

RESEARCH

REPORTS

RECOMMENDATIONS

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GENDER-BASED PERSECUTION? GENDER AS A CRITERION FOR GRANTING REFUGEE STATUS

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Gender-based persecution?

Gender as a criterion for granting refugee status

Chapter Seven of the Council of Europe Convention on preventing and combating violence against women and domestic violence is devoted to the issues of migration and obtaining refugee status. In Article 60 of this document we read that “Parties shall take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection”.¹ In this way, a gap – which, since the adoption of the Geneva Convention of 1951 has made it impossible to fully refer to the issue of gender-based discrimination as a ground for obtaining refugee status – will be filled. In 1951, when the Geneva Convention relating to the Status of Refugees was adopted, the issue of gender (sex) was not the centre of international discussion, and the category of gender (in the socio-cultural sense) had not yet become the object of such widespread interest that it enjoys today. It should be emphasised that in 2012 women constituted half of all the refugees on whom data have been collected by the United Nations High Commissioner for Refugees, UNHCR. The reason why refugees flee from their country of origin is often “race, religion, nationality, membership of a particular social group, or political opinion”² – as indicated in Art. 1 of the Geneva Convention. Many women, however, experience problems which do not fully fit into any of the above grounds for granting refugee status – problems which are common to women from various parts of the world seeking aid. Female genital mutilation, forced marriage, domestic violence, rape and sexual violence, honour crimes, human trafficking and prostitution, forced sterilization or abortion are only some of the reasons for fleeing that are experienced mainly or exclusively by women. For this reason, the Council of Europe Convention on preventing and combating violence against women and domestic

¹ Chapter 7, Art. 60, point 1 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011 - <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/210.htm> [accessed 18 January 2015]

² Art. 1, Section A, point 2 of the Geneva Convention relating to the Status of Refugees, Geneva, 28 July 1951 - <http://www.unhcr.org/3b66c2aa10.html>

violence states that “Parties shall ensure that a gender-sensitive interpretation is given to each of the Convention [relating to the Status of Refugees] grounds”.³

Poland signed the Convention on preventing and combating violence against women and domestic violence in December 2012, but it has been recommended to be ratified by the Polish Parliament at the beginning of 2015. Thus Poland must prepare to harmonize existing law with requirements of the Convention (on preventing and combating violence against women and domestic violence). Besides changing the mode of prosecution for rape, which was one of the key elements necessary in order to begin work on ratification of this international legal instrument, it is worth paying attention to other aspects linked with adoption by Poland of provisions of the Convention. One of them is the aspect of migration and granting refugee status due to persecution based on gender. In connection with this, it is worth tracing the progress of recognition of gender-based discrimination as a ground for granting refugee status in other countries, as well as becoming acquainted with good practice in this field. This expert report is aimed at presenting this issue and its development since the 1990’s, as well as discussing solutions functioning in selected member countries of the European Union.

Gender-based Discrimination

Discrimination based on gender is the unequal treatment of women or men due to their membership of a given gender, which cannot be justified by objective premises. The cause of this type of discrimination is stereotypes linked with social roles ascribed to a particular gender in a defined culture. Cultural models of femininity and masculinity in most societies are very clearly defined. This means that behaviour which is inconsistent with expected and foreseen norms for a given model may carry with it unfavourable consequences for the person breaching these norms. Such a situation may in turn lead to a decision to flee from the community (country of origin), which translates directly into refugee issues, which will be discussed later in this study.

Discrimination based on gender assumes different forms in different cultures. Discrimination based on gender can be, for example, lower remuneration of women for the same work that men do for higher earnings or the use of violence against women. The factor that does not change irrespective of country, geographical zone or social class is the source of discrimination. It is the belief that femininity is something worse than masculinity, and hence inferior treatment of women is a justified action.

³ Art. 60, point 2 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011.

Irrespective of whether we are talking about the circumcision of girls in Somali tribes, the beating of women in Polish families or the glass ceiling in American corporations, underlying these phenomena is the belief in the inferiority of women and the need to subordinate them to men.

The annual *Global Gender Gap Report* prepared by the World Economic Forum may be an indicator of the level of discrimination between women and men. The situation of women and men is analysed in four areas: political participation, economic opportunities, health and education. The smallest inequalities on a global scale are noted in the field of health and chances of survival, whilst the greatest are observed in the political sphere. The worldwide trend is a decrease in the gap between men and women, although in some countries this gap is continuously widening. In 2013, a considerable increase in differences between the sexes in comparison with the previous year was noted in Lesotho, Uganda, Moldova, Sri Lanka, Kyrgyzstan, Tanzania, Albania, Algeria, Benin, Iran and Mauritania.⁴ This does not mean, however, that in other countries the status of women is equal to that of men. Access to education and medical care or life expectancy are only selected indicators of inequality between women and men in the contemporary world. Furthermore, the *Global Gender Gap* ranking does not encompass the very significant component of violence against women. Women are victims of violence significantly more frequently than men and much more rarely perpetrators of such violence. It is very difficult to measure the scale of violence, but there are studies that try to assess this problem. The World Health Organisation reports that 35% of women have at some stage in their lives experienced psychological abuse or physical violence from their partner or sexual violence from a third party.⁵

The scale of this phenomenon in Europe is very similar. Research by the European Union Agency For Fundamental Rights shows that 33% of female inhabitants of the European Union aged 15 or over have experienced sexual or physical violence, and 22% of female respondents have experienced physical and/or sexual violence from a partner since the age of 15.⁶ Persecutors of women are thus as often persons who are closest to them as strangers. This most dramatic indicator of discrimination against women is also the most frequent cause of a decision to leave the family, neighbourhood, town, or sometimes even country. When a woman is forced to flee in order to save her health and life, she is faced with the dilemma of whether to take her

⁴ *Global Gender Gap Report 2013* – <http://www.weforum.org/reports/global-gender-gap-report-2013> [accessed: 8 March 2014].

⁵ *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence*, World Health Organization, 2013 – http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf [accessed: 8 March 2014].

⁶ *Violence against women: an EU-wide survey. Main results report*, European Union Agency For Fundamental Rights, 2014 – <http://fra.europa.eu/en/publication/2014/vaw-survey-main-results> [accessed: 8 March 2014].

children with her and where to seek shelter. She most often chooses countries in which she sees an opportunity for life without violence and discrimination. But is this a sufficient ground to grant such a woman refugee status?

Discrimination based on gender vis-à-vis granting refugee status

Refugee status, in accordance with the Convention relating to the Status of Refugees, is granted “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.⁷ This definition is very general, and lack of precise wording of some of its formulations may lead to misinterpretation. Questions arise as to what “persecution” and “well-founded fear” are and on what basis the “particular social group” should be constructed. In the sixty years in which the Geneva Convention has been applied, judicial practice has naturally led to the consolidation of generally accepted definitions of concepts contained in this international legal document. For this reason (amongst others), in 1992, the Office of the UN High Commissioner for Refugees issued a *Handbook on Procedures and Criteria for Determining Refugee Status*,⁸ but there is no reference in it to the issue of belonging to a defined gender as a ground for granting international protection.

