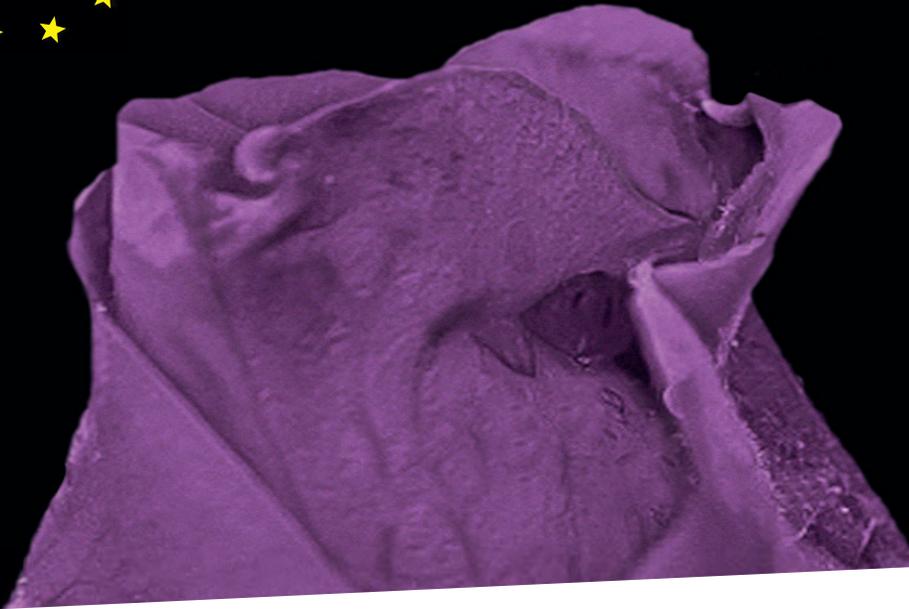


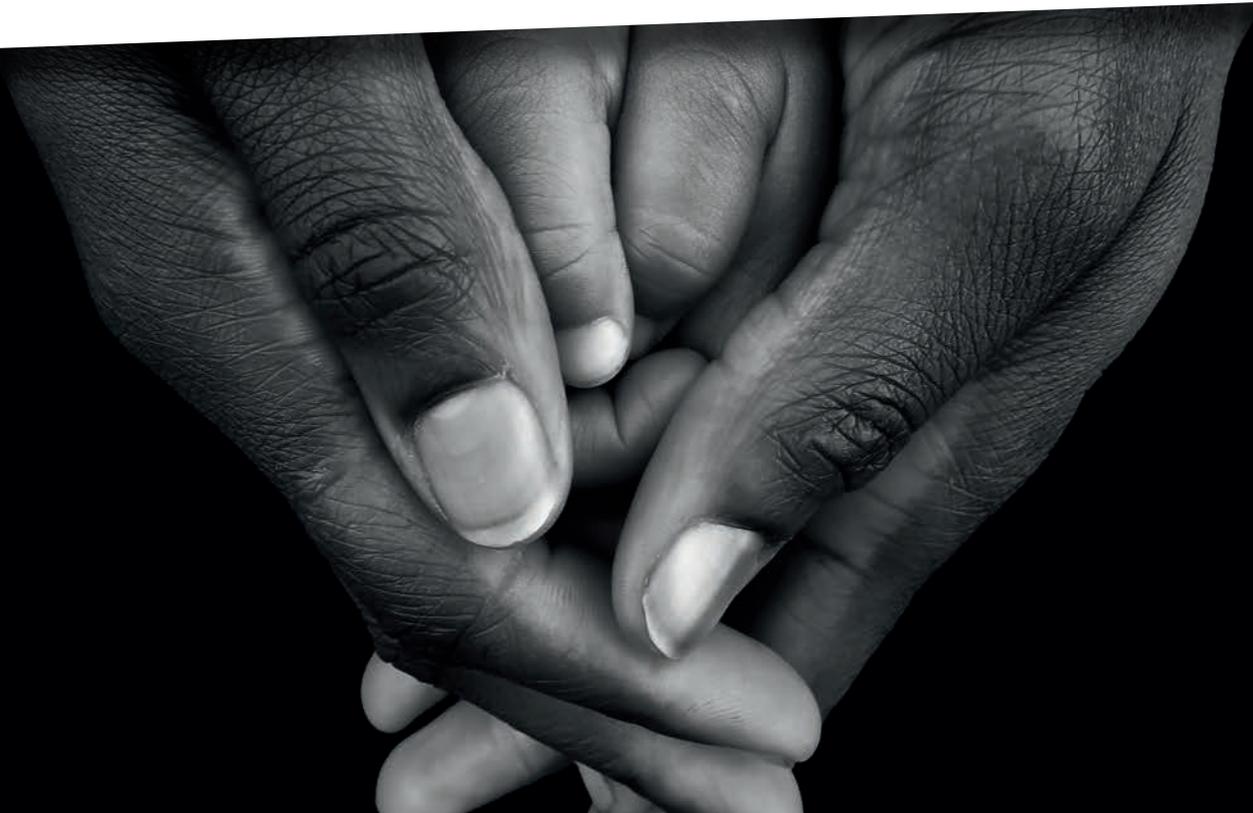
**End FGM**  
EUROPEAN NETWORK



# **FGM in EU Asylum Directives on Qualification, Procedures and Reception Conditions**

END FGM Network Guidelines for Civil Society

March 2016



# FGM in EU Asylum Directives *on* Qualification, Procedures and Reception Conditions

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March 2016



## List of abbreviations

CEAS	Common European Asylum System
CSO	Civil Society Organisation
EASO	European Asylum Support Office
EC	European Commission
EIGE	European Institute on Gender Equality
EU	European Union
FGM	Female Genital Mutilation
NGO	Non-Governmental Organisation
SGBV	Sexual and Gender-Based Violence
UNHCR	United Nations High Commissioner for Refugees



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cover: *Purple flower*, **DGT**

*This little light of mine*, created by Gynelle Leon, October 2015, UK

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'Flee for Her' by Valentin Bianchi, July 2014, Belgium

## I. Introduction

The purpose of this guide is to explain the changes that have taken place in the Common European Asylum System (CEAS) since 2013 and how they apply to asylum seekers affected by or at risk of female genital mutilation (FGM). The guide will serve to highlight the relevant provisions of revised EU directives and explain their application in an accessible and pragmatic manner to civil society representatives working with FGM survivors. This aims to enable them to communicate and advocate on the issues relating to CEAS and FGM with relevant state authorities and representatives. Finally, the guide will demonstrate the newly developed state obligations under the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), by outlining how it reinforces and builds upon existing international, EU and member state legislation.

