD, excessively difficult or impossible. Where Member States set time limits for procedural steps, these should be of a reasonable length which permits the applicant to pursue the claim effectively, and the determining authority to conduct an adequate and complete examination of the application.

This recommendation applies also to applicants in detention or in border or transit zones, who must have an effective opportunity to substantiate their application in accordance with Article 4 of the Qualification Directive, obtain relevant evidence, and to consult effectively with a legal adviser.

Applicants with special needs

Article 23 (3) APD is also explicit in stating that when an applicant has special needs, the examination of his/her application may be prioritized or accelerated.

This is reflected in the national legislation of Greece⁹² and Italy.⁹³ It is partially reflected in the national legislation of Slovenia, in that the examination of applications by unaccompanied children must be treated with priority.⁹⁴ In Spain, it has been reflected in the New Asylum Law to the extent that applications lodged in-country by persons with specific needs, particularly unaccompanied children, should be examined in the urgent RSD procedure.⁹⁵

⁹¹ Bail for Immigration Detainees, *Briefing Paper on the detained fast track – February 2009*; Independent Asylum Commission, *Deserving Dignity: Third Report of Conclusions and Recommendations, July 2008*.

⁹² Article 8 (2) PD 90/2008 states that examination of an application may be prioritized when the applicant belongs to a vulnerable group.

⁹³ Article 28 (1) d.lgs. 25/2008 requires the determining authority, the Territorial Commissions, to examine an application with priority when the applicant is considered a vulnerable person in accordance with Article 8 of the legislative decree of 30 May 2005, No. 140 [minors, disabled persons, old people, pregnant women, single parents with minors, persons who have suffered torture, rape or other serious acts of psychological, physical or sexual violence].

⁹⁴ Article 16 (1), indent 3 of IPA.

⁹⁵ Article 25 (1) (b). Although Article 25(1) (b) does not define the term ‘persons with specific needs’, Article 46 stipulates that the specific situation of applicants and beneficiaries of international protection who are especially vulnerable, including unaccompanied minors, persons with disabilities, elderly people, pregnant women, single parent families with minors, victims of torture, rape or other severe forms of psychological, physical or sexual violence and victims of trafficking will be taken into account. It also includes those persons who, because of their personal characteristics, could have been victims of persecution on account of several of the reasons laid down in the present law.

However, it is not reflected in the national legislation of Belgium, Bulgaria,⁹⁶ the Czech Republic, Finland, France, Germany, the Netherlands, or the UK.

Some determining authorities informed UNHCR that, although there is no legal provision, in practice, some applications may be prioritized. The determining authority in Belgium stated that it always prioritizes the examination of applications by unaccompanied children and that applications by other applicants with special needs may be prioritized on humanitarian grounds.⁹⁷ This was supported by UNHCR's audit of case files in Belgium, which revealed two cases in which the determining authority was requested to and did prioritize the examination.⁹⁸ Similarly, UNHCR was informed by the determining authority in Bulgaria that when the authority has the capacity, the applications of persons with special needs may be prioritized in the framework of the general procedure.⁹⁹

Prioritization may ensure that certain categories of claims are examined at an early stage, without the need for the applicant to wait for lengthy periods that may sometimes apply to other claims. This can bring positive benefits for applicants, provided that the prioritized examination includes all of the necessary guarantees to ensure a fair determination of the claim, including reasonable deadlines and opportunities for the applicant to prepare for interviews, gather and furnish evidence, and other steps. Prioritization may help ensure, for example, that applicants with special needs are not obliged to experience lengthy waiting periods due to backlogs or other administrative delays.

However, the special needs of some applicants may be such that it is wholly inappropriate to accelerate the examination of their applications. This may include persons with serious physical or psychological problems, those exhibiting symptoms of trauma, and separated children.

UNHCR believes that particularly vulnerable persons should have their applications exempted from accelerated procedures and their applications should instead be examined in the regular procedure, or a prioritized procedure with all necessary safeguards.¹⁰⁰ UNHCR's research has found that many of the Member States surveyed do not have legal exemptions from accelerated procedures in place for applicants with special needs: Belgium, Finland, France, Germany,¹⁰¹ Greece, the

⁹⁶ By law, applications by unaccompanied minors and juveniles are exempted from the accelerated procedure in accordance with Article 71 (1) LAR.

⁹⁷ Interview with the Commissioner-General on 27 April 2009.

⁹⁸ Cases 19 and 23.

