



Administrative
Appeals Tribunal

Migration and Refugee Division

Guidelines on Gender

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Introduction

1. All references in this document to 'tribunal' are to be read as references to the Migration and Refugee Division of the AAT.
2. These guidelines are primarily intended to address the needs of applicants with gender-related claims in protection visa reviews.
3. These guidelines may also have application to migration review cases involving gender issues, such as partner visa cases involving domestic violence issues.
4. The objectives of these guidelines are to:
 - further promote a gender inclusive and gender sensitive review process
 - recognise the social and cultural difficulties applicants face when making and presenting gender-related claims.
5. Gender-related claims may be made by men and women. However, they are more commonly made by women.
6. These guidelines are intended to complement existing legislation, policy and guidance and should not be applied inflexibly.

Definitions

Gender

The socially and culturally constructed experience of being a woman or a man and the power relations between women and men. It affects both women's and men's social identity, status, roles and responsibilities. Gender relations and gender differences are historically, geographically and culturally specific – what it means to be a woman or a man may vary over time and place and may be affected by other factors such as race, age, class and marital status. ¹

Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body, and other expressions of gender like dress, speech and mannerisms. ²

Gender-related persecution is the term used to encompass a variety of claims 'in which gender is a relevant consideration in the determination of refugee status'³ or of entitlement to complementary protection. 'Gender-related persecution is not necessarily the same as persecution on the basis of biological sex. It does not simply refer to persons being

persecuted because they are biologically male or female, but to them being persecuted because they fail or refuse to comply with the social requirements of being a man or a woman.’⁴

Gender specific persecution is the term used to describe forms of harm ‘more frequently or only used against women or affect women in a manner which is different from men’ including ‘sexual violence, societal and legal discrimination, forced prostitution, trafficking, refusal of access to contraception, bride burning, forced marriage, forced sterilisation, forced abortion and (forced) female genital mutilation, enforced nakedness/sexual humiliation.’⁵

Gender Based Violence is a term used to describe any violence, sexual, physical or psychological, including threats of harm, directed at a person on the basis of gender or sex.

Background

7. Women’s experiences of persecution or significant harm may be the same or similar to men’s and may not be because of a woman’s gender. However, women’s experiences of persecution or significant harm may also differ because sex and/or gender ‘can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment.’⁶ For example, when assessing claims as to whether the applicant meets the definition of a refugee, a woman may be persecuted in a gender specific manner for reasons unrelated to gender (e.g. raped because of her membership in a political party), she may be persecuted in a non-gender specific manner, but because of her gender (e.g. flogged for refusing to wear a veil), or she may be persecuted in a gender specific manner because of her gender (e.g. subjected to female genital mutilation).⁷
8. Gender-related claims may involve the following types of gender based violence.⁸
 - Sexual violence, including rape, sexual abuse, sexual harassment, sexual exploitation (e.g. trafficking, forced prostitution and forced marriage)
 - Family/domestic violence
 - Coerced family planning such as forced sterilisation or pregnancy, abortion and the murder of children after birth if they are the ‘wrong’ sex
 - Harmful traditional practices such as female genital mutilation
 - Punishment for transgression of social mores
 - Societal and legal discrimination
 - Discrimination against lesbian, gay, bisexual and transgender persons.

9. Further information on protection visa reviews when gender-related claims are involved is provided in the Guide to Refugee Law in Australia which is at www.aat.gov.au.

Constitution of the Tribunal

10. An applicant or an applicant's representative should inform the tribunal at the earliest opportunity of any factors relating to the application that would make it appropriate that a Member of a particular gender conduct the review. The early identification of these issues will enable the tribunal to give consideration to them at the time the matter is allocated to a Member to conduct the review.
11. When a case is identified by tribunal staff as involving a gender-related claim, the case should immediately be brought to the attention of staff in the Caseload Strategy Section, to consider whether a recommendation should be made that a member of a particular gender should conduct the review.
12. If an applicant has requested an interpreter of a particular gender, we will give consideration to whether a Member of that gender should conduct the review.
13. If a gender-related claim or a request for a Member of a particular gender is made subsequent to constitution, we will give consideration, where appropriate, to re-constituting the matter to a Member of a particular gender.

