

# **Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisdictions:**

## **A Resource for U.S. Attorneys**

**May 2014**



**Center for Gender & Refugee Studies  
University of California Hastings College of the Law**



Review of Gender, Child, and LGBTI Asylum  
Guidelines and Case Law in Foreign Jurisdictions:

A Resource for U.S. Attorneys

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*Left to right:*

John Seelinger

Richard Boswell

John Seelinger

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STUDIES

Center for Gender & Refugee Studies  
University of California Hastings College of the Law  
200 McAllister Street  
San Francisco, CA 94102  
(415) 565-4877  
<http://cgrs.uchastings.edu>

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# Introduction

Asylum claims involving women, children, and lesbian, gay, bisexual, transgender, and intersex (LGBTI) individuals are increasingly common in the United States. However, in certain circumstances, such claims continue to be controversial and face challenges during the asylum adjudication process. Guidance from the United Nations High Commissioner for Refugees (UNHCR)<sup>1</sup> and foreign jurisdictions that are also signatories to the 1951 United Nations Convention Relating to the Status of Refugees (the Refugee Convention) and/or the 1967 Protocol may be helpful to supplement U.S. authority in certain types of cases, particularly in areas where U.S. law is undeveloped or diverges from internationally recognized principles of refugee law. Although UNHCR guidance is not binding on U.S. courts, the U.S. Supreme Court and federal courts of appeal have recognized UNHCR guidance as persuasive authority.<sup>2</sup> Opinions from foreign jurisdictions are valuable in demonstrating how sister signatory states have interpreted international refugee law and may also be cited as persuasive authority.<sup>3</sup>

This resource is intended for use by U.S. attorneys representing asylum seekers involving claims of gender-based persecution and sexual orientation and gender identity-related persecution as well as claims involving child applicants. This resource first discusses what these types of claims entail and how they are defined. Then it provides country by country summaries of any relevant laws, regulations, guidelines, case law, and other sources on these types of claims in key refugee receiving jurisdictions.

## Gender

As defined by the Refugee Convention, a refugee is a person who is unable or unwilling to avail himself or herself of the protection of his or her country “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”<sup>4</sup> Gender is not a separate ground for protection under the Convention, and while gender claims can proceed under any of the enumerated grounds, they most frequently proceed under membership in a particular social group.

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<sup>1</sup> UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (reissued December 2011), available at <http://www.refworld.org/docid/4f33c8d92.html>. The Handbook was first issued in 1979 to provide guidance to government officials of state parties to the Refugee Convention and 1967 Protocol regarding the procedures and criteria for determining refugee status. In response to varying legal interpretations of Article 1 of the Refugee Convention, UNHCR has issued “Guidelines on International Protection,” which are UNHCR’s legal positions on specific questions of international law.

<sup>2</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 (1987) (referring to UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status to interpret the 1967 Protocol’s definition of refugee); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427-28 (1999); see also *Ndom v. Ashcroft*, 384 F.3d 743, 753, n4 (9th Cir. 2004);

<sup>3</sup> See *Abbott v. Abbott*, 560 U.S. 1, 130 S. Ct. 1983, 1993 (2010) (recognizing that opinions of sister signatories are “entitled to considerable weight” when interpreting domestic law) (internal quotation marks and citations omitted).

<sup>4</sup> United Nations Convention Relating to the Status of Refugees 1951, art. 1A(2), 189 U.N.T.S. 150 (Apr. 22, 1954).

Gender-related asylum claims stem from harms (such as female genital cutting) directed solely or nearly exclusively at a particular gender or harms (such as repressive social norms that restrict women's freedom) inflicted because of gender. Gender refers to the "relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate, but acquires socially and culturally constructed meaning over time."<sup>5</sup>

Gender-based harm is often inflicted by private individuals rather than governmental actors. In many cases, such harm is encouraged, tolerated, or ignored by the government. Governments are also often unwilling or unable to protect their citizens from these harms.

Both women and men can suffer gender-based persecution, but women are disproportionately affected. Common types of gender-based persecution include rape and other forms of sexual violence, domestic violence, coercive family planning policies that target women, forced marriage, female genital cutting, human trafficking, and honor killing.<sup>6</sup>

Because gender-based refugee claims differ in some ways from traditional asylum claims, they have historically faced significant challenges.<sup>7</sup> As early as the 1980s, the United Nations High Commissioner for Refugees (UNHCR) and other UN bodies began to recognize the gaps in protection for women fleeing gender-based persecution and the unique issues involved in their cases.<sup>8</sup> The UNHCR Executive Committee (EXCOM) first issued formal recommendations regarding expansion of the refugee definition to include individuals who have experienced

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<sup>5</sup> UN High Commissioner for Refugees, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, para. 3, HCR/GIP/02/01 (May 7, 2002) (hereinafter UNHCR Gender Guidelines); see also Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI), Department of Economic and Social Affairs of the UN, *Concepts and Definitions*, <http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>.

<sup>6</sup> UNHCR Gender Guidelines, *supra* note 2.

<sup>7</sup> Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims*, *Refugee Survey Quarterly*, Vol. 29, No. 2 (2010).

<sup>8</sup> See Alice Edwards, *Overview of International Standards and Policy on Gender Violence and Refugees: Progress, Gaps and Continuing Challenges for NGO Advocacy and Campaigning* (Presentation to the Canadian Council for Refugees), Amnesty International Index: POL 33/004/2006 (July 26, 2006), available at <http://www.amnesty.org/en/library/asset/POL33/004/2006/en/b1ed18d8-d40a-11dd-8743-d305bea2b2c7/pol330042006en.html> (citing, *inter alia*, UNHCR, *A Thematic Compilation of Executive Committee Conclusions* (2nd ed. 2005), <http://www.unhcr.org/publ/PUBL/3d4ab3ff2.pdf>). Generally, there is increasing international commitment to addressing through international law the rampant violence faced by women worldwide. For comprehensive consideration of women's international human rights relating to gender-based violence, see Rebecca Adams, *Violence Against Women and International Law: The Fundamental Right to State Protection from Domestic Violence*, 20 N.Y. INT'L L. REV. 57, 104-129 (2007); Erin Patrick, Migration Policy Institute, *Gender-Related Persecution and International Protection* (2004), <http://www.migrationinformation.org/Feature/display.cfm?id=216>; UN High Commissioner for Refugees, *Improving Asylum Procedures – Comparative Analysis and Recommendations for Law and Practice: Key Gender Related Findings and Recommendations* (Mar. 2010), available at <http://www.unhcr.org/refworld/docid/4be01ed82.html>.

sexual violence or other gender-related forms of persecution in 1991.<sup>9</sup> The agency issued more comprehensive guidelines on gender-related persecution in 2002.<sup>10</sup> Subsequently, in 2008, the UNHCR issued the [UNHCR Handbook for the Protection of Women and Girls](#), which supplements the Guidelines on the Protection of Refugee Women (1991), and addresses both the legal framework as well as broader protection-related issues.<sup>11</sup>

In addition to issuing its own guidelines, the UNHCR Executive Committee has exhorted countries to develop and implement domestic criteria and guidelines regarding protection for women who claim refugee status based on a well-founded fear of gender-related persecution. Several receiving states have since either enacted such guidelines or have amended their legislation to instruct adjudicators to recognize gender-based persecution as a potential ground for refugee protection. Summaries of current law or guidelines on gender-based claims in countries that are signatories to either the 1951 Refugee Convention or its 1967 Protocol follow this introduction.

### **Sexual Orientation and Gender Identity**

In October 2012, the UNHCR issued *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity*, recognizing global persecution against LGBTI individuals and those perceived to be LGBTI.<sup>12</sup> The Guidelines describe that “LGBTI individuals are the targets of killings, sexual and gender-based violence, physical attacks, torture, arbitrary detention, accusations of immoral or deviant behaviour, denial of the rights to assembly, expression and information, and discrimination in employment, health and education in all regions around the world.”<sup>13</sup> Although discrimination on the grounds of gender identity and sexual orientation is prohibited by established international human rights law,<sup>14</sup> countries throughout the world maintain criminal laws imposing incarceration, corporal punishment, and/or the death penalty for consensual same-sex relations.<sup>15</sup> Further, “[i]n these and other countries, the authorities may not be willing or able to protect individuals from abuse and persecution by non-State actors, resulting in impunity for perpetrators and implicit, if not explicit, tolerance of such abuse and persecution.”<sup>16</sup>

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<sup>9</sup> UNHCR, *Guidelines on the Protection of Refugee Women*, paras. 3-4, U.N. Doc. ES/SCP/67 (July 1991).

<sup>10</sup> UNHCR Gender Guidelines, *supra* note 2.

<sup>11</sup> UNHCR, *UNHCR Handbook for the Protection of Women and Girls* (2008).

<sup>12</sup> UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/GIP/12/09 (Oct. 23, 2012) (hereinafter UNHCR LGBT Guidelines). The guidelines recognize persecution based on an individual’s actual or perceived gender identity. In 2008, the UNHCR issued a *Guidance Note on Refugee Claims relating to Sexual Orientation and Gender*, but the 2012 guidelines replaced the note.

<sup>13</sup> *Id.* at para. 2 (internal footnotes omitted).

<sup>14</sup> *Id.* at para. 6.

<sup>15</sup> *Id.* at para. 2.

<sup>16</sup> *Id.*

For these reasons, [UNHCR Sexual Orientation and Gender Identity Guidelines](#) affirm that persons facing persecution on account of actual or perceived gender identity or sexual orientation are entitled to protection under the Refugee Convention.<sup>17</sup> The Guidelines draw on the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, which were adopted by human rights experts in 2007. The Principles establish that “[e]veryone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.”<sup>18</sup> Summaries of current law or guidelines on sexual orientation and gender identity claims in countries that are signatories to either the 1951 Refugee Convention or its 1967 Protocol follow this introduction.

## Children

Article 22 of the United Nations [Convention on the Rights of the Child](#) (CRC) provides that “States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee. . . shall . . . receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention.” In recognition of the special vulnerability of refugee children, the UNHCR has developed policies and guidelines for addressing their unique needs. The UNHCR first issued Guidelines on Refugee Children in 1988, which were incorporated into the UNHCR [Policy on Refugee Children](#) in August 1993.<sup>19</sup> The Policy was followed by the UNHCR publication, [Refugee Children: Guidelines on Protection and Care](#), which urges governments to cooperate with and implement the 1988 Guidelines on Refugee Children.<sup>20</sup> In 2008, UNHCR issued [Guidelines on Determining the Best Interest of the Child](#),<sup>21</sup> supplemented by [Annexes 1-9](#).<sup>22</sup> The UNHCR Best Interest of the Child guidelines draw on the CRC, affirming that the “best interests of the child shall be a primary consideration in all actions affecting children,” including children’s asylum claims and related claims.<sup>23</sup> The Guidelines charge states with “collecting and analysing all

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<sup>17</sup> *Id.* at para. 6. *See also, id.* at para. 1, stating “people fleeing persecution for reasons of their sexual orientation and/or gender identity can qualify as refugees under Article 1A(2) of the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol” There is broad acknowledgement that LGBTI individuals are members of “particular social groups” within the meaning of asylum law. Group membership may also overlap with an individual’s political opinion and/or religious beliefs. *Id.* at para. 46.

<sup>18</sup> *Id.* at para. 7 (citing Principle 23 of the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity).

<sup>19</sup> UNHCR, *Policy on Refugee Children*, U.N. Doc. EC/SCP/82 (Aug. 6, 1993), available at <http://www.unhcr.org/refworld/docid/3f9e6a534.html>.

<sup>20</sup> UNHCR, *Refugee Children: Guidelines on Protection and Care* (1994), available at <http://www.unhcr.org/refworld/docid/3ae6b3470.html>.

<sup>21</sup> UNHCR, *Guidelines on Determination of the Best Interests of the Child* (May 2008), available at <http://www.unhcr.org/4566b16b2.html>.

<sup>22</sup> UNHCR, *Annexes to the UNHCR Guidelines on Formal Determination of the Best Interests of the Child* (May 2008), available at <http://www.unhcr.org/refworld/docid/4bfe92b32.html>.

<sup>23</sup> UNHCR, *Guidelines on Formal Determination of the Best Interests of the Child*, at 14. *See also id.* at 9, noting three circumstances under which UNHCR must undertake a Best Interest of the Child Determination (BID),



relevant information; and balancing all relevant factors to determine which of the possible options is in the best interests of the child” in the assessment of an asylum claim.<sup>24</sup> The UNHCR issued additional guidelines on procedural and substantive issues in children's asylum claims in 2009 ([Guidelines on International Protection No. 8](#)).<sup>25</sup> The 2009 guidelines discuss child-specific forms and manifestations of “persecution” and address how to analyze the Convention grounds in cases involving child asylum seekers. Summaries of current law or guidelines on children’s asylum claims in countries that are signatories to either the 1951 Refugee Convention or its 1967 Protocol follow this introduction.

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including “the identification of the most appropriate durable solution for unaccompanied and separated refugee children, (ii) temporary care decisions for unaccompanied and separated children in certain exceptional circumstances, and (iii) decisions which may involve the separation of a child from parents against their will.”

<sup>24</sup> *Id.* at 10.

<sup>25</sup> UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08 (Dec. 22, 2009).

## Law and Guidance by Country

Below are summaries of the current treatment of gender, gender identity, sexual orientation, and children's claims in the European Union (EU) system and in foreign jurisdictions that are signatories to the 1951 Refugee Convention and/or its 1967 Protocol and have explicitly addressed these types of claims. Some parties to the Convention have incorporated interpretative guidance and/or procedural safeguards within national legislation or policy and legal guidelines for decision-makers.<sup>26</sup>

The summaries below are introductory and provide only a general overview. They are, therefore, limited in depth, and in some cases are only as accurate as the sometimes restricted information available with respect to a particular country's system.

### Argentina

#### Legislation and Regulations

In late 2006, Argentina enacted a new refugee law, the General Law for the Recognition and Protection of Refugees (Spanish PDF: [Law Nº 26.165](#)). The General Law adheres to the refugee definition of the 1951 Refugee Convention.<sup>27</sup> While Argentina's refugee law does not explicitly recognize gender persecution as a basis for granting asylum, it contains special provisions for handling and assessing refugee claims made by women, children, and victims of violence, and requiring officials to adopt a gender-sensitive approach and to take a claimant's special situation into consideration.<sup>28</sup> Since 2005, Argentina has maintained a resettlement program for refugees that includes a sub-program for "women at risk."<sup>29</sup> This sub-program addresses the specific needs of women who "lack the traditional protection of their families or communities and face physical and/or psychological threats (rape, sexual harassment, violence, exploitation, torture, etc.)."<sup>30</sup> The Women at Risk program provides support, such as financial assistance, to refugee women in situations of risk for no fewer than 24 months, whereas financial assistance for refugees is otherwise limited to 12 months.<sup>31</sup>

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<sup>26</sup> UNHCR Gender Guidelines, *supra* note 2.

<sup>27</sup> UNHCR, *Resettlement Handbook, Country Chapter: Argentina* § 2.1, August 2011, revised June 2013, available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=52a0775e0&skip=0&query=unhcr%20resettlement%20handbook&querysi=argentina&searchin=title&sort=relevance>

<sup>28</sup> UNHCR, *Argentina: Refugee law approved by Congress - Briefing Notes* (Nov. 10, 2006), available at <http://www.unhcr.org/4b7bc3a19.html>.

<sup>29</sup> UNHCR *Guidelines on International Protection No. 8: Child Asylum Claims*, *supra* note 25, at §§ 1.1, 3.1.

<sup>30</sup> *Id.* § 3.1.

<sup>31</sup> *Id.* § 13.9–13.10.

In July 2010, Argentina passed legislation legalizing same-sex marriage.<sup>32</sup> In May 2012, Argentina enacted The Right to Gender Identity ([Spanish PDF: Law No. 26.743](#)), which recognizes an individual's right to freely develop in accordance with their gender identity and to be treated in accordance with their gender identity. The law grants individuals living in Argentina – including foreigners, refugees, and stateless people<sup>33</sup> – the right to obtain a recertification of their gender identity and name in national instruments evidencing identity.<sup>34</sup>

## Guidelines

The Home Office has the authority to adopt policy guidelines for population and migration under Decree 616/2010, which regulates the *Ley de Migraciones Nº 25.871 y sus modificatorias*.<sup>35</sup> The Home Office has not adopted any gender guidelines, but in 2012, it adopted [Resolución 23/2012](#), which introduced a tourist visa for Dominicans to prevent the exploitation and trafficking of people as well as abuse of the asylum system.<sup>36</sup> Although Argentina has not adopted its own gender guidelines, the General Law for the Recognition and Protection of Refugees charges the National Refugee Committee with following the guidelines issued by the UNHCR for the Protection of Refugee Women.<sup>37</sup> In addition, the law calls on the National Committee to pay special attention to the psychological needs of women refugees and to issues of gender-motivated violence, and calls for speedy resolution of cases.<sup>38</sup>

In cases involving child applicants, the General Law charges the Commission with giving consideration to guidelines and policies established by the UNHCR and other NGOs for the protection and care of refugee children.<sup>39</sup> In 2011, a protocol concerning unaccompanied children, Protocol for the Protection, Assistance and Durable Solutions for Unaccompanied and Separated Children Seeking Asylum, was adopted, and it contributes to regulating the General

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<sup>32</sup> Human Rights Watch, *World Report 2011: Argentina*, available at <http://www.hrw.org/world-report-2011/argentina>.

<sup>33</sup> Anna Johansson, *Foreigners in Argentina Now Able to Change Sex in Identification*, THE ARGENTINA INDEPENDENT, Jan. 2, 2013, available at <http://www.argentinaindependent.com/currentaffairs/foreigners-in-argentina-now-able-to-change-sex-in-identification-documents> (citing Derecho a la Identidad de Género, Law No. 26.743, May 23, 2012, [32.404] B.O. 2 (Arg.)). See also [http://www.migraciones.gov.ar/accesibleingles/?identidad\\_genero](http://www.migraciones.gov.ar/accesibleingles/?identidad_genero), (website of Argentina Ministry of Interior and Transportation: National Direction of Migration, providing gender identity recertification form for those with permanent residence in Argentina).

<sup>34</sup> Law No. 26.743 Art.1(c), May 23, 2012, [32.404] B.O. 2 (Arg.), available at <http://www.infoleg.gov.ar/infolegInternet/anexos/195000-199999/197860/norma.htm>.

<sup>35</sup> Decreto 616/2010, Decree 616/2010, ch. II, art. 3°, May 6, 2010, [31.898] B.O. 7, available at <http://www.refworld.org/pdfid/4be2de512.pdf>.

<sup>36</sup> Resolución 23/2012, Resolution 23/2012, Jun. 19, 2012 [32.428] B.O. 9, available at <http://www.boletinoficial.gov.ar/Avisos/VerPDF.castle?f=20120629&s=01&pd=9&ph=0&sup=False>.

<sup>37</sup> Ley N° 26.165, De reconocimiento y protección al refugiado, Law No. 26.165, art. 53, Nov. 28, 2006 [31.045] B.O. 5, available at <http://www.boletinoficial.gov.ar/Inicio/index.castle?s=1&fea=01/12/2006>; see also Juan Pablo Terminiello & Nazli Zaki, *Argentina offers care and support to refugee women victims of violence*, Jan. 4, 2007, <http://www.unhcr.org/459cfbea4.html>.

<sup>38</sup> Ley N° 26.165, De reconocimiento y protección al refugiado, *supra* note 35.

<sup>39</sup> *Id.*

Law.<sup>40</sup> As with gender cases, the Commission is obliged to pay special attention to the psychological needs of refugee children and to resolve their cases quickly.<sup>41</sup>

### Key Cases

Since the enactment of the 2006 Refugee Law, Argentina has accepted refugees fleeing from sexual and gender-based violence.<sup>42</sup>

## Australia

### Legislation and Regulations

The [Australian Migration Act 1958](#) (amended June 2012) incorporates the UN Refugee Convention into Australian law.<sup>43</sup> The Migration Act lays out the requirements for asylum, called a “protection visa.” The Act states that “minors” shall only be detained as a measure of last resort<sup>44</sup> and defines a “minor” as a “person who is less than 18 years old.”<sup>45</sup>

### Guidelines

In 1996, Australia’s Department of Immigration and Multicultural Affairs issued [Guidelines on Gender Issues for Decision Makers](#).<sup>46</sup> The Department developed these guidelines in consultation with the UNHCR and other NGOs, and they are consistent with the 1951 UN Refugee Convention definition of a refugee, which Australia implemented through the Migration Act of 1958. The guidelines apply to the first level of immigration review and offer guidance on understanding gender-based persecution and sensitive procedural considerations.<sup>47</sup>

In May 2010, the Australian Government issued the [Australian Migration Review Tribunal and Refugee Review Tribunal's Gender Guidelines](#) directed at members of the Tribunal. These guidelines lay out specific considerations for reviewing gender-related protection visa claims, such as how to ensure that the review process is gender-sensitive. In addition to addressing procedural considerations for gender-related claims, the guidelines explicitly name “discrimination against lesbian, gay, bisexual and transgender persons” as a type of “gender

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<sup>40</sup> Protocolo para la protección, asistencia y búsqueda de soluciones duraderas para los niños no acompañados o separados de sus familias en busca de asilo, *available at* <http://www.mpd.gov.ar/articulo/index/articulo/protocolo-para-los-ni-os-no-acompa-ad-os-o-separados-de-sus-familias-en-busca-de-asilo-953>.

<sup>41</sup> *Id.* p. 16

<sup>42</sup> Terminiello & Zaki, *supra* note 37. The decisions themselves are unavailable.

<sup>43</sup> *Migration Act 1958* (Cth) s 36, *available at* [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ma1958118](http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118).

<sup>44</sup> *Id.* at s 4AA.

<sup>45</sup> *Id.* at s 5(1).

<sup>46</sup> Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants – Guidelines on Gender Issues for Decision Makers* (July 1996), <http://refugeestudies.org/UNHCR/66%20-%20Refugee%20and%20Humanitarian%20Visa%20Applicants.%20Guidelines%20on%20Gender%20Issues%20for%20Decision%20Makers..pdf>.

<sup>47</sup> *Id.* at s 1.

based violence” upon which a gender-related claim may be based.<sup>48</sup> The guidelines were updated in 2012 (hereinafter “2012 Gender Guidelines”).

Both the Guidelines on Gender Issues for Decision Makers and the 2012 Gender Guidelines constitute administrative authority and supplement existing legislation, regulations, and guidelines. They serve to “further promote a gender inclusive and gender sensitive process and recognise the social and cultural difficulties applicants face when making and presenting gender related claims.”<sup>49</sup> In addition to addressing gender-based claims, the 2012 Guidelines provide for an additional form of protection, called “complementary protection.” Complementary protection provides a protection visa available to individuals who do not qualify as refugees but whose return to their country of origin would violate Australia’s international obligations due to the risk of torture, death, or “cruel,” “inhuman,” or “degrading” treatment such individuals would face upon return.<sup>50</sup>

In addition to gender guidelines, the Migration Review Tribunal and Refugee Review Tribunal have developed [Guidance on Vulnerable Persons](#). This guidance addresses the needs of vulnerable individuals in proceedings, and requires the Tribunal to assess the need for support persons (such as legal guardians, friends, relatives, church leaders, medical practitioners, social workers, counselors or psychologists) and representatives (registered migration agents, parents or guardians) to ensure that the process is fair and just.<sup>51</sup> As do the gender guidelines, the Guidance focuses more on process and procedure than on substance. Previously, there were separate guidelines for children’s cases. However, children are considered “vulnerable persons” under this guidance, which replaces the previous child-specific guidelines entitled *Guidelines on Children Giving Evidence*.<sup>52</sup>

Finally, the Migration Review Tribunal and Refugee Review Tribunals’ [Guide to Refugee Law in Australia](#) summarizes judicial and legislative developments to provide general information on the interpretation of “persecution” and the various grounds for refugee status.<sup>53</sup> The Guide functions as a reference tool for the Tribunal, and it offers more general information than the gender guidelines and Guidance.

