

A Manual on Providing Early Legal Advice to Persons Seeking Protection



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Any errors or omissions in the manual are ours alone.

Brian Collins, Senior Solicitor

Irish Refugee Council Independent Law Centre



Forewords

This comprehensive manual will be helpful both to lawyers and to all who work with persons seeking asylum and other forms of international protection. The manual certainly lives up to the promise of its title. It provides step by step instructions on the provision of early legal advice. I have seldom read a document which offers so much clarity and so much good sense, and that is in an area of law that is notoriously complex and full of traps for the unwary.

The manual reflects the experience of the Irish Refugee Council Independent Law Centre, which since 2001 has developed a model of free early legal advice for those who seek asylum or other protection. Experience here in Ireland and in other jurisdictions shows that early legal advice to applicants for protection enables them to understand the 'asylum' process and to assemble the necessary information for the first stages of that process. The end result is a reduction in the time spent by individuals awaiting a decision and a consequent reduction of cost to the state. This manual must be seen as of particular relevance in the present tragic European and international migration context. It is also so in the Irish context, where over a period of years, three or four High Court judges have been required to deal with the ever-lengthening list of judicial reviews arising from applications for asylum. Both that context, and the fact that numbers of applicants have remained in the unsatisfactory direct provision system for far too long, show that there are basic faults in our law and procedure in meeting our obligations to those who seek protection under international law.

It is clear from many of the judicial review cases, and from the judgments given by the judges engaged in hearing these cases, that legal advice at an early stage would have reduced both the time involved in reaching an eventual conclusion and the complexity of the decisions to be reached at the various different stages. This cannot but be in the interest

both of the asylum applicants and of the state. I hope that the availability of this excellent manual will encourage increased legal advice at an early stage. Equally important is the need to extend the present system of legal aid, which currently applies only to the appeal stage, to the primary stages of the process.

The manual also includes a detailed chapter on the recast Dublin Regulation. While this Regulation can give enhanced protection in certain cases it is complex both in form and in application. Here, early legal advice is even more essential, and the careful stage by stage explanation included in this chapter, together with full references to current case law, will bring clarity both to lawyers and to others involved in the asylum process.

Recently much attention has been drawn to the position of children in the asylum system, and in particular of the children who have been forced to reside in direct provision for long periods of time. This manual includes valuable advice about the procedures concerning children both when accompanied by their families and also when unaccompanied. Stress is placed on the need to put the best interests of the child to the forefront, especially in cases involving the Dublin Regulation.

I wholeheartedly welcome the publication of this truly clear and practical manual, and I am confident that it will be an essential tool for all lawyers and others who are aiding and advising applicants for international protection.

Catherine McGuinness

November 2015

Forewords

Quality legal assistance and representation throughout the asylum procedure, and in particular at first instance, is an essential safeguard to ensure fairness and efficiency. Due to the growing complexity of asylum procedures, professional and independent legal advice and assistance during the procedure has become indispensable for asylum seekers to assert their rights under the EU asylum acquis.

In order to ensure a quality asylum determination procedure, it is imperative that early legal advice is provided. This enables the applicant to put forward a comprehensive application and it also ensures that more accurate and more properly considered decisions can be achieved. Ensuring quality first instance decision-making also reduces unnecessary appeals, and thereby saves time and resources. If first instance decisions are coherently reasoned, and clearly identify the issues at stake, then appeal bodies are enabled to hear appeals more quickly and therefore cost-effectively.

This practical manual is a valuable resource which provides practical guidance for practitioners on how early legal advice can be applied in the asylum procedure as well as in the application of the Dublin Regulation and to vulnerable groups. A proper understanding and application of early legal advice is essential for the effectiveness of the right to asylum as well as ensuring the proper implementation of the EU asylum acquis. This manual contributes towards ensuring these objectives and ultimately safeguarding that the rights of those seeking international protection are respected.

Michael Diedring

*Secretary General, European Council
on Refugees and Exiles*

November 2015



Introduction

This manual aims to give practical guidance to lawyers, legal advisors and legal representatives, caseworkers and NGOs who give legal advice and assistance to their clients during the first instance protection procedure. It is hoped the manual will be used across the EU and elsewhere, with this international audience in mind, it will be translated in to other languages. It references the various recast directives despite them not yet being transposed in to Irish law.

Early legal advice (ELA), or ‘frontloading’, involves intensive work over a short space of time. A lawyer may only have approximately three or four weeks to take instructions, complete an application form, draft and read back a personal statement and to collate and submit relevant evidence. This is a challenging task and it requires trust and rapport to be established between the representative and the client in a relatively short space of time.

The function of the lawyer in the ELA process is to assist the individual in need of international protection to be identified and recognised at the earliest opportunity. This work has three elements. Firstly, enabling the applicant to voice the full extent of her application (including overcoming fear of disclosure and concerns regarding confidentiality); a key feature of this process is assisting the client in preparing a personal statement ahead of her personal interview with the decision-maker. Secondly, assisting the applicant to consider what evidence it might be appropriate, safe and possible to obtain in support of the application. Thirdly, assisting the decision-maker by providing legal submissions which outline the protection needs of the client in the context of the state’s international legal obligations.

Chapter 1 sets out in detail the ‘key stages’ of ELA provision. Chapters 2-4 focus on vulnerable persons, the recast Dublin Regulation and children in the protection process.

ELA is an essential pillar of a meaningful asylum system. Given the complexities of this area and the inherent vulnerability of people seeking protection, early intervention is as valuable and important as it is in other areas of law. Article 4 (1) of the recast Qualification Directive also places a considerable, and arguably unequal, burden on persons seeking protection to substantiate their application as soon as possible, cooperate with the decision-maker and meet a particular standard and burden of proof. ELA can assist an applicant in discharging this significant burden.

Since 2011 the Irish Refugee Council Independent Law Centre (IRC Law Centre) has developed an innovative model of free ELA for those in need of international protection in Ireland. The Centre has found that ELA has been particularly important for vulnerable adults who may have difficulty articulating their application, particularly in an unfamiliar environment.

ELA has also been valuable for those who have not yet applied for protection and who wish to make an informed decision about making an application for protection. In providing services at the earliest possible stage, ELA protects the integrity of the process by preventing unnecessary applications for international protection as well as offering comprehensive individualised advice and representation to those in the process.

Introduction

The benefits of ELA in a protection process have been highlighted by studies involving countries across the EU.¹ ELA has been linked to improved efficiency and fairness, improved communication and encouraging a genuine non-adversarial approach. UNHCR suggests that frontloading of legal advice in an asylum system should not only reduce costs for the state involved, but also result in 'fairer and more efficient' decisions for the applicant.²

The manual is aimed at both experienced lawyers and those new to this area of law. It is also hoped that, through illustrating the considerable practical steps involved in ELA, it will encourage policy makers at national and EU level to ensure that sufficient resources are made available to lawyers practicing in this area of law.

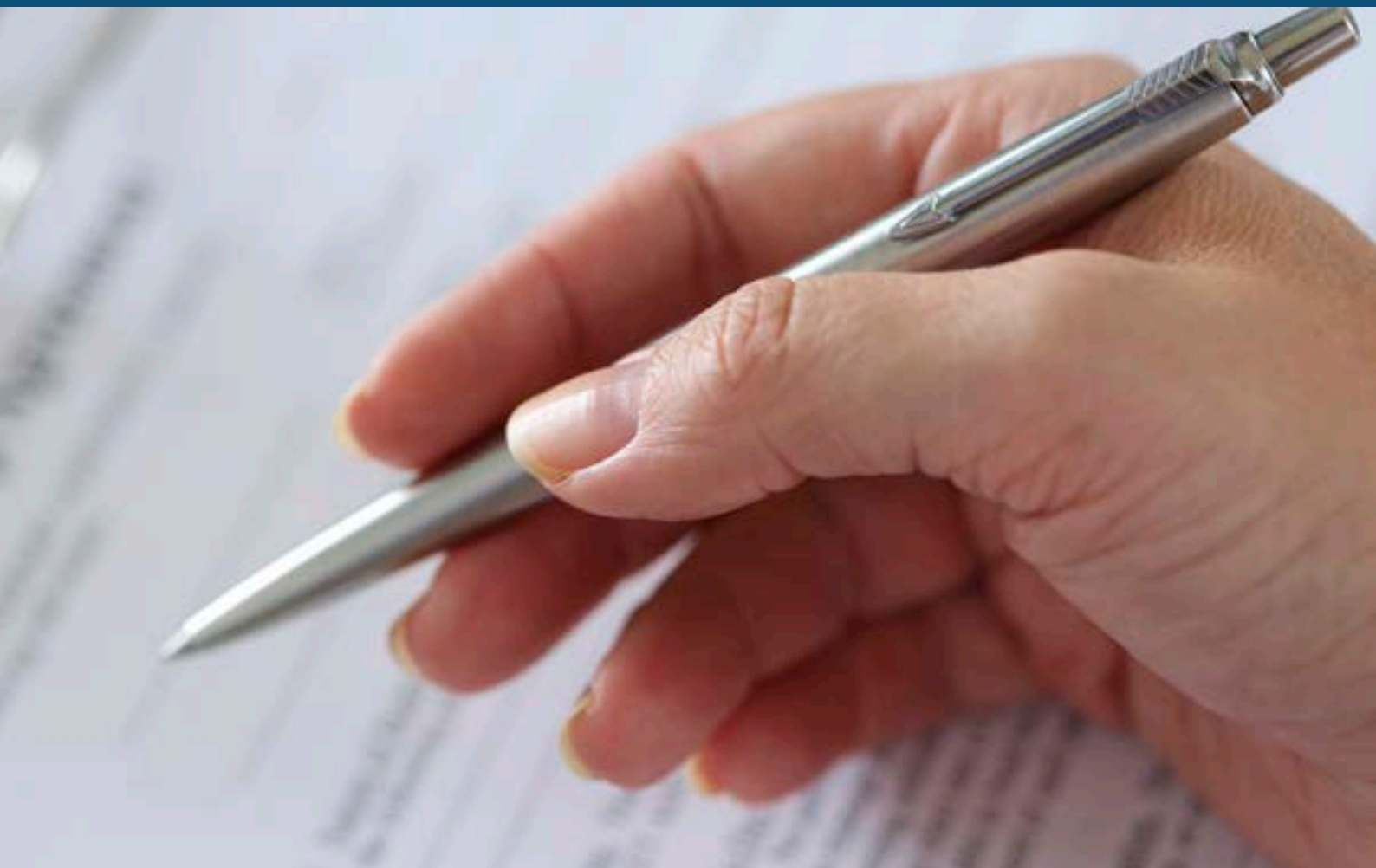
The generic term 'lawyer' is used to refer to the person representing the individual who is claiming protection, who is interchangeably referred to as client or applicant and is given the female gender.

¹ ECRE/ELENA, 'Survey on Legal Aid for Asylum Seekers in Europe', October 2010; Bridget Anderson & Sue Conlan, 'Providing Protection Access to early legal advice for asylum seekers, 2014; Home Office, Evaluation of the Early Legal Advice Project, Final Report Research Report 70, May 2013

² UNHCR, 'Moving Further Toward A Common European Asylum System, UNHCR's statement on the EU asylum legislative package', June 2013

Chapter 1:

The Key Stages of Early Legal Advice



Chapter 1: The Key Stages of Early Legal Advice

The manual gives guidance on the following key stages of ELA, set out in chronological order:

1. Appointment preparation;
2. Meeting and taking instructions from a client;
3. Case planning;
4. Application and admissibility forms;
5. The personal statement;
6. The read back of the personal statement;
7. Accompaniment to the personal interview;
8. Post-personal interview submissions and evidence;
9. Post-decision consultation and planning.

The information contained in this manual is not exhaustive. This information, and the sample documents provided in the annex, are intended to be a guide only. Lawyers may adapt or tailor their model of service to suit their resources and capacity and, in particular, domestic law and procedures.

While it is preferable for potential clients to approach you before they apply for protection, in practice, they may present to you at various different stages of the first instance process, therefore all stages will not be applicable to every case.

Key Stage 1: Appointment preparation

The first key stage is to prepare for the appointment between the lawyer and the individual who is seeking advice on applying for protection or who has recently applied for protection.

The purpose of the advice appointment is to provide both general legal information on the protection

procedure and tailored legal advice particular to the facts of the individual's case. Following this appointment, a client should have an understanding of the strengths and weaknesses of her application; know the key evidence needed to substantiate her application; understand the protection process in the country she is in and be aware of the key supports she can avail of. Be aware that it will often take more than one appointment to obtain full instructions from your client and you may not therefore be able to give her definitive advice at the outset.

In circumstances where a client has not yet applied for protection and the lawyer has determined, on the facts of the case, that the protection process is not appropriate for her, the client should be advised accordingly. The final decision on whether a protection application is made lies with the client herself.

It is important for the lawyer to be fully prepared in advance of an appointment. Thorough preparation will assist the lawyer to elicit relevant instructions, properly assess the strengths and weaknesses of the case (although, as noted above, this may not be possible after only one appointment) and to advise the client accordingly. A lawyer who is prepared will also be in a better position to gain the trust and confidence of their client, which is necessary for the purpose of taking instructions.

In order to properly prepare for an appointment, there are a number of matters to be dealt with and taken into account, which are detailed below.

First steps

A client may approach your organisation or be referred to you by a third party or another lawyer. A referral may contain information about the client or you may only have their name and contact details. As a first step, you should make contact with the client, introduce yourself and try to ascertain

whether she requires an interpreter and, if so, whether she would prefer a male or female.³

Even if your client has a good knowledge of the language you wish to communicate in, as you will be discussing complex legal issues with her, she may still require an interpreter. It is your responsibility to judge whether or not an interpreter is required for your client to be able to convey her account to you in detail and to understand your advice. Your client may also have a preference in relation to where the interpreter is from in her country or the interpreter's ethnicity. While these requests should be handled sensitively, it may be possible to put your client at ease by emphasising that the interpreter is bound by confidentiality, will act objectively and has a role to only interpret what the client and the lawyer say. It is suggested interpreters are given a 'Code of Conduct' outlining what is expected of them,⁴ preferably as soon as possible after the booking has been made so that it can be read in advance of the appointment.

Tell the client of the proposed appointment date and time, if known, and ask that she brings all of her documents with her to the appointment. It can be useful to post or email a map showing the location of your office and details of how your client can get there. If your client has to travel far in order to make her appointment, you should take this into account and arrange a suitable appointment time. Also ensure your client has or can access the funds to travel. If there is no available public transport after your appointment or it would be too much travelling for your client to undertake in one day, you should try to make arrangements for her to be accommodated overnight in a nearby accommodation centre if possible and if the client is happy with this arrangement.

If an interpreter is required, try to book her as soon as possible. It can sometimes be challenging, especially within a short space of time, to find interpreters for less common languages.

Check with the client as to whether there is a lawyer already representing her. If so, you will need to ask her whether she wishes to change her lawyer and, if so, the appropriate notification should be given to the acting lawyer and a copy of the client's file requested. It may be necessary to check with the client why she wishes to change her lawyer.

Ascertain whether the client has any special needs. She may have a disability/medical condition which needs to be taken in to account.

Preliminary research

If you have any documentation relating to the client, perhaps received from a referring organisation, read it carefully. If known, make a note of any critical dates, for example if the application for protection has to be submitted by a particular date.

Where possible, do some preliminary research into the topics relating to the client's case and the prevailing conditions in the client's country of origin. This should include:

- Research of the general human rights and security situation in the client's country of origin;⁵
- If known, it may be necessary to research the relevant law on the reason under the Refugee Convention why the client fears persecution particularly if it is a reason rarely raised such as membership of a particular social group;
- Any relevant UNHCR Guidelines or position notes;

³ See Key Stage 2 for full details on working with an interpreter.

⁴ A sample Interpreter's Code of Conduct is provided in the Annex.

⁵ See Key Stage 8 for a discussion on the use of COI evidence.