However, it is worth noting that the issue of granting refugee status is, each time, an individual matter of a specific person, with their often dramatic past, who is trying to start a new, better life in another country. Too much rigidity and precision of wording could thus in certain cases tend to be harmful rather than enable an individual approach.

It seems, however, that the Geneva Convention omits one of the very significant bases of discrimination, which has an influence both on the decision to flee and on later treatment in the process of granting refugee status. This basis is the gender of the person seeking protection in another country. Above all, the issue of gender has not appeared among the main reasons for persecutions due to which persons may

⁷ Art. 1A, point 2 of the Convention relating to the Status of Refugees, drawn up in Geneva on 28 June 1951 (Journal of Laws 1991, No. 119, item 515, 517) - <http://www.unhcr.org/pages/49da0e466.html>

⁸ *Zasady i tryb ustalania statusu uchodźcy. Zgodnie z Konwencją dotyczącą statusu uchodźcy z 1951 r. oraz Protokołem dodatkowym do niej z 1967 r. Podrecznik*, (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) Geneva, January 1992 – http://www.unhcr-centraleurope.org/_assets/files/content/resources/pdf_pl/legal_documents/Podrecznik-UNHCR-Zasady-i-tryb-ustalania-statusu-uchodzcy.pdf [Accessed: 17 July 2014]

seek asylum. The researches cited earlier concerning violence against women do not leave any doubts that many women may not feel safe in their homes, towns, and countries, and their life is seriously threatened. Although the provisions of the Geneva Convention are “blind to the gender issue”, its application is often based on different treatment of women and men. Procedural obstacles linked with obtaining refugee status, which also of course affect men, sometimes have very severe consequences in the case of women. Interpretations concerning the experiences of women asylum seekers also seem marginalized, and they are clearly different from the experiences of men. As pointed out by Professor Heaven Crawley, women are often refugees for the same reasons as men – political or ethnic, but the reasons for which they seek help are different:

- “Women may hide people, pass messages or provide community services, food, clothing and medical care;
- The authorities in some countries exploit family relationships to intensify harm;
- Women who do not conform to the moral or ethical standards imposed on them may suffer cruel or inhuman treatment;
- Women may be targeted because they are particularly vulnerable, for example, those with caring responsibilities or young women who can easily be sexually abused;
- Women may be persecuted by members of their family and/or community.”⁹

If you want to adopt the gender perspective in the area of granting refugee status, you have to take into account many aspects and undertake a comprehensive analysis of the process of obtaining asylum. Firstly, you should consider whether women are victims of persecutions simply because of the fact that they are women or whether both genders experience these persecutions but the nature of the persecution is different due to gender. Secondly, it is essential to monitor the treatment of women in the process of obtaining refugee status, irrespective of their grounds for applying for protection. This means both looking at purely technical procedural elements of the process (interview methods, provision of medical care), and analysing the decision to grant refugee status from the gender perspective. The extent to which officials are aware of specific experiences of women and men in their countries of origin and whether their decisions are taken under the influence of gender stereotypes would need to be studied. In this expert report, I will concentrate on the first aspect of the discussed problem, but undertaking systematic research into the procedure of granting refugee status from the perspective of the gender of the person seeking this

⁹ H. Crawley, *Gender-Related Persecution and Women's Claims to Asylum* – <http://www.refugeelaidinformation.org/gender-related-persecution-and-women%E2%80%99s-claims-asylum> [accessed: 8 March 2014].

status also appears to be necessary in order to fully analyse the phenomenon under consideration.

The fact that women in many countries are subjected to persecution is not seriously doubted. Repression can assume various forms which men will not experience – thus talking about a specific type of persecution of women is fully justified. In 2009, a representative of the United Nations stated that “work remains to be done to establish gender as independent grounds for claiming asylum as a refugee”.¹⁰ In October 2010, the Committee for Migration, Refugees and Population of the Parliamentary Assembly of the Council of Europe adopted a resolution recommending that the Council of Europe should take action to implement measures that take into account gender when assessing applications for refugee status in Member States of the Council of Europe¹¹. Currently, there is a change in approach to women from third countries seeking asylum in Europe, so it is important for Polish authorities to be aware of the problem as well, and to take preventive action.

We can talk about cases in the field of *gender asylum*, in other words, obtaining refugee status due to gender, in three situations:

- o when the persecution only applies to women or is rarely experienced by men (for example, women not having ownership rights or not being allowed to continue education),
- o when the form of persecution applies to women, but its causes are other than gender (for example, rape of women involved in an opposition movement against a government),
- o when women are persecuted due to their gender in a way that applies only to women (for example, female circumcision).

The following should be mentioned among forms of persecution typical for women:

Female genital mutilation (FGM). According to the World Health Organisation, female genital mutilation encompasses all procedures aimed at the body of a woman, linked with partial or complete removal of external female genitalia or other ways of mutilating them, carried out for non-medical reasons. Female genital mutilation is traditionally carried out mainly in African countries, but also in some countries in the Near East and Asia. This problem also affects female migrants.

¹⁰ Y. Ertrük, *15 Years of the United Nations Special Rapporteur on Violence Against Women. Its Causes and Consequences*, United Nations, 2009.

¹¹ PACE Resolution 1760 (2010).

Example

Fauziya Kassinga came to the United States in 1994 in order to obtain refugee status.¹² She was 17 years old and had run away from Togo just after having been forced to marry a forty-five-year-old man who had three other wives. Although she did not agree with this situation, she was compelled by force to marry and had to wait under lock and key to be circumcised. While he was alive, her father had not allowed her and her sisters to be subjected to this cruel practice, but after his death there was no-one left to protect them. The woman managed to escape before the circumcision was carried out and got to the United States. As soon as she arrived at the airport in Newark, Fauziya Kassinga asked for political asylum. In August 1995, a judge denied her the right to political asylum, but in June 1996 the Board of Immigration Appeals (the second instance in the American Department of State) decided on the need to grant Fauziya Kassinga political refugee status in order to avoid the tribal practice of female circumcision.

Forced Marriage. Forced marriage is a union which has been entered into against the will of at least one of the parties. Most frequently, it involves a young woman who has been forced to marry an older man. In September 2013, the United Nations Human Rights Council adopted a resolution on child, early and forced marriage. Poland was one of the countries that work on the draft resolution and propagated the idea of its adoption amongst other members of the United Nations.