This guide is intended to be used primarily by the members of the END FGM Network - as organisations working on FGM in Europe, they need to have a good understanding of the obligations of EU member states under EU asylum legislation to be able to perform their watchdog function vis-à-vis the state. The guide will also be useful to other NGOs or CSOs working on asylum, in order to reinforce their knowledge of the gender and FGM-specific provisions within the CEAS and the revised asylum directives. Finally, it can serve as a useful source of information for e-learners on the [a<sup>1</sup>](#) web knowledge platform.

This publication is a result of a six-year collaboration between END FGM and UN Refugee Agency (UNHCR) on issues relating to FGM and asylum. The organisations have cooperated on developing EIGE studies on FGM, consulting on the creation of the CEAS, inputting to EASO activities related to gender mainstreaming and the development of training on SGBV, and in the development of the United to END FGM web knowledge platform for health and asylum professionals. One of END FGM's Belgian members, INTACT, is a key CSO interlocutor for UNHCR's work relating to gender and asylum in Belgium. This history of collaboration, and UNHCR's contribution to its creation, have helped ensure the quality of this guide, its sound basis in evidence and wide dissemination. This guide will also complement the European Commission's action on FGM and international protection.<sup>2</sup>



Hope and Unity, by Olivier Jacquemain, October 2015, Belgium

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<sup>1</sup> <http://www.uefgm.org/>.

<sup>2</sup> As foreseen in objective 5 of the 2013 European Commission Communication on FGM, [http://ec.europa.eu/justice/gender-equality/files/gender\\_based\\_violence/131125\\_fgm\\_communication\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gender_based_violence/131125_fgm_communication_en.pdf), p.10.



## II. What's new? The revised legal framework on asylum in the EU and its impact on FGM

The EU has been working on creating the CEAS since 1999. Between 1999 and 2005, it began by adopting several legislative measures harmonising common minimum standards for asylum. **In 2013, a second generation of laws was adopted, aiming to harmonise national asylum processes and to ensure that they are safe, fair and more effective.** The common system sets out to harmonise the protection and reception standards across the EU member states. Asylum seekers are therefore to be guaranteed the same opportunities for international protection throughout the EU. Among these new measures are three central pieces of legislation:

1. The [revised Qualification Directive](#)<sup>3</sup> which clarifies the grounds for granting international protection and is designed to make asylum decisions more robust. It also sets out to improve the access to rights and integration measures for beneficiaries of international protection.
2. The [revised Asylum Procedures Directive](#)<sup>4</sup> which aims to achieve fairer, quicker and better quality asylum decisions. Under this directive, asylum seekers with particular needs must receive the necessary support to explain their claim. Among others, it sets out to create better protection systems for unaccompanied minors and victims of torture.
3. The [revised Reception Conditions Directive](#)<sup>5</sup> which aims to ensure that there are humane material reception conditions (such as housing) for asylum seekers across the EU and that the fundamental rights of the concerned persons are fully respected. It also specifies that detention should only be applied as a measure of last resort.

**The revised directives now take certain specific concerns related to gender-based types of persecutions, such as FGM, as grounds for an asylum claim in a much more comprehensive way.** Progress has been made in the new directives as sexual violence and FGM are classified as acts of persecution and the definition of vulnerable groups includes victims of sexual violence; member states are instructed to make procedures more gender-sensitive and to adequately train asylum authorities in this regard, as well as to establish procedural guarantees for vulnerable groups. **It is therefore essential that organisations and professionals supporting asylum seekers affected by, or at risk of FGM, be informed of these new provisions in EU law to monitor their proper implementation by national authorities and to make an effective use of them in asylum procedures.**

While the revised directives set a general legal framework for the EU, it is the member states' legal obligation to implement these provisions into their national laws within a defined time frame. While the primary role to monitor member states' actions lies with the European Commission, CSOs also play an important role in monitoring national legislation and in ensuring that the EU provisions are implemented into national law in a proper and timely fashion.

Member states were to transpose the Qualification Directive by 21 December 2013, the Reception Directive by 20 July 2015 and the Asylum Procedures Directive for the most part by 20 July 2015 (with a few provisions by 20 July 2018). **All member states should have therefore already modified their national law in line with the provisions of the directives.** Unfortunately, this is far from being the case, with the European Commission currently pursuing a number of infringement procedures against member states who have failed to implement these directives.<sup>6</sup> This underlines the importance of monitoring and follow up on progress towards the full implementation of the Common European Asylum System.

<sup>3</sup> Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

<sup>4</sup> Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing of international protection (recast).

<sup>5</sup> Directive 2013/33/EU of the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

<sup>6</sup> European Commission – Press release '[Implementing the Common European Asylum System: Commission escalates 8 infringement proceedings](#)', 10 December 2015.

The expanded body of EU asylum legislation is further strengthened by legally binding commitments taken on by individual EU member states, as well as the EU as a whole. This is the case in particular with regards to the [Council of Europe Convention on violence against women \(Istanbul Convention\)](#),<sup>7</sup> **which contains a number of provisions relevant to asylum law, therefore adding to the legal protections afforded to women asylum-seekers in the countries that ratified it.** In October 2015, a roadmap<sup>8</sup> was launched which is designed to ultimately lead to the ratification of the convention by the EU as a whole.

## III. Revised directives: provisions relevant for asylum seekers affected by or at risk of FGM

### III.1. Provisions relating to FGM within the Qualifications Directive

The EU Qualification Directive **ensures eligibility for international protection for women and girls with a well-founded fear of persecution or facing the risk of suffering FGM.**

Apart from the victims themselves, it **extends international protection to parents fearing persecution** or facing a real risk of suffering serious harm because they refuse to consent to their child undergoing FGM.<sup>9</sup> It further lists the criteria for **subsidiary protection** to include serious harm, such as torture or inhuman or degrading treatment or punishment (which FGM is considered to be under international jurisprudence), therefore **qualifying FGM survivors for this type of protection.**<sup>10</sup>

The revision of the directive has also strengthened protection for women and girls who have not undergone FGM but are at risk of it, as the directive now explicitly **recognises that issues arising from an applicant's gender should be given due consideration** if they are related to the applicant's well-founded fear of persecution. The directive clearly states that such issues include gender identity and sexual orientation, and may be related to certain legal traditions and customs such as genital mutilation.<sup>11</sup>

Following the provisions of the Convention on the Rights of the Child,<sup>12</sup> the new Qualification Directive also **underlines the importance of the principle of the best interests of the child** as a primary consideration for member states to take into account in various provisions.<sup>13</sup> However, national asylum offices within the individual EU member states will have varying definitions of the best interests of the child in the asylum process as a binding European-level definition on this is lacking. As a basis for determining best practice, the EC principles on the best interests of the child<sup>14</sup> can be promoted.