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<sup>48</sup> Migration Review Tribunal - Refugee Review Tribunal, *Gender Guidelines* (Mar. 24, 2012), available at <http://www.mrt-rrt.gov.au/Files/HTML/GenderGuidelines-GU-CD.html>.

<sup>49</sup> *Id.*

<sup>50</sup> See Department of Immigration and Border Protection, *Fact Sheet 61a – Complementary Protection* (June 2012), available at <http://www.immi.gov.au/media/fact-sheets/61a-complementary.htm>.

<sup>51</sup> Migration Review Tribunal - Refugee Review Tribunal, *Guidance on Vulnerable Persons*, (June 2012), available at <http://www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=93fc0ac3-6487-49d5-be3d-996871575c23>.

<sup>52</sup> *Id.*

<sup>53</sup> Migration Review Tribunal - Refugee Review Tribunal, *Guide to Refugee Law in Australia* (2013), available at <http://www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=43d8e9c5-d5bb-48a5-b538-0a828d1d6b29>.

## Key Cases

In *Minister for Immigration and Multicultural Affairs v. Khawar*,<sup>54</sup> the High Court held that a Pakistani woman qualified for refugee status based on her fear of severe abuse by her ex-husband and his family, because the state either could not or would not intervene.<sup>55</sup> The court also held that “Pakistani women” could constitute a “particular social group,” and that the size of the group did not matter.<sup>56</sup> However, the *Khawar* opinion does not refer to Australia’s gender guidelines,<sup>57</sup> which had been published six years earlier. There have been no relevant High Court developments since *Khawar*.

For a discussion of how Australian refugee law became less receptive to gender-related refugee claims as a result of amendments to the Migration Act immediately following the *Khawar* decision, see Catherine Hunter, *Khawar and Migration Legislation Amendment Bill (No. 6): Why narrowing the definition of a refugee discriminates against gender-related claims*, 8 AUSTRALIAN J. OF HUMAN RTS. 107 (2002).<sup>58</sup>

In 2009, the Federal Court in *Azaar v. Minister for Immigration and Citizenship*<sup>59</sup> overturned the Tribunal’s denial of a Vanuatu woman’s asylum claim. The Tribunal and the Federal Court both held that the woman belonged to a particular social group under the Refugee Convention, namely “Vanuatu women” or “married Vanuatu women.”<sup>60</sup> However, the Tribunal denied asylum based on its finding that membership in a particular social group was not the cause of the harm the applicant had suffered and that the authorities were not unable or unwilling to protect her. The Federal Court reversed, ruling that while there were laws and other mechanisms in place to address domestic violence in the country of origin, the mere existence of such measures was not sufficient to find that the state would protect her from domestic violence at the hands of her husband, especially considering that domestic abuse is deeply embedded in the culture and traditional practices. The woman never actually sought police assistance, but the court found that this was not a bar to her claim, as she had a “reasonable apprehension that such an approach would only exaggerate [her] predicament.”

For a more comprehensive discussion of Australian case law and policies addressing gender-based persecution, see Susan Kneebone, *Women within the Refugee Construct: ‘Exclusionary*

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<sup>54</sup> *Minister for Immigration and Multicultural Affairs v. Khawar* [2002] HCA 14, available at <http://www.unhcr.org/refworld/docid/3deb326b8.html>.

<sup>55</sup> See Stephen M. Knight, *Reflections on Khawar: Recognizing the Refugee from Family Violence*, 14 HASTINGS WOMEN’S L.J. 27 (2003).

<sup>56</sup> *Minister for Immigration and Multicultural Affairs v. Khawar* [2002] HCA 14, available at <http://www.unhcr.org/refworld/docid/3deb326b8.html>.

<sup>57</sup> Jenni Millbank, *Gender, Sex, and Visibility in Refugee Claims on the Basis of Sexual Orientation*, 18 GEO. IMMIGR. L.J. 71, 77 n.28 (2003).

<sup>58</sup> Catherine Hunter, *Khawar and Migration Legislation Amendment Bill (No. 6): Why narrowing the definition of a refugee discriminates against gender-related claims*, 8 AUSTRALIAN J. OF HUMAN RTS. 107 (2002).

<sup>59</sup> *AZAAR v. Minister for Immigration and Citizenship* [2009] FCA 912, available at <http://www.unhcr.org/refworld/docid/4aae4fd212.html>.

<sup>60</sup> *Id.* at para. 1–3.

*Inclusion' in Policy and Practice – the Australian Experience*, 17(1) International Journal of Refugee Law 7, 40 (2005).

### Of Note

Displaced women who are subject to persecution in their home country or are “of concern” to the UNHCR may also be eligible for a “Woman at Risk Visa” (Subclass 204) in Australia.<sup>61</sup> This visa is separate from the protection visas ordinarily issued to refugees under Australia’s Humanitarian Program, although a woman may legally qualify for both visas.<sup>62</sup> The Woman at Risk Visa is available only to women and their dependents, and it requires that they be without the protection of a male relative as well as in danger of abuse or victimization due to their gender.<sup>63</sup>

## Belgium

### Legislation and Regulations

In Belgium, refugee status is recognized based on the 1951 Refugee Convention. The [Act of 15 December 1980 Relating to Access to the Territory, Residence, Establishment and Removal of Foreigners](#) regulates Belgian asylum procedure and authority.<sup>64</sup>

The Act recognizes persecution by the state or by quasi-state actors, as well as persecution by non-state actors when the state is unable or unwilling to protect the refugee claimant.<sup>65</sup> Although it does not contain a direct reference to gender, the Act provides examples of harms that may constitute persecution, such as sexual violence, discrimination by state actors, and acts committed against persons on account of gender or against children.<sup>66</sup> The Act defines a particular social group as a group sharing an immutable characteristic.<sup>67</sup> Belgium’s Office of the Commissioner General for Refugees and Stateless Persons (known by its French acronym CGRA) has defined “social group” to include victims of gender-related persecution, such as female genital cutting (FGC), forced marriage, honor crimes, domestic violence and rape as well as victims of persecution based on sexual orientation and gender identity.<sup>68</sup>

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<sup>61</sup> Department of Immigration and Border Protection, *Refugee and Humanitarian Entry to Australia - Women at Risk Subclass (Visa 204)* (Dec. 20, 2013), <http://www.immi.gov.au/visas/humanitarian/offshore/204>.

<sup>62</sup> Lenore Manderson, et al., *A Woman without a Man is a Woman at Risk: Women at Risk in Australian Humanitarian Programs*, 11 J. REFUGEE STUD. 267, 268 (1998).

<sup>63</sup> Department of Immigration and Border Protection, *supra* note 63.

<sup>64</sup> Belgium, Loi du 15 Décembre 1980 sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers, as amended up to January 23, 2013, art. 48/3, *available at* [https://dofi.ibz.be/sites/dvzoe/FR/Documents/19801215\\_F.pdf](https://dofi.ibz.be/sites/dvzoe/FR/Documents/19801215_F.pdf).

<sup>65</sup> *Id.* art. 48/5.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* art. 48/3.

<sup>68</sup> Commissariat Général aux Réfugiés et aux Apatrides [CGRA], *Rapport Annuel CGRA 2010 [CGRA Annual Report 2010]* (June 2010), *available at* [http://www.cgvs.be/fr/binaries/2010\\_Rapport-Annuel\\_FR\\_tcm126-130185.pdf](http://www.cgvs.be/fr/binaries/2010_Rapport-Annuel_FR_tcm126-130185.pdf).

The Act also contains provisions for granting subsidiary protection to applicants who are both ineligible for refugee status and not entitled to a humanitarian visa. Subsidiary protection is available to applicants for whom there are substantial grounds to believe they would face a real risk of serious harm if returned to their country of origin despite their ineligibility for other forms of relief.<sup>69</sup>

The Act was modified by the law of July 8, 2011, which introduced new and stricter conditions for family reunification, such as the requirement of a stable, sufficient, and regular means of subsistence.<sup>70</sup>

The NGO Ciré (Coordination and Initiatives for Refugees and Foreigners) has criticized Belgium's "safe country of origin" list as discriminating against asylum seekers from Balkan countries.<sup>71</sup> Albania is listed as a safe country of origin, for example, although it ranks among the top 10 countries of origin for refugees in Belgium.<sup>72</sup> Ciré has also criticized Belgium for expediting the asylum decision-making process without establishing high standards of protection for applicants.<sup>73</sup>

The European Court of Human Rights held in October 2012 that Belgium violated Article 13 (right to an effective remedy) and Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights for rejecting documents filed in asylum cases without sufficient investigation.<sup>74</sup> The judgment became final in January 2013.<sup>75</sup>

As a member of the EU, Belgium must incorporate the minimum standards laid out in the EU Qualification Directive into its national law by December 21, 2013.<sup>76</sup> Please see European Union section below for further details.

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<sup>69</sup> Belgium, Loi du 15 Décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, art. 48/4, *supra* note 64.

<sup>70</sup> Coordination et initiatives pour réfugiés et étrangers [Ciré], *La nouvelle loi sur le regroupement familial est entrée en vigueur* [The new law on family reunification has come into effect, (Oct. 20, 2011), available at <http://www.cire.be/thematiques/sejour-et-regroupement-familial/regroupement-familial/583-la-nouvelle-loi-sur-le-regroupement-familial-est-entree-en-vigueur>.

<sup>71</sup> Ciré, *Note de politique générale de la Secrétaire d'Etat à l'Asile et la Migration, du 21 décembre 2012: Observations et questions du Ciré* [General policy note of the State Secretary for Asylum and Migration, from December 21, 2012: Observations and questions from Ciré] (Jan. 22, 2013), available at <http://www.cire.be/publications/analyses/811-reaction-du-cire-a-la-note-de-politique-generale-de-maggie-de-block>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Affaire Singh et autres c. Belgique* [Singh et al. v. Belgium], No. 33210/11, Eur. Ct. H. R. (2012), available at <http://www.refworld.org/docid/506c63bf2.html>

<sup>75</sup> *Id.*

<sup>76</sup> Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (Qualification Directive), 2004 O.J. (L 304) 0012–0023, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>.



## Guidelines

Belgium does not have gender-specific guidelines for asylum seekers, but instead provides instructions and operational notes for officers adjudicating gender asylum claims. These operational notes include two notes on FGC asylum claims, one on forced marriage, one addressing gender identity, and one on rape. The notes and instructions are neither public nor legally binding.<sup>77</sup>

In 2005, the CGRA appointed a coordinator for gender issues who is responsible for determining guidelines for handling women's asylum applications and ensuring that such guidelines are applied consistently.<sup>78</sup> In addition, it has appointed "reference persons" in charge of identifying training needs, and has organized trainings on FGC and sensitivity in interviewing victims of rape and other forms of sexual abuse.<sup>79</sup>

The CGRA is currently considering recognition of gender-related persecution as a basis for refugee claims and has instituted policies to address the specific needs and vulnerabilities of women asylum seekers and other individuals fleeing gender-based violence.<sup>80</sup> For example, an asylum seeker may request a caseworker and interpreter of the same sex, and childcare is available for applicants with children between the ages of 1 and 12 so that applicants need not tell their story in front of young children.<sup>81</sup>

The CGRA has special procedures for unaccompanied children seeking asylum, who are assigned guardians to assist them throughout the asylum procedure.<sup>82</sup> Also assigned to these cases are adjudicators with special training in adapting asylum interviews to the child's age and maturity.<sup>83</sup> To guarantee protection, CGRA has implemented a follow-up procedure for girls recognized as refugees on account of FGC. The follow-up procedure requires parents of girls granted refugee status based on FGC to present a medical certificate showing that their daughter has not suffered any further genital cutting following the grant of refugee status.<sup>84</sup>

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<sup>77</sup> ASYLUM Aid, COMISIÓN ESPAÑOLA DE AYUDA AL REFUGIADO, FRANCE TERRE D'ASILE, CONSIGLIO ITALIANO PER I RIFUGIATI & THE HUNGARIAN HELSINKI COMMITTEE, GENDER-RELATED ASYLUM CLAIMS IN EUROPE: A COMPARATIVE ANALYSIS OF LAW, POLICIES AND PRACTICE FOCUSING ON WOMEN IN NINE EU MEMBER STATES (May 2012) 36.

<sup>78</sup> Office of the Commissioner General for Refugees and Stateless Persons, *Women and Gender Issues* (2013), [http://www.cgra.be/en/Groupes\\_vulnerables/Femmes\\_et\\_problematique\\_du\\_genre](http://www.cgra.be/en/Groupes_vulnerables/Femmes_et_problematique_du_genre).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Office of the Commissioner General for Refugees and Stateless Persons, *Unaccompanied Minors* (2013), [http://www.cgra.be/en/Groupes\\_vulnerables/Mineurs\\_etrangers\\_non\\_accompagnes/index.jsp](http://www.cgra.be/en/Groupes_vulnerables/Mineurs_etrangers_non_accompagnes/index.jsp).

<sup>83</sup> *Id.*

<sup>84</sup> Office of the Commissioner General for Refugees and Stateless Persons, *Coordination genre* [Gender coordination] (2013), [http://www.cgra.be/fr/a\\_propos\\_du\\_CGRA/organisation/organigramme/coordination\\_genre](http://www.cgra.be/fr/a_propos_du_CGRA/organisation/organigramme/coordination_genre).

## Key Cases

In 2009, in *Jurisprudence n. 29225*,<sup>85</sup> a woman from Guinea was granted refugee status in Belgium. She had had been subjected to FGC and forced marriage, and she feared that if forced to return to Guinea, her daughter – a product of the marriage – would also be subjected to forced FGC. The Court held that FGC of one's child can constitute persecution of the parent on account of the parent's political opinion in opposition to FGC.

In another case from 2010, *Jurisprudence n.45742*,<sup>86</sup> the Court granted asylum to a woman from Albania who had suffered severe domestic violence at the hands of her husband. The Court recognized the abuse as persecution, because the authorities had failed to protect the applicant. It further found that the applicant was a member of a particular social group defined by her gender, and that the persecution occurred on account of her membership in that social group.

In *Jurisprudence n.10458*,<sup>87</sup> issued on April 24, 2008, the Court held that "female minors" could constitute a particular social group and granted asylum to a girl from Cameroon who lacked parental protection and who had suffered physical and sexual abuse as well as other persecution.

In 2011, in *Jurisprudence n.61832*,<sup>88</sup> a woman was granted asylum in the appeal of her second asylum application. She claimed that she had been subjected to FGC as a child and that she was at risk of enduring further FGC in Djibouti because she had had a child out of wedlock. The Council for Alien Law Litigation (CALL) found that FGC constitutes persecution in the sense of the 1951 Refugee Convention and that her fear of infibulation could be considered fear of persecution on the basis of being a member of a particular social group.

In another case in 2011, *Jurisprudence n.60622*,<sup>89</sup> the CALL granted asylum to a woman in her appeal whose case had been rejected by the CGRA on the grounds that the applicant was not credible and thus did not prove she was afraid of being subjected to forced marriage and FGC. The CALL held the CGRA's examination of the case to have been superficial, finding that while the assessment of credibility is necessary, it should not overshadow the question of whether the applicant fears persecution.

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<sup>85</sup> Decision on file with CGRS.

<sup>86</sup> Decision on file with CGRS.

<sup>87</sup> Decision on file with CGRS.

<sup>88</sup> Decision on file with CGRS.

<sup>89</sup> Decision on file with CGRS.

# Canada

## Legislation and Regulations:

The [Canadian Immigration and Refugee Protection Act](#) (last amended in 2014) is the primary federal legislation regulating immigration to Canada.<sup>90</sup> The Act is accompanied by the [Immigration and Refugee Protection Regulations](#),<sup>91</sup> which define the various classes of immigrants and discuss enforcement. Although it does not directly address substantive issues in children's asylum claims, the Immigration and Refugee Protection Act authorizes all minor children in Canada to study at "pre-school, primary or secondary level," and limits the use of detention in cases involving children seeking refugee status.<sup>92</sup> The Act does not mention gender-based claims.

In 2010, the [Balanced Refugee Reform Act](#)<sup>93</sup> was adopted with a stated intent to "improve Canada's asylum system, resettle more refugees from abroad and make it easier for refugees to start their lives" in Canada.<sup>94</sup> The Act called on the Minister of Citizenship, Immigration and Multiculturalism to waive the requirements of the refugee definition under the Act when doing so "is justified by humanitarian and compassionate considerations relating to the foreign national, taking into the account the best interests of a child directly affected."<sup>95</sup> At the same time, however, advocates expressed concern about some of the bill's provisions.

Two years later, however, the [Protecting Canada's Immigration System Act](#) was adopted in order to "help stop foreign criminals, human smugglers and those with unfounded refugee claims from abusing Canada's generous immigration system and receiving taxpayer-funded health and social benefits."<sup>96</sup> The Canadian Council for Refugees, the Canadian Civil Liberties Association, UNHCR, Human Rights Watch, and advocates criticized the bill for undermining fairness in the process of seeking refugee status and refusing refugee status based on a blanket determination that particular countries are safe.

## Guidelines

While the Immigration and Refugee Protection Act does not refer explicitly to gender-based persecution or gender-related refugee claims, decision-makers are expected to apply the guidelines or provide a reasoned justification for not doing so as reiterated by the Federal Court

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<sup>90</sup> Immigration and Refugee Protection Act, S.C. 2001, c. 27, available at <http://laws-lois.justice.gc.ca/eng/acts/I-2.5/>.

<sup>91</sup> Immigration and Refugee Protection Regulations, SOR/2002-227, available at <http://laws.justice.gc.ca/PDF/SOR-2002-227.pdf>.

<sup>92</sup> Immigration and Refugee Protection Act, S.C. 2001, c. 27, §§ 30(2), 60.

<sup>93</sup> Balanced Refugee Reform Act 2010, S.C. 2010, c. 8, available at [http://laws-lois.justice.gc.ca/PDF/2010\\_8.pdf](http://laws-lois.justice.gc.ca/PDF/2010_8.pdf).

<sup>94</sup> Canada Border Services Agency, *Regulatory Impact Analysis Statement* (Aug. 19, 2010), available at <http://www.gazette.gc.ca/rp-pr/p1/2012/2012-08-18/html/reg1-eng.html>.

<sup>95</sup> Immigration and Refugee Protection Act, S.C. 2001, c. 27, § 25.1.

<sup>96</sup> Citizenship and Immigration Canada, *News Release – Legislation to Protect Canada's Immigration System Receives Royal Assent* (June 29, 2012), available at <http://www.cic.gc.ca/english/departement/media/releases/2012/2012-06-29.asp>.

in *Narvaez v. Canada (Minister of Citizenship and Immigration)* (discussed below).<sup>97</sup> The Canadian government became the first to issue national guidelines regarding gender-based persecution in 1993, when it issued the *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*<sup>98</sup> pursuant to § 65(3) of the Immigration and Refugee Protection Act. In 1996, the Canadian Immigration and Refugee Board issued an updated version of the guidelines, entitled [Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution](#).<sup>99</sup> The guidelines state that women can belong to a “gender-defined social group” whereby they “fear persecution as the consequence of failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin” and also “fear persecution resulting from certain circumstances of severe discrimination on grounds of gender or acts of violence either by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect the concerned persons.”<sup>100</sup>

The guidelines are administrative directives issued to members of the Immigration and Refugee Board (IRB). As such, they are considered persuasive but not binding authority. However, IRB adjudicators must apply the guidelines unless “compelling reasons” require departing from them.<sup>101</sup> The Canadian Federal Court has indicated its support for the application of the guidelines to cases involving women refugee claimants fearing gender-related persecution.<sup>102</sup> In 2003, the IRB also issued a [Compendium of Decisions: Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update](#), summarizing a number of gender-based refugee decisions.<sup>103</sup>

In 1996, the IRB released guidance specific to child asylum applicants in [Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues](#), which addresses the specific procedural issues that arise when processing claims by unaccompanied children. In keeping with the CRC, the Child Refugee Claimant guidelines require that the Convention Refugee Determination Division (CRDD) of the IRB should give primary consideration to the best interests of the child in

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<sup>97</sup> Cecilia Narvaez, Miguel Alexandro Narvaez et Daniel Antonio Narvaez c. Ministre de la Citoyenneté et de l'Immigration, [1995] 2 F.C. 55, 62, available at <http://www.unhcr.org/refworld/docid/3ae6b6e1c.html> [in French]; Immigration and Refugee Board of Canada, *Chairperson's Guidelines*, available at <http://www.unhcr.org/refworld/pdfid/4713831e2.pdf>.

<sup>98</sup> Judith Ramirez, *The Canadian Guidelines On Women Refugee Claimants Fearing Gender-Related Persecution*, 14 REFUGE 3 (1994).

<sup>99</sup> Immigration and Refugee Board of Canada, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution - Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act -Update* (Nov. 13, 1996), available at <http://www.refworld.org/docid/3ae6b31c98.html>.

<sup>100</sup> *Id.*

<sup>101</sup> Nicole LaViolette, *Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines*, 19 INT'L J. REFUGEE L. 169, 169–214 (2007); see also *Narvaez v. Canada (Minister of Citizenship and Immigration)*, *supra* note 97 at 33.

<sup>102</sup> Immigration and Refugee Board of Canada, *Backgrounders - Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (Aug. 6, 2003), available at <http://www.unhcr.org/refworld/pdfid/4713831e2.pdf>.

<sup>103</sup> *Id.*

determining the procedure to be followed.<sup>104</sup> Accordingly, Canada's Immigration Act "requires the designation of a representative for all child claimants."<sup>105</sup>

Guideline 8: Guideline on Procedures with Respect to Vulnerable Persons Appearing before the IRB was released in 2006 and amended in 2012. This guideline contains procedural accommodations for vulnerable asylum claimants appearing before the IRB, including, but not limited to, the mentally ill, children, the elderly, victims of torture, survivors of genocide and crimes against humanity, women who have suffered gender-related persecution, and individuals who have been victims of persecution based on sexual orientation and/or gender identity.<sup>106</sup>

### Key Cases

The early decision of *Canada v. Ward* (1993)<sup>107</sup> remains one of the most influential opinions regarding gender-based refugee claims. The case itself did not involve a gender-related claim; however, in its opinion, the Supreme Court of Canada stated (in *dicta*) that the characteristics of gender and sexual orientation can define a particular social group.<sup>108</sup> The recognition of gender as a valid criterion for membership in a social group was a major development in the case law, as women refugee claimants had previously experienced difficulties in linking their fear of persecution on the basis of gender to one of the enumerated Convention grounds.<sup>109</sup>

Another key case is *Narvaez v. Canada (Minister of Citizenship and Immigration)* (1995).<sup>110</sup> In its decision, the Court stated that although the gender Guidelines are not binding law, they were "intended to be followed unless circumstances are such that a different analysis is appropriate."<sup>111</sup> Subsequently, the court has set aside decisions in which the Board failed to consider and apply the Gender Guidelines and remanded for re-determination by a different panel.<sup>112</sup>

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<sup>104</sup> Immigration and Refugee Board of Canada, *Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues, Guidelines issued by the Chairperson pursuant to Section 65(3) of the Immigration Act, § A(I)* (Sep. 30, 1996), available at <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir03.aspx>

<sup>105</sup> *Id.* § A(II).

<sup>106</sup> Immigration and Refugee Board of Canada, *Guideline 8: Procedures with Respect to Vulnerable Persons Appearing Before the IRB*, Canada, § 2.1 (Dec. 15, 2006), available at <http://www.refworld.org/pdfid/462e14b72.pdf>.