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- Relevant case law including any 'country guidance' cases;
- Domestic policy guidelines and legislation.

Consider whether there are any issues which will need to be dealt with as a priority. For example, your client may require release from detention or it may be apparent that the recast Dublin Regulation is likely to be imminently applied.⁶

Preparing the interview space

In order to maintain confidentiality, try to make sure your consultation room is private and soundproof. The room should have a window and be bright, safe and welcoming. Remember, your consultation may well be the first time your client speaks about traumatic events. A client's willingness to discuss these sensitive topics will vary and, as her lawyer, you should endeavour to provide consultation conditions which are conducive to such disclosures, including a calm, quiet consultation space, and a lawyer and interpreter in the gender preference of your client. It is important for your client to feel welcome, comfortable and safe.

Prior to the appointment, the client and the interpreter should sit apart. Where this is not possible, you should ensure that the interpreter and client do not speak about the client's application.

Persons other than the lawyer, interpreter and client should not normally be present during a consultation. Family members or friends can inhibit a client's ability to give full instructions. However, particularly traumatised clients may require the presence of a support worker or social worker to enable them to fully put forward her account. Children should always be accompanied by an appropriate adult. In circumstances where the client is an adult parent with accompanying children, it

may be appropriate to seek child care facilities in order to avoid a situation where the child is witness to the parent giving instructions on sensitive elements of the application for protection. See Chapter 4 for more information on children and the protection process.

Family members should always be interviewed separately, even where one family member's application for protection appears to be entirely derivative of the other family member's application. For example, there may be situations where (i) a spouse has not disclosed an incident of sexual violence or torture to the other spouse; (ii) a family member may be under duress from another family member; or (iii) a conflict of interest may arise between family members.

Key Stage 2: Meeting and taking instructions from your client

Meeting your Client

There are generally three parts to an appointment:

- Firstly, introductions are made and explanations are given as to the purpose of the consultation and what will occur;
- Secondly, substantive instructions are taken; and
- Finally, the consultation is concluded.

Opening an appointment

When opening an appointment, there are a number of preliminary matters to consider and address.

Ensure the seating arrangements are correct: that you are directly facing your client and the interpreter is to one side. Avoid the interpreter sitting opposite the client as there is a risk that the client will address the interpreter directly when speaking.

⁶ Regulation (EU) No 604/2013 of the European Parliament and of the Council, of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)

Introduce yourself and the interpreter to your client and explain your respective roles. Ensure that the client and the interpreter fully understand each other; you can do this by asking the client different types of questions, for example about where she has traveled from, how she traveled to your office and how she will return. Verify with the interpreter the language being used.

Emphasise to the client that the interpreter is bound by confidentiality and is there to interpret only what she and the lawyer say. It may be helpful to the interpreter to tell the client that she should speak in short phrases so that the interpreter is able to interpret each phrase and that nothing is omitted.

Explain to the client who you are and make her fully aware that you are independent, that you do not work for the government, nor do you have a role in making the decision on her protection application. Confirm that your role is to assist the client in making the application by giving thorough and professional legal advice and representation.

Explain the purpose of the consultation and how you intend to proceed. It is important to manage a client's expectations at the outset. If you are unable to represent the client for more than a one-off advice appointment, for example for reasons of not having capacity to properly assist the client, make this clear to the client at the very outset. A client may still benefit from a single, one-off, appointment, particularly if they have not yet applied for protection and are looking for advice on the process.

Indicate how long the consultation may take and reassure your client that she should inform you if a break is needed at any time. You should take a short break each hour if possible. If a consultation is likely to last longer than 3 to 4 hours, a further consultation should be arranged. As each client is different, with a different set of needs, you will need to determine what is appropriate in terms of the conduct and length of your consultation on a case-by-case basis. Also be aware of the interpreter's needs.

Client care

If you will offer the client a full ELA service, you should advise the client accordingly and explain the exact service you are offering. In particular, you should explain the purpose and function of taking detailed instructions and the personal statement. It may be appropriate to state that the personal statement is not a formal requirement of the protection process in your country but is a developed model which can assist applicants and decision-makers.

It can be helpful to give your client a letter at the beginning of your first consultation which details the following:

- Your role and responsibilities;
- The client's role and responsibilities;
- The terms of the service you are offering;
- The purpose of the representation you are offering including client confidentiality and conflicts of interest;
- The benefits of drafting and submitting a personal statement;
- The benefits of making submissions on the client's behalf;
- Details of appropriate support services;
- The law that will be applied to your client's case by the decision-maker.

A sample initial client care letter is provided in the annex to the manual. This letter can act as an aide memoire for you and also assist the client as she can refer back to it and use it for future reference. The contents of the letter should be read back to the client. If the client is satisfied with the terms of service, you may wish to ask her to sign a declaration, at the bottom of this letter, to confirm this.

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Client care letters update clients of the progress of their case. They contain clear, simple language. Client care letters are only a secondary support tool to the information provided during consultation meetings. They should be sent to clients after consultation meetings as their case is progressed throughout the asylum procedure as a way of recalling points agreed and future actions with the client.

The client care letter should be concise and provide key information only; use plain English language and avoid complex terms. Use headings to break up sections, for example: a) brief summary of information the client provided during consultation; b) what points were agreed as further action going forward in the case; c) what steps the lawyer will take in this regard and any further updated information. A section should also remind the client to contact you should they have further information, change their address or there has been a change of circumstances in their case. It should also contain your contact details.

You should also take the client's written form of authority to act for her and send it to the decision-maker to formally come on record as the client's lawyer. In this letter you should also request a copy of the client's full file from the decision-maker. It can be helpful to ensure that the authority signed makes reference to wording of any applicable freedom of information legislation to ensure quick release of records. The form of authority should be sent to the decision maker without delay so that you have ample time to review your client's full file in advance of submitting any application form or personal statement. It is important that you do not submit anything on behalf of your client without first having sight of her entire file from the decision maker.

If the client has not yet made an application for protection, when possible, especially in circumstances where there is a particular vulnerability or you are aware of delays or other problems in registering an application, accompany the client to the decision-making authority to make the application. This may require notifying the decision-maker that you will be attending their office and that an interpreter may be required in a particular language.

If you consider that you need an adjournment of the personal interview in order to allow you sufficient time to complete and submit her personal statement, you should take your client's instructions in this regard and make the request to the decision-maker. This can be done when you write and state that you are your client's legal representative, or at the earliest opportunity thereafter.⁷

Checking your client's mental and physical health

It is important to ascertain, as far as is possible, the state of your client's mental and physical health at the outset of all appointments with your client. Always ensure your client is sufficiently fit and well to proceed with the consultation and give instructions. Avoid long appointments which may make the client more tired or stressed and make it more likely that errors are made when giving you instructions.

Ascertain whether your client has any particular vulnerabilities and whether she has accessed medical/psychological care services. Record in your file all relevant details in this regard. Mental and physical problems can have a serious impact on a client's ability to give instructions but clients will often be reluctant to 'bother' you with these

⁷ There can be numerous reasons why you may require further time, for example (i) the client presents to you for representation just before her application form is due or her personal interview is scheduled; (ii) the client speaks a less common language and interpreter availability for appointments is limited; or (iii) the client does not reside close by and needs to travel a lengthy distance for his appointments with you; (iv) the client is particularly vulnerable and more time is needed to establish trust for full disclosure of her protection needs.

sorts of issues. Depending on your client's specific vulnerability, you may need to tailor the duration of the consultation or the frequency of breaks to meet her needs. Be aware of the needs of individuals who are survivors of torture and other trauma and be mindful not to risk re-traumatising her in conducting your consultation.⁸

It is important to put your client at ease and to gain her confidence as soon as possible. Trust and rapport with a client must be established quickly as often a lawyer will only have a short window of time within which to take instructions. Your client may come from a culture which perceives lawyers as figures of authority and this may inhibit disclosure. An approachable, open manner will help to counteract this, although a certain professional detachment must always be maintained.

At the outset of the consultation, explain to your client that you understand it may be difficult for her to recount her history and confirm that she is free to leave at any time and does not have to answer any question she does not wish to answer. It is also helpful to state from the outset that, as this can be a difficult process for the client, she should feel free to ask for a break at any point during the consultation.⁹

It may be appropriate to tell the client that you will be asking her questions that may be similar to those that the decision-maker will ask at her personal interview and that this can assist her in preparation for that interview. Be careful not to convey the impression that you know what the decision-maker will ask and ensure your independent role is clearly established.

Reassure the client that her instructions will be treated in confidence and that no information will be shared outside the organisation without her express consent. The client may also be informed that European Union law (Article 48 of the recast Asylum Procedures Directive¹⁰) requires that decision-makers are bound by confidentiality in relation to any information they obtain in the course of their work.

Remember to use professional and natural body language to gain the confidence of your client. Maintain eye contact with your client when you are speaking to her. Do not direct your questions at the interpreter. Be attentive when your client is speaking even though you may have to wait for the interpreter to translate what she says.

You should explain to the client, in simple terms, the definitions of refugee status and its component parts, subsidiary protection and any other relevant human rights grounds, such as Articles 3 and 8 of the European Convention on Human Rights (ECHR). The client will be better placed to provide instructions if she understands at the outset the eligibility requirements that the decision-maker will test her case against. You should also explain the recast Dublin Regulation and how it operates.¹¹

Explain to your client the importance of providing full and accurate instructions to advance her protection application and for the purpose of obtaining meaningful, accurate, legal advice. You should emphasise that she should disclose everything to you even if she believes it may harm her application as, otherwise, you will not be able to properly advise her and failure to disclose all facts could be detrimental to her application.

⁸ For more information on clients with special procedural needs see Chapter 2.

⁹ Taking breaks can be beneficial for the client when she is finding it difficult to recount particular events, it can also be beneficial for you, especially when you are taking instructions in relation to serious violence or torture.

¹⁰ Directive 2013/32/ of The European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)

¹¹ See Chapter 3 for more information on ELA and the recast Dublin Regulation

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Using an interpreter

Selecting the correct interpreter before meeting the client is important. Ideally the interpreter should have sufficient availability so as to be able to attend several appointments so that there is consistency for your client and she does not have to disclose information to different interpreters.

It is your responsibility to judge whether an interpreter is required, even if your client considers that she speaks adequate English. You will be discussing complex legal issues and your client may not be the best person to judge whether she will be able to communicate her account in detail, or understand advice given to her in relation to her application. Friends or relatives of the client should not be used as interpreters. As mentioned above you should establish as early as possible which language and dialect she requires for the consultation. Use sensitivity in your choice of interpreter; consider the appropriateness of the gender of the interpreter or whether there may be any other barriers to communication.

Ideally, the interpreter should speak the client's native language/dialect to a native level of fluency and should be familiar with slang and other idioms. Ideally your interpreter should have received training on interpreting in the refugee context.

Your client may be reluctant to discuss sensitive and personal information with someone from her home area due to tribal, ethnic or political differences. The client may also have concerns in relation to interpreter confidentiality, with particular worries that her private information and circumstances might be communicated to other members of her community. There are no absolute rules here. As the lawyer you should be alive to the various issues that may arise. If you think that there is an issue you should discuss the matter with the client in private, where possible. Where the client's wishes regarding the choice of interpreter are reasonable, you should respect her wishes and arrange a more suitable interpreter.

If you do use an interpreter, remember that the lawyer is responsible for the overall conduct of the consultation. The interpreter is only there to facilitate communication between you and the client. Do not delegate tasks to the interpreter. For example, never ask the interpreter to summarise something you have said or take instructions from the client. Do not let the interpreter give her own information or answer for the client. Over-enthusiastic interpreters may answer a question straightaway from her own knowledge without translating the question.

Both the lawyer and client should break questions and answers into parts short enough to allow the interpreter to effectively translate them. Otherwise, there may be too much information for the interpreter to be able to remember and accurately translate. During the consultation, when necessary, keep reminding your client to give answers in short sections to allow for translation.

It can be helpful, at this point, to remind the interpreter of the limits of her role by explaining to your client, through the interpreter, what the interpreter's obligations and duties are, namely:

- (i) The interpreter must **remain neutral** at all times;
- (ii) When translating, the interpreter should **speak in the first person** at all times and **translate, as accurately as possible, exactly what the lawyer and client say**, without adding to, omitting, rephrasing, embellishing or summarising what has been said. Where the client asks for clarification, the interpreter must translate this;
- (iii) The interpreter **should not become involved in discussion** with either the lawyer or client during the consultation. If the interpreter needs to clarify a certain point, she should inform the lawyer and, only after receiving express permission from the lawyer, should she proceed with seeking clarification;
- (iv) If the interpreter becomes aware that the client

may not have understood a question, she should nevertheless **translate the client's answer fully**. It is for the lawyer to clarify the matter, not the interpreter;

- (v) It is the responsibility of the lawyer alone to rephrase questions or ask follow up questions to clarify matters where needed.

Continue to monitor the performance of the interpreter throughout the interview. You must intervene each time the interpreter does not act according to her role. Problems can occur if the quality of the interpreter's language is insufficient. If it becomes clear that the interpreter's language is not of a high enough standard to conduct the consultation effectively, you should terminate the consultation and seek an alternative interpreter. It is important to feed back to the interpreter or the company for whom they work if there are any problems with the conduct or quality of an interpreter. It may help to keep a database of suitable interpreters, with the permission of the interpreters themselves.

Confirming your client's essential details

After introducing yourself and the interpreter you can confirm the basic details you already have on file and then take instructions on any details you do not have. In particular, you should ensure you obtain the following basic information from your client:¹²

- Full name including other names/aliases;
- Gender (this can be observed by you as well as stated);
- Nationality or if stateless, country of former habitual residence;
- Date of birth;
- Address (living and correspondence if different);

- Any reference number attached to her protection application;
- Contact number(s);
- Current immigration status and immigration history;
- Whether they speak the language of the country they are in;
- Basic instructions on her education;
- Date of departure from country of origin and brief details regarding the journey;
- Date of arrival in the country she is in;
- Family and other dependents and where they are located;
- Health needs, if any.

After taking these instructions, you should request your client provide you with any documentation, including any identity and supporting documentation, and official documents/correspondence relating to her application. Often, clients will not be immediately aware if a document is relevant to her application so it is best that you peruse all documents in your client's possession. Take a copy of all documents for your file or retain originals where appropriate and with your client's permission. The relevance of certain documents in your client's possession may not be immediately apparent at interview so it is best to review again all documents at the conclusion of your consultation, and again in the future and, where necessary, obtain further instructions from your client. A schedule of documents, which has a description of the document, any date, its origins and whether it is original or a copy can assist in keeping track of your client's documents. A sample of this document is contained in the annex.

¹² You may already have this information from documents completed when the client claimed protection but it is best to go through all of the details again with your client. See page 18 for information on addressing inconsistencies and discrepancies.

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Once you have ascertained the above basic details, you should record all critical dates in your file including any deadline for submission of any application form or statement and any personal interview date.

Following this, you should briefly ascertain whether the recast Dublin Regulation may apply to your client's case. Take your client's instructions on the following:

- Details of journey to the country she is in, including all countries transited and mode of entry;
- Details of any previous protection application in any other country;
- Details of whether fingerprinted in any other country;
- Details of previous visas and/or residence permits, if any, for Dublin regulation countries;
- Details of family members, if any, in the country they are in or another EU country.

If you determine that your client is likely to be made subject to the recast Dublin Regulation, you should deal with this as a matter of priority. See Chapter 3 for information on dealing with cases subject to the Regulation.

Taking instructions from your client

Once you have obtained the above information, you are ready to proceed to take your client's detailed instructions on her reasons for leaving her country of origin and for wishing to make an application for protection.

Explain to your client that you are going to ask her questions to allow her to tell you about all her reasons for applying for protection. Explain that you may interrupt with questions while she is giving you instructions in order to clarify relevant matters. Opening questions can vary but they should have the objective of seeking to establish your client's main reasons for applying for protection. Try to work from your client's first problem in her country of origin, through to why and how she left her country, her journey and then what happened when she arrived in the country of application and what she fears if she were returned to her country. As you take instructions, record in a separate document, in a chronology, the key events referred to in your client's account. A sample chronology is provided in the annex.