Example

Two months after the death of her husband, Elizabeth Nengwe from Cameroon found out from her brother-in-law that she had to marry her dead husband's older brother, who already had two wives. Otherwise she would have to pay back the dowry which her family had accepted from the groom. When the woman said that she had no money, her in-laws beat her until she was unconscious. They said that they would come back in a month to collect the equivalent of the dowry and that if she did not pay the debt, she would be killed for refusing to marry the older brother. The woman fled to the United States in 2001 and asked for asylum. Her case was rejected by all instances, including the Board of Immigration Appeals.

¹² This case is described in greater detail later on in this report.

Domestic violence. This phenomenon, which occurs throughout the world, above all affects women and children. Domestic violence may be mental, physical, economic or sexual. Violence occurs in a situation of imbalance, when one person wants to control another and show their strength. Usually the perpetrator is the man.

Example

Naima Khawar fled from Pakistan to Australia with her three daughters after experiencing years of growing violence at the hands of her husband and his family. She asked for asylum, since the Pakistani police systematically discriminated against her, refusing to protect her; this situation was also tolerated and sanctioned by the state. Furthermore, her justified fear of persecution was based on a lack of protection from the state in connection with her membership of a particular social group: “women in Pakistan”. Thanks to the decision of the Australian Supreme Court, Naima Khawar obtained refugee status in Australia.

Rape and sexual violence is forcing another person to have sexual intercourse, submit to another sexual act or perform such an act by one or many people, who use physical force, coercion, abuse of power, or deceit or make use of the victim’s inability to express informed consent. United Nations data encompassing 65 countries indicate 250,000 reports of rape or rape attempts annually. However, it should be noted that most incidents are not reported to the Police.

Example

Raquel Martí de Mejía was a teacher in Peru and the wife of a lawyer with political ambitions involved in trade unions. In June 1989, a group of masked soldiers rushed into the house of Mr and Mrs Mejía and took Fernando Mejía Egocheaga to a yellow truck belonging to the government. An hour later, this group again came to Raquel, demanding her husband’s documents. When the woman tried to explain that he wasn’t involved in any communist movement, a masked man raped her. Another hour later, another masked man came and also raped Raquel. In August 1989, afraid for her life, Raquel left Peru, first to the United States, then to Sweden, where she obtained political asylum.

Honour crimes – including murder – encompass violence perpetrated for the purpose of maintaining the reputation of the family or the community. Honour killing is the murder of a person accused of bringing shame on a family. Women are killed most often when they do not want to enter into marriage, commit adultery or are in a relationship which the remaining members of the family do not like. Honour crimes are committed throughout the world, but the scale of this phenomenon is unknown.

Example

A single 36-year-old Iranian woman fled from Iran in 1993, first to Turkey, then to New Zealand, where, at the airport in Auckland, she applied for refugee status. She based her application on four fundamental grounds: race and religion; the family environment and political activity of her brothers; the persecution of female members of the family by male members of her family; and persecution of women in Iranian society. The woman indicated many examples of discrimination due to gender in Iranian society which are not prosecuted by state authorities. She also feared an honour killing if her family found out that she was entering into sexual relations in spite of being unmarried. The Refugee Status Appeals Authority in Auckland decided on this basis that she had the right to obtain refugee status in New Zealand.

Human trafficking and forced prostitution. Human trafficking, according to the Council of Europe Convention on Action against Trafficking in Human Beings 2005, “shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.¹³

Although – as transpires from the statistics – victims of human trafficking are significantly more frequently women than men,¹⁴ women very rarely obtain refugee status on the basis of belonging to a group whose defined characteristic is being a victim of human trafficking. They more often obtain protection and care on a different

¹³ Art. 4 of the Council of Europe Convention on Action against Trafficking in Human Beings, drawn up in Warsaw, 16 May 2005 (Journal of Laws 2009, No. 20, item 107). <http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm> [Accessed 18 January 2015]

¹⁴ According to data from the Polish Ministry of Foreign Affairs, obtained from the Attorney General, it transpires that in 2012, 37,5% of the identified victims of human trafficking were men – see <http://www.handelludzmi.eu/hl/baza-wiedzy/statystyki/6143,Dane-statystyczne.html> [accessed: 17 July 2014].

basis from asylum. However, situations of recognition of this form of persecution as grounds for obtaining refugee status do occur, as evidenced by the following example.

Example

A Moldovan citizen became a victim of human trafficking – she was sent to Britain for the purpose of sexual exploitation. She managed to escape and to provide evidence of the guilt of her captor, who was sentenced in Great Britain to five years in prison for pimping and unlawful detainment. The Moldovan woman applied to the UK authorities for refugee status, as she feared retribution from relatives and friends of her captor after her return to her country of origin. In 2007, the Asylum and Immigration Tribunal in the UK found that being a former victim of human trafficking for sexual exploitation could be a characteristic of a particular social group, and that the Moldovan authorities would not be able to provide the woman with adequate protection, and therefore granted her refugee status.

Forced abortion or sterilization. Some countries are trying to influence the demographic development of their population by applying policies requiring having only one child. It was only in December 2013 that China moved away from the one-child policy, which assumed that if a woman becomes pregnant again, she must undergo an abortion or sterilization surgery.

Example

Chun Lan Liu, a mother of two daughters, came to the UK in 2002, shortly after she had been forced – in the eighth month of pregnancy – to terminate it, and had been ordered to appear again in hospital for the purpose of sterilization, so that she could never have a third child. At first she did not obtain refugee status, in spite of indicating that after her return to China she would be under threat of arrest. For the Immigration Appeals Tribunal found that the reasons for her persecution did not fall within the framework set by the Geneva Convention. A court of higher instance ordered a re-trial, pointing to other precedent-setting judgments, on the basis of which Chinese women who have a child and are pregnant could be recognised as a “particular social group” as understood in the Geneva Convention.

The above forms of persecution of women are encountered most frequently, but do not exhaust the list of situations in which women seek refugee status and in which gender plays a significant role. But it was only in 1985 that the Executive Committee of the United Nations High Commissioner for Refugees (ExCom UNHCR) issued *Conclusion No 39 on refugee women and international protection*.¹⁵ In accordance with this conclusion, countries had the right to accept the interpretation that women who had experienced inhumane treatment due to breaking rules that were socially accepted in their community could obtain refugee status on the basis of belonging to a “particular social group”. In this way, the United Nations High Commissioner for Refugees admitted that inhumane cultural and social norms can constitute persecution. These conclusions have become a milestone in case law relating to granting refugee status to persecuted women.