<sup>107</sup> *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, June 30 1993, available at <http://www.unhcr.org/refworld/docid/3ae6b673c.html>.

<sup>108</sup> Audrey Macklin, *Canada (Attorney General) v. Ward: A Review Essay*, 6 INT'L J. OF REFUGEE L. 362, 362–381 (1994).

<sup>109</sup> LaViolette, *supra* note 96 at 173.

<sup>110</sup> *Ministre de la Citoyenneté et de l'Immigration, supra* note 97.

<sup>111</sup> *Id.* s. 62.

<sup>112</sup> *Utoh v. Canada (Minister of Citizenship & Immigration)*, [2012] F.C. 399; *Winifred v. Canada (Minister of Citizenship & Immigration)*, [2011] F.C. 827.

For a comprehensive compilation of Canada's gender-based asylum cases up to 2003, see [Compendium of Decisions: Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update](#).

Relevant Canadian children's cases include V99-02929, a 2000 decision in which the IRB held that a child who had suffered persecution in the form of abuse by a parent could be a Convention refugee as a member of a particular social group, namely "minors." In VAO-02635 in 2001, the IRB compared children's claims to gender-based claims and applied the Gender Guidelines in finding that "a child-abuse claim cannot be rejected simply because many children in the country of origin suffer generalized oppression or violence." The IRB then went on to find that the claimant from China was a member of the particular social group "children" for the purposes of the claim, and was entitled to refugee protection.

### Of Note

In cooperation with the UNHCR, Canada offers protection to displaced women designated as "Women at Risk."<sup>113</sup> The program identifies and processes women in refugee camps for humanitarian resettlement. In order to be eligible, a woman must lack the normal protection of a family unit, and find herself in a precarious situation where the local authorities cannot assure her safety.<sup>114</sup>

## Costa Rica

### Legislation and Regulations

Costa Rica is a signatory to the UN Refugee Convention and Protocol. The immigration law, [Ley General de Migración y Extranjería](#) (entered into force March 2010),<sup>115</sup> meets the protection obligations assumed by Costa Rica under the Refugee Convention and improves the application process by creating a separate office within the General Directorate of Immigration to deal specifically with refugee issues.<sup>116</sup> The law also calls special attention to the best interests of children and demands compliance with international conventions concerning the rights of children.<sup>117</sup> The refugee-related provisions of the law make no mention, however, of gender-related claims.

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<sup>113</sup> MONICA BOYD, GENDER ASPECTS OF INTERNATIONAL MIGRATION TO CANADA AND THE UNITED STATES 3 (2006), available at [http://www.un.org/esa/population/migration/turin/Symposium\\_Turin\\_files/P08\\_Boyd.pdf](http://www.un.org/esa/population/migration/turin/Symposium_Turin_files/P08_Boyd.pdf); CITIZENSHIP AND IMMIGRATION CANADA, GUIDE TO THE PRIVATE SPONSORSHIP OF REFUGEES PROGRAM - 3. ADDITIONAL SPONSORSHIP OPPORTUNITIES: 3.2 WOMEN AT RISK PROGRAM, § 3.2 (2003), available at <http://www.cic.gc.ca/english/resources/publications/ref-sponsor/section-3-02.asp>.

<sup>114</sup> CITIZENSHIP AND IMMIGRATION CANADA, OP 5: OVERSEAS SELECTION AND PROCESSING OF CONVENTION REFUGEES ABROAD CLASS AND MEMBERS OF THE HUMANITARIAN-PROTECTED PERSONS ABROAD CLASSES 98 (2006), available at <http://www.cic.gc.ca/english/resources/manuals/op/op05-eng.pdf>.

<sup>115</sup> *Ley General de Migración y Extranjería*, Ley Nº 8.764, Aug 4, 2009, available at <http://www.unhcr.org/refworld/docid/4b0273cb2.html> [in Spanish].

<sup>116</sup> U.S. Department of State, *2009 Human Rights Report: Costa Rica* (2010), <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136107.htm>.

<sup>117</sup> Costa Rica, *Ley General de Migración y Extranjería*, *supra* at 110, art. 6(7).

Since the law went into effect, Costa Rica has implemented regulations regarding treatment of refugees, including refugee children, the [Reglamento de personas Refugiadas \(Refugee Regulations\)](#).<sup>118</sup> The Refugee Regulations contains a non-discrimination clause, Article 6, which states that migration authorities must respect the human rights of all refugee applicants regardless of gender, among other characteristics.<sup>119</sup> Moreover, Article 10 states that, when implementing the regulation, Costa Rican authorities must take into consideration the individual needs of members of certain groups of people, including unaccompanied minors and both women and men fleeing gender-based violence throughout all stages of the refugee process. Article 11 provides for immigration authorities to utilize a gender-sensitive approach in refugee cases.<sup>120</sup> Article 47 prohibits the detention of children, whether accompanied or unaccompanied.<sup>121</sup> Article 100 lists the obligations of the Restricted Visa and Refugee Commission and includes the requirement that commissioners make themselves available to receive training on issues related to refugee law, including human rights and the rights of refugees under international law,<sup>122</sup> with special emphasis on unaccompanied children, victims of sexual abuse, victims of gender-motivated violence, and victims of trafficking.<sup>123</sup> Article 123 concerns the functions of the refugee sub-processing office, and it instructs officers to alert and coordinate with other entities when handling cases involving unaccompanied children, victims of gender-based violence, and victims of trafficking in order to ensure prioritized and individualized treatment in those cases.<sup>124</sup>

In addition, the [Regulation for Implementation of the General Law on Immigration Number 8764 for Minors](#) includes articles specific to child refugees.<sup>125</sup> Protections are procedural and include the provision of legal representation

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<sup>118</sup> Reglamento de Personas Refugiadas, 209 La Gaceta Nº 36831-G (Sept. 28, 2011) (Costa Rica) at Article 6, 11 *available at* <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4fffe64d2&skip=0&query=Reglamento%20de%20Personas%20Refugiadas&coi=CRI> (hereinafter Reglamento de Personas Refugiados); Reglamento de Control Migratorio, 20 La Gaceta Nº 36769-G, Art. 11 (Jan. 28, 2011) (Costa Rica), *available at* <http://alcance.gaceta.go.cr/pub/2011/01/28/alca10.pdf>.

<sup>119</sup> Refugee Regulations, *supra* note 118.

<sup>120</sup> *Id.* at Art. 10, 11.

<sup>121</sup> *Id.* at Art. 47.

<sup>122</sup> *Id.* at Art. 100(b).

<sup>123</sup> *Id.* The Commission is the body responsible for determining refugee status [for individuals who apply for such status under Article 106], to ensure its decisions adhere to the rights of refugees as provided by Costa Rican and International human rights law, to allow visa applications for purposes of family unification, to establish special procedures when necessary to address large influx of migration, to promote government action conducive to effective economic, social, and cultural integration of refugees, and to work with other governmental organizations, non-governmental organizations, and UNHCR to support activities related to protection of and assistance and durable solutions for refugees. *See id.* Artículo 105.

<sup>124</sup> *Id.* at Art. 123.

<sup>125</sup> Reglamento para la Aplicación de la Ley General de Migración y Extranjería número 8764 a las Personas Menores de Edad, 209 La Gaceta Nº 36659-G (Costa Rica) at Title VI, *available at* <http://www.migracion.go.cr/institucion/leyes%20migratorias/Reglamento%20de%20Personas%20Menores%20de%20Edad.pdf>.



## Guidelines

Costa Rica does not have any guidelines for gender-related or children's refugee claims.

## Key Cases

In July 2008, Costa Rica granted asylum to a woman from the United States who sought protection on the basis of domestic violence suffered in the United States.<sup>126</sup> The court held that domestic violence can be the basis for refugee status, and that it would be inconsistent with international refugee rights to deny protection on this basis.<sup>127</sup> However, the court further stated that a refugee claim based on domestic violence in general will not automatically lead to a grant of asylum.<sup>128</sup> The decision cites to a number of key UNHCR documents that supported the grant of asylum in circumstances such as those of the applicant.

## European Union

### Legislation and Regulations

The European Union's 27 member states are all signatories to the 1951 Refugee Convention and 1967 Protocol.<sup>129</sup> Indeed, ratification of the 1967 Protocol is a prerequisite to EU membership.<sup>130</sup> The EU legislation includes asylum claims generally and, more specifically, the status of unaccompanied minors seeking asylum in the EU, gender-based asylum claims, and asylum claims related to sexual orientation and gender identity in Europe.<sup>131</sup>

Several EU treaties articulate human rights-related obligations of the Member States. The Amsterdam Treaty of 1997, which entered into force in May 1999, amended the Treaty establishing the European Economic Community (signed in 1957 and known as the Rome Treaty) and the Treaty on European Union (signed in 1992 and known as the Maastricht Treaty)

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<sup>126</sup> Keyea Caullette, *Costa Rica Grants Refugee Status to U.S. Citizen*, COSTA RICA PAGES, Aug. 1, 2008, <http://www.costaricapages.com/blog/costa-rica-news/american-refugee/1275>.

<sup>127</sup> *Resolution No 1023-2008 DMG*, Costa Rica, July 23 2008, Ministry of the Interior and Police [*Ministerio de Gobernación y Policía*], Office of the Secretary, San José (on file with CGRS).

<sup>128</sup> *Id.*

<sup>129</sup> Elspeth Guild, *The Europeanisation of Europe's Asylum Policy*, 18 INT'L J. REFUGEE L. 630, 630 (2006).

<sup>130</sup> *Id.*

<sup>131</sup> See *Action Plan on Unaccompanied Minors (2010 – 2014)*, SEC (2010) 534 final (May 6, 2010) [hereinafter *Action Plan on Unaccompanied Minors (2010 – 2014)*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:0534:FIN:EN:PDF>; *Annexes to the Action Plan on Unaccompanied Minors (2010-2014)*, COM (2010) 213 final (May 6, 2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:0534:FIN:EN:PDF>; HANA CHEIKH ALI, CHRISTEL QUERTON, & ELODIE SOULARD, *GENDER-RELATED ASYLUM CLAIMS IN EUROPE: A COMPARATIVE ANALYSIS OF LAW, POLICIES AND PRACTICE FOCUSING ON WOMEN IN NINE EU MEMBER STATES* (May 2012), available at [http://www.emnbelgium.be/sites/default/files/publications/gender\\_related\\_asylum\\_claims\\_in\\_europe.pdf](http://www.emnbelgium.be/sites/default/files/publications/gender_related_asylum_claims_in_europe.pdf); SABINE JANSEN & THOMAS SPIJKERBOER, *FLEEING HOMOPHOBIA: ASYLUM CLAIMS RELATED TO SEXUAL ORIENTATION AND GENDER IDENTITY IN EUROPE* (2011), available at <http://www.refworld.org/docid/4ebba7852.html>. See also, European Parliament Resolution of 24 May 2012 on the fight against homophobia in Europe, EUR. PARL. DOC. P7\_TA-PROV(2012)0222 (2012), available at <http://www.unhcr.org/refworld/docid/4fc863168.html>.



in several ways, including by initiating the development of European citizenship.<sup>132</sup> The Amsterdam Treaty also set forth an agenda for enacting a Common European Asylum System (CEAS).<sup>133</sup> Article 63(2) of the Amsterdam Treaty required the Member States to issue directives regarding procedures for the reception and qualification of asylum seekers, refugees, and displaced persons within five years. The Treaty of Lisbon, signed on December 13, 2007 by EU member states and entered into force on December 1, 2009, amended the Rome and Maastricht Treaties by transforming the asylum measures into a common policy.<sup>134</sup> Whereas the Amsterdam Treaty called simply for the establishment of minimum standards, the Treaty of Lisbon called for the creation of a common asylum system amongst member states to include a uniform status of asylum and subsidiary protection, a common system of temporary protection, common procedures for granting and withdrawing asylum or subsidiary protection status, criteria and mechanisms for determining which member state is responsible for considering an application, standards concerning reception conditions, and partnership and cooperation with third countries.<sup>135</sup>

During the first phase of the establishment of the CEAS, the four most important legislative measures harmonizing the common minimum asylum law standards<sup>136</sup> were the Directive on Qualification for Becoming a Refugee or Beneficiary of Subsidiary Protection Status (the Qualification Directive), the Directive on Asylum Procedures, the Directive on Reception Conditions for Asylum-Seekers, and the Dublin Regulation.<sup>137</sup>

For the second phase of the EU asylum process, EU member countries agreed on an action plan under the Hague Programme 2004, aiming to establish the CEAS by 2010.<sup>138</sup> In 2008, the

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<sup>132</sup> Europa, *The Amsterdam Treaty: A Comprehensive Guide*, [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/amsterdam\\_treaty/a12000\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/a12000_en.htm) (last visited May. 13, 2014).

<sup>133</sup> See DAVID MCKEEVER, JESSICA SCHULTZ & SOPHIA SWITHERN, *FOREIGN TERRITORY: THE INTERNATIONALISATION OF EU ASYLUM POLICY* (2005), available at [https://www.compas.ox.ac.uk/fileadmin/files/Events/Events\\_2005/Foreign%20Territory%20Final%20\(English\).pdf](https://www.compas.ox.ac.uk/fileadmin/files/Events/Events_2005/Foreign%20Territory%20Final%20(English).pdf).

<sup>134</sup> Court of Justice of the European Communities, *The Treaty of Lisbon and the Court of Justice of the European Union*, Press Release No. 104/09 (Nov. 30, 2009), available at [http://europa.eu/rapid/press-release\\_CJE-09-104\\_en.htm](http://europa.eu/rapid/press-release_CJE-09-104_en.htm); Jean-Louis Antoine-Grégoire, *Fact Sheets on the European Union – Asylum Policy* (2013), available at [http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuld=FTU\\_5.12.2.html](http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuld=FTU_5.12.2.html).

<sup>135</sup> *Id.*

<sup>136</sup> European Commission, Home Affairs, *Common European Asylum System* (Dec. 5, 2013), [http://ec.europa.eu/home-affairs/policies/asylum/asylum\\_intro\\_en.htm](http://ec.europa.eu/home-affairs/policies/asylum/asylum_intro_en.htm).

<sup>137</sup> On February 18, 2003, the Council of the European Union adopted the “Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.” This regulation has been referred to as the Dublin Regulation, or the Dublin II Regulation, and replaced the Dublin Convention, which was adopted in 1990.

<sup>138</sup> EUROPEAN COUNCIL ON REFUGEES AND EXILES, *THE WAY FORWARD – EUROPE’S ROLE IN THE GLOBAL REFUGEE PROTECTION SYSTEM: TOWARDS FAIR AND EFFICIENT ASYLUM SYSTEMS IN EUROPE* 17 (2005), available at <http://www.ecre.org/topics/areas-of-work/protection-in-europe/127.html>; Europa, *Future Common European Asylum System* (July 30, 2007),

Council of the EU adopted the European Pact on Immigration and Asylum, calling for new initiatives to complete the establishment of a CEAS to offer a higher degree of protection.<sup>139</sup> While the EU has undertaken substantial efforts towards the establishment of CEAS, its implementation has been delayed, and the Stockholm Programme 2009<sup>140</sup> amended the action plan, with the renewed goal of implementing the CEAS by 2014.<sup>141</sup> To that end, the European Asylum Support Office (EASO) was established in 2010 to facilitate exchanges of information and to identify and compile best practices on general asylum matters.<sup>142</sup> EASO has designed training modules as part of a European Asylum Curriculum to hold asylum case workers to the same standards across the EU.<sup>143</sup>

The Qualification Directive<sup>144</sup> provides a common European definition of the term “refugee” and minimum standards for establishing refugee status.<sup>145</sup> It was initially implemented in 2004 and recast in 2011 in order “to seek to achieve a higher level of approximation of the rules on the recognition of international protection on the basis of higher standards.”<sup>146</sup> The recast Qualification Directive is binding on all member states except for the United Kingdom and Ireland, which will continue to be bound by the 2004 Qualification Directive, and Denmark,

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[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/l14561\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l14561_en.htm).3.

<sup>139</sup> Council of the European Union, European Pact on Immigration and Asylum 13440/08 ASIM 72 (Sep. 24, 2008), available at <http://register.consilium.europa.eu/pdf/en/08/st13/st13440.en08.pdf>.

<sup>140</sup> Council of the European Union, *The Stockholm Programme – An open and secure Europe serving and protecting citizens*, 2010 O.J. (C 115/01), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF>.

<sup>141</sup> European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Delivering an area of freedom, security and justice for Europe's citizens - Action Plan Implementing the Stockholm Programme*, COM (2010) 171 final (Apr. 20, 2010), available at <http://www.statewatch.org/news/2010/apr/eu-com-stockholm-programme.pdf>. See EU Commissioner for Home Affairs, “Common European Asylum System: challenges and perspectives,” 24 Mar. 2014, available at [http://europa.eu/rapid/press-release\\_SPEECH-14-244\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-244_en.htm).

<sup>142</sup> Regulation No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, 2010 O.J. (L 132), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32010R0439:EN:NOT>.

<sup>143</sup> EU Commissioner for Home Affairs, “Common European Asylum System: challenges and perspectives,” 24 Mar. 2014, available at: [http://europa.eu/rapid/press-release\\_SPEECH-14-244\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-244_en.htm)

<sup>144</sup> Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees and persons otherwise in need of international protection and the protection granted, 2004 O.J. (L 304), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>.

<sup>145</sup> Helene Lambert, *The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law*, 55 INT’L & COMP. L.Q. 161, 162 – 63 (2006), available at <http://ssrn.com/abstract=1335235>.

<sup>146</sup> Council Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 2011 O.J. (L 337/9) [hereinafter Qualification Directive], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF>, see in particular para. 10 regarding purpose of recast Directive.

which is bound by neither.<sup>147</sup> Because the Directive is not self-executing, each state was required to implement legislation or other measures to meet its requirements by December 21, 2013.<sup>148</sup> Both versions of the Directive include persecution by non-state actors as well as gender-based persecution as valid grounds for refugee status.<sup>149</sup> In defining a “particular social group,” the recast Directive states:

For the purposes of defining a particular social group, issues arising from an applicant’s gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilization or forced abortion, should be given due consideration in so far as they are related to the applicant’s well-founded fear of persecution.<sup>150</sup>

The Directive also affirms that member states must have regard to “child-specific forms of persecution” when assessing applications from minors for international protection.<sup>151</sup> Furthermore, the Directive includes an obligation to provide subsidiary protection status to individuals who are not eligible for refugee protection but demonstrate “substantial grounds . . . for believing that the person concerned, if returned to his or her country of origin . . . would face a real risk of suffering serious harm . . . and is unable, or owing to such risk, unwilling to avail himself of herself of the protection of that country.”<sup>152</sup>

The recast Qualification Directive includes “victims of trafficking” in its description of “vulnerable persons.”<sup>153</sup> Additionally, in April 2011, the EU Directive on Trafficking was adopted, “introduc[ing] common provisions taking into account [a] gender perspective.”<sup>154</sup> During this time, the Council of Europe<sup>155</sup> implemented the Convention on Preventing and Combating Violence against Women and Domestic Violence, which requires that parties to the Convention “take the necessary legislative or other measures to ensure that gender-based

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<sup>147</sup> Qualification Directive at paras. 50 – 51.

<sup>148</sup> *Id.* at art. 39.

<sup>149</sup> Council Directive 2004/83/EC, *supra* note 140, arts. 4(c), 6, 7, 9(a), (f), and 10(d); Qualification Directive, arts. 6(a) – (c).

<sup>150</sup> Qualification Directive at para. 30. *See also* art. 10, s. 1(d), which states that depending on the circumstances in a country of origin, a “particular social group” might include a group based on a common characteristic of sexual orientation or a group defined by “gender related aspects” including gender identity.

<sup>151</sup> Qualification Directive at para. 28.

<sup>152</sup> *Id.* at art. 20, para. 3.

<sup>153</sup> *Id.* at art. 20.

<sup>154</sup> CHEIKH ALI ET AL, *supra* note 128 at 41, *available at* [http://www.emnbelgium.be/sites/default/files/publications/gender\\_related\\_asylum\\_claims\\_in\\_europe.pdf](http://www.emnbelgium.be/sites/default/files/publications/gender_related_asylum_claims_in_europe.pdf) (citing Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, article 1).

<sup>155</sup> The Council of Europe is an international organization that promotes cooperation between all European countries with regard to legal standards, human rights, democratic development, the rule of law, and cultural cooperation. There are 47 member states, including 28 members of the EU. Every Council of Europe member state has signed the European Convention on Human Rights.

violence against women may be recognised as a form of persecution within the meaning of . . . the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection.”<sup>156</sup> However, there have been inconsistent interpretations of what actions constitute gender-based violence among EU member countries.<sup>157</sup>

In June 2013, the European Parliament endorsed new rules for the CEAS.<sup>158</sup> The revised Asylum Procedures Directive goes into effect on July 21, 2015 and seeks to establish a system for ensuring that asylum decisions are made more efficiently and fairly and that all Member States examine applications with a common high quality standard.<sup>159</sup> The Asylum Procedures Directive sets out rules on how to apply for asylum, how the application will be examined, what type of assistance asylum seekers will be given, and procedures on appeal.<sup>160</sup> Those in need of special help due to age, disability, illness, sexual orientation, torture, rape, or other serious forms of psychological, physical, or sexual violence will receive support and time to explain their claims.<sup>161</sup> Unaccompanied children will be appointed a qualified representative by the national authorities.<sup>162</sup>

A new Reception Conditions Directive also set to go into effect on July 21, 2015 provides asylum applicants with access to housing, food, health, medical and psychological care, and employment while they wait for their claims to be examined.<sup>163</sup> This new Reception Conditions

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<sup>156</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence, 7 April 2011, Art. 60(1), *available at* [https://wcd.coe.int/ViewDoc.jsp?Ref=CM\(2011\)49&Language=lanEnglish&Ver=final&Site=COE&BackColorIntranet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2011)49&Language=lanEnglish&Ver=final&Site=COE&BackColorIntranet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864).

<sup>157</sup> CHEIKH ALI ET AL, *supra* note 128 at 44 – 45 (noting that asylum is granted in some countries, but not others, to women who have suffered female genital mutilation, though subsidiary protection may remain available).

<sup>158</sup> Press Release, European Parliament, Parliament gives green light to the new European asylum system (June 12, 2013), *available at* <http://www.europarl.europa.eu/news/en/pressroom/content/20130607IPR11389/html/Parliament-gives-green-light-to-the-new-European-asylum-system>; European Migration Network, *European Parliament adopts Common European Asylum System (CEAS)* (June 12, 2013), <http://www.emnbelgium.be/news/european-parliament-adopts-common-european-asylum-system-ceas>.

<sup>159</sup> European Commission, *A Common European Asylum System: Asylum Procedures Directive*, *available at* [http://ec.europa.eu/dgs/home-affairs/e-library/docs/ceas-fact-sheets/ceas\\_factsheet\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/docs/ceas-fact-sheets/ceas_factsheet_en.pdf); *Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 2013 O.J. (L 180/60) [hereinafter Recast Asylum Procedures Directive], *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0060:0095:EN:PDF>.

<sup>160</sup> *Id.*

<sup>161</sup> Recast Asylum Procedures Directive at art. 24.

<sup>162</sup> *Id.* at art. 25.

<sup>163</sup> European Commission, *A Common European Asylum System: Reception Conditions Directive* (June 12, 2013), *available at* [http://ec.europa.eu/dgs/home-affairs/e-library/docs/ceas-fact-sheets/ceas\\_factsheet\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/docs/ceas-fact-sheets/ceas_factsheet_en.pdf); *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 2013 O.J. (L 180/96) [hereinafter “Recast Reception Conditions Directive”], *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0096:0116:EN:PDF>.