⁹⁹ Article 30a of LAR refers to vulnerable persons as minor or juvenile persons, pregnant women, elderly persons, single parents with their minor or juvenile children, persons with disabilities and persons who were victims of serious psychological, physical or sexual harassment.

¹⁰⁰ See also Parliamentary Assembly Resolution 1471 (2005) on accelerated asylum procedures in Council of Europe Member States which recommends that certain categories of persons be excluded from accelerated procedures due to their vulnerability and the complexity of their cases, namely separated children/unaccompanied minors, victims of torture and sexual violence and trafficking.

¹⁰¹ There is neither an exemption of applicants with special needs from the airport procedure nor a prioritization of their applications in the normal procedure. However, unaccompanied minors, persons having suffered gender specific persecution or traumatized persons shall be heard by

Netherlands¹⁰² and Slovenia. The exemption of applications by victims of torture or sexual violence from the accelerated examination in the airport procedure has frequently been called for in Germany, but has not been introduced in legislation or guidelines.¹⁰³

A few of the surveyed Member States have made some legal provision to exempt certain applications from accelerated procedures.

In Bulgaria, applications by unaccompanied children and juveniles are exempted from the accelerated procedure and admitted directly to the general procedure.¹⁰⁴ But there is no legal provision relating to other applicants with special needs. Similarly, in France, unaccompanied children do not require a temporary residence permit from the *Préfecture* and their applications are not routed into the accelerated procedure in practice.¹⁰⁵ However, there is no legislative provision regarding other applicants with special needs.

In the Czech Republic, applications by unaccompanied children are also excluded from accelerated procedures¹⁰⁶ and a broader category of applicants with special needs is excluded from the accelerated border procedure.¹⁰⁷

In the UK, there are administrative provisions setting out which applicants are unsuitable for detention for the purpose of examining their application in accelerated procedures.¹⁰⁸ However, these criteria set a very high threshold. The categories of people described in the 'suitability exclusion criteria' include *inter alia*:

- women who are 24 or more weeks pregnant;
- unaccompanied asylum-seeking children, whose claimed date of birth is accepted by the determining authority;

especially trained personnel (cf. *Internal Guidelines for Adjudicators: Adjudicators with special tasks* (1/3), Date 12/08.).

¹⁰² With the exception that C13/2 Aliens Circular provides that the detailed personal interview of unaccompanied minors under the age of 12 should not, in principle, take place in an application centre.

¹⁰³ Cf. for instance, Marx, *Commentary on the Asylum Procedure*, Section 18a, para. 99 et seq. UNHCR, Representation for Austria and Germany, *Eckpunkte-Papier zum Flüchtlingsschutz anlässlich der Konstituierung des Deutschen Bundestages und der Deutschen Bundesregierung zur 17. Legislaturperiode*, October 2009, p. 6.

¹⁰⁴ Article 71 (1) LAR.

¹⁰⁵ Interview with *Préfecture* of Rhône; Interview with Ministry of Immigration.

¹⁰⁶ Section 16 (4) ASA.

¹⁰⁷ Section 73 (7) ASA: "The Ministry will decide on the permit to enter the Territory for an alien who has made the Declaration on International Protection in the transit zone of an international airport and transport him/her into a reception centre at the Territory, if the alien is an unaccompanied minor, a parent or a family with handicapped minors or persons of full age, seriously handicapped alien, pregnant woman or a person who has been tortured, raped or subject to any other forms of mental, physical or sexual violence."

¹⁰⁸ The AIU (Asylum Intake Unit) instruction "DFT & DNSA – Intake Selection", 21.07.2008, Policy section, accessed via the UKBA website 5.01.2009 lists the suitability exclusion criteria.

- those for whom there is independent evidence from a reputable organization that they have been a victim of trafficking;¹⁰⁹ and
- those in respect of whom there is independent evidence of torture.

Although, as stated above, many of the Member States surveyed have no legal provision to exempt applications by persons with special needs from accelerated procedures, some determining authorities informed UNHCR that applications may be exempted in practice. In France, humanitarian considerations can be taken into account by the *Préfectures* in practice, in determining the procedure for the examination of an application.¹¹⁰

For example, in Italy, examination of an application by a vulnerable person is prioritized (not accelerated) on the basis of referrals or medical certificates. However, when the medical certificate recommends that the interview is postponed, the interview is postponed rather than prioritized. This practice, which has been supported by UNHCR, has happened in the case of victims of torture or persons who have suffered particularly serious trauma during the journey to Italy.¹¹¹

It should also be added that procedures should be in place to identify and respond to those cases which are unsuitable for examination within accelerated procedures, due to the nature of the special needs of the applicant. Personnel of the determining authority should act proactively to remove applications from the accelerated procedure if the applicant's vulnerability is such that s/he is hindered from fully substantiating the application within the time scales of the accelerated procedure.