Aim for a thorough consultation, but consider whether certain lines of questioning are pertinent to the core application. Keeping in mind the legal tests that will be applied to your client's case, you should focus on taking your client's instructions on the core elements of her application, in particular:

- Ascertain why your client is afraid of returning to her country of origin; what harm she fears she would experience and from whom. Always be mindful of the risk of re-traumatising a client when questioning her in relation to events she finds difficult to speak about.
- Ascertain whether there is a connection between what the client fears and one of the five grounds in the Refugee Convention and the law relating to subsidiary protection.
- Determine the nature of any serious harm or persecution already experienced and whether it is relevant to her present fear.¹³

¹³ Bear in mind that the law on relevant past persecution – return may be persecutory per se. Reference could be made to Article 4 (4) of the recast Qualification Directive that past persecution is a serious indication of the applicant's well-founded fear of persecution. Recital 36 of the same Directive states that family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status. Article 11 (3) of the recast Qualification Directive also states that, the cessation clauses in Article 11 will not apply if the refugee is able to invoke compelling reasons arising out of previous persecution.

- Establish whether your client sought protection from the state authorities and, if not, why not.
- Ascertain whether there was anywhere within the country of origin your client could have safely relocated to. Ascertain whether she has lived elsewhere in her country at any stage.
- Establish whether there is any part of her country of origin in which she thinks she is not at risk of serious harm, or whether she would have access to protection from persecution and whether she can safely and legally travel to, and gain admittance to, that part of the country and can reasonably be expected to settle there.
- Ascertain whether she has any relevant evidence, to support her account, in her possession or is able to reasonably and safely obtain evidence.

Questioning Techniques

There are various different questioning techniques, which you may use to elicit the above information from your client.

Open Questions

Open questions give no indication of what is expected in the answer. Use open questions when you are interested in getting your client to tell or expand upon her story; open questions will encourage your client to talk more freely.

It is usually most effective to use a mixture of open and closed questions. Also, putting questions in context, for example stating that you are now going to ask questions about the journey to the country in which they are in, can reassure a nervous client.

Closed Questions

Closed questions specify the type of information required (e.g. date, time, place, numbers, or names). Use closed questions if you want to focus in on the details of a particular incident or issue. Closed questions are also a good means of controlling the

interview if your client has become confused or is talking at length about irrelevant facts.

Recall Questions

Recall questions focus your client on statements that she has already made. Sometimes your client may have said something that struck you as important, but you did not want to interrupt her by asking a follow up question at that point. You may also want to use recall questions to focus your client on statements that they have already made and ensure that you have correctly recorded what they stated.

Leading Questions

Leading questions suggest a particular answer, assume facts that have not yet been established and require 'yes' or 'no' answers. You should avoid using leading questions at any stage during an interview. The danger in asking leading questions is that your client may simply agree with the statement that you have made, whether accurate or not, and this may have serious implications for your client.

Other questions to avoid

Try to avoid long questions or questions with double negatives. These can cause problems for your interpreter and your client may not understand your questions clearly. Also, avoid the temptation to ask more than one question at once.

Difficulties in remembering numbers or dates

To help your client remember numbers or dates, try asking the question in a different style, such as: 'Approximately how many years ago...?' or 'Was it before your child was born or after?' or 'Approximately how many people...?'

Be very careful not to press your client into guessing a number or date if she is not sure, as she may end up guessing figures that are wrong and that can be easily forgotten at the personal interview. You may explain to the client that you understand if they cannot recall but you need to check.

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Take instructions as to why your client is having any difficulties in remembering dates. It may be related to not being used to attaching dates to events or trauma.

Addressing inconsistencies and discrepancies

It is your role to address particular parts of your client's account that appear unclear or contradictory as any inconsistencies or discrepancies may damage her overall credibility and she needs to be advised accordingly.

If your client has presented to you for advice after she has applied for protection and after documents have already been submitted, you should go through those documents in order to ascertain whether their contents are accurate and consistent with her instructions to you. If not, you should seek your client's instructions as to why and make a note of clarifications or corrections to be brought to the decision-maker's attention. Similarly, if your client presents to you following submission of an application form, you should seek explanations for any inconsistencies between the information contained in her questionnaire and instructions given to you.

Your client may contradict herself during her consultation with you or her instructions may be inconsistent with her supporting documents or with available country of origin information (COI). Again, you should address any such contradictions with her as and when they arise, explaining why you need to do so.

You should ensure that, in clarifying any apparent discrepancies/inconsistencies in her account, your follow up questions are put in a neutral way. Remember, discrepancies in your client's account could be due to a number of different factors. For example, they could be an indication of a communication problem with the interpreter. Your client may not be familiar with using specific dates or able to remember dates. If your client is suffering

from trauma, this may affect her ability to give a clear narrative. Also, a discrepancy may simply be due to a misunderstanding. There may simply not be any COI on circumstances similar to your client, or your client may be able to explain any contradictory COI. As such, it is imperative that you seek your client's explanations on all discrepancies or inconsistencies that arise and that you are fully aware of any issues impacting on her capacity to give detailed, coherent, consistent instructions.

Subsequent applications for protection

ELA can be particularly beneficial to applicants who are making a subsequent application for protection, sometimes referred to as a 'fresh claim'. Sometimes an applicant will have received no legal representation during the original application, they may have new evidence that requires consideration, there may be a change in conditions in their country. The ELA approach, including using a chronology and a schedule of documents if there is a large amount of documentation and a complex history, can assist in showing why and how a person may be at risk of persecution now, despite not being found to be at risk in the past.

Concluding the consultation and advising your client

Once you have obtained your client's full instructions you should consider the application in light of what has been explained to you and advise your client on the following:

- The protection process, including the various stages and the functions of the decision-maker and any appeal body;
- The strengths and weaknesses of the case, including any aspects which you consider the decision-maker may focus upon;
- Key evidence in your client's possession which supports the application, including, for example, evidence which substantiates:

- Identity and nationality;
- Past persecution, if any;
- Risk of future persecution;
- Any other element of the account given;
- Witnesses, if any;
- Any other evidence which corroborates any aspect of your client's account and adds weight to your client's overall credibility.
- Key evidence not in her possession but which should be obtained, if safe and possible to do so;
- Possible expert medical evidence to support the application that may be available;
- COI that corroborates the application and comments on the viability of state protection and internal relocation in light of her particular circumstances;
- COI on other risks, if any;
- Credibility and how it is assessed; whether credibility issues arise with regard to aspects of her account and what aspects, if any, you recommend that she immediately clarifies;
- The possibility of any dependent children making their own separate protection application and the importance of giving a full account of the child's experiences at interview – see Chapter 4;
- The implication for the case if the client is from a designated safe country of origin;
- The duty of cooperation on the client and the importance of deadlines and obligations to the authorities;
- Possible outcomes and the consequences of being successful/unsuccessful in her application;
- Key supports available.

It can assist both you and your client to confirm the above in writing. Obviously it is unlikely that you will be able to come to a definitive conclusion about all of the above after one, or even several, consultations so emphasise that you may need to revise your opinion in the future after further consultations.

If it is not intended to offer the client representation, you should advise the client accordingly and, if they wish, assist her in seeking alternative representation and advise on the next steps she should take. Obviously any limitations on capacity should be explained to the client as early as possible so that she can seek such alternative representation. As it can be difficult for a client to repeatedly recount her experiences, you should offer to provide her with a copy of your typed attendance notes, which she can provide to a new lawyer. In the alternative, you may wish to seek consent to make a written referral on her behalf and enclose your notes and her instructions to you. You should also provide her with the contact details of relevant support organisations and, with the client's consent, assist in availing of their services.

If there are any inaccuracies in initial documentation submitted to the decision-maker these should also be addressed in any letter to the decision-maker and an explanation provided. It may be helpful to include the client's explanation of these inaccuracies in the personal statement, as it will be in her own words.

You should make the next appointment with your client and advise her as to what actions you require from her. Advise your client to inform you immediately if she changes address.

You should connect your client with any support services you consider would be of benefit to her. If, at this time, you have determined that medical evidence¹⁴ would be beneficial to your client's case, discuss the matter fully with your client and obtain her written authority to complete and send

¹⁴ See Key Stage 8 for further information on medical evidence.

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the appropriate referrals in this regard. Also, obtain her written authority for you to access medical information and discuss her treatment with relevant practitioners.

Key Stage 3: Case planning

Following the initial consultation, type up your attendance note and draft a case plan to include the following:

- Critical dates (e.g. dates relevant to the recast Dublin Regulation, any language analysis test date, application form submission deadline or personal interview date) and ensure they are correctly recorded on your file and in any electronic calendar;
- Set out an agreed schedule of appointments to meet with the client to prepare the personal statement;
- Set a deadline for completing and submitting the personal statement in advance of the client's personal interview and diarise the deadline;
- Ensure any client vulnerabilities are recorded on file and set out particular matters relating to the client and the management of her case. This is particularly important if the client will have contact with other members of staff;¹⁵
- Note any referrals to support organisations or medical practitioners which you have determined need to be made;
- Consider any COI research to be undertaken;
- Identify relevant supporting evidence, including evidence which (i) has already been submitted to the decision-maker by the client; (ii) is in the possession of client but has not yet been

submitted and (iii) the client can reasonably and safely obtain. It may be helpful to draft a schedule of documents, noting whether particular evidence is an original or a copy and whether it has been submitted to the decision-maker or not.¹⁶ A sample schedule is provided in the annex to the manual.

A concise chronology of key events should also be prepared. The chronology serves as a useful quick reference tool on the file and can be amended as necessary during the course of the case. It can serve to highlight gaps or inconsistencies in your client's instructions. It can also assist you in understanding a complex case history that involves many incidents over a long period of time. A sample has also been provided in the annex.

Key Stage 4: Application and admissibility forms

Some countries require that an application or admissibility form be completed by the applicant regardless of whether a personal statement is submitted. Failure to submit these forms, on time or at all, can be considered a failure to cooperate with the decision-maker.

It is important that the client is reminded of the significance of any application form and the need to provide full and accurate instructions in completing the document as it can be damaging to her credibility if her account is incorrect or amended/added to at a later stage.

It may be that the form has to be completed by a particular date and that the personal statement is submitted later, or alternatively, if time allows, that the documents are submitted simultaneously.

¹⁵ For example it may be necessary to record that your client has very specific interpreter requirements or that your client has particular vulnerabilities which need to be taken into account in how meetings with her are to be conducted.

¹⁶ It is advisable not to keep the client's original documents on file; any relevant documents should be submitted to the decision-maker at the earliest opportunity. The schedule of documents can be amended as appropriate during the course of the case and is a useful way of keeping a record of all evidence relevant to the case.

Regardless, it is important to ensure information in each document is consistent with the other.

The application form can, for various reasons, contain less information than the personal statement. This can be due to the limited questions asked by the form itself, space restrictions in the form or time pressure that you are under. It may be appropriate to note in the letter sent to the decision-maker that encloses the application form that a personal statement will be submitted which will elaborate on the issues raised in the application.

Like the personal statement, when the application form is completed, it should be read back to the client, line by line, in a language she understands. See Key Stage 6 for guidance on reading back material to your client. In the cover letter to the decision-maker that encloses the application form, any clarifications, inconsistencies or omissions between the application form and documentation submitted at the beginning of the application should be highlighted and where possible addressed. It is important that these matters are brought to the attention of the decision-maker at the earliest opportunity to ensure that the client's application is not in any way prejudiced. If you have relevant evidence and COI to hand at this point, this can also be enclosed and referred to in your letter to the decision maker.

Key stage 5: The personal statement

A personal statement is a detailed written account of the client's personal history relevant to her application for protection. It is drafted by the lawyer, based on the client's instructions and in the client's own words, and provided to the first-instance decision-maker, prior to the decision on the application for protection. A personal statement is a useful tool that can help a decision maker, as it sets

out the salient points of the application in detail, in chronological order allowing the decision-maker to focus on the most relevant issues at the personal interview.

Decision-makers in the Early Legal Advice Project in the UK commented, in a review of the project, that a good quality personal statement resulted in a more focused personal interviews; the availability of more evidence and a shorter decision time.¹⁷

The act of taking your client's instructions for the statement can also indirectly serves to prepare your client for the personal interview as she becomes accustomed to being asked questions and gains an understanding of which parts of her application may be under scrutiny.

Content of the personal statement

The core of any statement is a detailed description of why the applicant has a fear of persecution – including the reasons or incident(s) on which the fear is based and an explanation of why there is a future risk of harm. The statement should cover all elements of the Refugee Convention and subsidiary protection, plus any other provisions laid down in domestic legislation. The decision-maker should not be left wondering, for example, if state protection is available in the country of origin. Be aware however that your client may simply not be able to give instructions on certain issues including internal protection and your submissions (see Key Stage 8) should cover any gap that exists in the personal statement.

Unless the client uses the relevant legal terminology, you should not refer to such terms in the statement. For example a sentence like *'There was nowhere I could go to be safe'* should be used instead of *'I could not internally relocate.'*

¹⁷ 'Home Office, Evaluation of the Early Legal Advice Project, Final Report, Research Report 70', May 2013

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Below is a list of general topics that are useful to cover in the personal statement:

- (i) A brief **personal background**: including education level and immediate family members – all immediate family members should be mentioned, including foster children or de facto adopted children, as a family reunification application may follow at a later date. Note that any mistakes in name spellings or dates of birth, etc., may cause problems later, so particular care should be taken to ensure this information is accurate. Caution should be taken if names are phonetically translated.
- (ii) The **type of persecution** feared and any previous occurrences, if any (e.g. torture, ill-treatment or threat thereof, sexual abuse, threats to family members, etc.): This should be covered with a sufficient level of detail to bring the incident(s) to life in the statement. However care must be taken not to re-traumatise the applicant.¹⁸
- (iii) The **link between past and future persecution**: Where there has been past persecution (which is not a requirement for establishing eligibility for refugee status), you should cover any link between it and any risk of future persecution (if one exists). Article 4 (4) of the recast Qualification Directive¹⁹ states that the fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution. Past persecution of other family members may also be relevant to your client's protection application.
- (iv) The **decision to flee** and any events leading up to this: Some refugees suffer persecution over a long period of time before ultimately making the decision to flee. The circumstances surrounding this decision, and immediate events which were the catalyst to this decision, should be covered in detail in the statement, as should the applicant's state of mind regarding their flight.
- (v) Any **escape from detention**: of the millions of persons detained worldwide, a tiny minority manage to escape and reach Europe. A decision-maker may be sceptical of the plausibility of an escape so this part of the applicant's personal history should be covered in detail in the statement.
- (vi) The **absence of state protection**: if the agent(s) of persecution are non-state actors you will either have to show that there is no state protection available, or that the agents of persecution are operating with tacit state approval.
- (vii) **The possibility of internal relocation**: you should explain why it is not feasible in this case. Remember that you do not have to prove that the persecution would extend to all parts of the country of origin, just that it would occur in one area, and that the client cannot safely and legally travel to and gain admittance to another part of the country and cannot be reasonably expected to settle there.
- (viii) Any incident(s) of **prior internal relocation**, or attempts at such, should be covered in the statement together with an explanation as to why the relocation did not reduce the risk of persecution or why any attempts at future relocation would not be feasible.
- (ix) Any **delay in leaving the country of origin**: if the applicant did not leave her country of origin immediately after experiencing or fearing

¹⁸ If an applicant is too badly traumatised to be able to discuss the details of abuse she suffered, an explanation instead may suffice. For example: "in prison I was treated very badly, I have been diagnosed with PTSD as a result, I do not wish to recall the details of the abuse as I am afraid to think about it in case it brings on more flashbacks". See Chapter 2 for advice on working with vulnerable clients.