Directive adopts common rules on the detention of asylum seekers, and includes: an exhaustive list of detention grounds to help avoid arbitrary detention practices and limit detention to as short a time period as possible<sup>164</sup>; restrictions on the detention of vulnerable persons such as minors<sup>165</sup>; legal guarantees such as free legal assistance and information when lodging an appeal against a detention order<sup>166</sup>; and specific requirements for the reception conditions of detention facilities.<sup>167</sup> The recast Reception Conditions Directive also obligates Member States to conduct individual assessments to identify the specific reception needs of vulnerable persons, particularly unaccompanied minors and torture victims. The Directive ensures that these vulnerable persons have access to psychological support and includes rules on the qualifications of representatives for unaccompanied minors.<sup>168</sup> Additionally, the Directive provides that an asylum seeker must be granted access to employment within nine months.<sup>169</sup>

The revised Dublin Regulation, entered into force on July 16, 2013 and applying to all applications lodged six months after that date,<sup>170</sup> enhances the protection of asylum seekers during the process of establishing which Member State is responsible for examining the application and clarifies the rules governing the relationship between states.<sup>171</sup> Article 6 provides guarantees for minors, including an assessment of the best interests of the child, taking into account the following factors: (a) family reunification possibilities; (b) the minor's well-being and social development; (c) safety and security considerations, particularly where there is a risk that the minor is a victim of human trafficking; and (d) the views of the minor, in accordance with his or her age and maturity.<sup>172</sup>

The amended Eurodac regulation entered into force on July 16, 2013 and will apply beginning July 20, 2015.<sup>173</sup> Eurodac is primarily a biometric database for comparing fingerprints, and it assists EU member states to verify whether an asylum applicant has previously claimed asylum

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<sup>164</sup> Recast Reception Conditions Directive, *supra* note 161 at arts. 8–10.

<sup>165</sup> *Id.* at art. 11.

<sup>166</sup> *Id.* at art. 26.

<sup>167</sup> A Common European Asylum System: Reception Conditions Directive, *supra* note 161.

<sup>168</sup> *Id.*; European Commission MEMO/13/532, A Common European Asylum System, (June 12, 2013), *available at* [http://europa.eu/rapid/press-release\\_MEMO-13-532\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-532_en.htm); Recast Reception Conditions Directive, *supra* note 161, arts. 21–25.

<sup>169</sup> *Id.*

<sup>170</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the member States by a third-country national or a stateless person (recast), art. 49, 2013 O.J. (L 180/31) [hereinafter Regulation (EU) No 604/2013], *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF>.

<sup>171</sup> European Commission, Common European Asylum System, *available at* [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm); Regulation (EU) No 604/2013, *supra* note 168.

<sup>172</sup> Regulation (EU) No 604/2013, *supra* note 168, art. 6.

<sup>173</sup> Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac,' art. 46, 2013 O.J. (L 180/1), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0001:0030:EN:PDF>.

in another EU state or whether the applicant has previously been apprehended when entering EU territory unlawfully.<sup>174</sup>

The European Parliament 2006 resolution on women's immigration, [The Role and Place of Immigrant Women in the European Union](#), calls on the EU's European Council to generate campaigns and make provisions for "preventing and averting forced or arranged marriages, female genital mutilation, and other forms of mental or physical coercion" that typically target women migrants and asylum-seekers in the EU (not in their country of origin).<sup>175</sup>

Under its section regarding dignity, integrity, and an end to gender-based violence, the European Parliament's resolution of March 13, 2012 on equality between women and men in the European Union, calls on member states to "pay special attention to vulnerable groups of women: . . . [including] . . . female immigrants."<sup>176</sup> The resolution also "[c]alls on the Commission to implement its commitment to mainstream gender equality in the Common European Asylum System."<sup>177</sup>

### Guidelines

The EU has not yet issued guidelines for gender-related claims. However, several of the Commission's recent communications contain suggested policy plans addressing the special needs of vulnerable asylum seekers (e.g., children, women, and victims of torture) and take gender-related considerations into account by giving special attention to how interviews are conducted and by offering support and medical assistance.<sup>178</sup>

In 2010, the Committee on Migration, Refugees and Population of the Council of Europe Parliamentary Assembly prepared a report on gender-related claims for asylum.<sup>179</sup> In this report, the Committee discussed how gender-based persecution differs from other forms of persecution and what measures should be taken when assessing and processing claims involving gender-specific issues, including suggestions on how to evaluate the refugee

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<sup>174</sup> *Id.*

<sup>175</sup> European Parliament resolution on women's immigration: the role and place of immigrant women in the European Union 2006/2010(INI), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2006-437>.

<sup>176</sup> European Parliament resolution of 13 March 2012 on equality between women and men in the European Union - 2011 (2011/2244(INI)), para. 51, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0069+0+DOC+XML+V0//EN>

<sup>177</sup> *Id.* at 43.

<sup>178</sup> *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - Policy plan on asylum - An integrated approach to protection across the EU*, COM (2008) 0360 final (June 17, 2008), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0360:EN:HTML>; and European Union: European Commission, *Green Paper on the Future Common European Asylum System*, COM (2007) 301 final (June 6, 2007), available at <http://www.unhcr.org/refworld/docid/466e5a972.html>.

<sup>179</sup> EU Parliamentary Assembly Committee on Migration, Refugees and Population, *Gender-related claims for asylum*, Doc. 12350 (July 6, 2010), available at [http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=12509&Language=en#P19\\_71](http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=12509&Language=en#P19_71).

definition. For instance, the report calls on member states to “ensure that gender-based violence is taken into account under the five different grounds of persecution in any asylum determination process and that ‘gender’ is specifically included as a ‘social group,’ preferably by law, or at least in practice.”

In June 1997, the Council of the European Union adopted a [resolution on unaccompanied minors who are nationals of third countries](#). This resolution is based on the UNHCR guidelines and sets out certain minimum guarantees and principles for cases involving minors in recognition of their vulnerable situation.<sup>180</sup> Among other things, the resolution requires that unaccompanied minors’ asylum applications be given priority and calls for interviews to be conducted by specially qualified officers who have the necessary experience or training. The resolution also states that allowance should be made for the fact that a child applicant may have limited knowledge of conditions in the country of origin.

The Action Plan for The Hague Programme and the CEAS include a broad range of additional special provisions regarding children, in particular unaccompanied minors. In accordance with the CRC, the asylum policies for unaccompanied children provide that the best interests of the child should be the primary consideration of Member States in evaluating children’s asylum cases. They also guarantee child asylum seekers certain rights because of their special vulnerability, such as representation by a legal guardian or other appropriate party, the right to education, medical care, and accommodation with a foster family or reception center for children.<sup>181</sup>

### Key Cases

On November 7, 2013, the European Court of Justice (ECJ) issued a judgment in [X, Y, Z v Minister voor Immigratie en Asiel](#),<sup>182</sup> which concerned three homosexual individuals fleeing from Sierra Leone, Uganda, and Senegal respectively, who applied for asylum in The Netherlands.<sup>183</sup> The ECJ found that homosexuals can constitute a particular social group within Article 10(1)(d) of the Qualification Directive and may qualify for asylum in a EU Member State.<sup>184</sup> In considering whether the criminalization of homosexual acts with the possibility of imprisonment if there is a conviction constitutes persecution, the ECJ found that such criminalization does not per se

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<sup>180</sup> Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries, 1997 O.J. (C 221/03), available at [http://europa.eu/legislation\\_summaries/other/l33041\\_en.htm](http://europa.eu/legislation_summaries/other/l33041_en.htm).

<sup>181</sup> *Communication from the Commission to the European Parliament and the Council: Action Plan on Unaccompanied Minors (2010-2013)*, SEC (2010) 534 final (May 6, 2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0213:FIN:EN:PDF>.

<sup>182</sup> *X, Y, Z v. Minister voor Immigratie en Asiel*, Case C-199/12, C-200/12, C-201/12, ECJ ( Nov. 7, 2013), available at <http://curia.europa.eu/juris/documents.jsf?num=C-199/12>.

<sup>183</sup> *X, Y, Z v. Minister voor Immigratie en Asiel*, Case C-199/12, C-200/12, C-201/12, ECJ ( Nov. 7, 2013), Opinion at ¶¶ 14, 18, available at <http://curia.europa.eu/juris/document/document.jsf?sessionId=9ea7d2dc30dcc80801ee106a4c5aacedfbaab5893c3f.e34KaxiLc3gMb40Rch0SaxuMch50?text=&docid=139426&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=8158>.

<sup>184</sup> *Id.* at ¶¶ 32-36.



constitute an act of persecution for purposes of Article 9(1) of the Directive.<sup>185</sup> Rather, it is for the national authorities to assess, in light of the circumstances of the applicant's country of origin, the following: (1) the risk and frequency of prosecution, (2) in the event of successful prosecution, the severity of the sanction normally imposed, and (3) any other measures and social practices to which the applicant may reasonably fear to be subjected, whether a particular applicant is likely to be subject either to acts that are sufficiently serious by their nature or repetition as to constitute a severe violation of human rights, or to an accumulation of various measures, including violation of human rights, which is sufficiently severe similarly to affect the applicant.<sup>186</sup> In assessing whether criminalization of homosexuality as an expression of sexual orientation is an act of persecution within the meaning of Article 9(1) of the Directive, the Member States must consider whether the applicant is likely to be subject to acts, or an accumulation of various measures, that are sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights.<sup>187</sup>

There has not yet been other EU case law developed on other gender-related or children's refugee claims.

EU case law is searchable online at <http://eur-lex.europa.eu/JURISIndex.do> or through the Court of Justice site, [http://curia.europa.eu/jcms/jcms/j\\_6/](http://curia.europa.eu/jcms/jcms/j_6/).

A summary of recent European asylum case law is available at: <http://frian.tumblr.com/post/39343802037/ecre-elena-legal-update-recent-european-case-law>.

Information about asylum case law in individual EU countries (through their separate court systems) is available online through the European Database of Asylum Law (EDAL), which is undergoing further development. The database currently includes cases summaries available for review in multiple languages. More information regarding EDAL is available online at: <http://www.asylumlawdatabase.eu/en>.

## Of Note

Most of the EU states are working on (or have completed) implementing the Qualification Directive and the other changes. There has been significant focus on gender-related issues within the EU in general, and this may also speed up the inclusion of gender in refugee assessments.<sup>188</sup> Through its European Refugee Fund (ERF), the EU co-sponsored a 2012 Asylum Aid report on "Gender-Related Asylum Claims in Europe," focusing on women in several EU Member States.<sup>189</sup> The report addresses women's asylum claims, regardless of whether those

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<sup>185</sup> *Id.* at ¶ 50.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* ¶ 77(3).

<sup>188</sup> European Commission, *Gender Equality*, (Oct. 16, 2013), [http://ec.europa.eu/justice/gender-equality/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/index_en.htm).

<sup>189</sup> CHEIKH ALI ET AL, *supra* note 128 at 41, available at [http://www.emnbelgium.be/sites/default/files/publications/gender\\_related\\_asylum\\_claims\\_in\\_europe.pdf](http://www.emnbelgium.be/sites/default/files/publications/gender_related_asylum_claims_in_europe.pdf).



claims are gender-based.<sup>190</sup> While a number of European countries have adopted national gender guidelines to provide guidance for the examination of gender-related asylum claims, the 2012 report recommends that the EASO should also develop “EU-wide gender guidelines and/or promote examples of national good practice at the European level.”<sup>191</sup>

The EU additionally co-sponsored a report, “Asylum Claims Related to Sexual Orientation and Gender Identity in Europe,” published in 2011.<sup>192</sup> In 2010, the EU published its action plan on unaccompanied minors.<sup>193</sup>

## Germany

### Legislation

Germany was among the last major receiving countries to revise its asylum policies to recognize gender-based persecution, due partly to its unique post-World War II context. The fundamental right to asylum for those who are “politically persecuted” is enshrined directly in the German Constitution, known as the [German Basic Law](#), which was enacted in 1949, two years before the 1951 Refugee Convention.<sup>194</sup> This provision in the Basic Law has been criticized as discriminatory against women and others with gender-related claims, as the grounds for their asylum claims traditionally did not fit the designation of political persecution.<sup>195</sup> The 1990 Aliens Act, in line with the Refugee Convention, later prohibited removal of asylum seekers whose lives or freedom are threatened “by reason of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>196</sup>

The [2004 German Immigration Act](#), entered into force in 2005, is the first comprehensive legislative framework in Germany to attempt to manage all aspects of immigration and is actually a package of legislation composed of several immigration-related acts (such as the

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<sup>190</sup> *Id.* at 10.

<sup>191</sup> *Id.* at 37.

<sup>192</sup> *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, project of COC Netherlands, VU University Amsterdam, Hungarian Helsinki Committee, Avvocatura per i diritti LGBT/Rete Lenford & the European Council on Refugees and Exiles (Sep. 2011).

<sup>193</sup> Action Plan on Unaccompanied Minors (2010 – 2014), *supra* note 128, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:0534:FIN:EN:PDF>.

<sup>194</sup> Birthe Ankenbrand, *Refugee Women under German Asylum Law*, 14 INT’L J. REFUGEE L. 45, 48 (2002), available at <http://ijrl.oxfordjournals.org/content/14/1/45.full.pdf+html>.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 48; Act Concerning the Entry and Residence of Aliens in the Territory of the Federal Republic (Aliens Act), Germany (January 1, 1991), Art. 51(1). <http://www.refworld.org/docid/3ae6b55a0.html>.

Residence Act,<sup>197</sup> amended in 2011, and the Asylum Procedure Act<sup>198</sup>).<sup>199</sup> The Immigration Act moves German domestic law closer toward harmonization with the European Union Qualification Directive and the 1951 Refugee Convention by recognizing as refugees individuals who have survived persecution by a non-state party whom the state is unable or unwilling to control.<sup>200</sup> The Act further clarifies that persecution based on membership in a particular social group may be established if there is a threat to a person's life, physical integrity, or liberty solely on account of gender.<sup>201</sup>

As a member of the EU, Germany had the obligation to transpose the minimum standards laid out in the EU Qualification Directive into its national law by December 21, 2013.<sup>202</sup> Please see the European Union section above for further details.

### Guidelines

Germany has not implemented any gender guidelines for assessing and considering refugee claims.

The Federal Office for Migration and Refugees has, however, issued a working paper on [Unaccompanied Minors in Germany](#). The working paper provides that children under the age of 16 shall be appointed a legal guardian to represent them with respect to the asylum application.<sup>203</sup> Furthermore, in all cases involving minors under the age of 18, "particular attention should be paid to the best interests of the child."<sup>204</sup> While the same criteria and requirements apply to child refugee claims as to those of adults, the working paper provides for children's asylum interviews and examinations to be "conducted in a less formal manner," and protects children from deportation if they have no one to care for them in their country of

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<sup>197</sup> Germany, Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet, 2004, available at [http://bundesrecht.juris.de/aufenthg\\_2004/index.html](http://bundesrecht.juris.de/aufenthg_2004/index.html) [in German]; for English, see Germany, Federal Office for Migration and Refugees, *Residence Act*, available at <http://www.iuscomp.org/gla/statutes/AufenthG.htm>.

<sup>198</sup> Germany, Asylum Procedure Act, available at [http://www.gesetze-im-internet.de/asylvfg\\_1992/index.html](http://www.gesetze-im-internet.de/asylvfg_1992/index.html) [German]; <http://www.iuscomp.org/gla/statutes/AsylVfG.htm> [English translation].

<sup>199</sup> UNHCR, *New German immigration law includes advances in refugee protection*, says UNHCR, July 12, 2004, <http://www.unhcr.org/40f2bb884.html>.

<sup>200</sup> Germany, Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners (Immigration Act) of 30 July 2004 [English Translation], s.60 (1) and 60(1)(c), Federal Law Gazette Volume 2004, Part I No. 41, available at [http://www.proasyl.de/fileadmin/proasyl/fm\\_redakteure/Englisch/German\\_Immigration\\_Act.pdf](http://www.proasyl.de/fileadmin/proasyl/fm_redakteure/Englisch/German_Immigration_Act.pdf); for an introduction to the Act, see Auswärtiges Amt, *The Immigration Act*, Germany, [http://www.auswaertiges-amt.de/EN/EinreiseUndAufenthalt/Zuwanderungsrecht\\_node.html](http://www.auswaertiges-amt.de/EN/EinreiseUndAufenthalt/Zuwanderungsrecht_node.html).

<sup>201</sup> *Id.*

<sup>202</sup> ECRE, "Qualification Directive," available at <http://www.ecre.org/topics/areas-of-work/protection-in-europe/92-qualification-directive.html> (last visited Jan. 19, 2014).

<sup>203</sup> Federal Office for Migration and Refugees, *Unaccompanied Minors in Germany – Reception, Return and Integration Arrangements*, at 39-40, Germany, Working Paper 26, July 14 2009, available at [http://www.bamf.de/SharedDocs/Anlagen/EN/Publikationen/EMN/Nationale-Studien-WorkingPaper/emn-wp26-unaccompanied-minors-en.pdf;jsessionid=B182392F830442B06921D0196152ED89.1\\_cid370?\\_blob=publicationFile](http://www.bamf.de/SharedDocs/Anlagen/EN/Publikationen/EMN/Nationale-Studien-WorkingPaper/emn-wp26-unaccompanied-minors-en.pdf;jsessionid=B182392F830442B06921D0196152ED89.1_cid370?_blob=publicationFile).

<sup>204</sup> *Id.* at 41.

origin.<sup>205</sup> In those cases in which a child does not meet the refugee definition but has no one to care for him or her in the country of origin, the child is issued a residence permit for subsidiary protection.

### Key Cases

In *3 UE 3457/04.A v Federal Republic of Germany*, two minor girls from Sierra Leone were granted refugee protection in 2005. They feared persecution in the form of forced FGC by their family members, and the court found that they could not be effectively protected by the state.<sup>206</sup> The court held that the girls were members of a particular social group, “women in Sierra Leone, who were at risk of forced FGC.”

In 2008, the Administrative Court Stuttgart granted refugee status to a woman from Iraq. The Court held that an unmarried woman with a “Western” lifestyle, who is not religious and has no financial means, is at risk of gender-based persecution by non-state actors that meets the standard for asylum in case of return to Iraq.<sup>207</sup> In another case, the Administrative Court Trier granted refugee status to a mother of two children from China.<sup>208</sup> The Court recognized that there was sufficient probability of the applicant being forced to undergo sterilization in China due to violation of the one child policy and that was a valid basis for asylum on account of her membership in the particular social group of women.<sup>209</sup>

In a 2010 case, the German Administrative Court Aachen affirmed that the threat of FGC is considered political persecution as well as persecution due to membership in a particular social group under the Residence Act (however, the Court found that the particular petitioner did not face risk of persecution in the form of FGC).<sup>210</sup> German case law has further recognized refugee status for a Tibetan woman raped by Chinese police officers, deeming her to have been persecuted on account of race,<sup>211</sup> and for unmarried women fleeing forced marriage as persecution against a particular social group based on their female gender.<sup>212</sup>

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<sup>205</sup> *Id.* at 42 – 43.

<sup>206</sup> *3 UE 3457/04.A v Federal Republic of Germany*, Germany: Higher Administrative Court, March 30 2005, available at [http://www.refugeecaselaw.org/cases\\_files/Germany/case\\_1310\\_3.pdf](http://www.refugeecaselaw.org/cases_files/Germany/case_1310_3.pdf) [in German].

<sup>207</sup> Administrative Court Stuttgart, January 18, 2011, A 6 K 615/10, available at <http://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-stuttgart-18-january-2011-6-k-61510#content>.

<sup>208</sup> Administrative Court Trier, 23 March 2011, 5 K 1181/10.TR, available at <http://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-trier-23-march-2011-5-k-118110tr#content>.

<sup>209</sup> *Id.*

<sup>210</sup> Administrative Court Aachen, 10 May 2010, 2 K 562/07.A (Germany), available at <http://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-aachen-10-may-2010-2-k-56207a#content>.

<sup>211</sup> High Administrative Court Baden-Wurttemberg, 3 November 2011, A 8 S 1116/11 (Germany), available at <http://www.asylumlawdatabase.eu/en/case-law/germany-high-administrative-court-baden-wurttemberg-3-november-2011-8-s-111611#content>.

<sup>212</sup> Administrative Court Augsburg, 16 June 2011, Au 6 K 30092 (Germany), available at <http://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-augsburg-16-june-2011-au-6-k-30092#content>. See also Germany - Administrative Court of Oldenburg, 13 April 2011, 3 A 2966/09 (Germany),

# Ireland

## Legislation and Regulations

Ireland's incorporated its obligations under the 1951 Refugee Convention and 1967 Protocol into legislation under the [Refugee Act 1996](#). This Act has been amended by the Immigration Act 1999, the Illegal Immigrants (Trafficking) Act 2000, and the Immigration Act 2003.<sup>213</sup>

The Refugee Act 1996 (as amended) explicitly states that “membership in a particular social group” includes membership in a group of persons whose defining characteristic is belonging to the female or the male sex or having a particular sexual orientation.<sup>214</sup>

In 2008, the Immigration Residence and Protection Bill was introduced. Intended to consolidate and replace existing asylum and immigration legislation and to further implement EU directives, the bill was published, after a series of amendments, in June 2010.<sup>215</sup>

Under the 2010 [Immigration, Residence and Protection Bill](#), persecution by non-state actors constitutes grounds for protection, provided that the state is unable or unwilling to provide protection.<sup>216</sup> Furthermore, the Bill also defines “acts of persecution” as including acts of sexual violence and acts of a gender-specific or child-specific nature,<sup>217</sup> and it calls for the Minister or Tribunal to “take gender-related aspects into account.”<sup>218</sup> However, the definition of “membership in a particular social group” itself does not contain the explicit reference to the applicant's gender that is included in the Refugee Act 1996.<sup>219</sup> The amended Bill states that “a group shall be considered to form a particular social group where in particular— (i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, or (ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society, and, depending on the circumstances in the country of origin, a particular social group may include a group based on a common characteristic of sexual orientation.”<sup>220</sup>

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available at <http://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-oldenburg-13-april-2011-3-296609#content>; Administrative Court Stuttgart, 14 March 2011, A 11 K 553/10 (Germany), available at <http://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-stuttgart-14-march-2011-11-k-55310#content>.

<sup>213</sup> Irish Naturalization and Immigration Service [INIS], *Asylum Policy – Domestic Legislation*, available at <http://www.inis.gov.ie/en/INIS/Pages/Domestic%20Legislation>.

<sup>214</sup> Refugee Act 1996 (Act No. 17/1996), art. 1, available at <http://www.irishstatutebook.ie/1996/en/act/pub/0017>.

<sup>215</sup> Niamh McMahon, *The Long and Winding Road to Immigration Legislation in Ireland*, Human Rights in Ireland, June 18, 2010, <http://www.humanrights.ie/index.php/2010/06/18/mcmahongues>.

<sup>216</sup> Immigration, Residence and Protection Bill 2010, art. 67(1), available at <http://www.oireachtas.ie/documents/bills28/bills/2010/3810/b3810d.pdf>.

<sup>217</sup> *Id.* at art. 71(2)(a) and (f).

<sup>218</sup> *Id.* at art. 72(4)(b).

<sup>219</sup> *Id.* at art. 72(3); compare Refugee Act 1996, *supra* note 201, art. 1.

<sup>220</sup> *Id.* at art. 72(1)(d) (emphasis added).