<sup>7</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence, 12 April 2011.

<sup>8</sup> Roadmap: EU Accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), [http://ec.europa.eu/smartregulation/roadmaps/docs/2015\\_just\\_010\\_istanbul\\_convention\\_en.pdf](http://ec.europa.eu/smartregulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf).

<sup>9</sup> Recital 36, 2011/95/EU.

<sup>10</sup> Article 15b, *ibid.*

<sup>11</sup> Recital 30, *ibid.*

<sup>12</sup> Article 3.1, [Convention on the Rights of the Child](#).

<sup>13</sup> Recital 18, 19 and article 20.5, 2011/95/EU.

<sup>14</sup> European Commission Reflection paper: Coordination and cooperation in integrated child support systems, [http://ec.europa.eu/justice/fundamental-rights/files/2015\\_forum\\_roc\\_background\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/2015_forum_roc_background_en.pdf), pp.10-11.

## FGM-based asylum claims in the EU

The UNHCR estimates that 16,000 women and girls could potentially have already been affected by FGM at the time of their arrival in the EU in 2013, i.e. the 62% of all female applicants coming from FGM-practising countries.<sup>15</sup>

There is currently not enough information about the exact prevalence of FGM-based asylum claims being made in EU member states.<sup>16</sup> This is due to a number of reasons, most notably, the lack of adequate information gathering and statistics at national level. With a few exceptions, member states do not log the grounds for applying or the grounds for granting of refugee status, or they do so with reference to broad categories, such as being a member of a particular social group.

It appears that where information is collected, asylum is granted to applicants who have suffered or fear suffering from FGM predominantly on the basis of their being members of a particular social group. This however, according to the revised directives, is not the only basis for approving of an FGM-related application, as applicants can also qualify on the grounds of well-founded fear of persecution due to political opinion or religion, as described in the section below.

The revised Qualifications Directive contains the following provisions relevant to FGM-based asylum claims:

- **FGM as a ground for persecution on the basis of gender**

The Qualification Directive clarifies that the notion of persecution on the basis of membership of a particular social group may cover issues arising from an applicant's gender, which may be related to certain legal traditions and customs, such as genital mutilation. Gender-based issues should thus be given due consideration in so far as they may be related to the applicant's well founded fear of persecution.<sup>17</sup> In addition, the assessment of an application must **take into account the individual position and personal circumstances of the applicant such as background, gender and age**, to assess whether the applicant has been or could be exposed (or re-exposed) to persecution or serious harm.<sup>18</sup> FGM is a gender-specific violation to which girls can be particularly vulnerable, and it is prevalent within specific ethnic groups and countries and regions, meaning that all of these factors should be considered when an application for international protection is assessed.

- **FGM as an act of persecution**

The definition of **acts of persecution in the Qualification Directive lists a number of acts, including acts of sexual violence and acts of a gender-specific or child-specific nature**.<sup>19</sup> While these notions are not explicitly defined in the directive, FGM would fall within their scope as the UNHCR guidance note on refugee claims relating to female genital mutilation<sup>20</sup> recognises the practice as a form of gender-based violence that inflicts severe harm, both mental and physical, amounting to persecution. The UNHCR guidelines on child asylum claims further call for a gender- and age-sensitive interpretation of the refugee definition, stating that FGM can be seen as a form of child-specific persecution.<sup>21</sup>

- **Cooperation of the asylum authority with the applicant on the assessment of facts and circumstances**

The directive stipulates that member state **authorities are to cooperate with the applicant in order to assess the relevant elements of the asylum application**.<sup>22</sup> This is particularly important regarding FGM and other forms of gender-based violence. In some cases, women and girls who are victims of such violence are not always aware of being (potential) victims. Thus, women and girls victims of FGM may sometimes refrain from sharing certain information relating to the violence they have suffered, for example because they do not understand the procedure

<sup>15</sup> UN High Commissioner for Refugees (UNHCR), Too Much Pain: Female Genital Mutilation & Asylum in the European Union – A Statistical Update (March 2014), March 2014, <http://www.refworld.org/docid/5316e6db4.html>.

<sup>16</sup> UNHCR estimates that there may have been 2000 FGM-based asylum claims in the EU in 2011, *ibid*.

<sup>17</sup> Recital 30, 2011/95/EU.

<sup>18</sup> Article 4.3c, *ibid*.

<sup>19</sup> Article 9.2a and f, *ibid*.

<sup>20</sup> [UNHCR \(2009\), Guidance note on refugee claims relating to female genital mutilation](#)

<sup>21</sup> [UNHCR \(2009\), Guidelines on international protection: Child asylum claims unyouder Articles 1 \(A\)2 and 1\(F\) of the 1951 Convention and/or 1967 Protocol relating to the status of refugees.](#)

<sup>22</sup> Article 4.1, 2011/95/EU.



and do not trust the asylum authorities, due to the cultural taboo surrounding FGM or because they may have received incorrect information from their smugglers or entourage. **An active cooperation of the asylum authorities is particularly essential when the best interests of the child are at stake.** If a mother applies for asylum but does not raise the issue of her child being at risk of or having suffered FGM, it is essential that the asylum officer raise the issue, especially if the applicant comes from a country or an ethnic group with a high FGM prevalence rate.

- **Children and victims of sexual violence as vulnerable persons**

The Qualification Directive recalls as a general rule that member states are to **take into account the situation of vulnerable persons such as minors, pregnant women, single parents with minor children, persons who have been subjected to physical or sexual violence, as well as the best interests of the child**.<sup>23</sup> Women and girls who are victims of or at risk of FGM should thus be considered vulnerable persons falling under this definition.

- **Specific attention to child-specific forms of persecution and the best interests of the child**

The Qualification Directive requires **member states to give special consideration to applications from children and to have regard to child-specific forms of persecution**.<sup>24</sup> This is relevant for FGM to which, while it can affect women or girls of any age, children are particularly vulnerable.

- **Cessation of protection in the case of change in circumstances**

The Qualification Directive recognises that the **cessation of refugee status, due to a change of the circumstances in connection with which the status had been granted, does not apply to a refugee who is able to provide compelling reasons arising from previous persecution for refusing to seek protection of their country of nationality**.<sup>25</sup> This exception is particularly relevant in the context of violence such as FGM, which is a continuous form of harm and not a one-off experience. During her life, a woman may fear being subjected to another instance of FGM and/or may suffer long-term consequences of the initial procedure.