¹⁹ Directive 2011/95/EU of The European Parliament and of 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)

persecution, an explanation for the delay must be given, as delay may be held to be damaging to her credibility.

- (x) **The assistance of strangers:** Only a tiny minority of persecuted persons in the world manage to make it to a safe country and of these, some will have been assisted by a person seeking no gain for themselves, i.e. a Good Samaritan or a family member. A decision-maker may be sceptical of such assistance and it should therefore be clearly described and explained in the personal statement.
- (xi) **The journey/flight:** Again, this topic should be covered in some detail at the end of the statement. You may wish to take detailed instructions on this for your own reference, and include one or two paragraphs in the statement, as appropriate. Include details such as whether travel documents were used, the precise route taken (if known), any problems encountered en route, the cost of travel and how it was paid for and who assisted and why. Though these issues will not usually be core elements of the application for protection, they may be of interest to the decision-maker, and could lead to negative credibility findings if not adequately addressed.
- (xii) **Travel through other countries:** There is no requirement in the Refugee Convention that a person seeks protection close to her home: a refugee is entitled to go to the country of her choosing to seek protection. However, Article 38 of the recast Asylum Procedures Directive does state that Member States may apply the safe third country principle. If, for example, your client was under the control of an agent during the journey this should be specified.
- (xiii) **Family members:** it may be pertinent to explain the situation of any family members left behind in the country of origin, and whether they are at risk (and if not, why not).
- (xiv) **Delay in applying for protection:** any delay

in applying for protection should be dealt with in the statement, as this may be deemed damaging to your client's credibility.

- (xv) **Exclusion clauses, if applicable:** If your client was a police or army officer, or a member of a rebel group, you should explore the possibility of whether she has taken part in any activities which would potentially exclude her from the protection of the Refugee Convention. You may need to ask specific questions during your interview to elicit such information.

A personal statement is distinct from COI and lengthy descriptions of general conditions in the country of origin should be avoided. This topic is best covered by objective, impartial evidence, rather than the client's own testimony.

Drafting the personal statement

The style and tone of each statement should be different and tailored to the individual client. Obviously, spelling and grammar mistakes can be corrected to ensure coherence, but a statement should reflect, as closely as possible the client's own manner of speech. For example, the statement of a traumatised, elderly, uneducated person should have a much different tone to that of an articulate, university-educated young person. Be wary of amending the vocabulary in the statement and keep it as close as possible to the words used by the client (via the interpreter, as the case may be). It is permissible to break the occasional grammatical rule in order to give some sense of the applicant's manner of speaking.

A personal statement is not to be confused with a lawyer's submissions (see Key Stage 8). A clear distinction should be drawn between the applicant's account and any legal points you wish to make, which should be made in separate correspondence drafted by you, as the lawyer.

To avoid the personal statement being a sterile account of facts, the client's personal history should be brought to life by using descriptive phrases used

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by your client. The information contained in the statement should be vivid enough to highlight its plausibility. Asking your client how they felt when an event occurred is important, so that the factual events described are properly situated within the client's individual frame of reference.

Once you have a draft statement, it should be reviewed for internal consistency, and for consistency with other documents, particularly documents already submitted to the decision-maker. Your chronology can assist in cross checking dates and events.

The statement is an opportunity to correct any mistakes or inconsistencies that exist in any 'border' procedure interview or pre-application screening interview. Any inconsistencies which arise should be tackled as soon as possible by asking the client about them directly.

Inconsistencies and discrepancies

Inconsistencies can arise for various reasons, including:

- (i) A misunderstanding on your part;
- (ii) An interpretation problem;
- (iii) A problem with the client's recollection (which may indicate a more serious problem, such as learning difficulties or a mental health issue).

Some applicants are so badly traumatised that they are simply incapable of giving a coherent account, and will mix up dates or the chronology of instances of persecution, etc. The best way to frame a statement in such cases is to explain this to the decision-maker at the outset, making the difficulty clear, for example: *"I am not used to using a calendar and frequently mix up dates and events. I also struggle to estimate distances."*

If the client is confused about a particular date or timeframe, this matter should be left open in the statement – it can be narrowed to a range that

the client is comfortable with, but no more. If the client is unable to recall the year that specific events occurred, it is sufficient to use phrases like *"sometime later"* or *"some years after"*. At all times, the statement should accurately reflect your client's ability to remember her own personal history in chronological order.

During the process of taking the statement you may wish to do simultaneous COI research, this may give rise to inconsistencies with the client's account. Where these occur you should firstly take your client's instructions and then put the apparent inconsistency to your client.

The personal statement for persons who have experienced trauma

As part of the case plan, you will have made a decision about how much of your client's experiences, including trauma, should be recalled in the personal statement. While it is important to remind the client why such testimony is relevant to on behalf of her protection application, if your client is distressed in recalling her experiences or there is a risk of re-traumatisation, it should be avoided. It may be necessary to seek a medical opinion as to whether it is appropriate to proceed and any limitations on your client's capacity.

The lawyer should try to obtain the following information for inclusion in the personal statement depending on its relevance to the application for protection:

- (i) **Circumstances leading up to the trauma**, including details of arrest, abduction and detention, if appropriate; sometimes it may be more appropriate to focus on the peripheral information surrounding such events rather than gathering a lot of information on the torture event itself. The approach will have to be tailored depending on the individual circumstances of the client.

(ii) **Approximate times and dates of trauma, if known;** this may be difficult to obtain. Persons who have experienced particularly traumatic events, may provide inconsistent statements due to their experiences. This has been well-documented by way of clinical research.²⁰ The benefit of gathering this testimony means that such discrepancies and inconsistencies are highlighted early in the process as well as any trauma-related issues concerning the client and addressed prior to the interview stage of the procedure.

(iii) **A description of the perpetrators** involved in the arrest/detention and torture, where possible.

(iv) The **usual routine of the place of detention and the pattern of treatment.**

(v) **A description of the torture,** including the methods of torture used, where possible. Instructions on this will most likely require more than one consultation. It may be more appropriate to gather information surrounding the event itself, depending on the materiality of the past event for the application and to obtain other supporting evidence, for example a medico-legal report.

(vi) **Be aware that applicants often conflate rape with other forms of sexual assault** and may not be aware that acts involving a violation of her intimacy, such as groping, verbal assaults, forced disrobing and blows to the genitals constitute forms of sexual assault. It is common for victims of sexual assault to say nothing or deny any assault so it may not be until a second or third consultation that they disclose such information to you and speak of their experience.

You will have to be patient and sensitive to your client's individual circumstances and it may be appropriate to take information from the client on elements surrounding the event rather than the event itself to avoid re-traumatisation.

(vii) **Physical injuries sustained during the course of the trauma,** especially where such injuries have resulted in scarring; this will be helpful in establishing whether a referral to a medical professional for a medico-legal report would be appropriate to establish how such physical injuries occurred.

(viii) **A description of weapons or other physical objects used.**²¹

Persecution on account of sexual orientation or gender identity

LGBT applicants may face particular impediments to accessing a meaningful and effective protection process. Your client may not initially present as a person seeking protection and may have entered the country on a tourist or student visa. She may have been refused leave to land or enter at an airport or border point and apply for protection without any legal advice at all. Because she has not yet entered the protection process, she may not find it easy to obtain legal aid. She may have left her country before she came out or fully realised her own gender identity or sexual orientation. She may never have spoken about her gender identity before and need significant reassurance about the confidentiality of her application (e.g. that there will be no contact with her country of origin about the application). She may be at risk for reasons of religion or imputed political opinion as well as her gender identity or sexual orientation.

²⁰ See generally, Jane Herlihy, Peter Scragg and Stuart Turner, 'Discrepancies in Autobiographical Memories – Implications for the Assessment of Protection Seekers: Repeated Interview Study', *British Medical Journal* 2002; Juliet Cohen, 'Errors of Recall and Credibility: Can Omissions and Discrepancies in Successive Statements Reasonably be said to Undermine Credibility of Testimony?', *Medico-Legal Journal* 2001. See generally, publications from the Centre for the Study of Emotion and Law (www.csel.org.uk).

²¹ See OHCHR, 'Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', 1999.

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If the client does not have the opportunity to set out her testimony fully, that essential proof in her case is not fully advanced and there is a risk that a person in need will not be recognised as needing protection. In these circumstances, the personal statement may be of particular importance.

For cases involving applications based on sexual orientation and/or gender identity, the personal statement can include instructions on your client's upbringing, her first awareness of her sexual and/or gender identity, her feelings as she has grown older, her interaction with her family and the society in which they lived. Details of discrimination, harassment and persecution should be included, as well as comment on the availability of protection and proposed internal relocation alternatives, depending on the individual circumstances of the case.

The 'Difference, Stigma, Shame and Harm'²² model can be useful as it enables a client to address her individual narrative in a personal statement by asking specific questions.²³ Not all clients with protection applications related to sexual orientation and gender identity will have all of these factors arising in their applications. However a significant proportion will, so it can be a useful starting point in the personal statement once a relationship of trust has been established.

The preparation of a personal statement for an LGBT client can be an empowering experience in and of itself. The client can gain a degree of comfort in talking about her life. She can express, perhaps for the first time, her hopes and fears for the future. She can gain self-confidence in articulating her own experiences.

Key Stage 6: The read-back of the personal statement

At the end of the process of taking instructions, the entire personal statement should be read back, line by line, to the client, in the presence of an interpreter if needed, enabling any corrections and clarifications to be made. The read-back is of vital importance. The client should be advised that errors in the statement will be very difficult to overcome later in her application and may undermine her credibility and ultimately damage her application. Care should be taken to ensure that your client's instructions have been correctly recorded, that there are no chronological errors and most importantly that your client believes that the personal statement represents a full and accurate representation of her experiences.

Often the read back will result in the need for further instructions to be taken, particularly if the personal statement covers a long period of time and involves many incidents. Do not rush the read back, particularly in circumstances where further instructions need to be taken. If necessary run it over several appointments. The read back will also assist in identifying any errors which the lawyer may have made during the drafting of the personal statement.

If your client is proficient in the language that you are using, it is appropriate to give her a copy of her statement to take away and read herself. This should always be followed up with a full, oral read-back by the lawyer.

The importance of the read-back needs to be emphasised to the client and that they can amend their statement prior to it being finally signed by

²² S. Chelvan, Difference, Stigma, Shame and Harm, April 2014. The model involves the following elements: **Difference** which can include recognition that oneself is not like other 'boys/girls' with respect to personal sex gender role development and not living a heterosexual narrative; **Stigma** which commonly involves recognition that 'the majority' does not accept or disapproves of the identity of the LGBTI individual and **Shame** commonly arises as an impact of stigma and includes feelings associated with isolation. **Harm** as part of the model can include both fear of persecution from state authorities as well as non-state agents such as communities and families.

²³ See also, S. Chelvan, From ABC to DSSH: How to Prove You Are a Gay Refugee, July 2014

them. Clients may also be overly respectful of the lawyer (or overly grateful towards a person providing her a service free of charge), and may be reluctant to point out mistakes, preferring to say that the draft document is correct in its entirety.

Method of read back

Consider reading from a paper version of the statement rather than from the computer monitor as mistakes will be easier to spot. Pause at the end of each sentence to ensure that the client is in agreement with the content.

The statement should contain a signed declaration from the client confirming that its contents are true and accurate and have been read back to her in full, in a language she understands. The interpreter should also sign a declaration to confirm that she has accurately interpreted its contents and that the client has confirmed she understands it.

Provide your client with a copy of the statement, translated in to her own language if possible.

Submitting the personal statement

The personal statement should be submitted prior to any personal interview, as early as possible, to the decision-maker, enabling her to have full regard to the material contained therein. A sample of this letter is provided in the annex to the manual. This letter can be a good opportunity to flag any particular vulnerability and submit any relevant COI or evidence (see below). A personal statement that is received by the decision-maker shortly before the personal interview is unlikely to be read in advance of the interview itself.

As a statement contains highly sensitive personal information, it should always be sent by registered post, or hand-delivered to the decision-maker.

If your client has documentary evidence that supports her application it may be appropriate to submit that evidence with the personal statement,

particularly if that evidence is referred to in the statement and is best seen by the decision-maker prior to the interview. Remember that it is your client's decision as to whether evidence should be submitted or not, the lawyer's role is to advise her of the consequences of submitting such evidence. See Key Stage 8 for information on submitting evidence.

Key Stage 7: Accompaniment to the personal interview

After the application form and personal statement have been submitted the applicant will, generally, have a personal interview with the decision-maker. Article 14 of the recast Asylum Procedures Directive states that an applicant shall be given the opportunity of a personal interview with a person competent under national law to conduct such an interview. The personal interview is an opportunity for the decision-maker to clarify the information presented in the personal statement. It is also an opportunity for the applicant to 'bring to life' her personal history and present her application.

Be aware that Article 14 (2) of the recast Asylum Procedures Directive states that a personal interview may be omitted where the decision-maker is able to take a positive decision with regard to refugee status on the basis of evidence available; or where the decision-maker is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his or her control; when in doubt, a decision-maker shall consult a medical professional. If your client's case fits either scenario it may be appropriate to draw the decision-maker's attention to this Article.

Article 23 (3) of the recast Asylum Procedures Directive allows for a legal adviser admitted or permitted as such under national law, to attend the personal interview.

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If you have not attended a personal interview in the past. It may be suitable to contact the decision-maker and state that you will be attending the interview with your client.

Preparation for the personal interview

Prior to the personal interview, explain to your client what will happen. Reassure her as much as possible that this is an opportunity for her to tell her story. This information is best given to the client in a separate appointment, after the personal statement and evidence has been submitted, rather than at the end of the read back when your client may be tired.

The client may have questions about the role of each party attending including you, the lawyer. It is also important to reiterate the particular role of the interpreter and that if at any stage, the client does not understand the interpreter, she must indicate this. The client may not want to be seen as 'complaining', for fear it may damage her application but she should be reassured that this is not the case.

If possible it may be beneficial to contact the decision-maker, before the interview but after they have received the personal statement, with a view to narrowing down the issues that the decision-maker wishes to ask questions about. If precedent is required for this practice, the example of the UK's Early Legal Advice Project could be used. This project required the decision maker and lawyer to discuss the material issues in the application before the personal interview and to come to an agreement in relation to relevant issues such as the key material factual claims, the key legal or country issues engaged by the case and any areas of concern or specifically in dispute (and why).²⁴

When you feel a client, who has undergone traumatic experiences, will be negatively affected about recalling her experiences, you may need to put the decision-maker on written notice of the

likelihood of any serious problems. For example, a client who is prone to dissociative flashbacks, or an epileptic client for whom stress may trigger a seizure. The decision-maker may need to shorten the duration of questioning, provide additional breaks, or reduce the normal pace of questioning.

On the morning of the personal interview you should check that your client is fit and well to conduct the interview that day, including whether she has any special needs, for example requiring a break to take medication at a certain point during the day. You may wish to alert the interviewing officer to this at the outset of proceedings (if they have not already been informed in writing).

You should bring to the interview a photo identification for yourself and a copy of the client's file, including extra copies of the client's personal statement and any other documents that you are relying on.

It may be helpful to go through the client's file and flag, for your own reference, important documents or correspondence so that these can be easily identified and checked by you during the interview.

Scope of the lawyer's role at the personal interview

While the interviewing officer will usually have full responsibility for the conduct of the interview and the lawyer will be an observer, not an active participant, your presence at the personal interview serves several purposes. You are there to:

- Provide moral support to the applicant, who may feel nervous, intimidated and apprehensive about the interview;
- Observe the process to ensure that best practice is adhered to;
- Observe the quality of interpretation;

²⁴ UK Home Office, 'Early Legal Advice Project Guidance', 2010

- Ensure the interviewer has all the relevant documentation and assist her if necessary;
- Make formal comments at the end of the interview if any issues have arisen which merit the interviewer's attention.

Be cautious in speaking to your client during breaks in the interview, evidential rules generally state that a lawyer should not advise her client while they are giving evidence.