The Bill also calls for special procedural consideration in cases involving vulnerable applicants, such as children under the age of 18, pregnant women, and torture victims.<sup>221</sup>

The 2011 Regulations to the Act specifically address the interview process for children during their initial (first instance) interview and require the Refugee Applications Commissioner or decision-maker to take the best interests of the child into account as “a primary consideration” and to ensure that the interview and subsequent report and recommendations are carried out by officers with knowledge of the special needs of minors.<sup>222</sup>

Although Ireland is a member of the EU, it has opted out of the new recast EU Qualification Directive.<sup>223</sup> However, the minimum standards contained in the 2004 Qualification Directive still remain applicable to Ireland.<sup>224</sup> Please see European Union section above for further details.

### Guidelines

The Irish Office of the Refugee Applications Commissioner (ORAC) processes asylum applications and “claims to have a number of guidelines/papers that assist them when assessing women’s cases,”<sup>225</sup> However, these have not been made public.

In 2000, the Irish Council for Civil Liberties (ICCL) Women’s Committee published a statement of best practices in gender-related cases for immigration officials, decision-makers, and authorities.<sup>226</sup> In 2012, the Irish Naturalisation & Immigration Service (INIS) (formed in 2005 in order to serve as a “one stop shop” to administer asylum, immigration, and Irish citizenship matters)<sup>227</sup> issued Victims of Domestic Violence Immigration Guidelines, which assert that a victim of domestic violence who has legal status in the country does not need to stay with her

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<sup>221</sup> *Id.* at art. 109(6).

<sup>222</sup> Siobhan Mullally, *Separated Children in Ireland: Responding to “Terrible Wrongs,”* 23 INT’L J. REFUGEE L. 632, 644 (2011), <http://ijrl.oxfordjournals.org/content/23/4/632.full>; see also Refugee Act of 1996 (Asylum Procedures) Regulations (S.I. No. 52 /2011), available at <http://www.irishstatutebook.ie/pdf/2011/en.si.2011.0052.pdf>.

<sup>223</sup> Council Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 2011 O.J. (L 337/9) [hereinafter Qualification Directive], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF>

<sup>224</sup> *Id.*

<sup>225</sup> IRISH COUNCIL FOR CIVIL LIBERTIES WOMEN’S COMMITTEE, COMBINED FOURTH AND FIFTH PERIODIC REPORTS OF IRELAND UNDER THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN - SUBMISSION TO THE CEDAW COMMITTEE (May 2005), available at <http://www.iccl.ie/attachments/download/138/ICCLWomensCommittee-SubmissiontoCEDAWCommittee-May2005.pdf>.

<sup>226</sup> ICCL WOMEN’S COMMITTEE ET AL., WOMEN AND THE REFUGEE EXPERIENCE: TOWARDS A STATEMENT OF BEST PRACTICE (June 1, 2000), available at [http://www.iccl.ie/attachments/download/128/WomenandtheRefugeeExperience%20towards%20a%20State ment%20of%20Best%20Practice%20ICCL%20and%20Irish%20Times,%20June%202000.pdf](http://www.iccl.ie/attachments/download/128/WomenandtheRefugeeExperience%20towards%20a%20Statement%20of%20Best%20Practice%20ICCL%20and%20Irish%20Times,%20June%202000.pdf).

<sup>227</sup> Irish Naturalisation & Immigration Service, Mission Statement, <http://www.inis.gov.ie/en/INIS/Pages/WP07000076> (last visited Jan. 19, 2014).

abuser in order to maintain status where status is otherwise dependent on the abuser.<sup>228</sup> The Guidelines do not address asylum claims based on domestic violence outside of Ireland, nor do they provide status for victims of domestic violence who are otherwise unauthorized to reside in the country.<sup>229</sup>

While there are no publically available guidelines regarding children's refugee claims, according to ORAC there are some protections for child asylum seekers. For example, a child refugee claimant under the age of 18 and not in the custody of an adult is referred to the Health Board, which may then decide that an application for asylum should be made on behalf of the minor.<sup>230</sup> ORAC has specially trained caseworkers to process cases of unaccompanied minors<sup>231</sup> and the 2011 regulations contain special accommodations for interviewing unaccompanied minors.<sup>232</sup> The Health Service Executive supports minor applicants throughout the process.<sup>233</sup>

### Key Cases

There are few published Irish decisions involving gender-related claims. However, the Irish Refugee Council leads the development of the European Database of Asylum Law, which includes asylum case law from Ireland and partnering countries.

In *Reference 22 v. Ireland*, a young Zimbabwean woman had suffered abduction, rape, and sexual slavery by the Zimbabwe African National Union Patriotic Front (ZANU-PF) militia.<sup>234</sup> The Refugee Appeals Tribunal held that the applicant had a serious fear of future persecution and that there was a real chance that she would be targeted by the militia if she returned, especially due to her past mistreatment and escape. The Tribunal considered her age and gender as circumstances preventing internal relocation, and held that she was at risk of persecution based on her imputed political opinion (as an opponent of the government).

In 2011, the Refugee Appeals Tribunal in Ireland held that the liberal lifestyle of an Islamic Moroccan woman of the Berber ethnic group, whose family disapproved of her out-of-wedlock relationship with a male, was not eligible for asylum based on the determination that the

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<sup>228</sup> Irish Naturalisation & Immigration Service, Victims of Domestic Violence Immigration Guidelines, March 2012, § 1, available at <http://www.inis.gov.ie/en/INIS/Victims%20of%20Domestic%20Violence%20-%20Note%20for%20Web.pdf/Files/Victims%20of%20Domestic%20Violence%20-%20Note%20for%20Web.pdf>

<sup>229</sup> *Id.* § 5.

<sup>230</sup> Office of the Refugee Applications Commissioner, *Refugee Status Determination – Unaccompanied Minors*, ORAC <http://www.orac.ie/website/orac/oracwebsite.nsf/page/59D0D144A45C3AF580257A7100345114> (last visited on Feb. 2, 2014)

<sup>231</sup> *Id.*

<sup>232</sup> 2011 Regulations, *supra* note 190 at 3. – 4.

<sup>233</sup> ORAC, *supra* note 198.

<sup>234</sup> *Reference 22 v. Ireland* [2006] Refugee Appeals Tribunal, available at <http://www.refugeecaselaw.org/redirectpdf.aspx?caseid=1206>.

applicant could have sought internal protection.<sup>235</sup> The Tribunal further determined that internal relocation was a viable option for the applicant.

In the 2011 case of *J.T.M. v Minister for Justice, Equality and Law Reform*, Ireland found that an asylum applicant from Nigeria had been tortured because she was infertile, but denied her asylum, finding that she failed to show that her State was unwilling or unable to protect her from harm by non-State actors.<sup>236</sup> The Minister granted the applicant's leave for judicial review to address the state action requirement determination.<sup>237</sup>

## Mexico

### Legislation and Regulations

Mexico acceded to the Refugee Convention in 2000, and in 2011 the domestic Law on the Protection of Refugees and Asylum Seekers entered into force.<sup>238</sup> The law was developed with technical support from the UNHCR, and it implements international standards and recognized principles, such as non-refoulement, non-discrimination, family unity, and the best interest of the child.<sup>239</sup> The law also prohibits discrimination against refugees based on ethnic or national origin, gender, age, sexual preferences, or marital status.<sup>240</sup> Perhaps the most notable aspect of the new law is that it includes gender as one of the protected grounds for asylum along with the five traditional grounds.<sup>241</sup>

The law further requires that vulnerable applicants, including women, pregnant women, victims of torture, victims of sexual abuse and gender-based violence, and children and adolescents receive special attention as well as procedural and institutional measures established for their benefit.<sup>242</sup> Under the law, applicants who are not eligible for refugee status, but who are at risk of serious harm in their country of origin, such as torture or death, may be granted subsidiary protection.<sup>243</sup>

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<sup>235</sup> *A.A. v. Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform*, [2011] IEHC 389, available at <http://www.asylumlawdatabase.eu/sites/asylumlawdatabase.eu/files/aldfiles/A.A.%20v%20MJELR%202011%20IEHC%20389.pdf>.

<sup>236</sup> *J.T.M. v. Minister for Justice, Equality and Law Reform*, [2011] IEHC 393, available at <http://www.asylumlawdatabase.eu/sites/asylumlawdatabase.eu/files/aldfiles/J.M.T%20v%20MJELR%202011%20IEHC%20393.pdf>.

<sup>237</sup> *Id.*

<sup>238</sup> UN News Centre, *UN agency welcomes Mexico's new refugee law*, UN NEWS SERVICE, Jan. 28, 2011, <http://www.un.org/apps/news/story.asp?NewsID=37403&Cr=refugee&Cr1=>.

<sup>239</sup> *Id.*

<sup>240</sup> Mexico, *Ley Sobre Refugidos y Proteccion Complementaria*, Mexico, Jan 27 2011, art. 8, available at <http://www.unhcr.org/refworld/pdfid/4d4293eb2.pdf>.

<sup>241</sup> *Id.* at art. 13.I.

<sup>242</sup> *Id.* at art. 20, 42.

<sup>243</sup> Press Release, U.S. Committee for Refugees and Immigrants, *Mexico's Landmark Law Protects Refugees and Asylum Seekers*, <http://www.refugees.org/about-us/in-the-news/press-releases/mexicos-new-law-protects.html> (last visited Jan. 19, 2014).



## Guidelines

Mexico has not developed guidelines for gender-related or children's asylum claims.

## Key Cases

In 2008, before the enactment of the current law, a woman from Nicaragua who had suffered severe domestic abuse at the hands of her husband was granted refugee status in Mexico and, in 2009, her son was allowed to join her. She had initially planned to go to the United States, but was stopped by Mexican immigration authorities. After describing the verbal and physical abuse she had endured, her application was granted as it would be too dangerous for her to return to Nicaragua.<sup>244</sup>

## The Netherlands

### Legislation and Regulations

The Refugee Convention became incorporated into Dutch legislation upon its ratification.<sup>245</sup> The governing Dutch national statute regulating refugee and asylum procedures is the [Aliens Act 2000](#). Under the Act,<sup>246</sup> asylum seekers can be awarded a residence permit (1) on the basis of the Refugee Convention, (2) if they run a real risk of being subjected to the death penalty or execution, (3) if they would be at real risk of torture, inhumane or degrading treatment, or punishment, (4) if they risk serious and individual threat to their lives due to indiscriminate violence in situations of international or internal armed conflict, or (5) for compelling humanitarian reasons relating to their individual circumstances.<sup>247</sup> The Act does not specifically mention gender persecution as a basis for granting refugee protection. On June 8, 2012, the minister lodged a proposal to amend Article 29 of the Aliens Act, and it is likely that Article 29 will be altered in a restrictive manner. The proposed amendment removes humanitarian reasons as grounds for granting protection and places limitations on which family members of asylum seekers may obtain residence permits.<sup>248</sup>

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<sup>244</sup> Mariana Echandi, *A new start in Mexico: Leaving domestic violence behind*, UNHCR, Telling the Human Story, Sept. 23, 2009, <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=4ab9d5556&query=mexico>.

<sup>245</sup> AUSTRALIAN LAWYERS FOR HUMAN RIGHTS, AUSTRALIAN LAWYERS FOR HUMAN RIGHTS REFUGEE LAW KIT 2004 10 (Nov. 30, 2004), available at [http://www.alhr.asn.au/refugee-kit/downloads/chapters\\_all.pdf](http://www.alhr.asn.au/refugee-kit/downloads/chapters_all.pdf).

<sup>246</sup> Wijziging Vreemdelingenwet 2000 (Complete revision of the Aliens Act) 2000 (2007/19) Stb. 2000, 497, available at <http://www.unhcr.org/refworld/docid/3b5fd9491.html>.

<sup>247</sup> Ministry of Justice, *The Aliens Act 2000. Aliens in the Netherlands: Admission and Reception*, p.8, Code 4710, Netherlands, March 2004, available at <http://www.unhcr.org/refworld/docid/47fdfaea0.html>.

<sup>248</sup> Danielle Zevulun & Geert Lamers, EUROPEAN COUNCIL ON REFUGEES AND EXILES, DUBLIN II REGULATION NATIONAL REPORT: EUROPEAN NETWORK FOR TECHNICAL COOPERATION ON THE APPLICATION OF THE DUBLIN II REGULATION - THE NETHERLANDS 10 (Feb. 18, 2013), available at <http://www.unhcr.org/refworld/docid/51405ab02.html>, (citing Minister proposal to amend Article 29 Aliens Act, 8 June 2012, (Tweede Kamer der Staten-Generaal, Wijziging van de Vreemdelingenwet 2000 in verband met het herschikken van de gronden voor asiolverlening, 3333 293, nr. 2)).



As a member of the EU, the Netherlands was required to transpose the minimum standards laid out in the EU Qualification Directive into its national law.<sup>249</sup> Please refer to the European Union section above for further details.

## Guidelines

The Implementation Guidelines (Vreemdelingendecirculaire), published alongside the Aliens Act, advocate a “gender-inclusive approach.”<sup>250</sup> The guidelines provide that membership in a social group functions as a residual category for claiming refugee status under the Refugee Convention.<sup>251</sup> Furthermore, the guidelines state that women generally do not constitute a particular social group because they are too diverse in composition, unless the applicant can show that the persecution was related to her gender.<sup>252</sup> A “Work Instruction” on “Women in the Asylum Process” helps explicate the Implementation Guidelines issued by the Netherlands Immigration and Naturalization Services, stating, “Sex cannot be the sole ground to determine membership of a ‘particular social group’. Women in general are too diverse a group to constitute a particular social group. In order to establish membership of a particular social group one should be put in an exceptional position compared to those whose situation is similar. In addition, the persons should be targeted individually.”<sup>253</sup>

The Implementation Guidelines provide suggestions for presenting certain types of claims, including gender-based claims. For instance, women who have violated social norms and customs relating to their gender are encouraged to claim refugee status based on political opinion,<sup>254</sup> while women who face persecution in the form of FGC, may often be granted asylum based on a real risk that they will be subjected to “torture, inhumane or degrading treatment or punishment” (which is not one of the Convention grounds, but is one of the bases for awarding residence permits in Dutch Law).<sup>255</sup>

In addition, the Dutch Immigration Authority (IND) has issued several procedural guidelines addressing cases involving women or gender-related issues. The most recent guideline was published in 2006, providing procedural instructions for asylum officers in gender-related

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<sup>249</sup> ECRE, Qualification Directive, available at <http://www.ecre.org/topics/areas-of-work/protection-in-europe/92-qualification-directive.html> (last visited Jan. 19, 2014).

<sup>250</sup> UN General Assembly, Committee on Elimination of Discrimination against Women, *Women’s Anti-Discrimination Committee Examines Netherlands’ Policies on Prostitution Domestic Violence, Human Trafficking*, WOM/1601/Rev.1, Jan 24 2007, available at <http://www.un.org/News/Press/docs//2007/wom1601.doc.htm>.

<sup>251</sup> Ministry of Justice, *Vreemdelingendecirculaire 2000*, Netherlands, art. C.2.10.1, available at [http://wetten.overheid.nl/BWBR0012288/Opschrift/geldigheidsdatum\\_29-10-2010](http://wetten.overheid.nl/BWBR0012288/Opschrift/geldigheidsdatum_29-10-2010).

<sup>252</sup> *Id.* at art. C.2.2.11.

<sup>253</sup> Netherlands Immigration and Naturalization Service, Work Instruction No. 148, reprinted in UNHCR, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003), pp. 284-85.

<sup>254</sup> *Id.* C.2.2.8.

<sup>255</sup> Aliens Act 2000, *supra* note 239, art. 29 (1)(b).

asylum cases involving trafficking, domestic violence, and honor related violence.<sup>256</sup> In 2007, the IND also issued a separate guideline for dealing with (potential) victims of trafficking within the asylum procedure.<sup>257</sup>

Individuals who have a residence permit for a definite period may be entitled to a permit for continued residence if they are victims of domestic violence or trafficking or if they witness and report human trafficking.<sup>258</sup> While temporary resident permits may be provided to domestic violence victims on humanitarian grounds, the CEDAW Committee, in its Concluding Observations in 2010, remained concerned that domestic violence is still not formally recognized as a ground for asylum that leads to more permanent status.<sup>259</sup>

In 2005, the IND also issued a guideline for immigration officials regarding cases involving unaccompanied minors which contains instructions on procedural issues, but not on substantive issues.<sup>260</sup> Applications for unaccompanied minors seeking asylum in the Netherlands are assessed by IND employees trained in working with young people.<sup>261</sup> Unaccompanied minors seeking asylum are assigned a guardian to assist them with the asylum process as well as to ensure their care while in the Netherlands. If an unaccompanied minor does not qualify for residence through a grant of asylum, the IND will grant one-year residence permits (renewable for up to three years) to those unaccompanied minors who do not have “good reception options in the country of origin or a different country.”<sup>262</sup> At the same time, the Dutch government has begun to set up reception facilities for children in foreign countries, and to date has done so in Angola and Congo.<sup>263</sup>

## Key Cases

There are published decisions involving women refugee seekers available on the Dutch Judiciary’s website, [www.rechtspraak.nl](http://www.rechtspraak.nl) (in Dutch).

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<sup>256</sup> Immigratie- and Naturalisatiedienst [IND], *Werkinstructie 2006/17: Rol contactpersonen aangaande gender-gelateerde zaken*, Netherlands, Aug 7 2006, available at <https://www.ind.nl/Documents/WI%202006-17o.pdf> [in Dutch].

<sup>257</sup> Immigratie- and Naturalisatiedienst [IND], *Werkinstructie 2007/16: Werkinstructie “(potentiële) slachtoffers van mensenhandel en de asielprocedure”*, Netherlands, Dec 18 2007, available at <https://www.ind.nl/Documents/WI%202007-16o.pdf> [in Dutch].

<sup>258</sup> <http://netherlands.angloinfo.com/moving/residency/non-eu-nationals/>; Immigratie- and Naturalisatiedienst [IND], *Application for a regular residence permit without a provisional residence permit, or for a change to the purpose of residence*, available at [http://www.vu.nl/en/Images/5007\\_ENG\\_M35A\\_tcm6-591\\_tcm12-50812.pdf](http://www.vu.nl/en/Images/5007_ENG_M35A_tcm6-591_tcm12-50812.pdf)

<sup>259</sup> CEDAW, *Concluding observations of the Committee on the Elimination of Discrimination against Women*, para. 40, CEDAW/C/NLD/CO/5, 5 February 2010.

<sup>260</sup> Immigratie- and Naturalisatiedienst [IND], *Werkinstructie 2005/11 Alleenstaande/voorheen begeleide minderjarige vreemdelingen*, Netherlands, April 11 2005, available at <https://www.ind.nl/Documents/WI%202005-11o.pdf>.

<sup>261</sup> Immigration and Naturalization Service: Ministry of the Interior and Kingdom Relations, Fact Sheet: Information about the General Asylum procedure, the Extended Asylum procedure, Unaccompanied Minor Foreign Nationals procedure, Dublin procedure, Resettlement of refugees, at 3, available at [https://www.ind.nl/EN/Documents/factsheets\\_asiel.pdf](https://www.ind.nl/EN/Documents/factsheets_asiel.pdf)

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 4.

## Of Note

The Dutch asylum procedure was substantially amended in July 2010.<sup>264</sup> Under the new procedure, asylum seekers will more timely be informed about the outcome of their cases.<sup>265</sup>

## New Zealand

### Legislation and Regulations

The Immigration Act of 1987 incorporates the definition of a refugee from the 1951 Refugee Convention and the 1967 Protocol<sup>266</sup> governed domestic law in New Zealand until it was replaced by the Immigration Act of 2009 (2009 Act), last amended October 1, 2012. The 2009 Act does not contain any gender-specific provisions.

Following the 2009 Act, a number of immigration regulations entered into force, including the Immigration (Refugee and Protection Status Processing) Regulations 2010 (SR2010/240). These regulations discuss obligations of refugee and protection officers and claimants as well as notifications of decisions on refugee claims.<sup>267</sup>

### Guidelines

New Zealand has not adopted gender guidelines for refugee claims, preferring to apply the principles of treaty interpretation found in the Vienna Convention on the Law of Treaties when determining whether gender is a protected basis. In particular, Article 31(1) provides this guidance: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>268</sup>

Immigration New Zealand (INZ), the government agency responsible for implementing the country’s refugee program, most recently issued its Immigration New Zealand Operational

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<sup>264</sup> Press Release, Ministry of Security and Justice, New Asylum Procedure in Force on 1 July, May 18, 2010, *available at*

<http://www.government.nl/documents-and-publications/press-releases/2010/05/18/new-asylum-procedure-in-force-on-1-july.html>; THOMAS SPIJKERBOER, DE NIEUWE ASIELPROCEDURE (2010), *available at* <http://www.vajn.org/doc/nieuwe-asielprocedure-thomas-spijkerboer.pdf> [in Dutch].

<sup>265</sup> Ministry of Security and Justice, *supra* note 264, at 95.

<sup>266</sup> Immigration Act 1987, art. 129D, *available at* <http://www.legislation.govt.nz/act/public/1987/0074/latest/DLM113053.html>.

<sup>267</sup> Immigration Act 2009 Commencement Order 2010, SR 2010/185, *available at* [http://www.legislation.govt.nz/regulation/public/2010/0185/latest/whole.html?search=ts\\_regulation\\_immigration\\_resel](http://www.legislation.govt.nz/regulation/public/2010/0185/latest/whole.html?search=ts_regulation_immigration_resel); Immigration (Refugee and Protection Status Processing) Regulations 2010 (SR2010/240), Aug. 9, 2010, *available at* <http://www.legislation.govt.nz/regulation/public/2010/0240/latest/DLM3149401.html>.

<sup>268</sup> RODGER HAINES QC, ADVANCING A GENDERED INTERPRETATION OF THE REFUGEE CONVENTION: REFUGEE APPEAL NO. 76044 - PRESENTATION FOR 2009 NATIONAL MEMBERS' CONFERENCE OF THE MIGRATION REVIEW TRIBUNAL AND REFUGEE REVIEW TRIBUNAL (Sept. 10, 2009), *available at* <http://www.refugee.org.nz/Reference/Sydney09.html>.

Manual: Refugees and Protection in 2013.<sup>269</sup> The INZ operational manual includes some guidance on claims for refugee status by minors, but it does not address procedural or substantive matters relating to a refugee claimant's gender. Specifically, if a minor does not have a responsible adult to represent his or her interests, a refugee and protection officer must take steps to ensure that one is nominated.<sup>270</sup> Minors must be given the opportunity to express their views either personally or through a responsible adult, and the refugee protection officer must "give due weight to those views, taking into account the minor's age and level of maturity and understanding."<sup>271</sup>

The Immigration Protection Tribunal (IPT) – an independent body that was established by the 2009 Act and hears appeals and applications relating to refugee protected status claims<sup>272</sup> – issued its most recent Refugee and Protection Practice Note in May 2012.<sup>273</sup> Section 18 of the Practice Note addresses gender issues in asylum hearings by: (1) encouraging attorneys and appellants to alert the tribunal to any gender-specific factors in advance of hearings; (2) providing gender-appropriate translators where possible when a claim involves "allegations of sexual violence or abuse or similarly sensitive issues"; and (3) where possible, ensuring that "an appeal is heard by a member of the same gender as the appellant."<sup>274</sup> The Practice Note also addresses asylum claims and appeals from minors. In particular, the Tribunal asserts that a "minor's interests are to be represented by the minor's parent," or by a responsible adult appointed by the Tribunal in the absence of a parent.<sup>275</sup>

### Key Cases

The IPT was established under the 2009 Act as a single Tribunal to hear all immigration and asylum appeals, replacing the Residence Review Board (RRB), Removal Review Authority (RRA), Refugee Status Appeals Authority (RSAA), and Deportation Review Tribunal (DRT).

The IPT maintains a database of its Refugee/Protection decisions online at <https://forms.justice.govt.nz/search/IPT/RefugeeProtection>. The database is searchable by Convention grounds for determination of refugee status, by the outcome of the hearing, as well as by key search terms such as "gender" or "child."