Another important event was the publication in 1991 of the *Guidelines on the protection of refugee women*.¹⁶ By the same token, the Office of the UN High Commissioner for Refugees recognised that the Geneva Convention does not encompass the issue of gender as a basis for granting refugee status, and also repeated recommendations from 1985 that women’s issues should be recognised as a determinant of belonging to a particular social group, as defined in the Geneva Convention. Additional guidelines broadened the range of women’s issues which can be grounds for granting refugee status. In addition to inhumane treatment – brought on as a result of compliance with cultural and social norms of a given society – sexual harassment and rape in a war situation were also recognised as a basis for granting this status. Two years later, in conclusion no. 73, the Executive committee of the United Nations High commissioner for Refugees recommended that states should prepare appropriate guidelines concerning the treatment of women applying for refugee status due to the fact that they often experience different forms of persecution than men.¹⁷

The most important international document concerning the granting of refugee status as a result of persecution on grounds of gender is *Guidelines on international protection* from 2002. In the introduction we can read that “the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status. [...] In some cases, the claimant’s sex may bear on the claim in significant ways to which the decision-maker

¹⁵ *Conclusion on Refugee Women and International Protection*, ExCom Conclusion, no 39 (XXXVI), 18 October 1985.

¹⁶ *Guidelines on the Protection of Refugee Women*, United Nations High Commissioner for Refugees, Geneva, 1 July 1991.

¹⁷ *Conclusion on Refugee Protection and Sexual Violence*, ExCom Conclusion, no. 73 (XLIV), 8 October 1993.

will need to be attentive”.¹⁸ At the same time, however: “Adopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status. The refugee claimant must establish that he or she has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”¹⁹

The United Nations High Commissioner for Refugees therefore deemed that gender (sex) can be a factor that significantly changes the situation of the person applying for refugee status, although membership of a particular gender alone is not sufficient to gain such status. It is necessary to link issues of gender with one of the five grounds for granting refugee status contained in the Geneva Convention – with membership of a particular social group seeming to be the most appropriate in most cases linked with gender-based discrimination. The fact of discrimination (alone) cannot be the basis for granting refugee status, but “a pattern of discrimination or less favourable treatment could, on cumulative grounds, amount to persecution and warrant international protection. It would, for instance, amount to persecution if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on the right to earn one’s livelihood, the right to practice one’s religion, or access to available educational facilities”.²⁰ In addition, the guidelines cover an issue that is exceptionally significant in the case of persecution of women – lack of protection from the state: “If the State, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution. Particular cases of domestic violence, or of abuse for reasons of one’s differing sexual orientation, could, for example, be analysed in this context.”²¹

The 2002 guidelines also speak of specific situations where women must be protected in the form of being granted refugee status: “being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threats of harm [...] Where homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution, just as it would for refusing to wear the veil by women in

¹⁸ GUIDELINES ON INTERNATIONAL PROTECTION: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. <http://www.unhcr.org/3d58ddef4.html> [accessed: 18 January 2015]

¹⁹ *Ibidem*.

²⁰ *Ibidem*.

²¹ *Ibidem*.

some societies.”²² It is also extremely important for many women applying for refugee status to state in the guidelines that persecutions may be a result not only of the actions of the state but also of the local community or family members. Such actions “can also be considered persecution if such acts are knowingly tolerated by the authorities, or if the authorities refuse or are unable to offer effective protection”.²³

Guidelines of the United Nations High Commissioner for Refugees from 2002 deal comprehensively with the issue of gender (sex) in the process of granting refugee status, but their nature is advisory rather than binding. It is thus worth taking a look at practices of countries which have adopted their own guidelines concerning the work of migration officials in cases of women applying for refugee status. The first such countries were Canada and the United States.

Submission of applications for refugee status due to gender discrimination in Canada and the United States

In 1993, the Immigration and Refugee Board of Canada adopted guidelines concerning women applying for refugee status, who fear persecution on grounds of gender – *Women Refugee Claimants fearing Gender-Related Persecution*.²⁴ For the first time, issues of gender in the refugee field became a basis for issuing a document by a body dealing with granting asylum. As often happens in the case of significant changes in the field of rulings (case law) and legal doctrine, the impulse for accepting guidelines by the Immigration and Refugee Board of Canada was a particular case – of a specific woman who was not granted refugee status, which met with outrage on the part of the general public. A young woman from Saudi Arabia was applying for asylum in connection with fear of persecution due to discrimination against women not observing dress code rules in force in her country. In a decision refusing to grant refugee status, the Immigration and Refugee Board of Canada stated that the woman should comply with the generally applicable laws in her country.

The cited case best reflects the absurdity of legalistic thinking, in accordance with which, irrespective of whether the law is just or not, you should comply with it. Since the time of Gustav Radbruch and the formulation by him just after the second world war of the principle *lex iniustissima non est lex*²⁵ – a grossly unjust law is not a law – no-one has any doubts that regulations that are obligatory in a given country that are inconsistent with basic principles of human rights cannot be called law. As it turns

²² *Ibidem*.

²³ *Ibidem*.

²⁴ *Compendium of decisions: Guideline 4: Women refugee claimants fearing gender-related persecution: Update* – <http://www.refworld.org/pdfid/4713831e2.pdf> [accessed: 10 March 2014].

²⁵ G. Radbruch, *Rechtsphilosophie III*, [in] idem, *Gesamtausgabe*, ed. W. Hassemer, C.F. Müller, Heidelberg 1990, p. 96–100.

out, in relation to women, this regulation was not applied until the end of the 20th century and rulings are still handed down which oppose the granting of refugee status in connection with the fact that the treatment described by the applicant is in accordance with the law of the given country (no right of inheritance, female circumcision, ban on education). The Saudi case cited above ended favourably for the young woman in question and in January 1993 she obtained refugee status; however, the Immigration and Refugee Board of Canada deemed that, in connection with the large number of cases with a gender component filed in Canada, a special policy should be created in relation to women applying for asylum. That is why in March 1993, the first guidelines were issued (which were supplemented in 1996) concerning procedure in cases of women applying for asylum and fearing persecution due to their gender.

In accordance with these guidelines, the Immigration and Refugee Board of Canada when making a decision must take into account four issues:²⁶

- o Combining persecution on grounds of gender with five circumstances (grounds) for granting refugee status listed by the Geneva Convention of 1951. The guidelines show how to construct this combination so that situations which at first sight do not lie within any of the five grounds could in fact be a basis for granting asylum. Above all, guidelines recommend basing on the ground of “membership of a particular social group”.
- o If the application is motivated by sexual violence or other harmful treatment, the board must state whether the treatment certainly indicates persecution. Guidelines concerning the definition of sexual violence and harmful treatment are based on international documents, such as the Convention on the Elimination of All Forms of Discrimination against Women or the Declaration on the Elimination of Violence against Women.
- o The range of evidence that officials should take into consideration when dealing with issues that include a gender component should encompass the social, cultural, religious and economic dimension, in which [the woman] applying for asylum finds herself.
- o Procedural problems which women face when applying for refugee status must be taken into account. Giving testimony, especially in matters that are difficult for women, about which they haven’t spoken earlier and which they consider shameful, may have a big impact on a woman’s state and thus her credibility and chances for a positive decision.