Recommendation

Member States should legislate or provide guidelines to ensure that certain applications may be exempted from prioritized and accelerated examination due to the special needs of the applicant.

Subsequent applications

Article 32 APD addresses the situation where a person who has already applied for asylum in a Member State raises new issues or presents new evidence in the same Member State. These new issues or evidence are referred to in the APD as “further representations” or a “subsequent application”.

Article 32 (2) and (3) APD provides that a subsequent application, submitted after explicit or implicit withdrawal of the previous application, or after a (final) decision

¹⁰⁹ Extract from the guidance:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/victimsoftrafficking.pdf?view=Binary>.

¹¹⁰ Information obtained from the *Préfecture* of Rhône.

¹¹¹ The European Commission has provided for the tabling of medico-legal reports in recast Article 17, APD Recast Proposal 2009.

on the previous application has been taken, may be examined in a specific procedure in which it shall first be subject to a preliminary examination to determine whether new facts or evidence have arisen or have been presented by the applicant. The minimum procedural guarantees which are applicable to the preliminary examination are more limited than the basic guarantees set out in Chapter II of the Directive. Member States may lay down in national law rules on the preliminary examination, but these must not “*render impossible the access of applicants for asylum to a new procedure or result in the effective annulment or severe curtailment of such access*”. If it is determined that relevant “*new elements or findings*” have arisen or have been presented by the applicant, Article 32 (4) requires that the determining authority examine the subsequent application in conformity with the provisions of Chapter II as soon as possible.

UNHCR, in principle, agrees that subsequent applications may be subjected to a preliminary examination of whether new elements have arisen or been presented which would warrant examination of the substance of the claim. Such an approach permits the quick identification of subsequent applications which do not meet these requirements. However, in UNHCR’s view, such a preliminary examination is justified only if the previous claim was considered fully on the merits.

There are many reasons why an applicant may wish to submit further evidence or raise new issues following the examination of a previous application for international protection, including *inter alia* trauma, shame, or other inhibitions which may have prevented full oral testimony by the applicant in the previous examination procedure, particularly in the case of survivors of torture, sexual violence and persecution on the grounds of sexuality.

Reduction or withdrawal of reception conditions

The Reception Directive permits Member States to reduce or withdraw reception conditions where an asylum seeker has already lodged an application in the same Member State. This provision was introduced to deter applicants from abusing the asylum procedure and the reception system by lodging subsequent applications. However, it must be underlined that an applicant who makes a subsequent application may be a refugee or may qualify for subsidiary protection status.

In some Member States, applicants submitting subsequent applications lose their rights to receive shelter, food and financial allowances, and/or receive lesser entitlements than applicants in the regular procedure.

Withdrawal or reduction of reception conditions may render applicants destitute, and adversely impact upon their ability to exercise their procedural rights. Therefore, UNHCR opposes the withdrawal of reception conditions from applicants submitting subsequent applications.

Recommendation

UNHCR encourages states to continue to make available reception conditions to applicants pursuing subsequent applications. At the minimum, these should be at a standard adequate to ensure subsistence, access to emergency health care and essential treatment of physical or mental illness. Amendments to the Reception Conditions Directive should guarantee these.

Interpretation of “new elements or findings”

Article 34 (4) APD provides that “*if, following the preliminary examination referred to in paragraph 3 of this Article, new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue of Directive 2004/83/EC, the application shall be further examined in conformity with Chapter II*”.

However, there is no explicit guidance in the Directive on the interpretation of what constitutes “*new elements or findings*”, and the research findings reveal a wide divergence in interpretation in practice. It appears that this phrase is subject to differing interpretations across Member States and within Member States. In some instances there is a very strict interpretation whereas in others there is a lack of interpretation, guidelines, or criteria. This means that *de facto* interpretation is left to the discretion of decision-makers, resulting in legal uncertainty and diverse practice.