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<sup>269</sup> IMMIGRATION NEW ZEALAND, IMMIGRATION NEW ZEALAND OPERATIONAL MANUAL: REFUGEES AND PROTECTION (Aug. 19, 2013), *available at* <http://www.immigration.govt.nz/NR/rdonlyres/60E7836A-D2B6-4628-BC63-4EFBAB2825DF/0/Refugeesandprotection.pdf>.

<sup>270</sup> *Id.* at s. C7.1.

<sup>271</sup> *Id.* at s. C7.1.15.

<sup>272</sup> New Zealand Ministry of Justice, Immigration and Protection Tribunal, <http://www.justice.govt.nz/tribunals/immigration-protection-tribunal> (last visited Jan. 19, 2014).

<sup>273</sup> IMMIGRATION AND PROTECTION TRIBUNAL, PRACTICE NOTE 2/2012 (REFUGEE AND PROTECTION) (May 10, 2012), [*hereinafter* Refugee and Protection Practice Note], *available at* <http://www.justice.govt.nz/tribunals/immigration-protection-tribunal/documents-1/practicenote-refugeeandprotection>.

<sup>274</sup> Refugee and Protection Practice Note, § 18.1 – 18.3.

<sup>275</sup> Refugee and Protection Practice Note, § 8.4.

In 1995, the Refugee Appeals Authority (a predecessor to the IPT) held in the precedential decision, *Refugee Appeal No 1312*,<sup>276</sup> that sexual orientation can be the basis for finding the existence of a “particular social group.” In analyzing whether “homosexuals in Iran” could constitute a “particular social group,” the Authority looked to international jurisprudence on sexual orientation asylum claims, and found that “homosexuality is either an innate or unchangeable characteristic, or a characteristic so fundamental to identity or human dignity that it ought not be required to be changed.”<sup>277</sup>

In a 2008 decision concerning honor killings in Turkey, *Refugee Appeal No. 76044*,<sup>278</sup> the Refugee Appeals Authority made important observations about gender in the context of refugee claims based on political opinion and the need for a gender-sensitive interpretation. In this case, the claimant successfully argued that her assertion of her right to life and to autonomy was a “political opinion” in that it challenged familial and community values, norms, and collective morality. The Authority held that the applicant’s challenge to inequality and the power structures that supported it was plainly political, and that she was at risk for persecution for reasons of her political opinion. The decision recognizes that gender norms and societal traditions are political.<sup>279</sup> In particular, the opinion discusses the inequality and gendered distribution of power as reflected by the observance of customs related to honor and the power structures underlying collective morality and behavior.<sup>280</sup>

While the applicant was granted asylum based on political opinion, the Authority also observed that her claim would succeed based on “membership in a particular social group,” holding that the applicant was at risk of being persecuted “for reasons of” her membership in the group “women in Turkey.”<sup>281</sup>

In *Refugee Appeal No. 76501* (2010),<sup>282</sup> an indigenous Fijian woman was granted refugee status because she was a victim of domestic violence by her husband, who was a police officer. The Refugees Appeal Authority stated that, “The persecution that the appellant faces is for reason of her membership of a particular social group, namely women.”<sup>283</sup> The Authority was “mindful that a finding that women constitute a particular social group is necessarily country specific,”<sup>284</sup> and found that “[t]he country information concerning the status of women in Fiji establishes

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<sup>276</sup> *Refugee Appeal No. 1312/93*, Refugee Status Appeals Authority, Auckland 1312/93, 30, Aug. 1995, available at [https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref\\_19950830\\_1312.pdf](https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_19950830_1312.pdf).

<sup>277</sup> *Id.*

<sup>278</sup> *Refugee Appeal No. 76044*, Refugee Status Appeals Authority, Auckland 76044, 11 Sept. 2008, available at [https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref\\_20080911\\_76044.pdf](https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_20080911_76044.pdf).

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 83.

<sup>281</sup> See, e.g., *Australia’s Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 (HCA); UK’s *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 (HL); and UK’s *Fornah v Secretary of State for the Home Department* [2007] 1 AC 412 (HL); see also Rodger Haines QC, *supra* note 268, at para. 18.

<sup>282</sup> *Refugee Appeal No. 76501*, [2012] NZIPT 800041, available at [https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref\\_20101119\\_76501.pdf](https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_20101119_76501.pdf).

<sup>283</sup> *Id.* at para. 57.

<sup>284</sup> *Id.* at para. 58.

that the specific social and cultural position of women, combined with the absence of effective state protection from police and the judiciary in cases of domestic violence, is such that they are appropriately recognised as a particular social group for the purposes of the Refugee Convention.”<sup>285</sup> Notwithstanding the legal framework of gender equality set out in the Fijian constitution and various legal and policy developments, the Authority found that “women continue to face intense social and familial pressure to reconcile with violent partners and to maintain marriage notwithstanding the violence. Such pressure is also manifest in women’s interactions with the police and judiciary.”<sup>286</sup> As such, the Authority determined that the woman faced a real chance of persecution at the hands of her violent husband and that state protection was not available at least in part because of ingrained social attitudes to women” in Fiji.<sup>287</sup>

In *BS (Fiji)*,<sup>288</sup> the Tribunal considered the appeal of a Fijian transwoman who claimed that if she returned to Fiji, gender reassignment treatment would not be available to her, causing her to suffer serious mental harm. She also stated that she would be forced to undertake sex work to survive, exposing her to violence at the hands of clients and harassment from the military. The Tribunal found that Fiji’s public health system would not provide the appellant with specialist hormonal treatment or gender reassignment surgery, and without treatment her physical and mental health would be seriously compromised. The Tribunal concluded that the inability to access specialist gender reassignment medical treatment in Fiji does not amount to being persecuted. However, the Tribunal found that the appellant would suffer significant discrimination in accessing employment in Fiji “amounting to a breach at the core of her right to work” and “[w]ithout the support of her family who have ostracized her, the appellant, like many other transsexuals, will face having to engage in sex work in order to avoid becoming destitute.”<sup>289</sup> The Tribunal concluded that the harms to the appellant from having to undertake illegal sex work in Fiji would include (a) damage her psychological well-being, (b) endanger her physical health by heightening her risks of sexual disease and HIV, (c) expose her to risk of abuse and violence from clients against whom she cannot seek police protection without putting herself at risk of being charged, (d) increase her risk of harassment from the police. These harms are “sufficiently serious to meet the standard required for ‘being persecuted’” on account of her “being a member of a particular social group, namely, transsexuals.”<sup>290</sup>

*Refugee Appeal No. 800279* (2012) involved the case of a Colombian woman and her teenage son who fled after the woman’s eldest son was killed by members of a criminal gang he had refused to join.<sup>291</sup> After gang members killed the eldest son, they approached the family to ask

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<sup>285</sup> *Id.* at para. 60.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at para. 63.

<sup>288</sup> *BS (Fiji)*, [2012] NZIPT 800041, available at [https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref\\_20120803\\_800041.pdf](https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_20120803_800041.pdf).

<sup>289</sup> *Id.* at paras. 110–11.

<sup>290</sup> *Id.* at paras. 123, 127, 128.

<sup>291</sup> *Refugee Appeal No. 800279*, [2012] NZIPT 800279–280, available at [https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref\\_20121220\\_800279.pdf](https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_20121220_800279.pdf).

if they planned to seek prosecution for the eldest son's death and to recruit the teenage son into their ranks. The appellants feared that the gang would harm them to prevent them from retaliating and because the youngest son resisted pressure to join the gang.<sup>292</sup>

With respect to the son, the Tribunal found that there was a real chance that he would be killed by the same criminal gang that killed his brother and that there was no effective state protection to prevent this from happening.<sup>293</sup> The Tribunal found that "a contributing reason for the risk faced by the son is his membership of a particular social group, namely as a family member of the eldest son. His brother's resistance to joining the gang and death at [the] hands [of the gang] mean that the son is seen as someone who may take revenge against the gang or join another gang."<sup>294</sup> The Tribunal noted that the UNHCR's *Guidance Note on Refugee Claims relating to Victims of Organized Gangs* recognizes that a family member of a "gang resister" may be persecuted because of his or her membership of a particular social group.<sup>295</sup> The Tribunal further found that the son does not have an internal protection alternative in Colombia and should be recognized as a refugee.<sup>296</sup>

### Of Note

New Zealand provides certain domestic violence victims in the country the opportunity to apply for a resident visa. To be eligible for such a visa, applicants must: (a) be or have been in a partnership with a New Zealand citizen or residence class visa holder; (b) have intended to seek a residence class visa in New Zealand on the basis of that relationship; (c) have ended the partnership due to domestic violence by the New Zealand citizen, residence class visa holder, or by someone with whom the applicant is living in a domestic relationship; (d) be unable to return to their home country because they would either have no means of financial support or would be at risk of abuse or exclusion from their community because of stigma; and (e) meet health and character requirements.<sup>297</sup>

## Norway

### Legislation and Regulations

The primary legislation controlling Norwegian refugee law is the [Act Concerning the Entry of Foreign Nationals into the Kingdom of Norway and their Presence in the Realm 2008](#) (Immigration Act) (last amended in 2012). The Immigration Act follows the refugee definition set out in the Refugee Convention and Protocol, and it recognizes acts of persecution related to

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<sup>292</sup> *Id.* at paras. 59-62.

<sup>293</sup> *Id.* at para. 48.

<sup>294</sup> *Id.* at para. 50.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at paras. 57-58.

<sup>297</sup> IMMIGRATION NEW ZEALAND, IMMIGRATION NEW ZEALAND OPERATIONAL MANUAL s4.5 (Jan. 15, 2014), *available at* <http://www.immigration.govt.nz/opsmanual/42635.htm>.



gender or committed against children as bases for refugee claims.<sup>298</sup> The Act also recognizes that acts by non-state actors can constitute persecution for asylum purposes where the state is unwilling or unable to protect against such acts.<sup>299</sup> On October 15, 2009, Norway issued Regulations on the Entry of Foreign Nationals into the Kingdom of Norway and Their Stay in the Realm.<sup>300</sup> The regulations address issues such as border control, immigration enforcement, residency permits, and asylum interview procedures. However, they do not provide standards or special procedures for gender-based claims other than allowing women to request an interview by a female officer.<sup>301</sup>

## Guidelines

The Norwegian Government issued updated guidelines on gender-related persecution in 2009, replacing previously issued guidelines.<sup>302</sup> The 2009 guidelines contain procedural considerations and requirements for obtaining refugee status and asylum. In particular, they address how the Refugee Convention can be interpreted to encompass gender-based persecution, and they note that gender-related claims should be considered in the context of social and cultural conditions in the applicant's home country.<sup>303</sup> The guidelines provide examples of gender-related persecution, including rape, forced sterilization, female genital mutilation, forced prostitution/trafficking, and domestic violence (depending on the "seriousness and extent of abuse").<sup>304</sup>

The Norwegian Directorate of Immigration considers unaccompanied minors to be a particularly vulnerable group of asylum applicants, and consequently it applies special procedures and standards in their cases.<sup>305</sup> Among other child-specific standards, the threshold for what is deemed to constitute persecution is lower for children than for adults, based on the presumption that children are more vulnerable than adults. Applications from minors receive priority, and there is great emphasis on protecting the best interests of child applicants. A child who does not meet the refugee definition but has no caregiver in the country of origin is granted a residence permit on "grounds of strong humanitarian considerations."

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<sup>298</sup> Norway, Lov om utlendingers adgang til riket og deres opphold her (Utlendingsloven), LOV 2008-05-15 nr 35, art. 28 s.1(a) and art. 29 s.2(f), May 15 2008, available at <http://www.lovdato.no/cgi-wift/ldles?doc=/all/nl-20080515-035.html#map004> [in Norwegian].

<sup>299</sup> *Id.* at art. 29, s. 3 (c).

<sup>300</sup> Available at [http://www.regjeringen.no/upload/JD/Vedlegg/Forskrifter/Immigration\\_Regulation.pdf](http://www.regjeringen.no/upload/JD/Vedlegg/Forskrifter/Immigration_Regulation.pdf).

<sup>301</sup> *Id.*

<sup>302</sup> Utlendingsdirektoratet (UDI), *Retningslinjer om kjønnsrelatert forfølgelse*, Norway, AI -105/2009, Dec 21 2009, available at <http://www.regjeringen.no/en/dep/jd/dok/rundskriv/2009/AI--1052009-Retningslinjer-om-kjønnsrelatert-forfølgelse.html?id=591396> [in Norwegian].

<sup>303</sup> Utlendingsdirektoratet, *supra* at 302.

<sup>304</sup> *Id.* at § 3.1.

<sup>305</sup> Directorate of Immigration (UDI), *Unaccompanied minor asylum seekers*, Norway, Dec 30 2009, available at <http://www.udi.no/Norwegian-Directorate-of-Immigration/Central-topics/Protection/Asylum-seekers-and-refugees/Unaccompanied-minor-asylum-seekers/>; Utlendingsdirektoratet (UDI), *Saksbehandlingsrutiner for enslige mindreårige asylsøkere og flytninger*, DM sak 050824-05, September 2005, available at <http://www.udi.no/upload/Regelverk/EMA/UDIsSaksbehandlingsrutinerEMA.pdf> [in Norwegian].



## Key Cases

In *05-017600TVI-OTI R/0*, an Iranian woman who had suffered forced marriage and domestic violence was granted asylum on account of her membership in a particular social group based on her being a divorced, uneducated single woman accused of violating fundamental ethical norms.<sup>306</sup> She had divorced her husband in Iran and became romantically involved with another man. Her ex-husband and her own family claimed that she had dishonored them by being unfaithful to her (former) husband, and they threatened to kill the couple or to report the “affair” to the authorities. The applicant tried to relocate, but she continued to receive threats to her life, and her brother-in-law raped her.

Upon filing for asylum in Norway, the applicant initially did not disclose the rape and the nature of her relationship with the second man. As a result, the first body of decision-makers found her testimony not credible. The court later reversed this finding, holding that the applicant’s fear, mental condition, and cultural differences could explain the inconsistencies. The court further accepted that she would not be able to relocate within her country of origin, and that she would not be able to get sufficient, if any, protection from the authorities in Iran.<sup>307</sup>

## Of Note

Individual decisions are not published in Norway. However, the Immigration Appeals Board (IAB) issues “practice notes” regarding recurring issues. In 2009, the IAB issued a practice note describing its typical treatment of cases involving persecution of homosexuals.<sup>308</sup> Claimants within this group are customarily considered to be members of a particular social group, not automatically entitled to protection on a general basis, but refugee status and protection may be granted depending on the level of risk and credibility in the individual case.<sup>309</sup>

The IAB has also issued a practice note on cases where there might be a risk of FGC upon return to the home country.<sup>310</sup> The note states that in cases involving minors, the IAB should examine the possibility of FGC *sua sponte*, especially when the general country conditions indicate that there might be an elevated risk. Typically, the IAB grants refugee protection on the basis of membership in a particular social group where there is a risk of FGC.<sup>311</sup>

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<sup>306</sup> Decision on file with CGRS.

<sup>307</sup> Oslo Tingrett, Saksnr.: 05-0176009TVI-OTI R/04, May 6 2005, *available at* [http://www.refugeecaselaw.org/cases\\_files/Norway/case\\_1033\\_17.pdf](http://www.refugeecaselaw.org/cases_files/Norway/case_1033_17.pdf).

<sup>308</sup> Utlendingsnemnda [UNE], *Praksis i UNE – homofili: Forfølgelse på grunn av homofili*, Norway, 2009, *available at* <http://www.une.no/Praksis2/Notater/Praksis-i-UNE---homofili/> [in Norwegian].

<sup>309</sup> *Id.*

<sup>310</sup> Utlendingsnemnda [UNE], *Saker der det kan foreligge risiko for kjønnslemlestelse ved retur til hjemlandet*, Norway, April 24 2009, <http://www.une.no/Praksis2/Notater/Saker-der-det-kan-foreligge-risiko-for-kjønnslemlestelse/> [in Norwegian].

<sup>311</sup> *Id.*

## Romania

### Legislation and Regulations

Romania is a signatory to the Refugee Convention and Protocol. In 2006, Romania adopted a new refugee law ([Law no. 122/2006 on Asylum in Romania](#), hereinafter Asylum Law),<sup>312</sup> which implements the obligations assumed under the Convention. In addition, the Asylum Law offers subsidiary protection to individuals who do not satisfy the refugee definition, but who face a risk of torture, execution, or a serious risk to their life or integrity.<sup>313</sup> In addition to the Asylum Law, Romanian law regulating migration and asylum includes Government Emergency Ordinance no. 194/2002 on the Regime for Foreigners in Romania, and Government Decision no. 1251/2006 on approving the Methodology for the Implementation of Law no. 122/2006 on Asylum in Romania.<sup>314</sup> Article 8 of the Asylum Law mandates that all decisions involving minor children be made in the best interests of the child. Minors' claims are assessed with the highest priority, and a legal representative is assigned to each case.<sup>315</sup> Article 9 of the Gov. Ordinance no. 1251/2006 includes gender-specific and child-specific types of harm within the definition of persecution.<sup>316</sup>

On January 24, 2014, the Official Gazette of Romania, Part I., no. 63, published the Government Emergency Ordinance no. 1/2014 amending and supplementing the Asylum Law and a Government Ordinance on the social integration of foreigners who have been granted protection or the right to residence in Romania.<sup>317</sup> The Ordinance includes protection for persons who are vulnerable or have special needs, including minors, unaccompanied minors, people with disabilities, elderly people, pregnant women, victims of trafficking, persons with mental illness, and people who have been subjected to torture, rape, or other serious forms of psychological, physical or sexual abuse.<sup>318</sup> Following the Ordinance, an unaccompanied minor registered as an asylum seeker is appointed legal representation and assisted with family tracing.<sup>319</sup>

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<sup>312</sup> Law no. 122/2006 on Asylum in Romania, available at [http://ori.mai.gov.ro/api/media/userfilesfile/Legislatie/Legislatie%20nationala/L\\_122\\_2006\\_EN.pdf](http://ori.mai.gov.ro/api/media/userfilesfile/Legislatie/Legislatie%20nationala/L_122_2006_EN.pdf).

<sup>313</sup> *Id.* at art. 2(h), 26.

<sup>314</sup> Minister of Justice of Romania, Report for the 28th Conference of European Ministers of Justice (Lanzarote, October 25-26, 2007), at 3, available at [http://www.coe.int/t/dghl/standardsetting/minjust/mju28/MJU-28\(2007\)08E-Romania.pdf](http://www.coe.int/t/dghl/standardsetting/minjust/mju28/MJU-28(2007)08E-Romania.pdf).

<sup>315</sup> Law no. 122/2006 on Asylum in Romania, art. 8  
[http://ori.mai.gov.ro/api/media/userfilesfile/Legislatie/Legislatie%20nationala/L\\_122\\_2006\\_EN.pdf](http://ori.mai.gov.ro/api/media/userfilesfile/Legislatie/Legislatie%20nationala/L_122_2006_EN.pdf)

<sup>316</sup> HANA CHEIKH ALI, CHRISTEL QUERTON, & ELODIE SOULARD, GENDER-RELATED ASYLUM CLAIMS IN EUROPE: A COMPARATIVE ANALYSIS OF LAW, POLICIES AND PRACTICE FOCUSING ON WOMEN IN NINE EU MEMBER STATES (May 2012), at 42, available at [http://www.emnbelgium.be/sites/default/files/publications/gender\\_related\\_asylum\\_claims\\_in\\_europe.pdf](http://www.emnbelgium.be/sites/default/files/publications/gender_related_asylum_claims_in_europe.pdf); (See also, Govt. Emergency Ordinance No. 194/2002, available at [http://ori.mai.gov.ro/api/media/userfilesfile/Legislatie/Legislatie%20nationala/OUG\\_194\\_2002\\_2007\\_EN.pdf](http://ori.mai.gov.ro/api/media/userfilesfile/Legislatie/Legislatie%20nationala/OUG_194_2002_2007_EN.pdf)).

<sup>317</sup> Amendment of regulations regarding the asylum, *Romanian Legal Week* (February 2, 2014), available at: <http://www.legalweek.ro/5882/amendment-of-regulations-regarding-the-asylum.html>

<sup>318</sup> Emergency Ordinance no. 1/2014 (Jan. 22, 2014), Art. 2k<sup>1</sup>.

<sup>319</sup> *Id.* at art. 40(1) and art. 73.

## Guidelines

The Romanian Immigration Office maintains guidelines concerning how to determine gender-related asylum claims. These guidelines are used to train asylum officers and guide adjudicators, but they are not legally binding.<sup>320</sup>

## Key Cases

In *Minor Appellant L.A.A. v. Decision of the National Refugee Office*, 8945/2003, a 16-year-old girl from Somalia was granted refugee status in Romania after the murders of her family members and multiple rapes by members of the paramilitary forces. She asked that her application be analyzed from a gender perspective, and also with a view to the fact that she was a minor and therefore protected under the UN Convention on the Rights of the Child. Due to unsafe conditions, she could not be out by herself, nor could she attend school. Her situation had worsened after the rape, as she was already a member of a minority tribe, and as a “stained” woman it would be even harder for her to get married and find protection. Furthermore, the rape made it even more likely that she would be raped again or even murdered if she remained in Somalia. The Court held:

As regards the subjective aspect, the Court considers that the fear of persecution of the appellant is well founded, having in mind not only the lack of education (nonattendance of school), but also the age at which she suffered the traumatizing events invoked (killing of parents and brothers and the rape against herself) during childhood, as well as the mentality of the community that she belongs to with regards to women and single girls, especially if they were victims of sexual attack, in which case there is a risk for feminine genital mutilation enforced by the members of her own community.

The court further concluded that although the persecution was by a non-state agent, the authorities were unable to offer protection, held that the persecution was based on the claimant’s ethnicity, and granted her refugee status. The decision was based in part on the “best interest of the child” principle.<sup>321</sup>

## Of Note

There are specific procedural guarantees for unaccompanied and separated children seeking asylum in Romania. While case officers must take into account the intellectual development and maturity of the child, they are not required to carry out a best interest determination.<sup>322</sup>

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<sup>320</sup> CHEIKH ALI ET AL., *supra* note 312 at 34, available at [http://www.emnbelgium.be/sites/default/files/publications/gender\\_related\\_asylum\\_claims\\_in\\_europe.pdf](http://www.emnbelgium.be/sites/default/files/publications/gender_related_asylum_claims_in_europe.pdf). While Romania has adopted gender guidelines, a copy of the guidelines has not been made easily accessible to the public.

<sup>321</sup> *Minor Appellant L.A.A. v. Decision of the National Refugee Office*, 8945/2003, Romania: Bucharest Sector II Court, Nov. 24, 2003, available at <http://www.unhcr.org/refworld/docid/4104e5784.html>.

<sup>322</sup> UNHCR, *Response to Vulnerability in Asylum* (December 2013), at p. 26, available at: <http://www.unhcr-centraleurope.org/pdf/what-we-do/caring-for-vulnerable-groups/response/response-to-vulnerability-in-asylum-project-report.html>

During the asylum process, unaccompanied children are appointed a legal guardian from the Child Protection Directorate; children under 16 are housed in a child protection facility, while those over 16 may choose to stay in a reception center or be placed in a facility of the Child Protection Directorate.<sup>323</sup>

## South Africa

### Legislation

The 1998 [South African Refugees Act](#) is the primary legislation incorporating South Africa's responsibilities and obligations under both the Refugee Convention and Protocol and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>324</sup> The Act defines "social group" as including a group of persons of a particular gender or sexual orientation.<sup>325</sup>

The Refugees Act was amended by the 2008 [Refugees Amendment Act](#), bringing the South African definition of "refugee" in line with its obligations under the Refugee Convention.<sup>326</sup> The Amendment Act also explicitly incorporates gender-related persecution claims by including gender as one of the possible bases for a "particular social group" as well as by adding gender as a separate ground for refugee status.<sup>327</sup> The Refugees Act was most recently amended by the 2011 Refugees Amendment Act.<sup>328</sup>

The Act requires that unaccompanied children under the age of 18 be issued asylum seeker permits and brought before the Children's Court.<sup>329</sup> Children should be detained only as a measure of last resort, and only for the shortest period of time possible, taking into consideration the best interests of the child.<sup>330</sup>

### Guidelines

The South African Government has not issued guidelines for gender cases. However, a group of NGOs developed and issued non-binding gender guidelines for asylum determinations based on gender-related claims, suggesting "alternative approaches to traditional interpretations of

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<sup>323</sup> *Id.*

<sup>324</sup> Refugees Act 130 of 1998, Preamble, *available at* [http://us-cdn.creamermedia.co.za/assets/articles/attachments/22555\\_a130-98.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/22555_a130-98.pdf).