²⁶ See: N. Laviolette, *Gender-Related Claims: Expanding the Scope of the Canadian Guidelines*, “International Journal of Refugee Law” 2007, Vol. 19, Issue 2.

Guidelines are administrative directives and are not fully binding, but should be implemented if there are no compelling reasons for which they should not be applied. In spite of this, only in 1994, out of 170 cases with a gender component, 70% were adjudicated positively thanks to the application of the above guidelines.²⁷ Thanks to these guidelines, women fleeing from China in connection with the one child policy and forced abortion, women raped by soldiers in Guatemala, women escaping forced marriages in Kenya and numerous women who have found themselves in dramatic situations that, however, are not directly covered by the Convention relating to the Status of Refugees have found protection in Canada. At the beginning of the twenty first century, even some Polish women received asylum in Canada in connection with the fact that the Polish state – in the opinion of Canadian officials – was not able in some cases to ensure appropriate protection.²⁸

Two years after the release of the Canadian guidelines, the United States also prepared a document titled *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*.²⁹ These guidelines for migration officials adjudicating in cases of granting refugee status to women are in large part based on the Canadian experiences and the document of the United Nations High Commissioner for Refugees. They list situations which may be a basis for persecution – sexual abuse, rape, infanticide, female genital mutilation, forced marriage, slavery, domestic violence and forced abortion. This document sanctions unceasing physical harm as a basis for deeming that a person is persecuted. The recognition that discrimination that increases with time or that increases its intensity can be treated as persecution is also important. As in the case of the Canadian guidelines and the guidelines prepared by the United Nations High Commissioner for Refugees, an additional (separate) provision relating to gender-based persecution was not established, but it was recommended that the provision concerning political opinion and membership of a particular social group be interpreted in a manner that is sensitive to gender.

Several months after the publication of *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*, in August 1995, Fauziya Kassinga flew to the United States. A resident of Togo from the Tchamba-Ksuntu tribe, whose tradition requires circumcision of women, as well as allowing polygamous marriage without the consent of the women in question. While he was alive, Fauziya's father had not agreed to such cruel treatment of his daughters, but after his death, the sixteen year old girl ended up in the care of her aunt (on her father's side), who supported the

²⁷ *Ibidem*.

²⁸ See: M.A. Zieliński, *Polacy szukają azylu w Kanadzie (Poles seek asylum in Canada)*, „Rzeczpospolita”, 8 July 2006 – <http://www.refugee.pl/?mod=knowbase&path=240&PHPSESSID=2032749ac768e0bdab3381adf238881c> [accessed: 17 July 2014].

²⁹ *Considerations for Asylum Officers Adjudicating Asylum Claims from Women (“INS Gender Guidelines”)*, United States Bureau of Citizenship and Immigration Services, 26 May 1995 – <http://www.refworld.org/docid/3ae6b31e7.html> [accessed: 12 March 2014].

patriarchal division of roles in the community. She ordered Fauziya to stop her education and go to a forty-five-year-old man, in order to become his fourth wife. Marriage required undergoing circumcision. Thanks to help from her mother and sister, Fauziya managed to escape to Germany, and from there to the United States. However, the judge refused her the right to political asylum, finding that there was no evidence for past, future or present persecution, since she cannot be considered to be a member of a particular social group as she comes from a tribe in which all women are subjected to circumcision. The fact that it was her in particular they wanted to circumcise did not thus attest to persecution, since she was not treated exceptionally. By the same token, the judge found that the case of Fauziya Kassinga did not bear the hallmarks of persecution, for cruel treatment is a cultural norm of her community. Further instances upheld the original decision, considering the reasoning of the judge as valid, but interest on the part of the media and public pressure meant the Immigration and Naturalization Service had to create a new interpretational framework in relation to the issue of persecution.

According to them, persecution is also behaviour which is “so extreme as to shock the conscience of the society from which asylum is sought”³⁰. In accordance with this interpretation, such behaviour must fulfil the following criteria:

- o the victim must experience extreme harm,
- o the victim is subjected to harmful behaviour without his/her consent,
- o the victim must actually experience extreme and shocking violence, not just feel the consequences of refusal to conform to norms.

Thanks to the above interpretive framework, the case of Fauziya Kassinga ended favourably for her. For, in accordance with this framework, female circumcision is considered persecution, in spite of the fact that it is a widely applied practice in many countries.

The case of Fauziya Kassinga was a breakthrough in the field of refugee cases taking into account the component of gender, but it did not mean a drastic change in the treatment of women applying for asylum in the United States. Just after the decision in the case of Fauziya Kassinga, the case of Rody Alvarado came before a judge – a sixteen year old Guatemalan girl, who had run away from her five times older husband, a former soldier. Her numerous complaints about domestic violence met with no response on the part of the Police in Guatemala, and her attempt at escape inside the country ended with her being found by her husband and beaten unconscious. The judge granted her asylum, justifying the decision by the fact of her

³⁰ *Brief of the INS to the BIA in the Matter of Kassinga.*

having experienced persecution in the past and a well-founded fear of successive persecutions in the future by her husband, which the Guatemalan authorities cannot in any way control. The judge deemed that Rody Alvarado belongs to a particular social group of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination”.³¹ The criterion of membership of the group was thus gender and the past relationship with a Guatemalan man.

The decision of the judge, however, was challenged by members of the Board of Immigration Appeals. The greater part of the interpretation of the judge was upheld, but the board decided that a particular social group must be socially perceived as separate and visible in society. Many milieux criticized this argument. A position on the question of “social visibility” was taken by – among other bodies – the Office of the United Nations High Commissioner for Refugees, according to which emphasis should be placed on the fact that a particular group is understood to have a common feature by society and that in a certain sense, this feature distinguishes the group from remaining citizens. This does not mean, however, that the common feature must be visible to the naked eye or easily recognisable by the public. Such a literal understanding of “social visibility” would close the door to gaining asylum to many people who need it – for example, women who have not yet been circumcised, or homosexuals who have not come out. It is worth noting that the guidelines of the United Nations High Commissioner for Refugees do not require that a group should be “socially visible”. After many years, the United States Department of Homeland Security issued a document in which it accepted that “social visibility” occurs in a situation where a woman enters into a family relationship, and a member of the family states that he or she can treat her how he or she wants and outside the law. This allowed Rody Alvarado to obtain refugee status after fourteen years of trying, but did not remove the obstacle of the necessity to demonstrate the social visibility of the particular group of which membership is the reason for persecution.

Canada and the United States are the first countries that have adopted defined standards in the field of granting refugee status in cases in which the gender component plays an important role. This does not mean, however, that these countries do not have to contend with numerous problems in the field of case law in these cases, but they certainly have specific guidelines which facilitate the work of migration officials and judges. Similar guidelines also function in some European

³¹ See: <http://www.refworld.org/docid/3f8fb4774.html> [accessed: 18 January 2015]

Union countries – for example, in Great Britain, Malta, Romania, the Netherlands and Sweden.