From the research, it is apparent that some of those Member States (Belgium, France, the Netherlands and the UK) that typically receive greater numbers of subsequent applications have developed more extensive interpretation and jurisprudence concerning application of the criteria governing what constitutes new elements and findings. Three of these states (Belgium, the Netherlands and the UK) have adopted a restrictive interpretation, whereas France allows decision-makers a greater margin of appreciation. In Germany,¹¹² the criteria for subsequent applications are not specific to the asylum procedure, but stem from general administrative law. Many issues that do not necessarily concern matters specific to asylum law are disputed in the legal literature and by the courts. Practice in some of these states, as well as other surveyed states, is considered in more detail below.

UK administrative provisions contain relatively explicit criteria governing the assessment of new elements and findings.¹¹³ These provide that “*submissions will*

¹¹² Percentage of subsequent applications: 1995: 23.4%; 1996: 22.0%; 1997: 31.2%; 1998: 33.2%; 1999: 31.2 %; 2000: 33.2%; 2001: 25.4%; 2002: 22.2%; 2003: 25.5%; 2004: 29.0%; 2005: 32.6%; 2006: 30.1%; 2007: 36.8%; 2008: 21.2%; 2009: 16.3%. (BAMF supplement to “*Entscheiderbrief*” 2/2010; “*Aus der Geschäftsstatistik des Bundesamtes für das Jahr 2009*”; p. 1; published on 11 February 2010; available on www.bamf.de.)

¹¹³ These are set out in Paragraph 353 and 353A of the UK Immigration Rules: *Fresh Claims*: 353. *When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under*

amount to a fresh claim if they are significantly different from the material that has previously been considered." The material must be relevant to the applicant and should not have been available prior to the most recent decision on the applicant's case, unless there is a satisfactory reason why the material was not submitted earlier.¹¹⁴ UK criteria as currently applied would consider the fact of a subsequent worsening of conditions in the country of origin (or a new COI report published even if relating to conditions at the time of the initial procedure) as usually constituting 'new' elements. However, this would not normally be the case for facts known at the time of the initial application (e.g. sexual violence suffered, homosexuality etc.), or even not necessarily for new documentary proof relating to facts previously known or raised.

In France, according to case law, "new elements" are "*facts that happened after the previous final decision or for which it can be proved that the person concerned could only be aware of them after this decision and which can, provided they are established, justify the fears for persecution that he/she claims*".¹¹⁵ In addition, the new fact must be "*likely to have an influence on the appreciation of the fears of persecution of the applicant.*" However, new documentary proof of facts already presented in the framework of the previous application is not usually considered as a new relevant fact, for example, a health certificate.

In discussions between UNHCR and the determining authority (OFPRA), it was confirmed that if the applicant mentions a fact such as sexual violence or homosexuality in the subsequent application, which in theory could have been raised before the final decision on the previous application, this would in principle not be considered a "new element". However, on a case-by-case basis, the determining officer might nonetheless take it into account, depending on the reasons why this fact was raised so late.

In Finland, the criteria simply refer to the requirement to produce "any new grounds for staying in the country that would influence the decision on the matter," which have not arisen in the previous application.¹¹⁶ Case-law indicates that the expression refers to situations of changed circumstances either in the country of origin or the host country. There is little guidance available regarding the interpretation of "new grounds". Nevertheless, from the audited cases, it is

paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content: (i) had not already been considered; and (ii) taken together with the previously considered material, create a realistic prospect of success, notwithstanding its rejection. This paragraph does not apply to claims made overseas. 353A: Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise."

¹¹⁴ This may be the initial decision on the application, an appellate decision on the case or a decision on previous further submissions; *UKBA Guidance on Further Submissions*, accessed 28 January 2010.

¹¹⁵ *Conseil d'Etat, Décision du 27 janvier 1995, Mlle Gal*. [Unofficial translation].

¹¹⁶ Section 103 (3) 2) of the *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 29.4.2009).

clear that if the applicant presents “new” evidence relating to issues raised in the previous application, it is not likely that the subsequent application will be examined in the regular procedure. The audited cases show that there is a strong reliance on a requirement for new elements/circumstances, and not only new documentary evidence, in order to have the subsequent application dealt with in the regular procedure. If the applicant obtains new evidence, for example, recently published COI relating to the same issues raised in the previous application, the same limitation applies. However, if new grounds for asylum are raised, even such as facts not mentioned in the previous application but which were known at the time of the previous application (e.g. sexual violence or torture suffered, homosexuality etc.), there is a greater chance of having the application considered substantively on its merits. Moreover, if the situation in the country of origin changes significantly, it is likely that a subsequent application will be examined in the regular procedure. The same applies for subsequent applications made after a change in key circumstances of the applicant in the host country.¹¹⁷