<sup>325</sup> *Id.* at ch.1, art. 1(xxi).

<sup>326</sup> U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS [USCRI], WORLD REFUGEE SURVEY: SOUTH AFRICA 2009 (June 17 2009), <http://www.unhcr.org/refworld/country,,USCRI,,COG,,4a40d2b22,0.html>.

<sup>327</sup> Refugees Amendment Act 33 of 2008, art.1 § 1.(xxi), art. 4(a), *available at* <http://www.refworld.org/docid/4a54bbd4d.html>.

<sup>328</sup> *Refugees Amendment Act, 2011*, *available at* <http://db3sqepoi5n3s.cloudfront.net/files/bills/110830a12-11.pdf>.

<sup>329</sup> *Id.* at art. 14 § 21A (1).

<sup>330</sup> *Id.* at art. 24 § 29 (2).

categories of persecution.”<sup>331</sup> The NGO guidelines address general gender-related issues and considerations, in addition to offering suggestions for how officials interviewing asylum-seekers can be sensitive to specific issues that can arise in gender-related claims.<sup>332</sup>

In 2011, South Africa’s Department of Social Development issued [Guidelines on Separated & Unaccompanied Minors](#) as part of a social worker training on Unaccompanied and Separated Foreign Children in South Africa.<sup>333</sup>

### Key Cases

South Africa does not appear to have published any decisions on gender-related refugee claims. However, there is an article that mentions the denial of asylum to a woman who fled Kenya to avoid FGC and a man who fled persecution in Uganda because he is gay.<sup>334</sup> A list of refugee cases, with summaries where available, can be found at [http://www.refugeerights.uct.ac.za/legal/case\\_law\\_reader](http://www.refugeerights.uct.ac.za/legal/case_law_reader).

In a 2011 case, the North Gauteng High Court in Pretoria declared that an unaccompanied minor denied the opportunity to apply for asylum due to lack of guardianship need not produce a court order from the Children’s Court to be granted an asylum seeker permit, which would allow him to remain in South Africa pending a decision on his asylum claim, and remanded the case for further review.

### Of Note

The 1998 Refugees Act prohibited refusal of entry, expulsion, or extradition of refugees, and gave a right of appeal to all refugees. The Department of Home Affairs became extremely backlogged as a result, and, at the end of 2009, still had more than 100,000 cases pending.<sup>335</sup> The 2008 Refugees Amendment Act addressed this backlog as one aspect of its efforts to improve the efficiency and effectiveness of refugee assessment.<sup>336</sup> In contravention of the Act, in 2011, the Department of Home Affairs closed the Cape Town, Johannesburg, and Port

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<sup>331</sup> Nahla Valji & Lee Anne De La Hunt, The University of Cape Town Legal Aid Clinic, *Gender Guidelines for Asylum Determination*, National Consortium on Refugee Affairs (1999), available at <http://www.ccrweb.ca//safr.PDF>. At the time of this publication, this is the most recent version of the NGO gender guidelines easily available to the public.

<sup>332</sup> *Id.* at 3, 10, 14, 22.

<sup>333</sup> See UNIVERSITY OF CAPE TOWN, REFUGEE RIGHTS PROJECT, SOCIAL WORKER TRAINING MATERIALS, available at <http://www.refugeerights.uct.ac.za/info>; REPUBLIC OF SOUTH AFRICA, DEPT. OF SOCIAL DEVELOPMENT, GUIDELINES ON SEPARATED AND UNACCOMPANIED CHILDREN OUTSIDE THEIR COUNTRY OF ORIGIN IN SOUTH AFRICA (July 2011), available at [http://www.refugeerights.uct.ac.za/usr/refugee/Information\\_Sources/Guidelines\\_on\\_separated\\_&\\_unaccompanied\\_minors.pdf](http://www.refugeerights.uct.ac.za/usr/refugee/Information_Sources/Guidelines_on_separated_&_unaccompanied_minors.pdf).

<sup>334</sup> IRIN, “South Africa’s flawed asylum system,” 30 Apr. 2013, available at <http://www.refworld.org/country,,,ZAF,,5187a9f74,0.html%29>.

<sup>335</sup> U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS [USCRI], WORLD REFUGEE SURVEY: SOUTH AFRICA 2009 (Jun. 17, 2009), available at <http://www.unhcr.org/refworld/country,,USCRI,,COG,,4a40d2b22,0.html>.

<sup>336</sup> Parliamentary Monitoring Group, *Refugees Amendment Bill [B30-2010]: briefing by Department of Home Affairs* Oct. 14, 2010, available at <http://www.pmg.org.za/report/20101014-department-home-affairs-refugees-amendment-bill-b30-2010>.

Elizabeth Refugee Reception Offices (RRO), leaving only three operational RROs.<sup>337</sup> Asylum applicants and refugees needing to lodge applications or renew their documents have since had difficulty gaining access to the existing and over-burdened RROs, and have been left at risk of being fined, detained, or refouled.<sup>338</sup> The courts have ruled that the three RRO closures were unlawful and ordered them re-opened.<sup>339</sup> However, due to the backlog produced by its closure, when the Cape Town RRO re-opened in May 2013, only women and children asylum seekers were allowed access, leaving many male asylum seekers and refugees without protection.<sup>340</sup>

## Spain

### Legislation

Spain's [Asylum Law of 2009](#) repeals the former Asylum Law of 1984 and is the primary law regarding refugees and the asylum procedure in Spain.<sup>341</sup> In accordance with the EU Qualification Directive and UNHCR Guidelines, it includes gender and sexual orientation as independent grounds for refugee claims and asylum, in addition to the five Convention grounds.<sup>342</sup> It further recognizes that persecution by non-state actors can amount to persecution that gives rise to a right to refugee protection, and may come in forms such as sexual abuse committed against adults or children.<sup>343</sup>

The Law also calls for special treatment of vulnerable persons, such as minors, elderly people, pregnant women, single parents, and victims of torture.<sup>344</sup> Minors seeking international protection are also entitled to receive medical and psychological care and support, and, if unaccompanied, shall also receive support through an appointed guardian.<sup>345</sup>

As a member of the EU, Spain was required to transpose the minimum standards laid out in the EU Qualification Directive into its national law.<sup>346</sup> For further details, please see the above section on the European Union.

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<sup>337</sup> AMNESTY INTERNATIONAL, ANNUAL REPORT 2012: THE STATE OF THE WORLD'S HUMAN RIGHTS – SOUTH AFRICA (2012), *available at* <http://www.amnesty.org/en/region/south-africa/report-2012#section-4-4>;

<sup>338</sup> AMNESTY INTERNATIONAL, *supra* note 329.

<sup>339</sup> Lenyaro Sello, Fight over Refugee Reception Centre in court, ENEWS CHANNEL AFRICA, Apr. 18, 2013, *available at* <http://www.enca.com/south-africa/fight-over-refugee-reception-centre-court>.

<sup>340</sup> AMNESTY INTERNATIONAL, "SOUTH AFRICA: POLICE REPEATEDLY TURN ON ASYLUM-SEEKERS AMID XENOPHOBIA SPIKE," MAY 29, 2013, *available at* <http://www.amnesty.org/en/news/south-africa-police-repeatedly-turn-asylum-seekers-amid-xenophobia-spike-2013-05-29>.

<sup>341</sup> Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria (B.O.E. 2009, 263), *available at* [http://noticias.juridicas.com/base\\_datos/Admin/l12-2009.html](http://noticias.juridicas.com/base_datos/Admin/l12-2009.html) [in Spanish].

<sup>342</sup> *Id.* at art. 3.

<sup>343</sup> *Id.* at art. 6, 13.

<sup>344</sup> *Id.* at art. 46.

<sup>345</sup> *Id.* at art. 47, 48.

<sup>346</sup> ECRE, Qualification Directive, *available at* <http://www.ecre.org/topics/areas-of-work/protection-in-europe/92-qualification-directive.html> (last visited Jan. 19, 2014).

## Guidelines

Spain's Ministry of Health, Social Services and Equality has published a guide, *Specific Rights of Women Victims of Gender-Based Violence*, which discusses gender-based violence in general, and includes a section on the "Rights of Foreign Women Victims of Gender-Based Violence."<sup>347</sup> This guide indicates that women victims of gender-based violence may be recognized as refugees if they have a well-founded fear of being persecuted "for reasons of belonging to certain social, gender or sexual orientation group."<sup>348</sup> The persecution may be in the form of physical or psychological violence, including acts of sexual violence.<sup>349</sup> The concept of a particular social group, according to the guide, includes "a group based on a common sexual orientation or sexual identity characteristic."<sup>350</sup>

## Key Cases

In 2005, Spain granted asylum to a woman survivor of domestic violence who had escaped from a forced marriage.<sup>351</sup> This was the first asylum case granted on the basis of gender, thus demonstrating that the courts are willing to recognize "women whose governments fail to protect them from institutionalized and pervasive violence" as refugees.<sup>352</sup>

In 2009, Spain granted asylum to an Algerian woman who sought protection from gender-based persecution by a non-state agent. The High National Court ruled that gender is recognized as a "particular social group" and that persecution need not be perpetrated by state actors.<sup>353</sup>

## Of Note

A leading Spanish NGO, the Spanish Commission for Assistance to Refugees (Comisión Española de Ayuda al Refugiado or CEAR) issued a [manifiesto](#) expressing some concern regarding the new asylum law. Although CEAR recognizes that it contains certain improvements, it also contains a "safe country" exception (similar to the U.S./Canada Safe Third Country Exception) that lists the third countries that are presumed safe, and it limits the ability of refugee claimants to apply for asylum in certain situations.<sup>354</sup> In particular, CEAR expressed concern that the safe third

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<sup>347</sup> MINISTERIO DE SANIDAD, SERVICIOS SOCIALES E IGUALDAD, *SPECIFIC RIGHTS OF WOMEN VICTIMS OF GENDER-BASED VIOLENCE*, 19–24, available at <http://www.msssi.gob.es/ssi/violenciaGenero/Recursos/GuiaDerechos/DOC/DERECHOSING.pdf>.

<sup>348</sup> *Id.* at 22–23.

<sup>349</sup> *Id.* at 23.

<sup>350</sup> *Id.*

<sup>351</sup> UNHCR, *Spain Grants Asylum to Battered Woman*, UNHCR NEWS STORIES, June 9, 2005, available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=42a849eb4&query=spain%20asylum>

<sup>352</sup> [Decision](#) on file with CGRS.

<sup>353</sup> Spain - High National Court, Jan. 13, 2009, 1528/2007, available at <http://www.asylumlawdatabase.eu/en/case-law/spain-high-national-court-13-january-2009-15282007#content>.

<sup>354</sup> *Public Manifesto: In Defence of the Right to Asylum*, STATEWATCH.ORG, at 2. (last visited Mar. 3, 2014) <http://www.statewatch.org/news/2008/dec/spain-cear-manifiesto.pdf>; CEAR, *Propuestas de CEAR ante el borrador de anteproyecto de la ley reguladora del derecho de asilo y de la protección subsidiaria* (Oct. 24, 2008), available at [https://www.icam.es/docs/ficheros/200707060001\\_6\\_3.pdf](https://www.icam.es/docs/ficheros/200707060001_6_3.pdf).



country and safe countries of transit exceptions will make it possible to reject applications for asylum without analyzing the personal circumstances of the applicant.<sup>355</sup>

## Sweden

### Legislation

Swedish immigration and refugee determinations are regulated by the [Aliens Act 2005](#), which entered into force in 2006 and repealed the 1989 Aliens Act. Under the Act, refugee claims may be based on fear of persecution “on grounds of gender, sexual orientation or other membership of a particular social group,” in addition to the other Convention grounds, thus incorporating the EU Qualification Directive into Swedish law.<sup>356</sup> As a member of the EU, Sweden was required transpose the amended minimum standards laid out in the EU Qualification Directive into its national law in 2013.<sup>357</sup> Please see European Union section above for further details.

Last amended in 2011, the Aliens Act continues to provide protection against persecution on grounds of “race, nationality, religious or political belief, or on grounds of gender, sexual orientation or other membership of a particular social group.”<sup>358</sup> Furthermore, the law recognizes persecution by non-state as well as by state actors.<sup>359</sup>

The Act provides that in cases involving child applicants, particular attention must be given to the child’s health, development, and best interests.<sup>360</sup> Each case must be assessed individually, but the various interests of the child must be weighed in determining the child’s eligibility for refugee protection.<sup>361</sup> The Act also limits the use of detention of children and provides for appointment of a legal representative in cases of unaccompanied minors.<sup>362</sup>

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<sup>355</sup> *Id.*

<sup>356</sup> 4 ch. 1 § Utlänningslag (Svensk författningssamling [SFS] 2005:716) (*hereinafter* Aliens Act 2005), *available at* <http://www.unhcr.org/refworld/docid/3ae6b50a1c.html>; UNHCR, UNHCR COMMENTS ON THE INQUIRY (SOU 2006:6, SWEDISH GOVERNMENT OFFICIAL REPORT) ON THE IMPLEMENTATION IN SWEDISH LAW OF COUNCIL DIRECTIVE 2004/83/EC OF

29 APRIL 2004 ON MINIMUM STANDARDS FOR THE QUALIFICATION AND STATUS OF THIRD COUNTRY NATIONALS OR STATELESS PERSONS AS REFUGEES OR AS PERSONS WHO OTHERWISE NEED INTERNATIONAL PROTECTION AND THE CONTENT OF THE PROTECTION GRANTED (HEREAFTER THE QUALIFICATION DIRECTIVE) (May 15, 2006), *available at* <http://www.unhcr.org/refworld/pdfid/4a54bbef0.pdf>.

<sup>357</sup> ECRE, “Qualification Directive,” *available at* <http://www.ecre.org/topics/areas-of-work/protection-in-europe/92-qualification-directive.html> (last visited Jan. 19, 2014).

<sup>358</sup> 4 ch. 14 § Aliens Act 2005, *supra* note 248.

<sup>359</sup> *Id.* at 4 ch.1 §.

<sup>360</sup> *Id.* at 1 ch. 10 §.

<sup>361</sup> Ministry of Justice, *Children in the Asylum Process* (May 23, 2013), <http://www.sweden.gov.se/sb/d/11901/a/125270>.

<sup>362</sup> 10 ch. 2, 3, 5 §, 18 ch. 3, 4 § Aliens Act 2005, *supra* note 248.



Finally, the Act offers subsidiary protection for refugee claimants demonstrating “exceptionally distressing circumstances” when they cannot establish eligibility for asylum.<sup>363</sup> The Act specifically provides that “exceptionally distressing circumstances” need not be as serious for children as for adults.

### Guidelines

In 2001, the Swedish Migration Board issued [Gender-Based Persecution: Guidelines for Investigation and Evaluation of the Needs of Women for Protection](http://www.unhcr.org/refworld/docid/3f8c1a654.html).<sup>364</sup> A year later, in January 2002, the Migration Board issued [Guidelines for Investigation and Evaluation of Asylum Cases in which Persecution based on Given Sexual Orientation is Cited as a Ground](http://www.unhcr.org/refworld/docid/3f8c1af44.html). The stated objective of the sexual orientation guidelines is “[t]o increase the awareness of the staff regarding the special problems of persons with certain sexual orientation can have in the asylum process, and at the same time, to give the applicants as good an opportunity as possible to describe their own experiences, to the extent that they will do so, including extremely sensitive and private aspects.”<sup>365</sup>

Both the gender and sexual orientation guidelines were based on the previous Aliens Act, and their status and utility after enactment of the Aliens Act 2006 (last amended in 2011) is unclear.

In 2008, the Swedish Refugee Advice Center, an NGO offering legal advice and doing refugee advocacy, published guidance on gender claims to asylum decision-makers and legislators.<sup>366</sup> This guidance offers suggestions as to what factors should be considered when evaluating asylum claims in which the persecution is based on gender-related issues or sexual orientation, in addition to suggesting certain procedural measures to make the asylum proceedings gender-sensitive.

The Swedish Refugee Advice Center also published a handbook in 2008 based on a variety of sources, including published immigration decisions. The handbook offers an overview of the asylum process and suggests how to improve the Swedish asylum procedure from a gender-based perspective, such as by using interpreters and asylum officials of the same gender as the applicant and by establishing trust and ensuring confidentiality.<sup>367</sup>

The Ministry of Justice has published a policy note on [Children in the Asylum Process](#). The policy note offers an introduction as well as a brief explanation of how children’s cases should

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<sup>363</sup> *Id.* at 5 ch. 6 §.

<sup>364</sup> SWEDISH MIGRATION BOARD, GENDER-BASED PERSECUTION: GUIDELINES FOR INVESTIGATION AND EVALUATION OF THE NEEDS OF WOMEN FOR PROTECTION (Mar. 28, 2001), *available at* <http://www.unhcr.org/refworld/docid/3f8c1a654.html>.

<sup>365</sup> SWEDISH MIGRATION BOARD, GUIDELINES FOR INVESTIGATION AND EVALUATION OF ASYLUM CASES IN WHICH PERSECUTION BASED ON GIVEN SEXUAL ORIENTATIONS IS CITED AS A GROUND, (Jan. 28, 2002), *available at* <http://www.unhcr.org/refworld/docid/3f8c1af44.html>.

<sup>366</sup> RÅDGIVNINGSBYRÅN FÖR ASYLSÖKANDE OCH FLYKTINGAR, HÅLLPUNKTER FÖR EN GENUSMEDVETEN ASYLPRÖVNING (2008), *available at* [http://sweref.org.dynamichosting.se/kvinnor/en\\_rattvis\\_asylprovning.aspx](http://sweref.org.dynamichosting.se/kvinnor/en_rattvis_asylprovning.aspx) [in Swedish].

<sup>367</sup> MARIA BEXELIUS, ASYL RÄTT, KÖN OCH POLITIK – EN HANDBOK FÖR JÄMSTÄLLDHET OCH KVINNORS RÄTTIGHETER, RÅDGIVNINGSBYRÅN FÖR ASYLSÖKANDE OCH FLYKTINGAR (2008), *available at* <http://www.adlibris.com/se/product.aspx?isbn=9163323001> [in Swedish].

be handled under the Alien's Act and UN Convention on the Rights of the Child.<sup>368</sup> It further outlines the rights afforded to children seeking protection in Sweden, such as to health care and education.

### Key Cases

Although some cases are published, even published decisions are not binding. In deciding cases, the courts consider a variety of authorities, such as legislation and legal theory and principles, along with case law. Case law serves as persuasive authority.<sup>369</sup>

In a case from 2008, an Albanian woman and her two minor children sought asylum from persecution in the form of domestic violence based on her gender, or membership in a particular social group. While the court held that persecution by a private individual can lead to a valid refugee claim, it found that in this case there was an internal relocation alternative that would give adequate protection, as domestic violence was not accepted or tolerated in other parts of the country. The refugee claim was accordingly denied and the basis for the claim not further discussed.<sup>370</sup>

In 2011, the Migration Court of Appeal granted asylum to a Somali woman on the grounds that she faced a risk of gender-related persecution on return to Somalia. The applicant's male relatives threatened to kill her because she had given birth to an illegitimate child. The Court found that there was no internal protection alternative available to the applicant.<sup>371</sup>

### Of Note

The preparatory works describing the legislative intent of the Aliens Act 2005 emphasize that gender-related persecution must be recognized as a basis for refugee protection on equal grounds with persecution due to sexual orientation.<sup>372</sup> These documents also discuss the intended meaning of various terms in the Act, and they are often used by courts and practitioners to interpret the statutory language.<sup>373</sup>

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<sup>368</sup> Ministry of Justice, *Children in the Asylum Process*, *supra* note 352, available at <http://www.sweden.gov.se/sb/d/11901/a/125270>.

<sup>369</sup> BEXELIUS, *supra* note 359 at 130.

<sup>370</sup> Migrationsöverdomstolen [MIG] [Migration Court] 2008-21-11 ref 39 UM1042-8, available at [http://www.refugeecaselaw.org/cases\\_files/Sweden/case\\_1599\\_24.pdf](http://www.refugeecaselaw.org/cases_files/Sweden/case_1599_24.pdf).

<sup>371</sup> Migrationsöverdomstolen Avgörande [Migration Court of Appeal] 2011-21-4 UM 7851-10, available at <http://www.asylumlawdatabase.eu/en/case-law/sweden-%E2%80%93-migration-court-appeal-21-april-2011-um-7851-10#content>.

<sup>372</sup> BEXELIUS, *supra* note 359 at 14.

<sup>373</sup> Sveriges Riksdag, Socialförsäkringsutskottets betänkande 2005/06:SfU4, Förföljelse på grund av kön eller sexuell läggning, [Social Security Commission Report 2005/06:SfU4, Persecution based on gender or sexual orientation Social Security Committee Report], available at [http://www.riksdagen.se/sv/Dokument-Lagar/Utskottens-dokument/Betankanden/Forfoljelse-pa-grund-av-kon-el\\_GT01SfU4](http://www.riksdagen.se/sv/Dokument-Lagar/Utskottens-dokument/Betankanden/Forfoljelse-pa-grund-av-kon-el_GT01SfU4) [in Swedish].

# Switzerland

## Legislation

The Asylum Law of 1998 incorporates the definition of a refugee from the 1951 Refugee Convention into Swiss national law. The law does not specifically recognize persecution on grounds of gender or sexual orientation as a basis for refugee protection. However, it provides that “motives for flight specific to women shall be considered.”<sup>374</sup> On September 28, 2012, an emergency amendment to the Asylum Law was passed, tightening asylum laws by housing asylum seekers considered recalcitrant in special centers,<sup>375</sup> abolishing the filing of asylum applications at Swiss embassies abroad, and refusing to recognize conscientious objection and military desertion as a legitimate reason for seeking refugee status.<sup>376</sup> In a referendum on June 9, 2013, 78.4% of Swiss voters favored keeping in place the restrictive measures, which are valid until September 28, 2015.<sup>377</sup>

Prior to the amended Asylum Law, gender-related refugee claims were typically rejected on the ground that the persecution was not perpetrated by state or quasi-state agents. Current practice focuses on the question of whether the country of origin is able and willing to protect the refugee from persecution, rather than on whether the persecutor is a state actor.<sup>378</sup>

The Asylum Law also calls on the Federal Council to issue provisions concerning asylum procedures, especially concerning the special situation of women and children refugees.<sup>379</sup>

Some guidance on gender-related claims is contained in the Asylum Ordinances. Under Article 6 of the Asylum Ordinance 1 Concerning Procedural Issues, asylum seekers should be

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<sup>374</sup> Loi sur l’asile [LAsi] [Asylum Law], June 26, 1998, RS 142.31, art. 3(2), *available at* [http://www.admin.ch/ch/f/rs/142\\_31/a1.html](http://www.admin.ch/ch/f/rs/142_31/a1.html).