The Situation in the European Union³²

Over 65% of people applying for refugee status in the European Union are men.³³ It is often more difficult for women to make a decision to leave their country, even in the face of severe persecution, since they have smaller financial resources, and are also often responsible for children and other dependent persons, whom they are not able to bring with them into the unknown. Unfortunately, there is a lack of accurate data enabling comparison between member countries in terms of the percentage of women applying for refugee status and the percentage of positive decisions issued by the relevant authorities in particular countries.³⁴ General data concerning the acceptance of refugees at the level of the European Union are of course available, as this was one of the purposes for which the Common European Asylum System (CEAS) was set up – the origins of the CEAS can be traced to 1999 (approval of the Tampere programme by the European Council³⁵). In the conclusion from the special meeting of the European Council we can read: “The European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement.”³⁶ However, it is worth noting that the European Council at that time did not provide a specific date for starting the Common European Asylum System.

This resulted in fairly slow development of the legal framework of the new system. Moreover, the necessity of preparing and carrying out appropriate and large scale research concerning refugees in European Union countries delayed the outlining of the structure of the Common European Asylum System. The programme adopted at the meeting in 1999 was foreseen as a five year programme. In 2005, the implementation of the next stage in the process of creating a common system, called the Hague Programme,³⁷ was started. In this programme, the European Commission

³² Prepared on the basis of: *Gender-related asylum claims in Europe: A comparative analysis of law, policies and practice in nine EU Members States*, Directorate General for Internal Policies, European Parliament, 2012.

³³ *Share of male (non-EU-27) asylum applicants in the EU-27, by age group and status of minors*, Eurostat, 2012.

³⁴ Eurostat data exist on the number of asylum applications submitted by men and women; however, there are no unified data concerning the overall picture of positive and negative decisions according to gender (sex) in particular Member States. This type of overview would certainly facilitate action for gender inclusion in European Union asylum policy.

³⁵ See http://www.europarl.europa.eu/summits/tam_en.htm#union [accessed: 18 July 2014]

³⁶ *Presidency Conclusions, Meeting of the European Council in Tampere 15–16 October 1999*, point 11 – http://www.europarl.europa.eu/summits/tam_en.htm [accessed: 18 January 2015]

³⁷ *Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union*, 2005/C 198/01 – [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52005XG0812\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52005XG0812(01)&from=EN) [accessed: 18 January 2015].

was asked to finish its assessment of the (legal) acts of the first stage and to submit to the European Council and European Parliament proposals for (legal) acts serving in the development of a common asylum procedure and uniform protection status.

In 2008, almost ten years after the adoption of the conclusions from Tampere, the European Council adopted the European Pact on Immigration and Asylum.³⁸ In it, the Council reiterated that “the grant of protection and refugee status is the responsibility of each Member State, the European Council considers that the time has come to take new initiative to complete the establishment of a Common European Asylum System, provided for in the Hague programme and thus to offer a higher degree of protection as proposed by the Commission in its asylum action plan”.³⁹ An important difference – in comparison with conclusions from Tampere – in the case of the European Pact on Immigration and Asylum was to set a specific date by which one asylum procedure would be established, containing common guarantees. That date was supposed to be 2012. At the same time, it was intended that a uniform status for refugees and beneficiaries of subsidiary protection should be adopted throughout the European Union. Another important arrangement contained in the pact was recommending the establishment in 2009 of a “European support office with the task of facilitating the exchange of information, analyses and experience among Member States, and developing practical cooperation between the administrations in charge of examining asylum applications”.⁴⁰ Such an office was established in 2010 as the European Asylum Support Office, EASO).⁴¹

The tasks of the European Asylum Support Office include supporting practical cooperation in the field of asylum: collecting and promoting the best practices of Member States, processing of data concerning countries of origin of asylum seekers, supporting the relocation of beneficiaries of international protection in the European Union, and creating and developing training available to members of all national administrative organs and courts and tribunals as well as national services responsible for asylum issues in Member States. The key task of the office from the perspective of the European Commission and European Council’s work to date is coordinating exchange of information and conducting other activities relating to issues linked with implementation of instruments and mechanisms of the external dimension of the Common European Asylum System. “The Support Office shall organise, coordinate and promote the exchange of information between the Member

³⁸ European Pact on Immigration and Asylum, October 2008 – <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2013440%202008%20INIT> [accessed: 18 January 2015].

³⁹ *Ibidem*, IV: Construct a Europe of Asylum.

⁴⁰ *Ibidem*, IV, Section 1.

⁴¹ Regulation of the European Parliament and Council (EU) No 439/2010 of 19 May 2010 establishing a European Asylum Support Office – <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0439&from=EN> [accessed: 18 January 2015].

States' asylum authorities and between the Commission and the Member States' asylum authorities concerning the implementation of all relevant instruments of the asylum acquis of the Union.”⁴²

Provisions of the Pact on Immigration and Asylum are implemented with the help of the Stockholm Programme,⁴³ adopted in 2010. In a section titled *Asylum: a common area of protection and solidarity*, the European Council emphasizes standardisation of the policy of granting international protection in individual EU countries. “It is crucial that individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination. The objective should be that similar cases should be treated alike and result in the same outcome.”⁴⁴ As in the meeting in Tampere in 1999, the introduction of a common system was recognised as a basic aim in asylum policy of the European Union under the Stockholm Programme in 2010: “Common rules, as well as a better and more coherent application of them, should prevent or reduce secondary movements within the Union, and increase mutual trust between Member States.”⁴⁵

Thanks to the activities of the new European agenda established at the European Asylum Support Office, work on a common European asylum system have a chance of gaining momentum. This institution’s plans for 2014 above all involve supporting Member States in implementing the first four transformed legal acts laying the groundwork for the implementation of the second phase of the Common European Asylum System: the directive concerning the qualification of third country nationals or stateless persons,⁴⁶ the Dublin III Regulation,⁴⁷ the directive laying down standards for the reception of applicants for international protection,⁴⁸ and the directive on asylum procedure.⁴⁹ These documents broadly deal with the issue of asylum policy of the European Union. However, within the framework of this expert report, only themes linked with the issue of the gender of the applicant and the influence of new regulations on the situation of women and men applying for international protection in a Member State are dealt with.

⁴² *Ibidem*, Section 3, Art. 11 point 1.

⁴³ The *Stockholm Programme – An Open and Secure Europe serving the citizen*, 2010/C 115/01 – <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2010:115:FULL&from=en> [accessed: 18 January 2015].

⁴⁴ *Ibidem*, Paragraph 6.2

⁴⁵ *Ibidem*, Paragraph 6.2.1.

⁴⁶ Directive 2011/95/WE – <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0095&from=EN> [accessed: 18 January 2015].

⁴⁷ Regulation (EU) no. 604/2013 – <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=en> [accessed: 18 January 2014].