The significant divergences in interpretation revealed by this research suggest a clear need for greater clarity and consistency through the development of more detailed legislative provisions or other guidance to decision-makers. UNHCR encourages the adoption of a broad and inclusive approach, that takes account of the challenges faced by asylum applicants in substantiating their claims (language barriers, lack of legal advice, having to flee their countries of origin without being able to gather supporting evidence, short procedural time frames etc.) as well as reasons for late disclosure of information (trauma, victims of gender-based violence etc). UNHCR is extremely concerned about the existence of very formalistic criteria in some states which risks excluding evidence that would support a claim for international protection. The adoption of such restrictive practices could put States at odds with their *non-refoulement* obligations under international law.

Recommendation

UNHCR considers that preliminary examinations should extend both to points of fact and law, and the notion of new elements or findings should be interpreted in a protection-oriented manner, in line with the object and purpose of the 1951 Convention. Facts supporting the essence of a claim, which could contribute to a revision of an earlier decision, should generally be considered as new elements. Procedural requirements, such as time limits, should not be established in a way that could effectively prevent applicants from pursuing subsequent applications.

Wider category of cases afforded a subsequent application

Article 34 (5) APD provides that “*Member States may, in accordance with national legislation, further examine a subsequent application where there are other reasons*

¹¹⁷ Audited case 76, where a woman was granted asylum following a subsequent application, based on changes in her marital status after the decision on the first application.

why a procedure has to be re-opened.” UNHCR has encouraged Member States to interpret such a provision to encompass cases where, for example, trauma, language difficulties, or age-, gender- or culture-related sensitivities may have delayed the substantiation of an earlier claim.

Of the states of focus in this research, none have in place explicit legislative provisions taking advantage of the discretion granted by Article 34 (5) APD. However, there is jurisprudence in some countries supporting such an interpretation, and several states do afford decision-makers discretion to consider wider categories of cases in practice.

In France, there are no legislative provisions requiring decision-makers to examine subsequent applications in wider categories of cases beyond those where new elements/findings arise. However, there is case law¹¹⁸ on the assessment of the notion of “*new elements/facts*” to support a requirement that the criteria defining new elements in the main precedent-setting decisions remain subject to an important margin of appreciation.¹¹⁹ As such, decision-makers have a margin of discretion and there is the possibility that their assessment of the “new element” could take into account factors such as trauma, age, language difficulties, gender sensitivities or other reasons and circumstances explaining why some facts or evidence were not produced earlier. However, it was not clear from UNHCR’s research whether this margin of appreciation is exercised in this way in practice. It was revealed that a significant number of applicants of subsequent applications are not invited to personal interviews and their applications appeared to be assessed in a rather summary manner.

In Spain, there are no legislative provisions which explicitly prevent consideration of a subsequent application in relation to wider circumstances such as trauma, age, gender, language or other difficulties which have prevented a full disclosure of facts during the initial procedure. However, discretion remains with the determining official as to whether the application is declared admissible in such circumstances. In practice, officials would usually seek guidance from their supervisors.

Similarly, German law does not contain an explicit legal provision in this regard. However, according to information submitted to UNHCR by the determining authority (BAMF), it is possible to take into account subsequent applications where, for instance, an applicant was not able to provide the relevant information in the initial asylum procedure, due to trauma. In such a case, the trauma (e.g. proven by a medical certificate) could be interpreted as “new evidence” in the sense of section 51 (1) No. 2 Administrative Procedure Act. The BAMF, as a rule, assumes in such

¹¹⁸ In another precedent setting decision (*CE, 28 avril 2000, 192701, Thiagarasa*), the Council of State added that if the CRR (now CNDA) considers that the new element is established and relevant, it has to rule on the asylum claim “*in the light of all the facts presented by the applicant in his/her subsequent application, including the facts already examined by the CRR*”. This was further reiterated in a precedent setting decision from the CRR (now CNDA) (*CRR, SR, 5 avril 2002, 379929, Keryan*).

¹¹⁹ See below for rate of positive decisions by the CNDA.

cases of trauma that the person concerned was, “without grave fault on his part”,¹²⁰ unable to bring forward the relevant grounds in the earlier procedure.

According to the determining authority in Bulgaria, in principle it is possible that other factors (e.g. trauma, age, language difficulties or gender sensitivities) which have prevented an applicant from fully substantiating his/her initial application could justify a subsequent application even in the absence of “new” elements.¹²¹ However, no concrete examples were provided in practice.