<sup>375</sup> According to Simonetta Sommaruga, member of the Federal Council of Switzerland and Head of the Federal Department of Justice and Police, “recalcitrant asylum seekers” are those who disturb day-to-day business, are drunk in accommodation facilities, molest others, provoke resentment in public places, cause brawls, are involved in fights or sexually harass others. See Friederike Vetter, “Tightening of Swiss Asylum Law Introduces New Form of Accommodation for Recalcitrant Asylum Seekers and Curtails Access to Asylum,” Feb. 1, 2013, *available at* <http://frian.tumblr.com/post/42018099509/tightening-of-swiss-asylum-law-introduces-new-form-of>

<sup>376</sup> Urs Geiser, “Minister pushes for more asylum reforms,” *swissinfo.ch*, *available at* [http://www.swissinfo.ch/eng/swiss\\_news/Minister\\_pushes\\_for\\_more\\_asylum\\_reforms.html?cid=36094414](http://www.swissinfo.ch/eng/swiss_news/Minister_pushes_for_more_asylum_reforms.html?cid=36094414); *Legge sull’asilo (LAsi) (Modifiche urgent della legge sull’asilo)*, Sept. 28, 2012, *available at* <http://www.admin.ch/opc/it/official-compilation/2012/5359.pdf> [in Italian]

<sup>377</sup> Schweizerische Eidgenossenschaft, Asylgesetz (AsylG) 142.31, June 26, 1998, <http://www.admin.ch/opc/de/classified-compilation/19995092/index.html>; Urs Geiser, “Minister pushes for more asylum reforms,” *swissinfo.ch*, *available at* [http://www.swissinfo.ch/eng/swiss\\_news/Minister\\_pushes\\_for\\_more\\_asylum\\_reforms.html?cid=36094414](http://www.swissinfo.ch/eng/swiss_news/Minister_pushes_for_more_asylum_reforms.html?cid=36094414)

<sup>378</sup> OSAR Formation juridique, *Pratique de l’ODM: Persécutions liées au genre*, Office fédéral des migrations [ODM], Dec 2010 [in French].

<sup>379</sup> *Id.* art. 17 (2).

interviewed by a person of the same sex when there are “concrete indications or if the situation in the country of origin makes it possible to deduct that persecution is gender-related.”<sup>380</sup>

## Guidelines

The Federal Office for Migration has developed an Asylum Procedure Manual (*Manuel de procédure d’asile*) to offer guidance and serve as a reference for asylum advocates and decision-makers.<sup>381</sup> The manual is updated at least once a year, taking into account case law, legal opinions, and other publications.<sup>382</sup>

In January 2008, Chapter J (2) of the Asylum Procedure Manual on the Issue of Gender-Based Persecution in Asylum Cases (French) was published.<sup>383</sup> This chapter fleshes out the meaning of “gender” and “sex,” and it gives examples of forms of persecution related to gender or sexual orientation that may lead to a grant of refugee status if based on membership in a particular social group. It also discusses the term “motives for flight specific to women and states that persecution that gives rise to such motives can be committed by non-state actors as well as governmental actors.”<sup>384</sup> Furthermore, the manual addresses issues related to persecution by non-state actors, holding that such persecution can give rise to a valid refugee claim, provided there is no internal flight alternative.<sup>385</sup>

Chapter J(1) of the Manual on the Issue of Unaccompanied Minor Asylum Seekers (French)<sup>386</sup> was also published in January 2008. The manual points out the importance of protecting vulnerable refugees and emphasizes the importance of acting in the child’s best interests. This includes both procedural and substantive considerations – for instance, whether the claim should be granted depends in part on the child’s age, level of maturity, and the presence of a caregiver or parent to take care of them upon return to the home country. Furthermore, the child is assigned a legal representative in addition to a guardian who will offer guidance and support on all matters throughout the asylum process.

## Key Cases

In 2006, the Swiss Appeal Commission on Asylum (CRA) issued a decision recognizing gender-related persecution.<sup>387</sup> In [\*EMARK 2006 Nr. 32\*](#), a young Ethiopian girl’s asylum application had

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<sup>380</sup>Le Conseil Fédéral Suisse, Ordonnance 1 sur l’asile relative à la procédure [OA 1] [Asylum Ordinance 1] Aug. 11, 1999, RO 1999 2302, available at [http://www.admin.ch/ch/f/rs/142\\_311/index.html](http://www.admin.ch/ch/f/rs/142_311/index.html) [in French].

<sup>381</sup>LE CONSEIL FEDERAL SUISSE, MANUEL DE PROCEDURE D’ASILE (Jan. 1, 2008), available at [https://www.bfm.admin.ch/bfm/fr/home/themen/asyl/asylverfahren/handbuch\\_asylverfahren.html](https://www.bfm.admin.ch/bfm/fr/home/themen/asyl/asylverfahren/handbuch_asylverfahren.html).

<sup>382</sup>*Id.*

<sup>383</sup>*Id.* at ch. J(2) s. 2.

<sup>384</sup>*Id.* at ch. J(2) s. 1.4.

<sup>385</sup>*Id.* at s. 2.1.

<sup>386</sup>*Id.* at ch. J(1) s. 1.

<sup>387</sup>*EMARK 2006 Nr. 32*, Schweizerische Asylrekurskommission (ARK Zollikofen), Oct. 9, 2006, available at <http://www.ark-cra.ch/emark/2006/32.htm>; Communiqués de presse, Organisation suisse d’aide aux réfugiés [OSAR], *La Commission de recours en matière d’asile reconnaît les persécutions liées au sexe*, Oct. 26, 2006, available at <http://www.fluechtlingshilfe.ch/actualite/communiqués-de-presse/la-commission-de-recours-en-matiere-d2019asile-reconnait-les-persécutions-liees-au-sexe/?searchterm=sexuelle> [in French].

been rejected by the Federal Office for Migration on the basis that the persecution she suffered in the form of a forced marriage was not committed by a state actor. The Swiss Appeal Commission on Asylum (CRA) reversed, holding that persecution by a non-state actor can be the basis for refugee claims in accordance with European legal principles if the home state is unable or unwilling to protect the refugee claimant.<sup>388</sup>

### Of Note

The Swiss Refugee Aid Organization (OSAR) offers information such as explanations of trends and developments in Swiss asylum law.<sup>389</sup>

## United Kingdom

### Legislation and Regulations

The [Asylum and Immigration Appeals Act 1993](#) incorporated the Refugee Convention into U.K. law and has subsequently been amended by the [Asylum and Immigration Act 1996](#), the [Immigration and Asylum Act 1999](#), the [Nationality Immigration and Asylum Act 2002](#), the [Asylum and Immigration \(Treatment of Claimants, etc.\) Act 2004](#), and the [Immigration, Asylum and Nationality Act 2006](#).<sup>390</sup>

The Immigration Rules part 11 set out the procedures that apply to refugee claims, referring to the international obligations undertaken by the United Kingdom.<sup>391</sup> While the Act does not address gender, under the Rules, the assessment of a claim should take into account the gender of the applicant in addition to other personal circumstances.<sup>392</sup>

The Rules provide that because unaccompanied children may be particularly vulnerable, their cases should be given special priority and care.<sup>393</sup> Close attention should be given to the welfare of the child at all times, and a special representative shall be assigned to the applicant.

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<sup>388</sup> *Id.*

<sup>389</sup> AGNES HOFMANN, KATHRIN BUCHMANN & MURIEL TRUMMER, ORGANISATION SUISSE D'AIDE AUX REFUGIES [OSAR], LA SUISSE TERRE D'ASILE – INFORMATIONS SUR LE DROIT D'ASILE (Apr. 2008), *available at* <http://www.fluechtlingshilfe.ch/hilfe/fluechtlinge/la-suisse-terre-d2019asile-pdf>.

<sup>390</sup> Asylum and Immigration Appeals Act 1993, 1993 c. 23, *available at* <http://www.legislation.gov.uk/ukpga/1993/23/contents>; Asylum and Immigration Act 1996, 1996, c. 49, *available at* <http://www.legislation.gov.uk/ukpga/1996/49/contents>; Immigration and Asylum Act 1999, 1999, c.33, *available at* <http://www.legislation.gov.uk/ukpga/1999/33/contents>; Nationality, Immigration and Asylum Act 2002, 2002, c.41, *available at* <http://www.legislation.gov.uk/ukpga/2002/41/contents>; Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, 2004, c. 19, *available at* <http://www.legislation.gov.uk/ukpga/2004/19/contents>; Immigration, Asylum and Nationality Act 2006, 2006, c. 13, *available at* <http://www.legislationline.org/download/action/download/id/968/file/67c8f38d38d6a578de8154746810.pdf>.

<sup>391</sup> UK BORDER AGENCY, IMMIGRATION RULES: PART 11 – ASYLUM (Dec. 2013), *available at* <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11>.

<sup>392</sup> *Id.* at 339J.(iii).

<sup>393</sup> *Id.* at 350.

A child's application should not be refused because the child is too young to understand the gravity of the risk; instead, more weight should be given to objective indications of risk.<sup>394</sup>

The Refugee or Person in Need of International Protection (Qualification) Regulations 2006,<sup>395</sup> entered into force on October 9, 2006, explicitly state that an act of persecution may take the form of "an act of physical or mental violence, including an act of sexual violence."<sup>396</sup> The Regulations provide that "a particular social group might include a group based on a common characteristic of sexual orientation but sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the United Kingdom."<sup>397</sup>

As a member of the EU, the United Kingdom has implemented changes necessary to comply with the minimum standards contained in the 2004 Qualification Directive into domestic law.<sup>398</sup> However, the U.K. has opted out of the new recast EU Qualification Directive,<sup>399</sup> although the minimum standards contained in the 2004 Qualification Directive still apply.<sup>400</sup> Please see the European Union section for further details.

## Guidelines

*Gender:* In 1998, the Refugee Women's Legal Group, a non-profit organization, proposed [Gender Guidelines for Determination of Asylum Claims in the U.K.](#) approved by the House of Lords in the case of *Islam and Shah* (see below).<sup>401</sup> The Immigration Appellate Authority adopted and further developed these guidelines, issuing the [Asylum Gender Guidelines](#) in 2000 to assist asylum adjudicators to assess claims.<sup>402</sup>

The UK Border Agency (UKBA) Home Office has also published guidance notes regarding how to conduct asylum interviews,<sup>403</sup> as well as more specific guidance notes addressing gender issues in asylum claims.<sup>404</sup> The guidance notes were first issued in 2004, but were updated in 2006

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<sup>394</sup> *Id.* at 351.

<sup>395</sup> Explanatory Memorandum to the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, 2006 No. 2525, *available at* [http://www.legislation.gov.uk/ukxi/2006/2525/pdfs/ukxi\\_20062525\\_en.pdf](http://www.legislation.gov.uk/ukxi/2006/2525/pdfs/ukxi_20062525_en.pdf).

<sup>396</sup> *Id.* at 5(2)(a).

<sup>397</sup> *Id.* at 6(1)(e).

<sup>398</sup> *Id.* at 2.1.

<sup>399</sup> European Council on Refugees and Exiles, *Qualification Directive*, (last visited Jan. 19, 2014), <http://www.ecre.org/topics/areas-of-work/protection-in-europe/92-qualification-directive.html>.

<sup>400</sup> *Id.*

<sup>401</sup> HILDEGARD DUMPER, INFORMATION CENTRE ABOUT ASYLUM AND REFUGEES IN THE UK, NAVIGATION GUIDE: WOMEN REFUGEES AND ASYLUM SEEKERS IN THE UK (Nov. 2004), *available at* <http://www.icar.org.uk/navgdwomen.pdf>.

<sup>402</sup> IMMIGRATION APPELLATE AUTHORITY, IMMIGRATION APPELLATE AUTHORITY: ASYLUM GENDER GUIDELINES (Nov. 1, 2000), *available at* <http://www.unhcr.org/refworld/docid/3ae6b3414.html>.

<sup>403</sup> UK BORDER AGENCY, CONDUCTING THE ASYLUM INTERVIEW (Mar. 2, 2012), *available at* <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/theasyluminterview/guidance/conductingtheasyluminterview.pdf?view=Binary>.

<sup>404</sup> UK BORDER AGENCY, GENDER ISSUES IN THE ASYLUM CLAIM (Jun. 26, 2013), <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/genderissuethasylum.pdf?view=Binary>.

and September 2010.<sup>405</sup> These guidelines address the special considerations that caseworkers should weigh when they assess claims for asylum that might include gender-related issues and advise on how to take gender into account when they look at the persecution experienced and whether there has been a failure of state protection.<sup>406</sup>

*Children:* In April 2004, the Asylum and Immigration Tribunal (AIT) issued Guidance Note No. 8 – Adjudicator Guidance Note: Unaccompanied Children, which addresses the need for careful case management and additional precautions when adjudicators deal with appeals by unaccompanied minors seeking asylum.<sup>407</sup> According to the guidance, an “unaccompanied child should be legally represented” and “[t]he child’s legal representative *must* attend the first hearing.”<sup>408</sup> If the child does not have legal representation, the adjudicator must take steps to inform the Refugee Council’s Panel of Advisors and the Refugee Legal Centre or Immigration Advisory Service and adjourn the case for counsel to be arranged.<sup>409</sup> Guidance Note No. 8 details how to conduct hearings in the case of an unaccompanied child, and states that the “assessment of the well-foundedness of the child’s fear ‘may call for a liberal application of the benefit of the doubt.’”<sup>410</sup>

The First Tier Immigration and Asylum Chamber replaced the AIT and developed the Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance. This guidance covers appellants and witnesses and provides advice on how to identify vulnerable individuals and conduct hearings with such persons.<sup>411</sup> By the time of the hearing, minor appellants should have been identified and all unaccompanied asylum-seeking children should have been referred to the Refugee Council’s Panel of Advisors by UKBA.<sup>412</sup> The Panel of Advisors can help a minor appellant to find legal representation.<sup>413</sup> Decisions should record whether the Tribunal has concluded that the appellant or a witness is a child, vulnerable or sensitive, and the effect of the vulnerability on the assessment of evidence.<sup>414</sup>

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<sup>405</sup> *Id.*

<sup>406</sup> Hildegard Dumper, *supra* note 392; ICAR Briefing – July 2007, *Women Refugees and Asylum Seekers in the UK*, (July 2007), *available at* [http://www.icar.org.uk/ICAR\\_briefing\\_on\\_WomenRefugees.pdf](http://www.icar.org.uk/ICAR_briefing_on_WomenRefugees.pdf).

<sup>407</sup> TRIBUNALS JUDICIARY, GUIDANCE NOTE NO. 8: ADJUDICATOR GUIDANCE NOTE: UNACCOMPANIED CHILDREN (Apr. 2004), *available at* <http://www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/lower/GuideNoteNo8.pdf>

<sup>408</sup> *Id.* at 3.1 (emphasis in original).

<sup>409</sup> *Id.*

<sup>410</sup> *Id.* at 5.4.

<sup>411</sup> TRIBUNALS JUDICIARY, JOINT PRESIDENTIAL GUIDANCE NOTE NO 2 OF 2010: CHILD, VULNERABLE ADULT AND SENSITIVE APPELLANT GUIDANCE (Oct. 30, 2008), *available at* <http://www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/lower/ChildWitnessGuidance.pdf>.

<sup>412</sup> *Id.* at 3.

<sup>413</sup> *Id.*

<sup>414</sup> *Id.* at 7.

The guidance note [Processing an Asylum Application from a Child](#) was updated in April 2013<sup>415</sup> and sets out “the policy and procedures to follow when dealing with an asylum application from a child.” The note requires “case owners” (the officer assigned to the case) to familiarize themselves with the applicable provisions in the UN Convention on the Rights of the Child. Among other things, the case owner must consider the best interests of the child, allow the child to express his or her own views freely and give them due weight, and protect and assist minor unaccompanied refugees.<sup>416</sup> The note further requires the case owner to be aware that a child may have been trafficked and to consider special circumstances that distinguish child applicants from others, such as age and maturity, family circumstances, other forms of persecution, and lack of protection. When assessing a child’s claim, the case owner must be convinced of the same standard (“a reasonable degree of likelihood that they have a well-founded fear of persecution for a Convention reason”) as with adult applicants. However, case owners should be aware that children may experience different forms or ways of persecution than adults, may not provide as much detail as adults in recalling abusive experiences, and may manifest their fears differently.<sup>417</sup> The note also recognizes that an act or acts that do not constitute persecution in the case of an adult may well be persecution when directed at a child.

As required under the UK Borders Act 2007, the Secretary of State issued the [UK Border Agency Code of Practice for Keeping Children Safe from Harm \(Code\)](#), entered into force in January 2009.<sup>418</sup> The Code provides guidance for sensitively handling cases of children who arrive with their families as well as unaccompanied minors. There is a presumption in favor of not detaining a family, and unaccompanied or separated children must not be detained except in the most exceptional circumstances.<sup>419</sup> The Code further provides for timely referrals of children’s cases to other agencies, mandatory training for those working with children, and a system of accountability in children’s case.

*LGBTI*: The UKBA issued [Sexual Orientation Issues in the Asylum Claim](#)<sup>420</sup> to provide guidance on how to approach asylum claims based on sexual orientation; additional issues decision-makers should consider when they assess claims for asylum that include sexual orientation; how to consider sexual orientation issues when they examining the persecution experienced and whether there has been a failure of state protection; and how they should objectively consider future fear within the legal, political, and social context of the country of origin.

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<sup>415</sup> UK BORDER AGENCY, PROCESSING AN ASYLUM APPLICATION FROM A CHILD (Oct. 17, 2013), *available at* <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/processingasylumapplication1.pdf?view=Binary>.

<sup>416</sup> *Id.*

<sup>417</sup> *Id.* at 31, 40, 42.

<sup>418</sup> UK BORDER AGENCY, UK BORDER AGENCY CODE OF PRACTICE FOR KEEPING CHILDREN SAFE FROM HARM (2008), ¶ 1.2, *available at* <http://www.unhcr.org/refworld/category,POLICY,,THEMGUIDE,,4948f8662,0.html>.

<sup>419</sup> *Id.* at paras. 3.2, 3.23.

<sup>420</sup> UK BORDER AGENCY, SEXUAL ORIENTATION ISSUES IN THE ASYLUM CLAIM (June 26, 2013), *available at* <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/sexual-orientation-gender-ident?view=Binary>.



## Key Cases

In *Islam v. Secretary of State for the Home Department, R. v. IAT and another ex parte Shah (conjoined appeals)*, HL (UK), 25 Mar. 1999, [1999] 2 WLR 1015 (hereafter *Islam & Shah*),<sup>421</sup> the House of Lords expressed approval of the 1999 Gender Guidelines for Determination of Asylum Claims in the United Kingdom. The Tribunal further held that the two women applicants, who had suffered domestic violence and were at risk of being accused of and punished for adultery if returned to Pakistan, were entitled to refugee protection under the Convention, as they feared persecution based on their membership in a particular social group – women in Pakistan – a distinct group that suffered widespread discrimination and was not afforded adequate protection by the state against non-state actors.

The Court of Appeal held that rape may constitute persecution in *Kacaj* [2001] INLR 354 and in *Katrinak v Secretary of State for the Home Department* [2001] EWCA Civ 832, [2001] INLR 499.

In *Secretary of State for the Home Department v. K. (FC) and Fornah (FC) v. Secretary of State for the Home Department* (2006) UKHL 46, 18 July 2006, the House of Lords granted asylum to an applicant who sought refugee status based on fear of forced FGC in Sierra Leone. The House of Lords held that the woman was persecuted as a member of a particular social group. Since *Fornah*, the Tribunal conducts a detailed examination of the risk of forced FGC in certain high-risk countries and develops country guidance cases, such as *FM (FGM) Sudan CG [2007] UKAIT00060*. In that case, a Sudanese woman was granted asylum based on her vehement opposition to the FGC practice and her fear that her two young daughters would be subjected to it at the hands of her husband's family if returned to their home country.<sup>422</sup>

In a 2008 decision, *Moldova v. Secretary of State for the Home Department*, a Moldovan woman had been trafficked to the U.K. for the purposes of sexual exploitation. She testified against her trafficker, leading to his subsequent arrest and conviction. The trafficker had since been released and, because he had presumably returned to Moldova, she feared that he would harm her if she returned to the country. The Tribunal held, without a robust discussion, that “former victims of trafficking” can constitute a social group that forms a basis for granting refugee protection.<sup>423</sup>

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<sup>421</sup> *Islam (A.P.) v. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal and another Ex Parte Shah (A.P.) (Conjoined Appeals)*, UK, House of Lords, 1998-99, available at <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm>.

<sup>422</sup> *FM (FGM) Sudan v. Secretary of State for the Home Department*, CG [2007] UKAIT00060, available at <http://www.refworld.org/docid/468269412.html>.

<sup>423</sup> *SB (PSG - Protection Regulations - Reg 6) Moldova v. Secretary of State for the Home Department*, CG [2008] UKAIT 00002, available at <http://www.unhcr.org/refworld/docid/47837c902.html>.

For more U.K. refugee and asylum case law from the House of Lords and the Court of Appeals, see Naina Patel (ed.), *UK Refugee & Asylum Case Synopses*, Blackstone Chambers (London), March 2009, which contains summaries of cases from 1999 to 2009.<sup>424</sup>

### Of Note

Human rights organizations have widely criticized recent changes to the U.K. Asylum System implementing a “fast-track” solution for their negative impact on complex cases, such as gender-based cases that often involve sensitive and difficult issues.<sup>425</sup> While the U.K. Border Agency has adopted gender guidelines to deal with some gender-related claims (see above), some officers and other staff members lack a basic understanding of the special issues involved in gender cases and lack sufficient information regarding gender issues in the applicant’s country of origin.<sup>426</sup>

Some victims of domestic violence who are the spouses or domestic partners of a British citizen or a person settled in the U.K. may be able to apply for indefinite leave to remain in the U.K. (also referred to as permission to settle in the U.K. permanently).<sup>427</sup> Children who do not qualify for refugee protection can also be granted discretionary leave to remain until they reach the age of majority.<sup>428</sup>

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<sup>424</sup>JESSICA BOYD ET AL., *UK REFUGEE & ASYLUM CASE SYNOPSSES* (Naina Patel ed., Blackstone Chambers, Mar. 2009), available at <http://www.google.com/url?sa=t&source=web&cd=2&sqi=2&ved=0CBkQFjAB&url=http%3A%2F%2Fwww.blackstonechambers.com%2Fdocument.rm%3Fid%3D298&ei=TdDATMy6OYPCsAP40sjfCw&usg=AFQjCNFrNNMFZbSmOdI4q-azpcvZEJ58lQ>.

<sup>425</sup> Human Rights Watch, *UK: ‘Fast Track’ Asylum System Fails Women*, HRW NEWS, Feb. 23, 2010, <http://www.hrw.org/en/news/2010/02/19/uk-fast-track-asylum-system-fails-women>.

<sup>426</sup> Gauri van Gulik, Human Rights Watch, *Women, Asylum and the UK Border Agency*, REUTERS UK, Mar. 2, 2010, available at <http://www.hrw.org/en/news/2010/03/02/women-asylum-and-uk-border-agency>.

<sup>427</sup> UK BORDER AGENCY, IMMIGRATION RULES: PART 8 – FAMILY MEMBERS: VICTIMS OF DOMESTIC VIOLENCE (Dec. 2013), available at <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part8/victimsofdomesticviolence>; UK Border Agency, *Victims of Domestic Violence*, <http://www.ukba.homeoffice.gov.uk/visas-immigration/while-in-uk/domesticviolence> (last visited Jan. 19, 2014).

<sup>428</sup> UK BORDER AGENCY, PROCESSING ASYLUM APPLICATIONS FROM A CHILD (Oct. 17, 2013), available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/processingasylumapplication1.pdf?view=Binary>.



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