During the personal interview

During the interview you should take a full and comprehensive handwritten record. If the interviewer is conducting proceedings at a speed which inhibits the taking of a full note, which can occur when your client speaks the language in which the interview is being conducted, you should politely request that they slow down so that you can take a full record.

Your handwritten record should include the following:

- A record of all questions asked and answers given, including where the decision-maker addresses you or the interpreter;
- A note of any interventions/requested breaks;
- Any stage where your client's account deviates from her previous instructions to you (contained in the personal statement or elsewhere) – you will need to take instructions on any such deviations at a later stage.

Be aware that Article 17 of the recast Asylum Procedures Directive states that Member States shall ensure that, either a thorough and factual report containing all substantive elements, or a transcript, is made of every personal interview. Member States

should also request that the applicant confirm that the content of the report or the transcript correctly reflects the interview. It may be necessary to remind the decision-maker of this obligation prior to the interview commencing. Article 17 (5) of the Directive states that the lawyer shall have access to this report before a decision is made on the application. It will be necessary to carefully read this report, when received, and make sure it is consistent with your record.

Comments or issues can be raised at an appropriate point during the interview or at the end. The recast Asylum Procedures Directive also states that decision-makers shall ensure that the applicant has the opportunity to make comments and clarify, orally or in writing with any mistranslations or misconceptions appearing in the report or in the transcript. Be aware that Article 23 (3) of the recast Asylum Procedures Directive states that Member States may stipulate that the legal adviser or other counsellor may only intervene at the end of the personal interview.

Note however that UNHCR state that a lawyer should intervene in the interview when appropriate. UNHCR's Building In Quality manual states: "Where national law permits, he or she [the lawyer] should participate in the interview, including potentially asking questions important to the applicant's application which have been missed, or objecting where there is a reason to object."²⁵

Any comments made to the interviewing officer should be interpreted by the interpreter for the benefit of the applicant (the interpreter may need prompting to do so). If you urgently need to speak to your client, and bearing in mind the evidential rules noted above, you may need to request a break to do so. You should take a full note of any such requests.

²⁵ UNHCR, Building In Quality, 'A Manual on Building a High Quality Asylum System, Further Developing Asylum Quality in the European Union', September 2011

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You will need to use your judgment to determine if a matter requires the immediate attention of the interviewing officer. Examples of such instances include:

- If there is a serious problem with interpretation you may wish to seek a pause in proceedings to confer with your client (with another interpreter on the telephone, if necessary and/or possible);
- In rare cases there may be an issue with the conduct of the decision-maker;
- Your client may become distressed while answering sensitive questions. You should ask for a break to consult with your client as to whether they are fit to continue with the interview.

Make a note of any disturbances or interruptions that may affect the conduct of the interview.

Time may be allocated at the end of the interview in order for you to raise any points that you may have. These points can either be raised orally, or alternatively (if the points are lengthy) you may wish to hand the interviewing officer a written note of your comments. You may ask for time to compose written comments at the end of proceedings if you wish. You should note that any points you make will be added to the official record of proceedings so they must be neutral and professional in tone, and as concise as possible.

After the personal interview

You should always have a post-interview consultation with your client regarding the interview. This allows you to take instructions on how they felt the interview went, and ask if there were any issues of concern. Of particular importance will be any points in which answers to questions deviated from previous instructions to you and/or the personal statement, as these are likely to require written submissions to be made to the decision-maker.

You should also remind your client that you will be making submissions to the decision-maker and outline the content of these submissions.

Key Stage 8: Post-personal interview submissions and evidence

The aim of post-personal interview submissions is to advocate, to the decision-maker, why your client is in need of protection. It will be a rare case where it is not necessary to make submissions on any issue. The types of issues which should be covered in submissions include, but are not limited to, the following:

- Brief summary of the material facts of the application;
- Why your client's account is credible;
- Applicable Refugee Convention and subsidiary protection grounds;
- Persecution; including a reference to past acts of persecution if applicable;
- Sufficiency of state protection in the country of origin;
- Response to issues/matters raised during the personal interview, for example if the decision-maker has stated that internal protection is an option for your client this should be responded to;
- Reference to COI and expert evidence and why and how it advances your client's case;
- Humanitarian grounds (for example any reference to her rights under the ECHR).

Post-interview representations can also be used to address the following issues:

- Problems with the interviewer's conduct of the interview, in particular any breach of fair procedures;
- Problems with the interpretation at interview;
- Instances where the interviewer put particular challenges or points to your client which you believe should be addressed in representations, for example, if they posit that your client could internally relocate when this is not relevant in the particular case;
- The interviewer made a comment that was wrong in law, or demonstrated that she has a fundamental misunderstanding of the facts of the case;
- You have identified further and relevant COI, which would corroborate specific or general aspects of the applicant's case. There may also be COI which addresses a specific point raised by the interviewing officer at interview.
- It may be relevant to flag to the decision maker if there is further evidence to be submitted. For example, you may be awaiting a medico-legal report, and it may be appropriate to submit a request that a decision not be made or issued on an application until same is submitted.

The right of the applicant to have submissions considered by the decision-maker

It is assumed that the applicant has the right to make submissions in relation to her case and for those submissions to be considered prior to a decision being made. If your submissions are ignored or no time is given to submit them, reference could be made to Article 41 of the

Charter of Fundamental Rights of the European Union (CFEU), which provides for a 'Right to Good Administration' and includes the right of every person to be heard, before any individual measure which would adversely affect her is taken. Also of relevance is Article 4 of the recast Qualification Directive which requires the Member State to assess the relevant elements of the application including the applicant's statements.

Drafting submissions

Begin by reading the interview notes you have made to identify any particular issues that may require further clarification or elaboration. Be as concise as possible, lengthy submissions are unlikely to be read by busy decision-makers. If you do not have the interview notes and did not attend the interview you may need to ask your client what issues arose or even contact the decision-maker. A basic template of submissions is provided in the annex.

Submissions on COI

If there is a lot of COI available and/or if it is a particularly complex application it may be helpful to submit an annex of selected extracts of COI, rather than voluminous COI reports. It may also be appropriate to submit a copy of your chronology and schedule of documents. Obviously make sure that both documents are accurate and, in the case of the schedule, it references the documents that your client has submitted.

Submissions on the law

Submissions on relevant points of law can assist the decision-maker and be persuasive in showing that the client is in need of protection. Submissions should contain all salient points without being overly technical or legalistic and show how the client's application fits within the refugee and subsidiary protection definitions or raises human rights grounds.

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The lawyer should also reflect on matters raised during the personal interview and how to respond to them within the remit of the legal submission.

Submissions should also cite relevant authorities to be relied upon including applicable case law on particular aspects of the application and relevant domestic, European and international law where appropriate. It is not necessary, or helpful to the decision maker, to cite general, well established legal principles. It is also advisable to avoid lengthy submissions on general points of protection law. Nevertheless, if an unusual or particularly complex point of law is raised it should be addressed in full in the legal submission. Sometimes further instructions may need to be taken from the client in relation to matters raised during the personal interview.

Assembling and submitting supporting evidence

Submissions should also be used to refer to evidence and its relevance to the application. You may have already submitted evidence prior to the personal interview or be submitting it for the first time.

Evidence can include everything from documents which show a person's education or employment history to reports from country experts to medical evidence. Remember that any evidence you submit should be carefully checked to ensure that it is consistent with your client's instructions, and is relevant to the application.

It is your client's decision whether to submit particular evidence in support of her application. However, you should always remind your client that it is advisable not to submit evidence in circumstances where she is unsure of its authenticity. Clients should also be advised to submit evidence to the decision maker at the earliest possible

opportunity, as mentioned previously. It may be appropriate to submit evidence when submitting the application form or personal statement so that the decision-maker can consider it before the personal interview.

Remember that evidence may not be able to substantiate a future risk of persecution but may contribute to the general credibility of your client's application.²⁶

Remember to give your client a copy of the final draft of your submissions.

Key Stage 9: Post-decision planning and consultation

When you receive the client's decision you should contact the client to arrange a consultation. How you proceed, thereafter, will depend on whether she received a positive or negative decision.

Delay in decision

Be aware that there may be a delay in the decision-maker issuing their decision. How you respond to any delay will depend on the facts of the case. If you believe that your client has a *prima facie* case for refugee status or the delay is causing her significant stress, it may be appropriate to make further oral or written submissions to the decision-maker and urge them to make their decision.

Article 12 (e) of the recast Asylum Procedures Directive states that an application "shall be given notice in reasonable time of the decision by the determining authority on their application." While no definition of "reasonable time" is given, it could be argued that, given the applicant has put forward a personal statement, submissions and possibly

²⁶ CREDO, 'Credibility Assessment In Asylum Procedures– A Multidisciplinary Training Manual', 2001

supporting evidence, she has more than met any burden on her and the decision-maker should be able to make a prompt decision.

It may also be appropriate to invoke Article 31 (7) of the recast Asylum Procedures Directive which states that Member States may prioritise an examination of an application for international protection in particular where the application is likely to be well-founded or where the applicant is vulnerable.

Where a negative decision is received

In circumstances where your client receives a negative recommendation, you should immediately determine both the time period within which to appeal and if necessary, assess any grounds to pursue judicial review it (if that option exists), and assess whether there is merit in undertaking either of these courses of action. You should arrange a meeting with your client as soon as possible and well in advance of the applicable deadlines to appeal.

Be aware that your client may be upset and traumatised on account of having received a negative decision. Time should be taken at your meeting to console but reassure your client. See Chapter 2 on assisting vulnerable persons including guidance on when a vulnerable client receives a negative decision. In addition it is recommended that the following steps are undertaken.

- Read the decision in detail to the client, with the assistance of an interpreter if required;
- Explain the reasons given for the negative recommendation, ensuring, as far as is possible, that the client fully understands it;
- Advise the client on the courses of action available to her. In particular, advise on whether there are grounds for appeal and/or judicial review, explaining the procedures involved

and the practical implications and potential cost implications and risks of pursuing a particular course of action;

- Where it is not your intention to continue to represent your client, you should advise her as to how she can obtain alternative legal representation and facilitate her in this regard. Advise the client on the relevant statutory deadlines for an appeal and/or judicial review and the importance of obtaining alternative representation as soon as possible. You should also ensure safe transfer of the file to the new lawyer if and when one is instructed.

The above should be confirmed in writing in a letter and given to the client.

Where a positive decision is received

In circumstances where your client receives a positive decision, you should arrange a final meeting with her to inform her of the positive outcome and to advise her of the following relevant matters:

- How she can obtain identity documents including a residence card;
- The rights and obligations of refugees, including, in particular, advice on the circumstances under which refugee status may be revoked;
- The possibility of applying for family reunification;
- Information on applying for travel documents;
- Advice on if and how she can apply for citizenship;
- Provide contact details of support organisations that can assist with the transition from a reception centre and integration into the

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community. This transition can be particularly difficult and may involve moving to another part of the country she is in. Depending on the client's instructions, it may be advisable to request, with her consent, that she be accommodated in the town or area where she currently resides;

- Whether original documents submitted to the decision-maker will be returned and, if so, how these can be obtained
- Provide information regarding how long you, as the client's lawyer, are obliged to keep your file for, how the client can obtain a copy of the file if needed and by what date the file would be expected to be destroyed.

The above should be confirmed in writing in a letter and given to the client.

Chapter 2:

Early Legal Advice for Clients who are Vulnerable or have Special Procedural Needs



Chapter 2: Early Legal Advice for Clients who are Vulnerable or have Special Procedural Needs

Introduction

It is widely recognised that all persons seeking protection are vulnerable. The European Court of Human Rights (ECtHR), in the case *MSS v. Belgium and Greece*, stated that asylum seekers are a particularly underprivileged and vulnerable population group in need of special protection.²⁷ Some clients may be particularly vulnerable for a variety of reasons including, but not limited to, factors relating to their individual personal circumstances, past persecution and related trauma and experiences on their journey to Europe or even within the protection procedure itself.

There is no exhaustive definition of vulnerable persons seeking international protection and a client may have numerous vulnerabilities with overlapping causes.

This chapter relates to ELA for vulnerable persons and is not a holistic assessment of rehabilitation and therapeutic requirements for the person concerned. It is important to recognise your role in the overall support network that should be available to your client. Lawyers should work with relevant support services to ensure that the special needs of persons seeking protection are met both within and beyond the protection procedure itself.

Law and guidance on treatment of vulnerable persons in a protection procedure

Both the recast Asylum Procedures Directive and the recast Reception Conditions Directive have introduced specific provisions for vulnerable persons.

Recital 29 in the Preamble of the recast Asylum Procedures Directive sets out, as a non-exhaustive example, a number of categories of persons that Member States should endeavour to identify as in

need of special procedural guarantees before a first instance decision is taken. The recital states that these applicants should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection. Recital 30 of the same Directive states that where adequate support cannot be given to an applicant who is in need of special procedural guarantees, but who is in an accelerated procedure, they should be withdrawn from that procedure.

Article 2 (d) of the recast Asylum Procedures Directive defines an applicant in need of special procedural guarantees as an applicant whose ability to benefit from the rights, and comply with the obligations, provided for in the Directive is limited due to individual circumstances. This definition is relatively wide and could be invoked by lawyers when making submissions that their client cannot obtain the rights, nor fulfil the obligations, in the Directive due to their vulnerability and should therefore be treated accordingly.

Article 21 of the recast Reception Conditions Directive also sets out a wide range of vulnerable persons, including minors, disabled people and victims of human trafficking whose specific situation Member States should take into account when implementing the Directive.

Member States are required to adapt the protection process for vulnerable clients in order to respect their international human rights obligations. The ECtHR has held that the “right not to be discriminated against in the enjoyment of the rights guaranteed under the [ECHR] is also violated when States...fail to treat differently persons whose situations are significantly different.”²⁸

²⁷ European Court of Human Rights, *MSS v Belgium*, 2011, paragraph 251

²⁸ European Court of Human Rights, *Thlimmenos v. Greece*, 2000; See also Fundamental Rights Agency and European Court of Human Rights, ‘Handbook on European Non-Discrimination Law’, 2010

The CFEU is binding during the protection procedure as the Member State is implementing EU law. Article 1 (that human dignity is inviolable and must be respected) and Article 18 (the right to asylum) and Article 41 (the right to good administration) are all relevant to the protection procedure.

Various other bodies have commented on how a protection procedure should be designed to accommodate and serve the needs of vulnerable persons. For example, the Council of Europe Convention on preventing and combating violence against women and domestic violence states: "Parties shall take the necessary legislative or other measures to develop gender-sensitive reception procedures and support services for asylum-seekers as well as gender guidelines and gender-sensitive protection procedures, including refugee status determination and application for international protection."²⁹

The International Association of Refugee Law Judges has noted, "in the assessment of the credibility of the evidence from a vulnerable or sensitive claimant, a failure to take into account appropriately their specific vulnerabilities can lead to an error of law".³⁰

This section is obviously not exhaustive and other sources and guidance should be researched in full.

The impact of vulnerability on the assessment of a protection application

Vulnerability, and the lack of procedural safeguards for vulnerable clients, may have a detrimental impact on the ability of clients to present their

applications, including the following:

- Restricting their effective access to the protection procedure;
- Hindering the ability to present the elements needed to substantiate their protection application including inhibiting disclosure of the persecution suffered due to feelings of shame, stigma or mistrust;
- Inability to clearly and coherently present their protection needs due to previous trauma;
- Memory loss and difficulty recalling events due to trauma and/or other mental health issues. Research has shown that persons seeking protection who have post traumatic stress disorder (PTSD) and/or depression are far less likely to be able to recall specific memories when prompted to do;³¹
- Impaired sense of time and space in the chronology of events;
- Late disclosure of protection needs (sometimes resulting in subsequent applications for protection).

Lawyers must reflect on how the client's specific vulnerabilities impact the legal analysis of their application. The following may be relevant:

- In-depth COI research related to similarly situated persons in the country of origin for example: the treatment of persons with disabilities, gender-related COI;³²

²⁹ Council of Europe, Convention on preventing and combating violence against women and domestic violence, 2011, Article 60 (Gender-based asylum claims).