Recommendation

UNHCR favours use of the possibility for Member States to address exceptional circumstances for considering a subsequent application beyond those cases involving new elements or findings. Discretion to re-open a substantive examination may be required in cases where, for example, trauma, language difficulties or age-, gender- or culture-related sensitivities may have delayed or prevented the substantiation of an earlier claim.

Subsequent applications by previous dependants

Article 32 (7) APD provides that the preliminary examination procedure “*may also be applicable in the case of a dependant who lodges an application after he/she has ... consented to have his/her case be part of an application made on his/her behalf. In this case the preliminary examination ... will consist of examining whether there are facts relating to the dependant’s situation which justify a separate application*”.

UNHCR welcomed this provision and reiterated the importance of ensuring that dependants, who may not have been able to submit a reasoned claim earlier, be given the possibility to have their asylum claims examined. Due consideration should be given in particular to trauma-, culture-, and age- or gender-related sensitivities.¹²²

In the UK, applications by previous dependants are not mentioned in the relevant Rule 353. However, there is guidance which tells decision-makers to treat such claims as ‘swapover’ claims. The guidance instructs officials to consider and judge swapover claims on their own merits in the same manner as other claims. But consideration of a swapover claim can be cut short by certification¹²³ under the Nationality Immigration and Asylum Act (NIAA) 2002 s96 (earlier right of appeal). Section 96 can remove appeal rights where a dependant was previously issued with a notice telling them of their right to claim asylum, and they chose not to do so. Rule 353 combined with NIAA 2002 s 96(2) could thus amount to a specific procedure for subsequent applications by previous dependants, since it means that there is no right of appeal against refusal. In this context, UNHCR has suggested the use of the possibility

¹²⁰ Section 51 (2) Administrative Procedure Act.

¹²¹ Interviews with interviewers.

¹²² UNHCR *Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 10 February 2005.

¹²³ Asylum Process Guidance *Handling Swapover claims* 23.4.07 accessed via UKBA website.

which Article 32 (5) APD provides for Member States to address exceptional circumstances. Discretion to re-open an examination is required where trauma, language difficulties, or age- or gender- related sensitivities may have delayed the substantiation of an earlier claim.¹²⁴ At present, this will depend on the initiative of the individual decision-maker.

Conclusion

UNHCR appreciates the political sensitivities and wider public policy issues at stake in discussions around the APD, and the rights of asylum seekers in general, in the EU today. In seeking to harmonize minimum standards for procedures, the APD addresses issues that go to the fundamental operation of legal systems. The obligations it creates can also carry major resource implications. Member States' reservations about significantly increasing the scope of procedural safeguards, or limiting their own flexibility to adjust the system, are understandable in this context.

At the same time, the APD is an instrument which is intended to be at the heart of a Common European Asylum System, but it has not yet brought about consistent approaches and does not always ensure fair and accurate outcomes. UNHCR maintained at the time of its adoption that in allowing extensive scope for exceptions, derogations and wide discretion, the APD created "protection gaps" which could create the risk of breaches of international and European law. The research carried out under this project has confirmed this to be the case. There are many areas in which individual's rights are not respected; the gender related findings collated in this document have highlighted such shortcomings. This is not only due to non-observance of the APD, but also in the context of the application of its provisions, in line with the low minimum standards it sets. As such, this research highlights the need for reform both of law and practice, to ensure that the gaps are filled.

UNHCR is ready and willing to work with Member States, European institutions, civil society and other stakeholders to find ways to strengthen the operation of asylum procedures across the Union, and improve their quality and consistency overall. This will require concerted efforts in a number of areas. The European Asylum Support Office will have a crucial role to play in bringing Member States together and supporting their common interest in such endeavours.

However, improvement also requires strengthening the legal framework for asylum procedures. Courts can assist in this area by interpreting and providing guidance to Member States on the correct application of the APD and related instruments. Beyond interpretation, however, further legislative reform will be needed, both at national and EU level, to ensure that the necessary safeguards are in place. This research has sought to highlight some of the main areas of need. It also seeks to provide constructive recommendations to support all parties involved to work towards completion of a Common European Asylum System which will be based, in law and practice, on the "full and inclusive application of the [1951] Convention" and other relevant treaties.

¹²⁴ UNHCR comments on the implementation in the UK of the APD, page 28.