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Asylum seekers with special needs

Gender

Discussant paper

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The need to have procedures that are sensitive to vulnerable asylum seekers with special needs is clear both from a theoretical and a practical point of view. I would like to stress though, that correct identification and appropriate reception conditions are so much intertwined that – even though different directives deal with them –, in practice, and from the point of view of the asylum seeker, they can not really be looked upon as separate processes. In many countries a correct identification may simply be missing – especially in cases of women – due to the lack of appropriately regulated and implemented reception conditions, but also as a result of a lack of binding, clear and detailed definitions of *gender-based persecution*, *vulnerability* and *special needs* in all of the related directives. As the Rapporteur's paper points out, vulnerability must be addressed horizontally throughout the proposals in order to avoid inconsistencies and re-victimisation, in short injustices both during the procedures and of the final decisions on granting or denying international protection. I would add that this is true of gender-based persecution and special needs as well.

While agreeing that once a common understanding will be reached it needs to be implemented horizontally and included in all of the legal tools and mechanisms in order to avoid confusion, I will focus here only on some of the main points of the paper:

- the need for clarification of, and connection between concepts such as vulnerable groups, vulnerable asylum seekers and special needs;
- the difference and interconnectedness between identification and reception conditions; and
- the need for mandatory regulation on specific procedures.

The rapporteur suggests that the confusion or lack of clarity present in the recast directives regarding the connection between *vulnerability* and *special needs* can and should be solved by “tying” the two in the expression “vulnerable persons *with* special needs”. While this undoubtedly reduces the ambiguity of the concept, it raises the question of correctness. Is it never possible that vulnerable persons do not have special needs? Can we at all hold that once somebody was identified as “vulnerable” (which in itself suggests a “special” state) his/her needs are “special”, and not naturally following from the state or situation she is in, which make them entitled not to special treatment, but a treatment that is “different” from usual, but equally “normal”? In other words, maybe it is time for us to adopt the view that is usually associated with trauma research: PTSD and complex PTSD is a normal reaction to “abnormal” events and situations, therefore “special” treatment is a normal procedure that must follow the identification of people who underwent trauma. Although this is a conceptual shift, and maybe too early to



implement in light of the generally low level of awareness regarding trauma-recognition in several countries, on the long run it may help avoiding a) the notion that States are “generous” in offering proper treatment for victims of persecution, b) unnecessary “pathologization” of asylum seekers with special (normal to the state of trauma) needs and c) empowering staff to recognize and handle traumatized persons. It is also important to bear in mind that the acceptance of symptoms of PTSD should not become a dogma. While this acceptance has been the result of a long fight on the part of women’s rights organizations and experts, even this insight can be used as an instrument of backlash: it happens now in domestic violence, incest and sexual assault cases that if a survivor does not display symptoms of trauma, her story is dismissed as a lie. Whether a person develops PTSD depends on several factors, many of them including childhood circumstances, internal resources, the presence of even a single „understanding witness”¹, or an accommodating environment. Some survivors are angry or upset instead of being depressed or showing other accepted signs of trauma. This may pose a problem especially in the case of women, or children, who are less permitted culturally to express anger. Therefore, every professional every time has to be aware that their main task is first and foremost to be trained, to have correct knowledge of different forms of persecution (including gender based persecution) and to listen to the asylum seeker attentively (including to things unsaid) and set aside preconceived notions of how the asylum seeker „should behave” in order to be considered credible.

It is also possible to ask the question: Can we always say that only vulnerable persons can have justified special needs? The recast of the Minimum Standards on Procedures seems to offer a definition that suggests that this is so because it seems to use persons with special needs as a synonym of vulnerable persons. From this angle, the paper is right to point out that a more thorough definition of “special needs” would be in place to avoid an unlimited broadening of the concept – and as a result of claims. Yet, we must bear in mind that the same “special need” may be justified in one case, while unjustified in another, depending on the individual’s situation even if we are unable to detect the vulnerability at first. A clear definition of vulnerability in the legal instruments adopting internationally accepted legal norms and several recommendations – and providing a non-exclusive list in order to facilitate implementation – would undoubtedly also help this process.

It has to be noted that the concept of gender based persecution is still missing from most of the legal instruments (with the exception of COM (2009) 554). Even though gender, and some forms of gender based violence (such as rape or sexual violence) are acknowledged as a basis for special treatment, a comprehensive understanding of gender-related persecution and the underlying gender-based discrimination – as defined e.g. by the CEDAW Convention, the DEDAW Declaration and by UNHCR documents and guidelines, and as adopted, for example by the Council of Europe² – is not apparent. This puts survivors of such persecution into a situation

¹ Herman, Judit (1992, 1997) *Trauma and Recovery: The Aftermath of Violence – from Domestic Abuse to Political Terror*. N.Y.: BasicBooks.