Conducting the review

Difficulties making and presenting gender-related claims

14. Applicants may, for social and cultural reasons, find it difficult presenting and pursuing gender-related claims in the protection visa process.
15. The difficulties faced by applicants may include but are not limited to⁹:
 - an assumption that female applicants' claims are derivative of male relatives' claims
 - difficulty an applicant may have in discussing his or her experiences of persecution because of shame or trauma
 - cultural differences or experience of trauma affecting an applicant's ability to give testimony or his or her demeanour
 - the compounding effect on an applicant's trauma that immigration detention may have
 - difficulties establishing the credibility of an applicant's claims
 - a fear of rejection and/or reprisals from his or her family and/or community.

Pre hearing

16. In preparation for a hearing in a case where a gender-related claim has been raised, the member should familiarise himself or herself with relevant country of origin information that takes into account women's experiences in that country. The type of information usually relied on may not be available in relation to gender-related claims. A Member may need to refer to alternative sources such as '... the testimonies of other women similarly situated in written reports or oral testimony, of non-governmental or international organisations or other independent research.'¹⁰ Thorough preparation for a hearing will assist the Member to develop a relationship of confidence and trust with the applicant, ask appropriate questions and deal with any issues that may arise during the hearing.¹¹
17. An applicant or the applicant's representative may request a postponement of a scheduled hearing to allow for receipt of particular information, particularly medical reports which may be pertinent to the assessment of a gender-related claim. A Member should carefully consider whether, given the circumstances and the nature of the gender-related claim, the request should be accommodated.

Hearing

18. In all hearings, whether involving gender-related claims or not, Members should:
 - seek to create an informal setting for the hearing
 - seek to create an open and reassuring environment to establish trust and encourage the disclosure of personal information
 - explain the role of the tribunal and interpreter, including that any information provided will be treated in confidence, and explain the purpose of the hearing
 - question applicants in a culturally sensitive and respectful manner
 - allow applicants to present claims with minimal interruption
 - adjourn hearings for breaks as appropriate.
19. If gender-related claims are involved, a Member should, in addition, be alert to the following:
 - whether an interpreter of a particular gender is required
 - providing an applicant with the opportunity to give evidence in the absence of family members
 - ensuring that the interpreting agency is appropriately briefed about any sensitive issues related to the review, so that an appropriate interpreter is provided

- in refugee reviews, assuring the applicant that the hearing will be conducted in private and that the identity of protection visa applicants cannot be disclosed
 - in migration reviews, considering whether it would be in the public interest for some or all of the proceeding to be conducted in private and taking into account the views of the applicant
 - considering whether the tribunal should make directions in relation to the publication or disclosure of evidence, information or documents
 - asking an applicant who has raised gender-related claims in the absence of his or her family members to provide, if available, separate contact details so that the tribunal can contact or correspond with him or her directly
 - being aware that gender-related claims may not be readily apparent from the information provided or articulated by the applicant.¹² For example, a female applicant may not relate questions about 'torture' to the harm feared '(such as rape, sexual abuse, female genital mutilation, forced marriage, etc)'¹³
 - during the hearing of claims concerning sexual violence or other traumatic incidents, an adjournment or second hearing may be appropriate if an applicant is becoming or has become emotionally distressed or in order to establish trust and obtain all relevant information. It is important that an applicant is not further traumatised by the process of giving evidence
 - encouraging an applicant to seek appropriate counselling or other support services after a hearing or suggesting to the applicant's representative that such services be sought.
20. If at a hearing the Member considers it appropriate that an applicant be given the opportunity to be assessed by a counsellor or a medical practitioner such as a psychiatrist, the Member should adjourn the hearing to enable the medical report or assessment to be obtained or for further investigations or enquiries to be made.