⁴⁸ Directive 2013/33/EU – <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN> [accessed: 18 January 2015].

⁴⁹ Directive 2013/32/EU – <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0032&from=EN> [accessed: 18 January 2015].

Directive concerning the qualification of third country nationals or stateless persons

This directive is a recast version 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.⁵⁰ The main aim of the new directive is “on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for those persons in all Member States”.⁵¹

From the point of view of deliberations in this expert report, Art. 25 of the directive is particularly important, requiring the introduction of common concepts of “protection needs arising *sur place*”, “sources of harm and protection”, “internal protection” and “persecution”, including “the reasons for persecution”. In a later article (Article 30), the directive directly refers to the issue of gender: “For the purposes of defining a particular social group, issues arising from an applicant’s gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion.”⁵²

Taking into account the issue of gender in the interpretation of membership of a particular social group as a reason for persecution will allow many women to gain – in the European Union – support and protection against discrimination on grounds of gender, which often threatens their health and sometimes life. At the same time – while being aware of how important it is to address this issue and to mention it directly in the text of the directive – it should be taken into account that such a provision may turn out to be an obstacle in the implementation of this legislation in some Member States – for example, in Poland. It is therefore worth bearing this problem in mind when planning implementation of the directive in Poland. The best example of the possible difficulties linked with transposition of these sorts of provisions into the Polish legal system is the resistance of conservative political forces to ratification in Poland of the Council of Europe Convention on preventing and combating violence against women and domestic violence.

⁵⁰ Directive 2004/83/EC – <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML> [accessed: 18 January 2015].

⁵¹ Directive 2011/95/EU, Art. 12. <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0095&from=en> [accessed: 18 January 2015]

⁵² *Ibidem*, Art. 30.

Dublin III Regulation

This Regulation lays down the criteria for determining which Member State is responsible for adjudicating an application for international protection. In principle, this is the first Member State into which the asylum seeker entered. In the Regulation, the legislator seeks to avoid the phenomenon of “circulating refugees” (refugees seeking asylum, for whom no Member State takes responsibility) and prevent multiple submissions of proposals and choosing of the best country to strive for asylum.⁵³

Directive laying down standards for the reception of applicants for international protection

The aim of this directive is to establish standards concerning the reception of applicants for international protection in Member States. The issue of the gender of persons applying for asylum or another form of protection in a Member State of the European Union has also been taken into account in this act. In particular, conditions in which foreigners should stay are described in detail. When placing specific persons in centres, gender – amongst other criteria – should be taken into account, which is explicitly stated in Art. 18, paragraph 3, which states that “Member States shall take into consideration gender and age-specific concerns and the situation of vulnerable persons”. Additionally “Member States shall take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment, within the premises and accommodation centres...”⁵⁴

Importantly, the authors of this directive are aware that merely stating the following general principle: “Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive”⁵⁵ does not necessarily mean it will be applied in practice. Therefore, Art. 29 of the Directive requires that Member States ensure “that authorities and other organisations implementing this Directive have received the necessary basic training with respect to the needs of both male and female applicants”.⁵⁶

⁵³ See: *Revised rules for treatment of asylum seekers*, Library Briefing, Library of the European Parliament, 6 June 2013 – <http://www.europarl.europa.eu/eplibrary/130546REV1-Revised-rules-for-treatment-of-asylum-seekers-PL.pdf> [Accessed: 18 July 2014].

⁵⁴ Directive 2013/33/EU, Art. 18, Paragraph 4.

⁵⁵ *Ibidem*, Art. 21.

⁵⁶ *Ibidem*, Art. 29, Paragraph 1.

Directive (2013/32/EU) on common procedures for granting and withdrawing international protection

This Directive outlines the procedural framework for granting and withdrawing international protection in all Member States. It also contains direct references to the needs and situation of women seeking the right to reside in the European Union. In the basic points of the Directive, it is stated that: “Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, **gender**, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, **rape or other serious forms of psychological, physical or sexual violence [bolding –A.N]**. Member States should endeavour to identify applicants in need of special procedural guarantees before a first instance decision is taken. Those applicants should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.”⁵⁷

The above general principle is reflected in particular procedures laid down in successive articles of the discussed directive. Among other things, a search of the applicant should be carried out by a person of the same gender:⁵⁸ “With a view to ensuring substantive equality between female and male applicants, examination procedures should be gender-sensitive. In particular, personal interviews should be organised in a way which makes it possible for both female and male applicants to speak about their past experiences in cases involving gender-based persecution. The complexity of gender-related claims should be properly taken into account in procedures based on the concept of safe third country, the concept of safe country of origin or the notion of subsequent applications.”⁵⁹ For this reason, Member States should ensure that personnel examining applications and making decisions should have the possibility of consulting with experts on specific issues linked with gender.⁶⁰ In accordance with the cited Directive, persons conducting the interview must also be “competent to take account of the personal and general circumstances surrounding the application, including the applicant’s cultural origin, gender, sexual orientation, gender identity or vulnerability”.⁶¹

Implementation of the above rules at the EU level and in particular Member States will certainly be a huge challenge for the European Asylum Support Office and for

⁵⁷ Directive 2013/32/EC, point 29.

⁵⁸ *Ibidem*, point 35.

⁵⁹ *Ibidem*, point 32.

⁶⁰ *Ibidem*, Art. 10 point 3d.

⁶¹ *Ibidem*, Art. 15 point 3a.

national institutions, especially in the area of the hitherto not too coherent asylum policy. For up till now, practices have differed in particular Member States, as shown in the following list of regulations and good practices from selected European Union countries.

Belgium

The number of asylum applications motivated by gender-based persecution increased in Belgium from 6% to 17% of all asylum applications between 2007 and 2012. Belgium is one of the countries that publish statistics on the granting of refugee status according to gender. Most of these cases have been brought by women, although men also refer to the issue of gender when their persecution is based on sexual orientation that is not accepted in a given country. Belgium has not only drawn up statistics taking into account gender but has also introduced the issue of gender into its policy towards refugees. It is the only country in Europe that has an office dedicated exclusively to cases with a gender component in the field of the procedure of granting refugee status – Commissariat général aux réfugiés et aux apatrides (CGRA).

Commissariat général aux réfugiés et aux apatrides has created its own typology of forms of persecution on grounds of gender. It is similar to typologies prepared in Canada and the United States, as well as ones recommended in the guidelines of the United Nations High Commissioner for Refugees. The Belgian typology encompasses the following treatments:

- o persecution based on sexual orientation and gender identity,
- o honour killing,
- o female circumcision,
- o forced marriage,
- o domestic violence,
- o rape and sexual violence,
- o forced sterilization and forced abortion.