² See e.g.: Parliamentary Assembly of the CoE Report on Gender-related claims for asylum– Document 12350 of 26 July 2010, a Report of the Committee on Migration, Refugees and Population. <http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12350.pdf>



where – whatever the definition and accepted content of vulnerability and special needs – they need to assert themselves above average and prove, from case to case that their experience indeed constitutes persecution. It is, therefore, strongly advisable to follow the UNHCR gender guidelines if good practices are to be implemented. (This will be visible from the short case descriptions provided as examples at the end of this discussion note)

This leads us to the next point I would like to comment on: the interconnectedness between identification and reception conditions. As the Rapporteur points out, the lack of proper procedures responding to the needs and vulnerability of an asylum seeker may and often does hinder his/her recognition as a refugee. This is also well illustrated in one of the cases below. But more than just affecting procedures and treatment of the individual asylum seeker, the lack of a coherent acknowledgement of gender based persecution in all of the related regulations (both regarding identification, and reception conditions) also leads to a less than sufficient – and, in cases, discriminatory – analysis of country of origin information.³ Asylum procedures, just as other legal mechanisms closely linked with individual human rights, cannot evade taking a stand: rape, intimate partnership violence, incest, arranged marriage, sexual harassment, dowry, buying and selling women, gay-bashing and other forms of gender based violence requires a clear stand on the boundaries between “cultural differences”/“traditional customs” and human rights. Thus, in the case of asylum seekers with a background of gender-related persecution, qualification seems to be the major pitfall. Procedures related to reception conditions and hearings are decisive in the sense that if a victim is not identified as vulnerable, and/or with special needs, of course her/his chances of being found qualified for international protection are significantly lowered. Therefore, a thorough regulation of these procedures is welcome, provided the regulations are clear, mandatory and monitored.⁴

The good practices suggested in the paper of the Rapporteur indeed have a lot of value. Without undermining their potential in helping both the asylum seekers and the staff, I would like to nevertheless call attention to some sensitive aspects of the recommendations. One of the concerns are related to “observation” of asylum seekers. In my opinion any such observation has to bear in mind basic personal data protection. Any observation can be used against a client in the lack of an understanding environment. Thus, even for observation the staff has to be trained in issues such as the after-effects of trauma, signs and potential symptoms of PTSD, or other possible causes of any “strange” behaviour. Involvement of all of the personnel may raise similar issues. Without training, this may become just gossiping about the asylum seeker(s). Potential problems can be foreseen if the staff member or personnel “detects” a problem (e.g. intimate

³ As EWL (an umbrella organization bringing together more than 4000 women's rights NGOs throughout the EU) points out: „As a standard practice, all COI must include information regarding the status of women in countries of origin. [...]It is important to stress that asylum is an individual right and therefore, the concept of “safe country” or region is in total contradiction with this right. This is particularly the case with regards to women as no country or region can be deemed “safe” given that violence against women and gender based persecution occur in all countries of the world.” (www.womenlobby.com)

⁴ The Belgian Office of the Commissioner General for Refugees and Stateless Persons (CGRS) is presently the only model where there is a gender structure.



partnership violence or incest in a family) but is not trained to make sense of it. They can fall into gender and/or cultural and/or age stereotyping, gender-role expectations, victim blaming, etc., all of which will hinder effective treatment of the asylum seeker. Thus it is welcome that the proposed Minimum Reception Standards (COM (2008) 244) include a section on training and on confidentiality (Art. 24, in place of Art. 20). It cannot be overstressed how important this section may become for individual asylum seekers.

The recommendations of the Rapporteur are in full agreement with all that has been said above. Training and involvement of NGOs are especially important, as implementation of even the best legal regulations are doomed to fail in the lack of trained personnel/staff, and in many countries NGOs are the only sources for gender-specific training on trauma and/or gender perspectives.

Given the clear need for actual implementation of legislation on vulnerable groups, I strongly endorse the recommendation for monitoring procedures for the implementation as well, with the added point that whichever institution is to carry it out, it has to be able to carry out thorough gender-analyses as well.