Credibility

21. When conducting a hearing based on sexual orientation or gender identity, a Member should ask questions in relation to the applicant's realisation and experience of sexual orientation or gender identity rather than questions that focus on sexual acts.¹⁴
22. For further information on assessing credibility, see *Guidelines on the assessment of credibility – MR Division*.

Decisions

23. Members should avoid unnecessary inclusion in decisions of information of a sensitive, private or personal nature.
24. If gender-related claims have been raised by an applicant in the absence of the other members of the family unit, a Member should, if possible, prepare a separate decision record that deals with those claims in order to protect the applicant's privacy.

Notification of decisions

25. If a Member has prepared separate decision records for members of the same family unit on account of gender-related claims raised, he or she should inform staff whether the applicant with the gender-related claims should be notified separately of the tribunal's decision. If the applicant with the gender-related claims has not provided an alternative address to which the notification can be sent, staff should contact the applicant and ask whether the applicant would like to collect the decision in person or whether it should be sent to the review applicant's address or an alternative address. These details should be confirmed in writing.
26. If the tribunal is concerned that an applicant may be distressed by the outcome of the review, the tribunal should endeavour to ensure that the applicant receives appropriate support at the time the decision is notified.

Sources of further guidance

Guidelines on the Assessment of Credibility – MR Division.

Guidelines on Vulnerable Persons – MR Division.

Endnotes

1. (Former) United Kingdom Immigration Appellate Authority (IAA) November 2000, *Asylum Gender Guidelines*, paragraph 1.12.
2. United Nations High Commissioner for Refugees (UNHCR) 21 November 2008, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, paragraph 5.
3. United Nations High Commissioner for Refugees (UNHCR) May 2003, *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons*, p. 111.
4. (Former) United Kingdom Immigration Appellate Authority (IAA) November 2000, *Asylum Gender Guidelines*, paragraph 1.14.
5. (Former) United Kingdom Immigration Appellate Authority (IAA) November 2000, *Asylum Gender Guidelines*, paragraph 1.13.
6. United Nations High Commissioner for Refugees (UNHCR), 7 May 2002, 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, paragraph 6.
7. (Former) United Kingdom Immigration Appellate Authority (IAA) November 2000, *Asylum Gender Guidelines*, paragraph 1.15.
8. United Nations High Commissioner for Refugees (UNHCR), May 2003, *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons*, pp. 15-18; United Nations High Commissioner for Refugees (UNHCR), 7 May 2002, 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, paragraph 3; (Former) United Kingdom Immigration Appellate Authority (IAA) November 2000, *Asylum Gender Guidelines*, paragraph 1.13.
9. United Nations High Commissioner for Refugees (UNHCR), 7 May 2002, 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; United Nations High Commissioner for Refugees (UNHCR), January 2008, *UNHCR Handbook for the Protection of Women and Girls*, and (Former) United Kingdom Immigration Appellate Authority (IAA) November 2000, *Asylum Gender Guidelines*.
10. UNHCR 7 May 2002, 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, paragraph 37.
11. United Nations High Commissioner for Refugees (UNHCR), 7 May 2002, 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, paragraph 36.
12. Hearn Mackinnon, R. & Jayasinghe, U. 'Sexual and Gender Based Persecution and Tribunal decision making: challenges for decision makers when social and cultural mores intersect with administrative review' (paper presented at 'Best practices for refugee status determination: principles and standards for state responsibility', Monash University Centre, Prato, Italy, 29- 30 May 2008), section 4.
13. United Nations High Commissioner for Refugees (UNHCR), 7 May 2002, 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, paragraph 36.
14. United Nations High Commissioner for Refugees (UNHCR), 21 November 2008, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, paragraph 36; La Violette, N 'Sexual Orientation and the Refugee Determination Process: Questioning a Claimant about their Membership in the Particular Social Group' Immigration and Refugee Board of Canada, May 2004.