United Kingdom

In the UK, one in three people applying for refugee status is a woman,⁶² so it is not surprising that the country has adopted its own guidelines concerning the treatment of victims of persecution on the grounds of gender. *Gender Issues in the Asylum*

⁶² Ch. Querton, “*I feel like as a woman I’m not welcome*”: A gender analysis of UK asylum law, policy and practice, Asylum Aid, Protection from Persecution, 2012.

*Claim*⁶³ were issued in 2004 and contain guidelines concerning how officials should treat cases with a gender component, including ones related to domestic violence, and how to implement procedures that are sensitive to gender. The guidelines have already been supplemented twice, in 2006 and 2010, after consultations with many non-governmental organizations and institutions – for example, Asylum Aid, the United Nations High Commissioner for Refugees and the Immigration Law Practitioners Association (ILPA).

The guidelines encompass a similar catalogue of forms of gender-based persecution – like the previously discussed documents – but also contain an interesting typology of discriminatory behaviours which can be treated as persecution. These include:

- o serious legal, cultural and social restrictions on the right to have adequate means of livelihood,
- o serious legal, cultural and social restrictions on the right to private and family life,
- o restrictions on political rights,
- o lack of opportunity to practise or not to practise a religion,
- o restrictions on access to public places,
- o lack of access to generally available social security, and educational and legal resources (for example, a situation where a woman has a limited right of ownership or limited access to the healthcare system, including the possibility of family planning).

Sweden

Sweden is applying interesting solutions in the area of regulations concerning the granting of refugee status. The *Aliens Act*⁶⁴ adopted in 2005 establishes that persons persecuted on grounds of gender are treated as foreigners requiring protection. By the same token, there is no need to create a separate criterion, on the basis of which “a particular social group” could be formed. Thus, according to the guidelines, e.g. “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination” or “Somali women, who have not yet been subjected to circumcision, but there is a probability that they will be forced to do so” do not constitute women fleeing from countries in which their rights have been broken. The criterion of gender is part of Swedish law

⁶³ See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257386/gender-issue-in-the-asylum.pdf [accessed: 15 March 2014].

⁶⁴ See <http://www.government.se/content/1/c6/06/61/22/bfb61014.pdf> [accessed: 14 March 2014].

concerning the granting of refugee status, which enables obviating legal and linguistic acrobatics when granting asylum to women fleeing from violence, forced abortion or forced marriage. For in accordance with the *Aliens Act*, “‘refugee’ means an alien who is outside the country of the alien’s nationality, because he or she feels a well-founded fear of persecution on grounds of race, nationality, religious or political belief, or on grounds of gender, sexual orientation or other membership of a particular social group and is unable, or because of his or her fear is unwilling, to avail himself or herself of the protection of that country”.⁶⁵

It seems that the Swedish solution most fully ensures protection for women who are persecuted in other countries and are seeking protection in Sweden. The fact that the criterion of gender is officially recognised as a basis for persecution – which may be a reason for granting asylum – means that officials and judges making decisions about refugee status can unquestionably make a decision about granting protection to women needing help.

Poland

Poland is one of the countries in which the proportion of women seeking international protection is highest compared to other Member States of the European Union.⁶⁶ The binding Act on granting protection to foreigners on Polish Territory from 2003 also clearly defines that persecution, justified fear of which causes a need to obtain protection, “may consist, in particular, in actions directed against persons due to their gender or because they are minors”.⁶⁷ In spite of this, as indicated by Witold Klaus, “in principle, there is a lack of positive decisions which would be based on this ground”,⁶⁸ noting that Polish authorities seem not to perceive the problem of violence against women in their countries of origin from the point of view of granting them international protection.

The situation is so difficult that – as Weronika Refortowicz writes – “women arrive, who no longer able to endure the humiliation which their cultural environment tacitly condones [...], decide on a desperate step in order to oppose violence while still in their country of origin [...]. This in turn puts them in danger of serious consequences, including life-threatening ones, and sometimes forces them to seek international

⁶⁵ *Ibidem*, Chapter 4, Section 1

⁶⁶ *Asylum applicants by gender, 2nd quarter 2011, 11/2012 – Statistics in focus*, Eurostat – http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-12-011/EN/KS-SF-12-011-EN.PDF [Accessed: 18 July 2014].

⁶⁷ The Act of 13 June 2003 on granting protection to foreigners on Polish territory (Journal of Laws of 2003, No. 128, item 1176), Art. 13 Section 4, point 6.

⁶⁸ W. Klaus, *Przemoc wobec migrantek przymusowych w Polsce – charakterystyka zjawiska (Violence against female forced migrants in Poland)*, [in:] *Bezpieczny dom? Przemoc fizyczna i symboliczna wobec uchodźczyń i uchodźców (Safe home? Physical and symbolical violence against female and male refugees)*, Ed. W. Klaus, Association for Legal Intervention, Warsaw 2014, p. 109.

protection.”⁶⁹ However, as it turns out, they often do not receive this support, hence calls for granting international protection by democratic states of the European Union.⁷⁰

Unfortunately, even when such women receive this protection – even if it is based on criteria other than gender-based persecution – their belief in Poland as a country without the problem of discrimination on the grounds of gender will be in tatters, as evidenced in the studies of Weronika Refortowicz.⁷¹ However, this topic is beyond the scope of this expert report. One can only hope that the common European asylum system will allow procedures of Polish authorities to be adapted to European guidelines, including ones concerning the gender of the applicant, and women who end up in Poland as refugees or beneficiaries of another form of international protection will feel at home here – a home that is safe for everyone irrespective of gender.

Conclusions

Women experiencing violence and discrimination should have equal opportunities to men to change their life and receive protection against discrimination – just as do men who are victims due to race, political beliefs, or ethnic origin – in spite of the fact that the issue of gender was not explicitly mentioned as a ground for granting refugee status in the Geneva Convention of 1951. The mere granting to women of the right to obtain asylum is not sufficient. It is above all necessary to diagnose the situation of women applying for refugee status – the problems and obstacles that they encounter – and then to shape the rules and procedures on the basis of the obtained research conclusions. It is also necessary to create a coherent European Union policy based on the guidelines of the United Nations High Commissioner for Refugees – as mentioned by the authors of the report titled *Gender-related asylum claims in Europe*. European women often face discrimination every day, in offices, homes, and public places. The magnitude of this discrimination is, however, incomparable with the persecution often faced by women from third countries. In order to enable such women to have a chance for a new life, the following are needed: relevant regulations which will enable the granting of refugee status to women, procedures facilitating passage through this difficult process, and the training of persons dealing with women waiting for a decision, which will allow avoidance of secondary victimization.

⁶⁹ W. Refortowicz, *Kulturowo uwarunkowana przemoc ze względu na płeć wobec kobiet z Północnego Kaukazu (Culturally conditioned violence against women from the North Caucasus due to gender)* [in:] *ibidem*, p. 120–121.

⁷⁰ See: *ibidem*, p. 151.

⁷¹ *Ibidem*.

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