

Инициатива качества
систем убежища

в Восточной Европе и на Южном Кавказе



Asylum Systems
Quality Initiative

in Eastern Europe and the Southern Caucasus

WELL-FOUNDED FEAR
UNHCR TRAINING
BAKU, AZERBAIJAN
SEPTEMBER 2014

INCLUSION CRITERIA

1. Outside country of nationality or habitual residence
2. **Well-founded fear**
3. Persecution
4. Grounds – race, religion, nationality, membership in a particular social group or political opinion
5. **Protection is lacking**

WELL-FOUNDED FEAR

- Two aspects of well-founded fear:
 - subjective element,
 - objective element
- role of COI and applicant's statements
- the test for risk of harm if applicant returns
- Issues arising under well-founded fear

SUBJECTIVE ELEMENT

- Refers to “fear” aspect of the definition.
- Fear is subjective and individual to each person
- Therefore, consider applicant’s state of mind/
motivations/ personality/ experiences
- Has applicant expressed fear of returning to his
country of origin?

OBJECTIVE ELEMENT

- Is there an objective basis to the applicant's fear?
Is the applicant's fear "well-founded"?

Consider:

- Applicant's experiences – Who does he fear?
What harm does he fear will happen if he returns to his country of origin?
- Experience of similarly situated individuals
- State protection

ASSESSMENT OF THE EVIDENCE

- Applicant's statements that are found to be credible
- Country of Origin Information that is:
 - Relevant
 - Up-to- date
 - Reliable
 - Accurate
 - Impartial and objective

Importance of COI

...the Court ... must be satisfied that the assessment made ... is adequate and sufficiently supported by domestic materials as well as materials originating from other, reliable and objective sources, such as, for instance, other Contracting and non-Contracting States, agencies of the United Nations and reputable non-governmental organizations.

Salah Sheekh v. The Netherlands [2007]
ECHR (11 January 2007)

Standard of Proof – Well founded

- serious possibility
- good grounds
- valid basis
- real or reasonable chance



ISSUES UNDER WELL-FOUNDED FEAR

- ✓ Lack of subjective fear - If the applicant does not/cannot express a subjective fear, is his application not well-founded?
- ✓ How does delay affect subjective fear?
- ✓ Lack of objective fear - If there is no objective basis for the applicant's fear, would the application always be rejected?

ISSUES UNDER WELL-FOUNDED FEAR

- ✓ Does the applicant have to experience past harm or persecution?
- ✓ Does state protection have to be perfect?
- ✓ Can non state entities provide protection?
- ✓ Why is the test of risk a “reasonable possibility”?

SUBJECTIVE FEAR ISSUES

Children and mentally ill applicants may not be able to express a fear of returning to the country of origin – place more weight on objective factors.

Delay – May indicate lack of fear – Ask about the delay. There may be a good reason.

LACK OF OBJECTIVE BASIS

Indicates that there is no well founded fear and application will fail BUT in some cases there are compelling reasons not to reject the applicant:

Circumstances in the country have changed and there is not a reasonable possibility of harm if the applicant returns. However, because of past persecution, there are compelling reasons not to return the applicant.

PAST HARM

Evidence of past harm is not required

Example – Applicant is member of a persecuted ethnic group. He has not been targeted personally. Consider situation of similarly situated members of the ethnic group.

But if the applicant has been harmed in the past, that is an indication of future harm.

Example - Applicant is member of persecuted ethnic group and has experienced racially motivated beatings.

STATE PROTECTION

- Is most relevant where the agent of persecution is an non-state actor
- If state authorizes the harm or tolerates it, state protection is not available.
- If state not involved in the harm, must ask what the state is doing to protect the applicant

ADEQUACY OF STATE PROTECTION

Assess COI to decide if the state is doing enough to protect the applicant –

Is there an effective legal system for the detection, prosecution and punishment of acts of persecution and can the applicant access it?

What has the applicant done to get protection?

Non-States and Protection

- * Examples – rebel militias, UN organizations
- * Requirements – Must have control of a region or area of the country and operate an effective legal system to detect, prosecute and punish harm feared by the applicant. The applicant must be able to access this legal system

REASONABLE POSSIBILITY TEST

Why is the test (or standard of proof) stated in terms of a “possibility” rather than a “probability”?

We are assessing future risk – what will happen if the applicant returns. This cannot be done with certainty. Therefore, the test has to be lower.

ANALYSIS FRAMEWORK FOR WELL-FOUNDED FEAR

- Identify what he fears will happen to him if he returns and consider what COI says about what he fears.
- Consider COI in relation to protection and determine whether adequate state protection is available.
- Is there a reasonable possibility that the applicant would experience harm if he returned? If “yes”, his fear is well-founded.

REVIEW OF INCLUSION CRITERIA

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