- **Right to family unity**

The directive **obliges member states to uphold the principle of family unity**. While assessing the best interests of the child, the asylum authorities are to take due account of the principle of family unity.<sup>26</sup> It is particularly important to apply this principle in cases where the child is granted refugee status on the basis of a risk of FGM, but where the parents are not afforded refugee status.<sup>27</sup> However, based on the principle of family unity, parents should be granted derivative refugee status carrying the same rights as those granted to their child.

In the case of a child in a family who fears FGM (whether in the country of asylum or on a visit to the country of origin) and lodges her own claim, the need for maintaining family unity needs to be established through the process of best interest determination.<sup>28</sup>

- **Proper training of staff in charge of implementing the directive**

Member states are to ensure that **staff in charge of implementing the directive are properly trained** and bound by the confidentiality principle.<sup>29</sup> This is particularly important as staff who are adequately sensitised to gender-based issues and the confidentiality of personal information submitted by applicants will be better qualified to recognise FGM-based claims and ensure respect for procedural safeguards as set out in the recast Asylum Procedures Directive discussed below.

<sup>23</sup> Article 20.3, *ibid*.

<sup>24</sup> Recital 28, 2011/95/EU.

<sup>25</sup> Article 11.3, *ibid*.

<sup>26</sup> Recital 18, 19 and Article 20.5, *ibid*.

<sup>27</sup> This situation can reportedly happen in some member states according to Christine Flamad, 'FGM: challenges for asylum applicants and officials', in Refugee Studies Centre, [Mini-feature on FGM and asylum in Europe](#), Forced Migration Review No. 49 – Disasters and displacement in a changing climate, May 2015, p.5.

<sup>28</sup> See: [UNHCR Guidelines on Determining the Best Interests of the Child](#), May 2008.

<sup>29</sup> Article 37, *ibid*.



### III.2. Provisions relating to FGM within the Asylum Procedures Directive

The revised Asylum Procedures Directive puts greater emphasis on **incorporating gender considerations into asylum procedures**. In particular, all female applicants are to be given the possibility to apply for asylum and have their cases examined on an individual basis (i.e. separately from their family or spouse, even if they are dependants)<sup>30</sup> and to receive effective protection if eligible; authorities must be adequately prepared to take into account the complexity of gender-related claims; female applicants should have an opportunity to reveal their personal experiences to the asylum authorities in a safe and confidential environment and to benefit from procedural guarantees, such as interpretation services and legal advice; victims of torture and of other severe forms of sexual, physical or psychological violence are to be provided with sufficient time and support to prepare for personal interviews and other crucial steps in the procedures.<sup>31</sup>

The revised Asylum Procedures Directive contains the following provisions relevant to FGM-based asylum claims:

- **Requirements for personal interview: a more gender-sensitive and child-friendly approach**

The Asylum Procedures Directive foresees a personal interview. Member states must **ensure that the official conducting the interview is competent to consider circumstances such as gender, sexual orientation, and vulnerability**.<sup>32</sup> Children must have access to making individual asylum claims (i.e. separately from their families, even if they are accompanied) and to be interviewed in a child-appropriate manner.<sup>33</sup> The applicant may request that the interview be conducted by a person of the same sex and with an interpreter of the same sex.<sup>34</sup> The **official carrying out the personal interview must be gender-sensitive** and the complexity of gender-related claims should be properly taken into account.<sup>35</sup> These provisions are extremely important for claims raised by women and girls who are victims or at risk of FGM, as they often face major difficulties to speak about their ordeal, in front of their families, to a male interviewer or in front of a male interpreter.

- **Examination of applications**

Member states have an obligation to ensure that asylum authorities take decisions after an appropriate examination. To that end, **asylum authorities can seek advice from experts on specific issues such as child- or gender-specific questions**,<sup>36</sup> making this provision especially relevant for FGM-based claims, which should be viewed specifically as a form of gender based violence and/ or violence against children. A shared duty to substantiate claims lodged by women and girls coming from countries with a high FGM prevalence rate would, because of the factors negatively influencing disclosure in such cases, notably shame, mistrust, ignorance that FGM can be a reason for granting refugee status, trauma and memory loss, be indispensable in affording these women and girls adequate protection.<sup>37</sup> This is even more important given that research demonstrates that the majority of claims related to gender are rejected on the basis of the lack of credibility.<sup>38</sup> In addition to this, research focusing specifically on FGM-based asylum claims demonstrates that these applications are frequently turned down due to the failure of the asylum system to recognise the specific nature of this violation and to provide adequate support to the applicants.<sup>39</sup>

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30 Article 7.1, Article 14.1, Article 15.1, 2013/32/EU.

31 Recital 29, 32, Article 15.3a, 2013/32/EU; [Communication from the Commission to the European Parliament and Council: Towards the Elimination of FGM \(2013\), COM 2013, 833 final](#), p.9.

32 Article 15.3a, 2013/32/EU.

33 Article 7.3 and 7.5, Article 15.3e, *ibid*.

34 Article 15.3b,c, *ibid*.

35 Recital 32, *ibid*.

36 Article 10.3d, *ibid*.

37 These duties derive not only from the Qualification Directive (Article 4.3, 6.1), but also from the provisions of the Asylum Procedures Directive, the UNHCR Handbook, and the case law of the European Court of Human Rights, as well as from fundamental principles of EU law. See also: UN High Commissioner for Refugees (UNHCR), [Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report](#), May 2013, pp. 104-105.

38 Asylum Aid, [Unsustainable: The Quality of Initial Decision-making in Women's Asylum Claims](#), January 2011. A report examining 45 cases of female claimants, of which 69% involved an element of gender-related persecution. In 87% of cases the applicant's claim was not believed. The assessment of credibility formed the core of the decision to refuse. In all cases allowed to appeal (50%), the credibility of the applicants' claims was accepted and the negative credibility findings at the initial decision-making stage were overturned.

39 M.J. Middelburg and A.D. Balta, 'Female Genital Mutilation/Cutting as a Ground for Asylum in Europe', *International Journal of Refugee Law*, 2016 (forthcoming).



- **Proper training of officials coming into contact with applicants of international protection**

**Member states' authorities must be properly trained**<sup>40</sup> and must have acquired a general knowledge of problems which could affect the applicant's performance or ability to be interviewed, such as **indications that the applicant may have been tortured**.<sup>41</sup> This provision applies also to FGM, as the practice is considered to amount to torture and cruel, inhuman or degrading treatment under international jurisprudence and legal doctrine, including by many of the UN treaty monitoring bodies, the Special Procedures of the Human Rights Council and the European Court of Human Rights.<sup>42</sup>

Furthermore, officials assessing applications can, if they feel it necessary, seek advice from experts on questions on medical, cultural, religious, child-related or gender issues.<sup>43</sup> This practice should be encouraged to ensure all issues relevant to FGM claims are taken into account.