The new European Asylum Support Office about to be set up has the potential to become a key actor in the process of making gender visible in the asylum procedure. The question of how to provide for the gender-aspect in the structure of the EASO is still open for debate. One way is to establish a gender unit that can coordinate the sharing of best practices on gender and asylum, research and gender training. Another way that was suggested is to appoint a high level gender officer who ensures that gender is mainstreamed; this has to be supplemented by gender officers in the different units, as is done in the Belgian model. In any case, it is clear that without a strong gender-sensitive solution women, who make up over half of all asylum seekers, do not receive the appropriate treatment during the asylum procedure that they are entitled to.⁵

Based on the above, the following questions arise:

- How to balance the integrity and the right to protection of sensitive data of an asylum seeker who has faced gender-related persecution with the need to identify their special needs as a vulnerable person?
- Is there a need to differentiate between „vulnerable persons“ and „special needs“? In other words: does a vulnerable person by definition have special needs, and is someone with special needs by definition a vulnerable person?
- How will the gender perspective be integrated into the work of the European Asylum Support Office, and how will the monitoring of gender aspects be ensured?

Cases:

⁵ This is especially important in light of the fact that in the European asylum curriculum gender is presently supposed to be integrated through “mainstreaming” with the result that no specific gender trainings are carried out. It is clear by now, however, that gender does not “get” mainstreamed into policies on its own without specific attention being paid to it. This needs the recruitment of gender-experts, gender trainers and continuous monitoring by gender-analysts.

2007: The court was reminded in a case of ethnic rape by serb nationals against a women who was perceived as Hungarian because of her marriage that rape can be a basis for asylum according to Council Directive 2004/83/EC. The woman was eventually granted asylum.

2006: the case of a Nigerian asylum seeker was turned down because of a combination of reasons – all pertaining to the present discussion. This is a typical case of cultural relativism, gender blindness, and denial of gender-specific persecution which merits some direct quotations from the final decision of the court.

The issues in question were:

- > inheritance of widow by brother of deceased husband (in effect: forced marriage)
- > forcing religious practices and rituals on widow who was of another religion by then
- > being subjected to death „sentence“ by tribe because of her objections to the above

Procedural and theoretical problems

faulty translation, communication problems leading to completely mistaken finding of facts (the woman was „found“ to have murdered four people when she in fact spoke about the death of her four year old son)

- > denial of women as a group
- > denial of a specific form of oppression as mostly affecting women
- > denial of traditional practice as enhancing vulnerability
- > denial of equal rights between European and African women

Quotes from the decision:

„She may have been misunderstood at the hearing at the reception center – the court notes that even the skilled interpreters have difficulty understanding her –, yet, her credibility cannot be fully established because she did sign the minutes of her first hearing.“ [conducted without a skilled interpreter, relying on the language skills of the staff member]

„The petitioner has sudden emotional outbursts“, her „answers are given in a not adequate manner“ „she starts to jabber when telling her story, it is difficult to understand her“ [she was crying and speaking very quickly] → forensic psychologist was asked to examine her to find out what causes the communication problems → PTSD, major depression and „brain fag“ associated with African culture [for young men studying in the West..., a diagnosis not so much in use in recent years] were found

„Her emotional outbursts may be performances, or the result of PTSD“

„Her story may have become more detailed because of the nature of PTSD, *but* also because she got a 'women's protector' lawyer as legal counsel which, by its very nature, strengthens this line.“ [„Woman-protector“ is a literal translation of the expression the judge used instead of WHR counselor which she could have used]

„The petitioner's lawyer is mistaken, because the petitioner is not a member of a specific group according to the Geneva Convention (a 'Nigerian widow rebelling against traditional community norms'), these are just her circumstances.“

„Her problems are a) religious, not group-specific, but even here, she is not persecuted because she became a Christian, but because she does not want to follow her tribe's cultural traditions (i. e. the Geneva criterion for religious persecution is not fulfilled), b) many men also find the inheritance of a woman from a male family member coercive, and oppressive so it is not gender-specific“ [the first husband was appr. 30 years older than the woman at the time of the marriage; no data about the age of the brother], c) „most of her problems are obsolete anyway (i. e. will not recur), such as being a widow or having been forced to widowhood rituals, with the only exception of being sentenced to death“.

„We have to take into account that the African understanding of HR is different from that in Europe. Also, we have to refer to the African Charter on Human and People's Rights which places high importance on the duties of people to preserve traditional tribal culture [by the way, this is not what the text of the Charter says – J.W.]“.

Surprisingly, even with these “findings”, the court ordered a new procedure (the woman was twice found to be not eligible and expelled beforehand) on the basis of the fact that the petitioner was diagnosed with PTSD!

She was expelled a third time since then, now with a final effect. Her status is at the moment is very shaky: she receives a temporary permission monthly to stay.

