Guidance note on refugee Claims relating to Female Genital Mutilation

Summary of main points

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by UNHRC

This paper provides a summary of the main points developed in the guidance.

Target audience: staff of UNHRC, governments, legal practitioners, decision-makers, the judiciary, non-governmental organizations and other partners involved in refugee status determination.

The guidance provides an overview of case law and international standards related to FGM and asylum. An increasing number of jurisdictions have recognized FGM as a form of persecution in their asylum decisions.

Claimants

- Girl or woman who has been compelled to undergo or is at risk of being subjected to FGM.
- Parents who fear that their girl will be exposed to FGM or who risk persecution due to their opposition to the practice.

FGM constitutes a form of gender-based violence amounting to persecution.

FGM is a form of child specific persecution which means that

- FGM can be qualified as persecution regardless of the age of the child.
- Even if a girl does not express fear, it should be assumed to be well founded since FGM is considered as a form of persecution. “In these circumstances, it is up to the decision-makers to make an objective assessment of the risk facing the child, regardless of the absence of an expression of fear.”
- The child who is at risk of FGM is the principal applicant even when accompanied with her parents.
- Refugee status for parents derives from their child’s refugee status.
- Parents can be the principle applicant where she or he is found to have a claim in their own rights.
- The fact that the parent did not demonstrate opposition to FGM in the country does not mean that the fear is unfounded.
- The birth of a daughter may, in these circumstances, give rise to a sur place claim.

FGM can constitute a Continuing form of harm

FGM-related claims not only involve applicants facing an imminent threat of being subjected to the practice, but also women and girls who have already suffered from it. Depends on individual circumstances of the case

- Could suffer another form of FGM
- Serious long terms consequences of the initial procedure.
Agents of Persecution
- Usually conducted by private individuals;
- The guidance specifies that there is no requirement to prove malicious or punitive intent from the part of the agent to be considered as persecution.
- Medicalisation of FGM is contrary to the medical ethic to “do no harm” and a violation of human rights. When it is carried out in state’s owned hospital, the states could be considered as agent of persecution.

Availability of State’s protection
- States have an obligation to take effective and appropriate measures to eliminate FGM: through legislation backed by sanctions, awareness arising and mobilization of public opinion against FGM. This also applies to states with immigrant communities in which FGM is practiced.
- Formal ban in law is not enough to conclude that State protection is available. For protection to be deemed available, States must display active and genuine efforts to eliminate FGM. This includes prevention activities as well as systematic and actual prosecutions and punishment for FGM-related crimes.

Convention grounds
Widely recognized that fear of being subjected to FGM is linked to the membership of a particular social group, also political opinion or religion.
UNHCR defines a particular social group as “a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights”. Gender and age are both innate characteristics. The size of the group is irrelevant. Even if the group is large, its size cannot justify refusing to extend the protection where it is otherwise appropriate.

Political opinion can be invoked when the asylum seekers is perceived as critical or challenging of the practice. UNHRC advice to take a board understanding of political opinion and can include opinion on gender roles.

Religion can also be a ground for applying for asylum as certain societies justify the practice on moral and religious grounds. A woman opposing FGM could have a well founded fear of being persecuted on religious grounds.

International flight or relocation alternative
- Should be relevant and reasonable (i.e. being able to live a relatively normal life without undue hardship).
- Only in cases when FGM is not a general practice, not wide spread.
- The risks need to be closely examined including potential reach of the agents of persecution.
- It should not be assumed that the claimant will be protected by the authorities.
“Relocation will not normally be reasonable if the applicant would then be without family support (as may be assumed in cases where the threat of FGM emanates from her immediate family members), and/or if she is very young.”

It is not appropriate to relocate claimants facing a desperate situation.

Procedural issues

Medical certificates

Recognition of refugee status should not be conditional on the presentation of a medical certificate to prove whether the girl has been subjected to FGM or not, particularly as certain medical examinations may have negative psycho-social implications for the child, if not undertaken in an appropriate manner.

Any medical examination should be carried out with the informed consent of the child, in an age and gender-sensitive manner, and with primary consideration for the best interest of the child.

Full text available at
http://www.unhcr.org/refworld/docid/4a0c28492.html

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