- **Special procedural guarantees for applicants with special needs such as victims of sexual violence**

The Asylum Procedures Directive requires member states to **identify groups with specific procedural needs, due to their age, gender or the harm they suffered**.<sup>44</sup> Applicants in need of special procedural guarantees such as victims of psychological, physical or sexual violence shall be provided with adequate support in order to prepare for personal interviews and throughout the duration of the asylum procedure. The challenge lies primarily in identifying invisible needs such as trauma as a consequence of FGM. Proper gender-sensitive procedures need to be put in place for the identification and onward referral of victims of FGM to appropriate procedures and services. Such procedures should as much as possible avoid the re-traumatisation of the victim.<sup>45</sup>

Member states are also to grant applicants with special needs procedural guarantees such as the right not to be subject to accelerated or border procedures.<sup>46</sup> This provision is important given that victims of FGM may first of all not self-identify and, once identified, may need support in preparation for personal interviews. Such support (e.g. psycho-social and medical support) may not be available or limited in accelerated procedures.

- **Medico-legal documents**

The directive provides that member states shall arrange for a **medical examination of the applicant with his/her consent where there are signs that might indicate past persecution or serious harm**.<sup>47</sup> Such documentation of symptoms and signs of violence may be based on the provisions of the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).<sup>48</sup> However, while a medical examination or a psychological report can be useful in proving sexual violence or trauma, the refusal to undergo the procedure cannot in and of itself disqualify an applicant from qualifying as a refugee, as it is only one of a number of elements assessed within the application.<sup>49</sup>

- **Applications made on behalf of dependants or children**

The Asylum Procedures Directive obliges Member States to ensure that a **child has the right to make an application for international protection either on their own behalf, through their parents or other adult family members, or through another adult responsible for them**.<sup>50</sup> As girls are particularly vulnerable to FGM, it is crucial that the authorities provide clear and detailed information to parents on the process of claiming asylum specific to children.

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40 Article 4.3, 6.1, 2011/32/EU.

41 Article 4.3, Article 14.1, *ibid*. See also EASO module on interviewing applicants with special procedural needs (not public).

42 [International Covenant on Civil and Political Rights \(ICCPR\)](#), Article 6, Article 7; CRC, Article 6, Article 37; [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(CAT\)](#), Article 3.16; Committee Against Torture, [General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2](#); Human Rights Committee, [General Comment No. 28: Article 3 \(The equality of rights between men and women\)](#), 29 March 2000, CCPR/C/21/Rev.1/Add.10; [Report of the Special Rapporteur on Torture \(2008\): Emily Collins and Ashley Akaziebie v. Sweden, European Court of Human Rights, Application no. 23944/05, 8 March 2007](#). For tools see: EASO tool for the identification of persons with special needs, <https://ipsn.easo.europa.eu/>.

43 Article 10.2 (d), 2013/32/EU.

44 Recital 29, Article 24.1, *ibid*.

45 [EASO tool for the identification of persons with special needs](#), See also: [EASO e-learning module on Gender, Gender Identity and Sexual Orientation](#) (not public).

46 Article 24.3, *ibid*.

47 Article 18.1, *ibid*.

48 Recital 31, 2013/32/EU.

49 Article 18.1 and 18.3, *ibid*.

50 Article 7.3, *ibid*.



- **Right to free legal assistance and advice**

The revised directive stipulates that **applicants should at first instance be provided, free of charge, with legal and procedural information**, taking into account their particular circumstances. The information should enable the applicants to better understand the procedure and comply with the relevant obligations. Member states have the choice of how to provide this information, including **through non-governmental organisations, professionals from government authorities or specialised services of the state**.<sup>51</sup> Member states should be encouraged to make clear who the actors responsible for the provision of free legal advice are and how the service can be obtained to ensure full access to applicants.

### III.3. Provisions relating to FGM in the Reception Directive

The revised Directive on Reception Conditions for Asylum Seekers **introduces gender specific reception conditions which are highly relevant to applicants affected by or at risk of FGM**, namely: the special needs of all vulnerable female applicants will need to be identified in a timely manner; those subjected to serious acts of violence are to have access to rehabilitation services to obtain the necessary psychological and medical support; and accommodation facilities are to be gender sensitive.<sup>52</sup>

The revised Reception Conditions Directive contains the following provisions relevant to those affected by or at risk of FGM:

- **Victims of FGM as vulnerable persons**

The **Reception Directive expressly recognises victims of FGM as a vulnerable group**.<sup>53</sup> National legislation transposing the directive will hence also have to identify victims of FGM as a vulnerable group. **Member states are to identify applicants with special needs within a reasonable period of time after the application is made**, although there is no requirement to include such an identification procedure into national law. Early detection of vulnerable applicants is critical to ensure a proper response to their needs for housing, psychological and medical care and to their specific procedural needs throughout the asylum procedure. In the case of FGM, early detection may help foster dialogue and prevention with the applicant's family, in particular through the delivery of information on FGM, its consequences on health and information about the national legal prohibition of the practice.

While EASO does provide a tool for the identification of persons with specific needs,<sup>54</sup> it does not contain provisions for specific questions to ask potential FGM victims, or any person with invisible special needs, due to the assumption that such procedures already exist at national level. Similarly, the tool does not contain standard provisions for operating procedures for referrals; it therefore falls to member states to ensure that both of these safeguards are in place.

- **Adapted material reception conditions**

The revised Reception Directive foresees that member states shall take into account gender and age-specific concerns as well as the situation of vulnerable persons in relation to reception conditions in border or transit zones and in accommodation centres.<sup>55</sup> This is important for individuals who have suffered or are at risk of FGM as it is crucial that the reception conditions not lead to re-traumatisation through, for example, placement of applicants with the opposite gender or unaccompanied children with adults.

- **Best interests of the child**

The Reception Directive recalls that the best interests of the child shall be a primary consideration, in particular in order to ensure a standard of living adequate for the child's well being.<sup>56</sup> While FGM is not a violation which occurs exclusively to children, many applicants who have suffered or are at risk of it are girls, and it is key that their best interests, including that of right to family unity, be prioritised.

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<sup>51</sup> Recital 22, Article 19, Article 21.1, *ibid.*

<sup>52</sup> [Communication from the Commission to the European Parliament and Council: Towards the Elimination of FGM \(2013\), COM 2013, 833 final](#), pp.9-10.

<sup>53</sup> Article 21, 2013/33/EU.

<sup>54</sup> EASO tool for the identification of persons with special needs, <https://ipsn.easo.europa.eu/>.

<sup>55</sup> Article 18.3, 2013/33/EU.