³⁰ Carolus Grutters, Elspeth Guild, Sebastiaan De Groot, 'Assessment of Credibility by Judges in Asylum Cases in the EU', November, 2013

³¹ Belinda Graham, Jane Herlihy and Chris Brewin, 'Overgeneral memory in asylum seekers and refugees', 2014, Journal of Behaviour Therapy and Experimental Psychiatry

³² Be aware that COI may not be readily available to support claims from vulnerable groups. COI reports often lack sufficiently detailed information on the position of vulnerable groups such as women and children. Therefore the personal testimony of the client will be of increasing importance in the adjudication of her protection needs and it may be appropriate to also seek expert evidence.

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- The relevance of specific circumstances with respect to legal concepts such as access to internal protection;
- Whether the persecution is from state agents or non-state agents and the impact of that in analysing the sufficiency of state protection;
- The link between the client's specific circumstances and the Refugee Convention. For example, many but not all gender-related protection applications and those related to sexual identity may engage the Convention ground of membership of a particular social group;
- Whether past events of persecution are indicative of future risk and contribute to establishing a well-founded fear of persecution;³³
- Assessing whether additional evidence is needed from relevant experts.

Identifying vulnerability

It is important that the specific vulnerabilities of a person seeking protection are identified early in the protection procedure.

The Enhancing Vulnerable Asylum-Seekers Protection Project (EVASP) refers to vulnerability as a "complex and composite phenomenon of various 'external' and 'internal' dimensions".³⁴

Lawyers should possess the necessary knowledge and skills to identify whether a person is experiencing a particular vulnerability, whilst still acknowledging their own limitations as lawyers who are not medically trained. Therefore, it is crucial that, once signs of trauma or other related vulnerabilities

are identified by the lawyer, suitable referrals are made to the appropriate medical services.

There is no definitive way to identify vulnerability, however a number of organisations provide support tools. The PROTECT Questionnaire, for example, aims to facilitate the early recognition of persons having suffered traumatic experiences, victims of torture, psychological, physical or sexual violence.³⁵

Providing early legal advice to vulnerable clients

Once the client's specific vulnerability has been identified, the next step is to adapt the provision of ELA accordingly. The person concerned may be part of a family group of clients or dependent on a partner's application. If so, it is important not to assume that vulnerable persons simply have dependent applications. Such clients may have substantially different applications to their family members that may warrant a separate application.

People react differently to trauma, stress and other external factors. UNHCR has noted that people who have suffered traumatic events frequently avoid thinking or talking about the event.³⁶ Sometimes a client may not even be conscious that she is doing this. This can make it difficult for lawyers to facilitate disclosure of all the relevant information required to draft the personal statement. If there are indications of a specific vulnerability you should reflect on what specific procedural needs your client will have during the protection procedure. Lawyers should consider applying the following:

- Adjustment of the timeframes for the protection procedure for example requesting more time to complete any application form, to submit

³³ Article 4 (4) of the recast Qualification Directive

³⁴ Enhancing Vulnerable Asylum Seekers Protection, 'Trainer's Handbook'

³⁵ PROTECT Partners, 'PROTECT Questionnaire (Process of Recognition and Orientation of Torture Victims in European Countries to Facilitate Care and Treatment'

³⁶ UNHCR, 'Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report', May 2013

the personal statement or further evidence and submissions;

- Request prioritisation of the client's protection application or postponement of the personal interview depending on the client's needs; prioritisation could be applicable when the applicant has a strong protection claim. See the section on delays in decision making contained in Key Stage 9;
- Submit appropriate referrals where necessary to access medical or psychological services on behalf of the client with consideration as to whether a medico-legal report may be sought;
- Ensure that the client has appropriate supports in place such as psychological services or counselling where necessary;
- Keep the client regularly informed, both verbally and in writing, as to the progress of her application and the next steps to be taken;
- Ensure that there are emergency protocols in place for at-risk clients who may present a danger to themselves and/or others;
- Depending on the circumstances of the client's case it may be useful to communicate with the decision-maker, early in the procedure, to state which aspects of her application the client finds particularly traumatic in preparation for her substantive personal interview. A sample of such a letter (pre-personal interview submissions) is provided in the annex;
- Requesting that the client's reception conditions are adapted to her needs, for example, that the client is released from detention and/or placed in specific reception centres designed for the special needs of traumatised persons. The detrimental impact that unsuitable

accommodation and reception conditions can have on the client's ability to present her protection needs should not be overlooked.

Taking instructions from your client

When taking instructions from your client consider the following:

- Ensure sufficient time for meeting with the client to establish trust and rapport;
- Create an open and safe environment for conducting meetings;
- Conduct separate interviews without the presence of husband/wife and/or children;
- Ensure confidentiality during meetings;
- Arrange where possible that the same interpreter is used for each consultation thereby ensuring continuity and a building of trust;
- Actively listen to the client;
- Respond appropriately to the client when she is distressed and/or emotionally distressed and break or stop interviews where necessary.

Lawyers should be careful to not re-traumatise the client when taking instructions. Questions can be asked around a traumatic event rather than recalling details of the actual event when the client is traumatised. Sometimes lawyers may note the distress of the client during a particular part of the personal statement as a footnote in that document or in separate legal representations.³⁷

³⁷ By way of example, sometimes the following could be added as a footnote in the Personal Statement: 'It was noted by the lawyer [name] that the client was emotionally distressed at this point in the consultation meeting.'

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The personal interview

It is important to advise a vulnerable client of what happens during the personal interview. If the client is particularly anxious about the personal interview, it may be appropriate to take the client to the location of the interview, before it takes place, to ease her concerns. As noted above it may also be appropriate to notify the decision-maker of any vulnerability prior to the interview.

Be aware that Article 14 (2) (b) of the recast Asylum Procedures Directive allows for the personal interview to be omitted if the determining authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond her control. When in doubt, the determining authority shall consult a medical professional to establish whether the condition that makes the applicant unfit or unable to be interviewed is of a temporary or enduring nature. If necessary this Article should be raised, appropriate medical evidence sought and submissions made as to why it should be invoked by the decision-maker.

Article 15 (3) of the recast Asylum Procedures Directive states that Member States shall ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability. It may be appropriate to remind the decision-maker of this obligation, before or during the interview itself.

In addition, it may be appropriate to write to the decision-maker and request that the interpreter and interviewer are of the client's preferred gender. Recital 32 of the recast Asylum Procedures Directive states that: "With a view to ensuring substantive equality between female and male applicants, examination procedures should be gender-

sensitive. In particular, personal interviews should be organised in a way which makes it possible for both female and male applicants to speak about their past experiences in cases involving gender-based persecution". This Article can be invoked in any submission requesting an interpreter or interviewing officer of a particular gender.

Obtaining medical evidence

The need for medical evidence should be identified as part of the case planning process. Requests for medical evidence should be sought with the client's informed consent. Lawyers may need to obtain medical evidence for various reasons including:

- To establish whether scarring or injuries are consistent with the claimed account of past persecution;
- For an opinion as to whether a person has PTSD or any other psychiatric condition;
- For an opinion on capacity to give instructions and/or fitness for interview;
- For a general medical opinion.

Even when the client meets or is examined by a medical expert, re-traumatisation may occur if the client is asked to relive her past experiences.³⁸ Care should be taken when instructing experts so that they do not ask questions or make an examination that has a high risk of re-traumatisation.

Be aware that Article 18 (1) of the recast Asylum Procedures Directive states that there is an obligation on decision-makers, when they deem it relevant for the assessment of an application for international protection, to obtain medical evidence of their own accord. The Article states that, subject to the applicant's consent, the decision-maker shall arrange for a medical examination of the

³⁸ The Istanbul Protocol in this regards states: "Despite all precautions, physical and psychological examinations by their very nature may re-traumatize the patient by provoking or exacerbating symptoms of post-traumatic stress by eliciting painful effects and memories... A subjective assessment has to be made by the evaluator about the extent to which pressing for details is necessary for the effectiveness of the report in court, especially if the claimant demonstrates obvious signs of distress in the interview."

applicant concerning signs that might indicate past persecution or serious harm. This Article can be invoked in a variety of situations, for example, if your client presents with scarring or psychiatric illness caused by past persecution.

It is advisable that, in advance of the medical professional's appointment with the client, a letter of instructions is sent. This should contain a summary of the client's case, enclose and refer to the personal statement, and set out instructions as to what issues you would like the professional to consider and what questions should be answered. Be aware that if the case proceeds to an appeal hearing or judicial review the letter of instructions may not be protected by legal privilege so the letter, and any correspondence exchanged, should be written with this borne in mind. Also be aware that the professional is an independent professional and that the lawyer's role is to ask them to give an opinion on matters within their expertise. Doctors, particularly those with little or no experience of working with victims of abuse and torture, could be directed to Freedom from Torture's 'Guidelines for the Examination of Survivors of Torture'.³⁹

Depending on the stage of the protection procedure, the lawyer may need to request that a decision is not made by the decision-maker until medical evidence has been submitted. This letter must explain why the medical evidence is relevant to the application. It may be necessary to draw the decision-maker's attention to recital 29 of the recast Asylum Procedures Directive that states that a person in need of special guarantees should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.

Be aware that it may be inappropriate, and against your client's interests, to flag to the decision-maker that you are seeking medical evidence, without having yet received it, as that evidence may not add anything to the application or at worst be unfavourable.

The medico-legal report should include a section stating how the medical professional came to their opinion (including details of any meeting(s) with the application and their duration). The professional's qualifications and expertise should also be stated. It may be appropriate to request that the expert append their CV.

Upon receipt of the medico-legal report, the lawyer should review the report in order to ensure the medical professional has answered the questions that they were instructed to answer. The factual history in the report should also be checked against the client's personal statement to identify any inconsistencies between the client's instructions to the lawyer and their instructions to the medical professional. The lawyer may need to refer back to the professional for clarifications on points raised whilst also bearing in mind and respecting the independence of the medical expert.

Any medical evidence submitted, including psychiatric reports, needs to be carefully considered by the relevant governmental authorities. If the decision-maker doubts medical evidence submitted by the applicant, the ECtHR, in *RC v Sweden* and also in *RJ v France*, have suggested that decision-makers should obtain their own medical evidence.⁴⁰

³⁹ Duncan Forrest, 'Freedom from Torture, Guidelines for the Examination of Survivors of Torture', 2011

⁴⁰ European Court of Human Rights, *RC v Sweden*, 9 March 2010.

Chapter 2: Early Legal Advice for Clients who are Vulnerable or have Special Procedural Needs

Submissions on behalf of a vulnerable client

Following the personal interview, submissions for vulnerable clients should make reference to any supporting documentary evidence. This can include medico-legal reports that support the client's account of past persecution, comment on their ability to recount their experiences and/or give an assessment as to the impact on the client of future actions, such as forced return to the country of origin. Studies and literature on the impact of traumatic events on memory and its impact on credibility assessments may also be sourced and relied upon. Depending on the legal issues raised in the client's case, the specific vulnerabilities of the client may be relevant for the determination of certain legal aspects of their application, such as the availability of an internal relocation alternative in the country of origin.

When a decision is received on the vulnerable client's application for protection, lawyers should analyse the decision as to whether the decision-maker has properly taken into consideration the client's particular vulnerability in the assessment of her protection needs. Be aware that if the decision is negative a client may be particularly upset and suffer a recurrence or worsening of any medical condition. It may be appropriate to ask the decision-maker to put you on notice if a decision will be sent to the client and to prepare the necessary supports.

Useful Resources

Legislation and International Instruments

- Recast Reception Conditions Directive;
- Recast Asylum Procedures Directive;
- The Convention on the Rights of Persons with Disabilities;
- The Convention on the Elimination of all Forms of Discrimination Against Women;
- The UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care;
- The UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities;
- The Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;
- Council of Europe Convention on preventing and combating violence against women and domestic violence;
- Council of Europe Convention on Action against Trafficking in Human Beings.

Relevant Case Law

- *MSS v Belgium and Greece*, Application no. 30696/09, 21 January 2011
- *RC v Sweden*, Application no. 41827/07, 9 June 2010
- ECtHR, *Thlimmenos v. Greece*, Application No. 34369/97 6 April 2000
- ECtHR, *Tarakhel v Switzerland*, Application no. 29217/12, 4 November 2014

Further Reading

- GENSEN Project, 'Gender-related asylum claims in Europe, a comparative analysis of law, policies and practice focusing on women in nine EU Member States', May 2012
- Fundamental Rights Agency and the European Court of Human Rights, 'Handbook on European Non-Discrimination Law', 2010
- Laurence Debauche-Discart, Asylum seekers with special needs, Ministerial Conference 'Quality and Efficiency in the Asylum Process', 13-14 September 2010
- European Migration Network, 'Identifying Victims of Trafficking of Human Beings in Asylum and Forced Return Procedures: Ireland' May 2014
- 'Protect: Process of Recognition and Orientation of Torture Victims in European Countries to Facilitate Care and Treatment'

- Publications from the Centre for the study of Emotion and Law
- UNHCR Central Europe, 'Response to Vulnerability in Asylum' December 2013
- UNHCR, 'Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report', May 2013
- EVASP: Enhancing Vulnerable Asylum Seekers Protection
- ILGA-Europe publications on transposition and best practices concerning LGBTI asylum applicants
- Asylum Aid, Unsustainable, the quality of initial decision-making in women's asylum claims
- Freedom from Torture, Body of Evidence: Treatment of Medico-Legal Reports for Survivors of Torture in the UK Asylum Tribunal, May 2011
- IARLJ, 'Guidelines on the Judicial Approach to Expert Medical Evidence'
- IARLJ, 'Judicial Guidelines on Procedures with Respect to Vulnerable Persons'

Chapter 3:

Early Legal Advice and the recast Dublin Regulation



Introduction

It is essential that applicants receive good quality ELA if they are subject to the recast Dublin Regulation.⁴¹ The Regulation,⁴² which has direct effect in all EU member states, provides enhanced procedural safeguards for persons subject to the Dublin procedure and the provision of ELA will enable applicants to assert their rights in practice.

Also, given the technical nature of the recast Dublin Regulation, ELA is a necessary support for asylum seekers subject to it. ELA in the Dublin procedure can be divided into two stages, firstly when ascertaining if the recast Dublin Regulation applies and secondly when your client is in the Dublin procedure.

Is the recast Dublin Regulation applicable?

The lawyer must first ascertain whether the recast Dublin Regulation is applicable to the individual circumstances of their client. Instructions should be taken from the client to include, but not be limited to, the following:

- The client's personal details and identity documents;⁴³
- The client's journey to the Member State in which she is in including transit;
- Critical dates concerning the journey and/or previous stays in other Member States;
- Any documents pertaining to residence or stay in another EU Member State including visa stamps in her passport, residence cards, travel tickets etc.;
- If the client previously resided in another Member State, instructions should be sought on whether she subsequently resided outside of the territories of the EU, for at least three months, and the availability of any supporting evidence;⁴⁴
- Any information as to whether the client previously claimed asylum in another Member State;
- Any information as to whether the client was previously removed and/or deported or voluntarily returned from another Member State to their country of origin or a third country;⁴⁵
- Any information on whether the client was previously fingerprinted within the territories of the Member States;
- Any information concerning the presence of family members, relatives and relations in the present Member State or any other Member State.

⁴¹ See, Bridget Anderson & Sue Conlan, 'Providing Protection Access to early legal advice for asylum seekers', 2014, n 23

⁴² Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), O.J. L 180/31 29.06.2013.

⁴³ Age is particularly relevant in cases where the client may be an unaccompanied child given the specific criteria in place for the assigning of responsibility for protection applications by unaccompanied children.

⁴⁴ If she left the territories of the EU for at least three months the obligations of the other Member State responsible shall cease, unless the person concerned is in possession of a valid residence document issued by the Member State responsible: recast Dublin Regulation Article 19 (2).