<sup>56</sup> Article 23, *ibid.*



- **Appropriate training of staff at reception facilities**

The revised Reception Directive states that it is essential the **personnel working in reception facilities be properly trained, in particular to accompany vulnerable applicants such as victims of sexual violence**.<sup>57</sup> Moreover, the directive obliges member states to ensure that **authorities in charge of reception have received the necessary training on the needs of both male and female applicants**, thus ensuring gender sensitivity.<sup>58</sup> As FGM is a gender-specific violation, this provision is crucial to the adequate reception of women and girls who have suffered from or are at risk of it and must be carefully implemented.

- **Detention of vulnerable persons and of applicants with special reception needs**

The Reception Directive stipulates that all applicants who are in detention should be treated with full respect for human dignity and their reception should be specifically designed to meet their needs in that situation. Specifically with regards to the detention of vulnerable persons, the directive obliges member states to ensure **regular monitoring and adequate support** taking into account their particular situation, including their health. **Female applicants should be accommodated separately from male applicants**, unless the latter are family members and all individuals concerned consent thereto. Children should be detained only as a measure of last resort, with the **child's best interests as a primary consideration. Unaccompanied children shall be detained only in exceptional circumstances, separately from adults and never in prison accommodation**.<sup>59</sup> Women and girls victims or at risk of FGM are therefore covered by both of these provisions which must absolutely be upheld to ensure their wellbeing.

- **Healthcare provision for asylum applicants**

Under the Reception Directive, member states must ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders. Member states are further to provide **necessary medical or other assistance to applicants who have special reception needs, including appropriate mental health care** where needed.<sup>60</sup> In particular, member states must ensure that persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment for the damage caused by such acts, in particular access to appropriate medical and psychological treatment or care.<sup>61</sup> This provision is crucial given the long lasting and serious consequences of FGM on physical, sexual and mental health, and the victims' need to receive appropriate health and psychological care.

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<sup>57</sup> Article 25.2, *ibid.*

<sup>58</sup> Article 29.1, *ibid.*

<sup>59</sup> Article 11, *ibid.*

<sup>60</sup> Article 19, 2013/33/EU.

<sup>61</sup> Article 25.1, *ibid.*



## IV. Istanbul Convention: adding a gender dimension to the Common European Asylum System

[The Council of Europe Convention on preventing and combating violence against women and domestic violence](#) (Istanbul Convention), which entered into force on 1 August 2014, is **legally binding** to those member states of the Council of Europe who have ratified it, providing an additional level of protection on top of the existing national, EU and international legal instruments aimed to combat violence against women. Crucially, the Istanbul Convention specifically lists FGM as a form of gender-based violence which it aims to combat.<sup>62</sup>

While not all EU member states have currently ratified the convention,<sup>63</sup> the EU itself has published a roadmap in preparation for the block's accession to it,<sup>64</sup> and committed to ratifying it by the end of 2016.<sup>65</sup> This development would mean that the Istanbul Convention would be **legally binding not only to all EU member states but also to all EU institutions and bodies**. The EU therefore would become internationally accountable for the implementation of the convention. However, for this to happen, all EU member states will have had to sign and ratify the convention – advocacy and lobbying from national NGOs will play a big role in making this a reality.

The Istanbul Convention is particularly interesting in the context of legal protection for those who have suffered or are at risk from FGM since it applies without discrimination to women asylum-seekers as well as to all migrant women, documented or not. **The convention gives states clear instructions to criminalise different forms of gender-based violence and practical measures on how to prevent them.** Monitoring and evaluation of the implementation of these measures falls also to civil society, which can contribute to the process of keeping states accountable to the commitments made under the Istanbul Convention.

The convention contains the following provisions relevant to those who have suffered or are at risk from FGM:

### • Gender-based violence as a form of persecution

The Istanbul Convention requires states parties to ensure that gender-based violence against women be recognised as a form of persecution within the meaning of the 1951 Convention relating to the Status of Refugees.<sup>66</sup> This obligation echoes Article 9 of the EU Qualification Directive, which expressly lists sexual violence, and gender-specific acts as acts of persecution. This provision is crucial to demonstrating the validity of FGM-based asylum claims.

### • A gender-sensitive interpretation of asylum grounds in the Geneva Convention

Under the 1951 Convention relating to the Status of Refugees, to be entitled to international protection asylum seekers must demonstrate that they have a well-founded fear of persecution due to their race, political opinion, religion or membership of a particular social group. The Istanbul Convention requires states parties to ensure that these grounds be interpreted in a gender-sensitive manner.<sup>67</sup> Persecution on the grounds of membership of a particular social group has increasingly been put forward in gender-related claims, and notably in FGM-based asylum claims. However, it is important not to overlook other potential grounds for claims. Indeed, **persecution on the ground of political opinion can include persecution on the grounds of opinions regarding gender roles**. Women or parents who oppose the performance of FGM may come under persecution based on political opinion. Similarly, **where FGM is linked to a religious practice, it may come under persecution on the grounds of religious belief**.

### • Gender-sensitive asylum procedures

The Istanbul Convention calls for more gender-sensitivity in refugee determination procedures, which echoes the EU Reception Directive and the EU Asylum Procedures Directive by obliging states parties to adopt gender-sensitive

<sup>62</sup> Article 38a, Council of Europe Convention on preventing and combating violence against women and domestic violence.

<sup>63</sup> The EU member states who have ratified the Istanbul Convention as of February 2016 are Austria, Denmark, Finland, France, Italy, Malta, the Netherlands, Poland, Portugal, Slovenia, Spain and Sweden. Full list available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>.

<sup>64</sup> Roadmap: EU Accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), [http://ec.europa.eu/smart-regulation/roadmaps/docs/2015\\_just\\_010\\_istanbul\\_convention\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf).

<sup>65</sup> Commission Staff Working Document - Strategic engagement for gender equality 2016-2019, [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/151203\\_strategic\\_engagement\\_en.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/151203_strategic_engagement_en.pdf), p.23.

<sup>66</sup> Article 60.1, Council of Europe Convention on preventing and combating violence against women and domestic violence.

<sup>67</sup> Article 60.2, *ibid*.



procedures, guidelines and support services in the asylum process.<sup>68</sup> Adequate reception conditions and procedures that ensure gender sensitivity at all stages are key to avoiding the re-traumatisation of FGM victims and can facilitate disclosure during the asylum interview.

### • Protection of victims of sexual violence from refoulement

The Istanbul Convention further reiterates the principle of non-refoulement which ensures that victims of violence against women in need of protection, regardless of their status or residence, are not returned to any country where their life would be at risk or where they may be subjected to torture or inhuman or degrading treatment or punishment.<sup>69</sup> This applies specifically to those women and girls who are at risk of FGM, which is considered to constitute torture and cruel, inhuman or degrading treatment under international jurisprudence.

<sup>68</sup> Article 60.3, *ibid*.

<sup>69</sup> Article 61.2, *ibid*.



## V. Conclusion

The CEAS harmonises the protection and reception standards across the EU to ensure that asylum seekers are guaranteed the same opportunities for international protection throughout all member states. The revised directives provide a good basis for a comprehensive, gender-sensitive asylum system across the EU. The system, when fully implemented, will further create a sound legal foundation for gender-specific considerations to be taken into account when reviewing asylum applications and for procedures and reception conditions to be better adapted to the needs of FGM survivors. The CEAS is further complimented by the Istanbul Convention, which by recognising SGBV in general and FGM in particular as forms of persecution and demanding that states take legal actions to combat and prevent them, with regards to all women independent of their legal status, further widens the obligations of the states to act to protect those who have suffered or are at risk of FGM.

However, as this guide has often mentioned, it is crucial for member states to adequately and efficiently implement the provisions contained in the revised directives for the system to be operating to its full potential. To ensure this, monitoring and evaluation of the implementation at national level will be crucial, signalling an important role for NGOs and civil society. As the EU member states are a long way off from fully implementing the provisions of the revised directives, they need to be encouraged to do so not only through a top-down process by the European Commission, but also from the bottom-up by their own civil society. Furthermore, with the Istanbul Convention so far only ratified by 12 EU member states, its application in the EU is not yet a given.

**CSOs within the EU member states have therefore a significant part to play in ensuring that their governments (i) transpose the revised asylum directives (ii) sign and ratify the Istanbul Convention.** To assist with this process, **Annex I** of this guide contains a **check-list of legal obligations** imposed on EU member states by the revised directives. NGOs working with asylum seekers who have suffered or are at risk of FGM can use this to monitor their state's compliance with the provisions of the CEAS. Any discrepancies should be highlighted to relevant authorities with a view of putting in place processes to rectify them. States must further be urged to **collect data and statistics on asylum applications on the grounds of FGM** that were received and granted, as these are crucial to raising awareness and ensuring that the specific needs and vulnerabilities of women and girls from FGM-practising countries are recognised and properly addressed.

The revision of the EU asylum directives provides EU member states with a unique opportunity to address challenging issues and shortcomings within their own asylum systems – it is crucial that this opportunity to improve the situation of women and girls victims or at risk of FGM not be missed.



## Appendix I: Check-list

### Qualification

The EU Qualification Directive ensures eligibility for international protection for women and girls with a well-founded fear of persecution or facing the risk of suffering FGM. To fulfil its provisions member states must:

1. take into account the individual position and personal circumstances of the applicant such as background, gender and age;
2. recognise asylum claims based on acts of persecution such as acts of sexual violence and acts of a gender-specific or child-specific nature – with FGM falling under this scope;
3. cooperate with the applicant in order to assess the relevant elements of the asylum application;
4. take into account the situation of vulnerable persons such as minors, pregnant women, single parents with minor children, persons who have been subjected to physical or sexual violence, as well as the best interests of the child;
5. give special consideration to applications from children and to have regard to child-specific forms of persecution;
6. not apply the cessation of refugee status to a refugee who is able to provide compelling reasons arising from previous persecution for refusing to seek protection of their country of nationality;
7. uphold the principle of family unity, especially when assessing the best interests of the child;
8. ensure that staff in charge of implementing the directive are properly trained and bound by the confidentiality principle.

### Asylum Procedures

The revised Asylum Procedures Directive puts greater emphasis on incorporating gender considerations into asylum procedures. To fulfil its provisions member states must:

1. ensure that the official conducting the personal interview with the applicant is competent to consider circumstances such as gender, sexual orientation, and vulnerability;
2. ensure that asylum authorities take decisions after an appropriate examination of the application; to that end, asylum authorities can seek advice from experts on specific issues such as child- or gender-specific questions;
3. ensure that asylum authorities are properly trained and have a general knowledge of problems which could affect the applicant's ability to be interviewed, such as indications that the applicant may have been tortured;
4. identify groups which qualify for special procedural guarantees such as victims of psychological, physical or sexual violence and provide them with adequate support in order to prepare for personal interviews and throughout the duration of the asylum procedure;
5. arrange for a medical examination of the applicant with his/her consent where there are signs that might indicate past persecution or serious harm;
6. ensure that a child has the right to make an application for international protection either on their own behalf, through their parents or other adult family members, or through another adult responsible for them;
7. provide applicants with free legal and procedural information, either through non-governmental organisations, professionals from government authorities or specialised services of the state.