⁴⁵ This will be relevant in terms of the cessation of responsibility of the requested Member State: recast Dublin Regulation Article 19.

Chapter 3: Early Legal Advice and the recast Dublin Regulation

Annex II of the Implementing Regulation to the recast Dublin Regulation provides a list of probative and indicative elements of proof for various Articles in the Regulation. For example probative evidence relating to Article 19 (2), which concerns whether a person has departed from the territory of the Member States, includes: an exit stamp; extracts from third-country registers (substantiating residence), and tickets establishing departure from or entry at an external frontier. It may be helpful to have this annex to hand when taking instructions from your client.

Your client should be made aware that the decision-maker will check fingerprints, visa information and other records concerning her personal details and previous travels. The client should be advised that she needs to give full disclosure as early as possible about her journey to, and stay in, any other Member State. Failure to disclose such information as soon as possible may also be deemed to impact the credibility of her case and she should be advised of this.⁴⁶

If there are indications that another Member State of the Dublin system played a role in the client's entry into the territories of the EU, for example through the issuing of a visa, a client's case may be considered under the recast Dublin Regulation. Article 5 of the Regulation states that the Member State shall conduct a personal interview in order to facilitate the process of determining the Member State responsible.

Be aware that an applicant's case may be placed for consideration under the Regulation at a later stage in the examination of the application, for example after the substantive personal interview. Therefore, you should advise your client that the personal interview

may contain questions which are pertinent to the applicability of the recast Dublin Regulation.

All relevant evidence concerning the applicability or non-applicability of the recast Dublin Regulation should be assessed by the lawyer. There may also be exceptional situations where your client wishes for the Regulation to be applied, for example, to unite with family members in other Member States. Where appropriate the lawyer should submit written representations on behalf of the client to the decision-maker as early as possible within the protection procedure timescale.

When the client is in the Dublin Procedure

When the lawyer becomes aware by way of notice from the decision-maker that their client is in the Dublin procedure the following steps should be taken:⁴⁷

- Record the relevant critical dates and timeframes for the Dublin procedure. The time limits for submitting take back or take charge cases run from the date of application of the protection application in the Member State.⁴⁸ Whether or not the client is in detention will also impact the time limits for the Dublin procedure meaning that a detained client may need to be prioritised given the shorter timeframes that apply in such cases;⁴⁹
- A request for an updated copy of the client's file should be submitted to the decision-maker this should include a request for any correspondence with other Member States regarding the Dublin Regulation;

⁴⁶ It also has implications for the assignment of responsibility under the Dublin criteria: recast Dublin Regulation Article 7 (3).

⁴⁷ This is not an exhaustive list of actions as much will depend on the individual circumstances of your client's case.

⁴⁸ Other time limits apply to those persons who are apprehended in an irregular manner in a Member State and do not submit a new application for asylum here: recast Dublin Regulation Article 24.

⁴⁹ Recast Dublin Regulation Article 28.

- A meeting with the client should be scheduled in order to advise her on the possibility of the Regulation being applied and in order to further her instructions;
- Submissions should be drafted to the decision-maker should the client wish to challenge the assignment of responsibility for her case to another Member State.
- The reasons why a client does not want to go to a particular Member State. This can be incorporated within the submissions or by way of a supplementary personal statement attached to the submissions;
- Any issues concerning the mental and physical health of the client and supporting evidence. This may involve instructing a medical expert on behalf of your client if necessary;

The personal statement

If a client wishes to challenge a transfer to a particular Member State then instructions should be taken as to the reasons why she does not wish to go to that State and why it is more appropriate to have her application examined in the country that she is in. These instructions should then be drafted in to a personal statement which should be read back to the client and then submitted to the decision-maker. Often a lawyer will only have a short window of time in which to take a statement from her client in relation to the Dublin procedure. Therefore, it is vitally important that the client provides all the relevant information as early as possible in the Dublin procedure. It is also important that the client fully understands why the focus is on her journey rather than on the substance of her application at this stage of the procedure. Many of the principles that apply to drafting a personal statement for the substantive procedure apply when drafting a personal statement for the Dublin procedure (see Key Stage 5). It may also be appropriate or convenient to draft a personal statement for the substantive procedure and include paragraphs on issues pertaining to the Regulation.

Legal submissions

The lawyer should also obtain instructions and undertake research for the drafting of a legal submission, including, but not be limited to the following:

- Any information pertaining to human rights concerns regarding a transfer to a particular Member State. This may also involve taking instructions on the client's previous experiences in a particular Member State and gathering relevant country information concerning that state;
- Relevant law applicable including national law, EU law and the relevant case law of the ECtHR and Court of Justice of the European Union (CJEU);
- Any procedural steps the national authorities needs to take to ensure the procedure is human rights compliant and takes into account the individual circumstances of the client;
- Where human rights concerns are raised the relevant articles in the ECHR and the CFEU should be cited and an explanation as to why they apply to the particular facts of this case;
- Relevant up-to-date and objective COI concerning the Member State in question.

If your client becomes aware of the presence of a family member in the state she is in or in any other Member State later in the Dublin procedure this information should also be presented promptly to the decision-maker.

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If your client is detained for the purpose of transferring her under the recast Dublin Regulation, the conditions and guarantees for detainees under the recast Reception Conditions Directive shall apply.⁵⁰

The right of appeal against a decision to transfer

If a transfer decision is issued under the Regulation the client has the right to an effective remedy, in the form of an appeal or a review, of that decision, before a court or tribunal. Depending on the Member State concerned, the appeal may automatically suspend the client's removal to the other Member State or an application may have to be made to grant suspensive effect. Depending on the national appeal procedure, the lawyer should request an oral hearing when submitting the grounds of their appeal. The court or tribunal can either affirm or set aside the transfer decision. The CJEU, in the decision *Migrationsverket v Edgar Petrosian*, stated that the time limits for transfer are suspended during the appeal procedure.⁵¹

In some situations the client may actually wish to fully withdraw from the protection process. The CJEU, in the ruling of *Migrationsverket v Kastrati*, stated that the Dublin procedure will no longer apply if the responsible Member State has not already agreed to take charge of the client's application for protection.⁵²

Challenging Dublin transfers

Although this chapter is primarily focused on ELA at the first stage of the Dublin procedure, lawyers should be cognisant of applicable case law on challenges to Dublin transfers which may be relevant throughout the protection procedure.

The ECtHR, in the decision *Tarakhel v. Switzerland*⁵³ stated that, when assessing the risk to a person upon transfer to another Member State, the individual must show a breach of Article 3 of the ECHR⁵⁴ to the standard set out in *Soering v. the United Kingdom*,⁵⁵ that is: "where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment."

The Court in *Tarakhel v. Switzerland* also clarified that the source of the risk does not alter the level of protection guaranteed under the Convention, or the Convention obligations, thereby rejecting the test of "systemic deficiencies" set out in the leading CJEU decision of *NS/ME*.⁵⁶ The assessment of the level of risk depends on the circumstances of the case including, *inter alia*, the duration, nature and context of the treatment feared upon transfer, its physical and mental effects as well as other factors such as the sex, age and health of the client. The evidence must be examined both in light of the client's personal circumstances and the general situation in the State concerned.

⁵⁰ The recast Reception Conditions Directive is explicitly referred to in Article 28(4) of the recast Dublin Regulation.

⁵¹ Court of Justice of the European Union, Case C-19/08 *Migrationsverket v Edgar Petrosian & Others*, 29 January 2009

⁵² Court of Justice of the European Union, Case C-620/10 *Migrationsverket v Kastrati*, 3 May 2012

⁵³ European Court of Human Rights, *Tarakhel v Switzerland*, Application no. 29217/12, 4 November 2014

⁵⁴ Article 3 ECHR refers to the prohibition against torture, inhuman and degrading treatment or punishment

⁵⁵ European Court of Human Rights, *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989

⁵⁶ Joined Cases C-411/10, C-493/10 *N.S. v. SSHD and M.E. v. ORAC*, Minister for Justice, Equality and Law Reform, 21 December 2011; For further information on this see RefLAW, Vulnerability, the Right to Asylum and the Dublin System, Maria Hennessy at: <http://www.reflaw.org/vulnerability-the-right-to-asylum-and-the-dublin-system/>

Timeframes under the Dublin procedure

As noted above it is essential that lawyers record critical dates and timeframes when their client is in the Dublin procedure. Failure to do so may mean a client is erroneously transferred when the responsibility of the other Member State has lapsed due to the expiration of time limits in the recast Dublin Regulation.

References are made to ‘take back’ and ‘take charge’ requests in the Regulation. Essentially a ‘take charge’ request indicates that the person has not previously applied for protection in the requested Member State but responsibility may be assigned to that Member State on a number of grounds including *inter alia* presence of family members or the issuing of visas on their behalf. A ‘take back’ request indicates the person previously applied for protection in the requested Member State.

The relevant provisions concerning timeframes in the Regulation are set out in Articles 21 – 25. When sending out a ‘take charge’ or ‘take back’ request to another Member State that is deemed responsible for the examination of a client’s application, the following time limits apply:

- The sending Member State has **three months** from the date of lodgement of the protection application here to request another Member State to assume responsibility.
- If the responsibility of another Member State is established on the basis of Eurodac data (fingerprints), the request must be sent by the sending Member State to the receiving Member State within **two months** from the date the results are received from the Eurodac. Therefore, in practice, there is a shorter timeframe when assigning responsibility on the basis of Eurodac data.

- When the receiving Member State has accepted responsibility for the examination of a client’s protection application, the client must be transferred within **six months** of that Member State accepting such responsibility, unless there is an appeal of the transfer decision which leads to the time limits for transfer being suspended until a final decision on the appeal.
- If the client is imprisoned or absconds, the time limit for transfers can also be extended by 12 months or 18 months respectively.

The timeframes for assigning responsibility are also altered if the client is detained during the Dublin procedure and shorter timeframes are provided for in relation to detention under Article 28 of the recast Regulation.

Vulnerability and the Dublin procedure

The ECtHR ruling in *MSS v Belgium and Greece* acknowledged the vulnerability of all asylum seekers seeking protection in Europe.⁵⁷ This was affirmed by the ECtHR in *Tarakhel v Switzerland*⁵⁸ which referred to the specific vulnerability of children within the Dublin system. Other categories of clients may also be vulnerable or indeed become vulnerable by way of being transferred to a particular Member State under the Dublin procedure.

Depending on the circumstances of a client’s application and the Member State in question, the lawyer may wish, with the consent of the client, to challenge the Dublin transfer and submit representations requesting that the Member State the client is in takes responsibility for the examination of her protection application by way of the discretionary clauses under Article 17 recast Dublin Regulation, which states, *inter alia*, that a Member State may decide to examine an application for protection, even if such examination

⁵⁷ European Court of Human Rights, *MSS v Belgium and Greece*, 2011.

⁵⁸ European Court of Human Rights, *Tarakhel v Switzerland*, Application no. 29217/12, 4 November 2014.

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is not its responsibility under the criteria laid down in the Regulation.

If the client is ill or experiencing physical or mental health problems, additional evidence may be considered such as the submission of a psychiatric report for persons at risk of suicide or victims of torture. Letters from GPs, medical reports and a personal statements from the client herself may also be useful in substantiating particular vulnerabilities. COI on the availability of continuing care and medical supports and supplies, with respect to the particular Member State, should also be gathered. An assessment should be made as to whether there would be a violation of the client's fundamental rights including the right to human dignity if she were to be transferred to a particular Member State and appropriate submissions made.

When receiving a transfer decision you should analyse the decision to check whether the decision-maker has made a thorough and individualised assessment of your client's situation with respect of any proposed transfer. Both the first instance decision-maker and the appeal tribunal or court will need to have detailed and reliable information concerning the specific medical treatments and reception facilities available with respect to your client. The decision-maker may need to seek individual guarantees from the responsible Member State that the client will be taken charge of in a manner adapted to their individual circumstances.⁵⁹

If you are representing a family unit, it is important to assess whether the authorities have taken into account the best interests of the child as a

primary consideration when applying the Dublin procedure.⁶⁰ The right to family unity must also be considered when assessing the situation on transfer to the responsible Member State.⁶¹ Furthermore, an assessment must be made about whether there is a risk of a vulnerable person being detained in the responsible Member State upon transfer. Whilst the detention of a vulnerable person is permissible under EU law, there needs to be an assessment as to how this would affect the vulnerable individual.⁶² The ECtHR in *Dybeku v. Albania*⁶³ listed three elements that need to be considered in relation to the compatibility of an client's health when in detention: a) medical condition of the detainee; b) the adequacy of the medical assistance and care provided in detention; c) the advisability of maintaining the detention measure in view of the state of health of a client.

If the transfer to another Member State is being implemented, you should also ensure that the state authorities have procedures in place to ensure a continuity of care for the person concerned so that she has access to health care to meet her needs. Article 32 of the recast Dublin Regulation provides for the exchange of health data, before transfer is carried out, for the sole purpose of the provision of medical care or treatment, in particular concerning disabled persons, elderly people, pregnant women, children and persons who have been subject to torture, rape or other serious forms of psychological, physical or sexual violence. This is a non-exhaustive list and other persons may also have particular vulnerabilities requiring safeguards for continuing care. Information about your client's health will be contained in a 'common health certificate' which

⁵⁹ European Court of Human Rights, *Tarakhel v Switzerland*, Application no. 29217/12, 4 November 2014

⁶⁰ Recast Dublin Regulation Article 6

⁶¹ European Court of Human Rights, *Tarakhel* (n 257); Court of Justice of the European Union, Case C-79/13, *Saciri and Ors v Federaal agentschap voor de opvang van asielzoekers*, 27 February 2014

⁶² It should also be noted that the guarantees for people in detention under the recast Reception Conditions Directive (Article 9 and 11) apply to those detained under the Dublin procedure.

⁶³ European Court of Human Rights, *Dybeku v. Albania*, Application no. 41153/06 18 December 2007

should *inter alia* detail the client's vulnerability, medical diagnosis and prescribed treatment and matters that should be taken in to account during the transfer. Annex IX of the implementing regulations contain an example of this certificate.⁶⁴

Children and the Dublin Procedure

The recast Dublin Regulation provides specific guarantees for children and declares that the best interests of the child shall be a primary consideration for Member States with respect to the Dublin procedures. National authorities must conduct an individualised assessment of the best interests of the child when determining responsibility for the examination of an application by an unaccompanied child. Therefore, when preparing legal submissions on behalf of your client in the Dublin procedure, you should also address the best interests of the child, where applicable, in determining which Member State is responsible for the examination of an application for international protection. This is relevant both with respect to accompanied children and unaccompanied children as demonstrated by the ECtHR ruling in *Tarakhel v Switzerland*.⁶⁵

In terms of assigning responsibility on the basis of a family member, sibling or relative being legally present in a particular Member State, it is important

to recall that the term 'legally present' is broader than the term 'legally resident' and includes all forms of legal presence in the Member States.

You should ensure that the voice of the child is heard during the process and request that the authorities take into account the view of the child in determining Member State responsibility.⁶⁶ As affirmed by the CJEU ruling in *C-648/11 MA, BT, DA*, the best interests of the child is paramount and it is in the interests of unaccompanied children not to prolong unnecessarily the procedure for determining the Member State responsible, and to ensure that unaccompanied children have prompt access to the procedures for determining refugee status.⁶⁷

The obligations of the Member State determined responsible for the application

Although this section is written from the perspective of the lawyer providing ELA to a client who is being transferred to another Member State within the Dublin procedure, you may also work with clients who have been transferred to the Member State in which you, the lawyer, work. Article 18 of the recast Dublin Regulation sets out the obligations of the responsible 'receiving' Member State. Once an applicant has been transferred to a Member

⁶⁴ Commission Implementing Regulation (EU) No. 118/2014 of 30 January 2014, amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Annex IX.