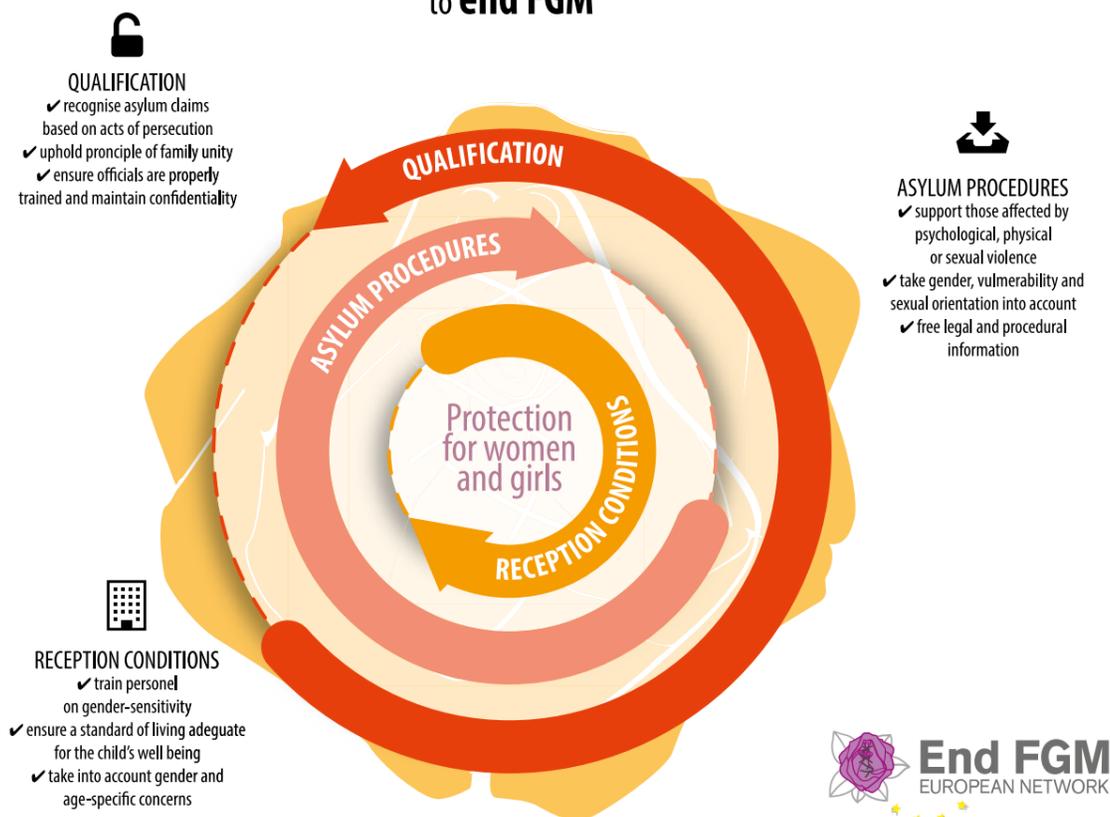


## Reception Conditions

The revised Directive on Reception Conditions for Asylum Seekers introduces gender specific reception conditions which are highly relevant to applicants affected by or at risk of FGM. To fulfil its provisions member states must:

1. identify applicants with special needs, including victims of FGM, within a reasonable period of time after the application is made;
2. take into account gender and age-specific concerns as well as the situation of vulnerable persons in relation to reception conditions in border or transit zones and in accommodation centres;
3. ensure the best interests of the child are a primary consideration, in particular in order to ensure a standard of living adequate for the child's well being;
4. train the personnel working in reception facilities on gender-sensitivity, to be able to accompany vulnerable applicants such as victims of sexual violence;
5. with regards to the detention of vulnerable persons, ensure regular monitoring and adequate support taking into account their particular situation, including their health;
6. provide necessary medical or other assistance to applicants who have special reception needs, including appropriate mental health care where needed.

## Using the EU Asylum Directives to end FGM



## Appendix II: Further reading

### EU resources

**European Asylum Support Office**, [Practical Tools for First-Contact Officials on Access to the Asylum procedure](#), March 2016

A set of practical tools aiming to assist first-contact officials working at borders and in detention facilities, border and coast guards, police, immigration authorities and personnel of detention facilities, in ensuring access to the asylum procedure for those who may be in need of international protection.

**European Commission, DG Justice and Consumers**, [Female Genital Mutilation in Europe: An analysis of court cases](#), January 2016

A comparative overview of the legal aspects of recent FGM court cases within the EU, and an exploratory survey of transnational movements in relation to FGM.

**European Commission**, [Communication Towards the elimination of female genital mutilation](#), November 2013

A communication from the EC bringing together the various policies that the EU has developed on FGM over the years as well as the recommendations of a report from EIGE. It covers internal as well as external policies and aims to develop a holistic, integrated approach on FGM, with particular emphasis on prevention.

**European Parliament**, [Study for the FEMM Committee: Reception of female refugees and asylum seekers in the EU, case study Germany](#), February 2016

A study examining the reception of female asylum seekers in Germany, which provides a number of facilities in reception centres and additional protection for vulnerable groups. The study presents both the EU and the German legal framework concerning the reception of (female) refugees. It also assesses whether gender-sensitive asylum application procedures and reception conditions are provided in practice in Germany.

### UN resources

**UN High Commissioner for Refugees (UNHCR)**, [Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report](#), May 2013

A report providing insights into member states' practices on specific aspects of the credibility assessment in the asylum process; it further contains suggestions on the further harmonization of practices across the EU.

**UN High Commissioner for Refugees (UNHCR)**, [The Heart of the Matter – Assessing Credibility when Children Apply for Asylum in the European Union](#), December 2014

A report aiming to help decision-makers assess the credibility of children's claims in a fair, objective and consistent manner with a number of observations on current practice that could serve as the foundation for guidance on the subject.

**UN High Commissioner for Refugees (UNHCR)**, [Too Much Pain: Female Genital Mutilation & Asylum in the European Union – A Statistical Overview](#), February 2013

**UN High Commissioner for Refugees (UNHCR)**, [Too Much Pain: Female Genital Mutilation & Asylum in the European Union – A Statistical Update](#), March 2014

A unique study providing some of the statistical evidence on the necessary policies and tools to address the specific vulnerabilities of female asylum-seekers with FGM in the asylum system on the one hand, and of refugee girls and women living with FGM and integrating in EU Member States on the other. An update on the statistics contained in the original study was published in March 2014.

**UNICEF**, [statistical report on female genital mutilation](#), February 2016

**Amnesty International, European Women's Lobby, ILGA Europe, *En-gendering the European Asylum Support Office, May 2011***

A joint statement from the END FGM European Campaign, ILGA-Europe and European Women's Lobby calling on the European Asylum Support Office to ensure gender and equality perspectives are fully integrated into the EU's asylum policies and practices.

**Council of Europe, Amnesty International, *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence; A tool to end female genital mutilation – Istanbul Convention, November 2014***

A guide on using the Istanbul Convention to combat FGM in the countries signatories of the convention. It aims to make the convention more widely known among those dealing with affected women and girls at risk, and all those working to end FGM.

**GENSEN, *Gender-related asylum claims in Europe: a comparative analysis of law and practice focusing on women in nine EU Member States, May 2012***

A comparative analysis of law, policies and practice relating to gender issues in asylum claims across nine EU member states (Belgium, France, Hungary, Italy, Malta, Romania, Spain, Sweden, and the United Kingdom) and recommendations towards integrating a gender perspective in EU asylum systems. The report focuses on women's asylum claims, whether gender-related or not.

**Parliamentary Assembly of the Council of Europe (PACE) and UNHCR, *Refugee women and the Istanbul Convention: Preventing and combatting sexual and gender-based violence, January 2013***

A briefing on the rights of refugee women under the Istanbul Convention based on the proceedings of a hearing organised by the Parliamentary Network "Women Free from Violence", the Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe and UNHCR.

**Refugee Studies Centre, *Mini-feature on FGM and asylum in Europe, Forced Migration Review No. 49 – Disasters and displacement in a changing climate, May 2015, ISSN 1460-9819***

The five articles in this mini-feature address some of the issues relating to the practice of FGM in respect of asylum, focusing in particular on practices in Europe.

(Footnotes)

1 UN High Commissioner for Refugees (UNHCR), *Too Much Pain: Female Genital Mutilation & Asylum in the European Union – A Statistical Update (March 2014)*, March 2014, <http://www.refworld.org/docid/5316e6db4.html>.

2 UNHCR estimates that there may have been 2000 FGM-based asylum claims in the EU in 2011, *ibid*.





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