⁶⁵ "The requirement of "special protection" of asylum seekers is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability. This applies even when, as in the present case, the children seeking asylum are accompanied by their parents. Accordingly the reception conditions for children seeking asylum must be adapted to their age, to ensure that those conditions do not "create ... for them a situation of stress and anxiety with particularly traumatic consequences", European Court of Human Rights, *Popov v France*, Application Nos. 39472/07 and 39474/07. Otherwise the conditions in question would attain the threshold of severity required to come within the scope of the prohibition under Article 3 of the European Convention on Human Rights, *Tarakhel* (n 257).

⁶⁶ "[M]easures must be put in place to facilitate their meaningful participation in line with their age and maturity": SCEP, 'Good Practice'. See also, UN Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the right of the child to have his or her interests taken as a primary consideration (Art. 3(1))' (CRC/C/GC/14, 29 May 2013); UN Committee on the Rights of the Child, 'General Comment No. 12 (2009): the right of the child to be heard' (CRC/C/GC/12, 20 July 2009)

⁶⁷ *MA, BT, DA* (n 230) [61].

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State it is essential that the authorities examine and complete the examination of her application for international protection.

Where the client's protection application was refused at first instance in another Member State she must be given an opportunity to seek an effective remedy, i.e. an appeal of that refusal decision, in the Member State she is in. If the client previously (implicitly or explicitly) withdrew her application for protection at first instance, before a first instance decision was made, then upon transfer to the Member State taking charge or taking back, the client is entitled to request that her application is completed or she is permitted to lodge a subsequent application for protection. It is important to note that the subsequent application for protection shall not be treated as a subsequent application under the recast Asylum Procedures Directive 2013/32/EU and therefore not subject to its restrictions.

Useful Resources

Relevant Legislation

- Regulation (EU) No. 604/2013
- Regulation (EC) No. 118/2014 including Annexes
- Regulation (EC) No. 1560/2003

Relevant Case Law

- *M.S.S. v Belgium & Greece*, Application no. 30696/09, 21 January 2011 (ECtHR); *Dybeku v. Albania*, Application no. 41153/06 18 December 2007 (ECtHR)
- *Tarakhel v. Switzerland*, Application no. 29217/12, 4 November 2014 (ECtHR)
- *Sharifi and Others v. Italy and Greece*, Application no. 16643/09, 21 October 2014 (ECtHR)
- Admissibility Decision, *A.M.E. v. the Netherlands*, Application no. 51428/10, 13 January 2015 (ECtHR)
- *A.S. v Switzerland*, Application no. 39350/13) Date needed (ECtHR)
- Joined Cases, C-411/10, C-493/10 *N.S. v. SSHD and M.E. v. ORAC*, Minister for Justice, Equality and Law Reform, 21 December 2011 (CJEU)
- C-620/10 *Migrationsverket v. Kastrati*, 3 May 2012 (CJEU)
- C-245/11 *K. v. Bundesasylamt*, 6 November 2012 (CJEU)
- C-179/11 *Cimade, Gisti v. Ministre de l'Interieur, de l'Outre-mer, des Collectivites territoriales et de l'Immigration*, 27 September 2012 (CJEU)

- C-648/11 *The Queen on the application of M.A., B.T., D.A. v. Secretary of State for the Home Department*, 6 June 2013 (CJEU)
- C-528/11, *Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet*, 30 May 2013 (CJEU)
- C-4/11, *Bundesrepublik Deutschland v. Puid*, 18 April 2013 (CJEU)
- C-394/12, *Shamso Abdullahi v. Bundesasylamt*, 10 December 2013 (CJEU)
- C-19/08, *Migrationsverket v. Petrosian*, Judgment of 29 January 2009 (CJEU)
- Pending CJEU case, C-155/15 *George Karim v. Migrationsverket*
- Pending CJEU case, C-63/15 *Mehrdad Ghezelbash v. Staatssecretaris van Veiligheid EU Justitie*
- *R (on the Application of EM (Eritrea)) v. Secretary of State for the Home Department*, [2014] UKSC 12
- ECtHR, *A.S. v Switzerland*, Application no. 39350/13)
- ECRE, 'Comments on Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast), O.J. L 180/31'
- JRS Europe, Protection Interrupted, the Dublin Regulation's impact on asylum seekers' protection, June 2013
- Council of Europe Press Unit Factsheet on 'Dublin' cases, November 2014
- ILPA Information Sheet, Dublin III Regulation, January 2014
- AIRE Centre, ECRE and Amnesty International, 'Third Party Intervention in *Tarakhel v Switzerland*' (Application no. 29217/12), Date of Intervention: 12 January 2014
- Maria Hennessy, The Dublin system and the Right to an Effective Remedy: The case of C-394/12 Abdullahi, EDAL Blog
- Steve Peers, *Tarakhel v. Switzerland*: Another nail in the coffin of the Dublin system, EU Law Analysis blog, 5 November 2014

Further Reading

- Dublin Transnational Network Database Project (<http://www.dublin-project.eu>)
- Dublin Transnational Network Project, *The Dublin II Regulation: Lives on Hold*, European Comparative Report, February 2013
- Cathryn Costello & M. Mouzourakis: Reflections on Reading *Tarakhel*: Is 'How Bad is Bad Enough' Good enough?
- RefLAW, Vulnerability, the Right to Asylum and the Dublin System, Maria Hennessy, 14 April 2015
- RefLAW, Establishing a Common European Asylum System by Leaving European Human Rights Standards Behind: Is this the Way Forward? Francesco Maiani, 4 February 2015

Chapter 4:

Early Legal Advice and Children in the Protection Process



Introduction

This chapter deals with issues specific to children in the protection system and sets out the benefits of ELA when representing children. It is important to note that this chapter provides general information only and is not designed to substitute the specialist and detailed body of guidance available on this complex area. Lawyers are advised to consult this guidance and seek training when working with children in the protection process.

Information is included on key aspects of representation of children, including the scope of that representation, how to work with separated and dependent children to best present their application, considerations when drafting representations and submissions to the decision-maker, and navigation of any age assessment procedure, if applied.

While there is a distinction generally made between unaccompanied minors and separated children, for the purposes of this manual, in line with guidance of Separated Children in Europe Programme (SCEP),⁶⁸ the term, 'separated children' is used as it is a more inclusive definition, encompassing unaccompanied minors. These terms are further defined and discussed below.

There are several aspects of a child's protection application that make it complex. Children have an inherent vulnerability, which may be exacerbated by an experience of trauma. Children experience the challenges of the protection process more intensely; this includes separation from and possible loss of family and friends, social isolation, language barriers, emotional and mental health problems and possible discrimination and racism. In most circumstances, the child will have had no control or choice over

the decision leading to her current position as a child seeking protection. She must then cope with uncertainty as to her future during a critical time of her development and maturity.

In terms of the assessment of facts and circumstances of a child's asylum application, there are a number of considerations a lawyer should take into account. Several factors can affect a child's ability to present her application coherently: a child may have a shorter attention span, limited vocabulary, limited linguistic abilities, and a limited understanding of time and space that will make presentation of a chronological account challenging. Due to a lack of maturity, younger children may be less able to articulate their application and present oral testimony in a coherent manner.

In light of these considerations, it is essential that the lawyer be familiar with the wide-ranging legislative protections that apply to children, both at a domestic and EU level, and be in a position to apply such provisions together with appropriate and relevant guidance when dealing with children's asylum applications.

Legal representation at the earliest possible stage of the protection procedure can ensure that a child's case is put forward taking into account the child's particular age, level of maturity and her inherent vulnerability.

Key definitions⁶⁹

SCEP define separated children as children under 18 years of age who are outside their country of origin and separated from both parents, or their previous legal or customary primary caregiver.⁷⁰ This definition encompasses unaccompanied minors (those who are not accompanied by parents or legal guardians) and those who entered the country

⁶⁸ Separated Children in Europe Programme, 'Statement of Good Practice', 2009

⁶⁹ For a list of definitions from different member states see: European Council on Refugees and Exiles, 'Right to Justice: Quality Legal Assistance for Unaccompanied Children – Comparative Report', 2014, section 2.1

⁷⁰ Separated Children in Europe Programme, 'Statement of Good Practice', 2009

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in the company of traffickers, smugglers or other non-habitual carers or extended family⁷¹ and may have travelled for a multitude of reasons, relating to persecution, fleeing violence or civil war, trafficking and/or exploitation.

Also of note is the definition of an unaccompanied minor under EU law. Article 2 (h) of the original Procedures Directive defines an unaccompanied minor as: “a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States.”⁷² The recast Asylum Procedures Directive references this definition.

Dependent children are those who are present with a parent or guardian, whether or not they are included in a parent’s application for asylum.

Scope of legal representation

The role of the lawyer when representing a child is to ensure that the child is enabled to state her case effectively and exercise her legal rights. The lawyer should provide legal support with commitment, responsibility, expertise and knowledge.

It is essential that the lawyer is mindful of the limitations of their role and does not stray into provision of parental or other supports. It is also important that the lawyer establishes what support is already being provided to the child, places themselves within that support structure, and refers the child to any appropriate additional supports and services as required.

Any child in a protection process should have a responsible adult assisting her. UNHCR state that an independent, qualified guardian needs to be appointed immediately, free of charge in the case of unaccompanied or separated children.⁷³ This may be one of several professionals supporting the child and assisting her with her complex needs; it could also be a foster parent or guardian. The responsibility for identifying an appropriate responsible adult may lie with the local authority where the child resides, the decision-maker or with you the lawyer. Regardless of where this responsibility lies, it is incumbent on the lawyer to liaise with the appropriate responsible adult and other key personnel during the protection process. Obviously the consent of the child should be sought before liaising with any other person. If a personal statement is being taken from the child it may be appropriate that this is shared (with the child’s consent) with other key personnel assisting the child so that instructions about previous experiences only have to be taken once and the statement can be used for future reference.

Other professionals likely to be engaged in supporting the child include: medical and mental health professionals, educational professionals, foster carers, and youth and support workers. The lawyer should also be aware that the child may be engaged in other legal processes, including care proceedings or family law proceedings, and it is therefore important to clearly establish that the lawyer is engaged only in assisting with the asylum process. It may be appropriate to liaise with any other lawyers assisting the child to explain your role and to obtain details of any other such legal proceedings.

At the initial meeting with the child, further detailed below, the lawyer should at the outset explain

⁷¹ Adam Hundt and Zubier Yazdani, ‘Working with Migrant Children: Community Care Law for Immigration Lawyers’, ILPA, (2012) 4.

⁷² Article 2 of the 2013 recast Procedures Directive refers to the definition of unaccompanied minor in the 2011 recast Qualification Directive, which is identical to the definition in the 2005 Asylum Procedures Directive.

⁷³ UNHCR, ‘Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees’, paragraph 69, 2009

their role to the child in clear and unambiguous terms. The lawyer should map out the support being provided to the child at the earliest opportunity and with the child's consent, make further relevant referrals for support that is needed. During the protection process, it is essential that all professionals supporting the child maintain the child's best interests as their primary consideration and provide an effective continuum of support.

Conflict of interest and children's protection applications

There are specific conflict of interest considerations when representing children in the protection process.

When representing a dependent child, it is not safe to assume that the child's application can be simply advanced through that of the parent or guardian's case. It is important that the lawyer ensures the child's application is fully explored in its own right and any specific risks identified. The application should also be explored and advanced within the context of a parent/guardian's case; specific human rights aspects may apply, particularly with respect of family life.

When representing a dependent child, a lawyer must navigate the line between both respecting the wishes and instructions of the parent or guardian but at the same time ensuring that the voice of the child is heard and her best interests protected.

The lawyer must at all times be mindful that a conflict of interest may arise between professional obligations to the parent or guardian on the one hand, and the best interests of the dependent child on the other. Circumstances may arise where the lawyer will not be in a position to represent

the entire family, because of such a conflict, and separate legal representation will be needed for either the parent or guardian or the child. The lawyer must also be aware of potential for conflict of interest with any responsible adult who is supporting the child in circumstances where he or she may be a relative or friend of the child. Appropriate checks should be completed to avoid any professional conflict.

Child-specific persecution

UNHCR notes that while children may face the same forms of persecution as adults, they may experience it in different ways.⁷⁴ UNHCR also emphasises the greater impact 'hostile situations' may have on the well-being of children, noting that they "are more likely to be distressed" than adults experiencing the same hostility due to their age, immaturity or level of development.⁷⁵ In this way, children's experiences of persecution have been described as child-specific. Child-specific forms of persecution include: exposure to, or experience of, domestic violence, trafficking, female genital mutilation, forced marriage, forced, bonded or hazardous labour, forced prostitution or participation in pornography, loss or absence of nationality, underage military recruitment or severe discrimination.⁷⁶

Recital 28 of the recast Qualification Directive states that, when assessing applications from minors for international protection, Member States should have regard to child-specific forms of persecution. Article 9 (2) (f) of the same Directive also states that acts of persecution can, *inter alia*, be child-specific in nature.

⁷⁴ UNHCR, 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', 2009

⁷⁵ UNHCR, 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', 2009, paragraph 16

⁷⁶ Ibid. paragraph 18

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An important factor in providing ELA in cases involving children is that you, the lawyer, recognise child-specific forms of persecution and assess any link between that persecution and the Refugee Convention and subsidiary protection law. It is important to note, however, that UNHCR states that the persecution feared must only have a link with a Convention ground.⁷⁷ The lawyer should also ensure that the benefit of the doubt is applied liberally in children's cases due to their inherent vulnerability and their developmental immaturity which can result in an inability to recount past experiences in the same way as an adult.⁷⁸

The obligations on a decision-maker when considering a child's application for protection

The lawyer should be aware of several legal obligations on the decision-maker to ensure that the best interests of the child is the primary consideration throughout the process. Article 3 (1) of the UN Convention on the Rights of the Child (UNCRC) sets out this obligation most explicitly.⁷⁹

Recital 33 of the recast Asylum Procedures Directive states that best interests of the child should be a primary consideration of Member States when applying the Directive, in accordance with the CFEU and the United Nations Convention on the Rights of the Child. The recital goes on to state that in assessing the best interest of the child, Member States should in particular take due account of the minor's well-being and social development, including her background.

Recital 18 of the recast Qualification Directive states that the best interests of the child should also be a primary consideration of Member States

when implementing that Directive. The recital states that when assessing the best interests of the child, Member States should in particular take due account of the principle of family unity, the minor's well-being and social development, safety and security considerations, and the views of the minor in accordance with her age and maturity.

There is also an obligation on decision-makers to take into account the inherent vulnerability of children. Article 20 (3) of the original Qualification Directive and the recast Qualifications Directive oblige the decision-maker to take into account vulnerabilities including the fact that the applicant is a minor or a separated child.

Article 15 (3) (e) of the recast Asylum Procedures Directive also states that Member States shall ensure that interviews with minors are conducted in a child-appropriate manner.

Interviewing a child client

Article 12 of the UNCRC states that where children are capable of forming their own views, those views should be taken into account and given 'due weight'.⁸⁰

Children should always be interviewed independently of parents or guardians. It is therefore recommended that the lawyer have a separate and child-friendly consultation with the child to ensure her voice is heard and to determine if a separate application should be made.⁸¹ As part of this process, it is essential that a conflict of interest check is completed to ensure there is no difficulty with the same lawyer acting for the parents and the child.

Younger children in particular are often unable to

⁷⁷ Ibid. paragraph 40

⁷⁸ Ibid. paragraph 73

⁷⁹ United Nations, Convention on the Rights of the Child, 1989

⁸⁰ Ibid. Article 12

⁸¹ See generally, the Swedish Migration Board for more information on interviewing dependent children separately for the purposes of submitting an asylum claim: Swedish Migration Board, Children in the Asylum Process, September 2014

articulate their application as well as an adult.⁸² As a result, a personal statement, where appropriate, can facilitate the child's voice being heard more clearly heard within the asylum process as well as assisting the decision-maker in fully understanding the child's application.

Given the challenges children face in navigating the protection process, when preparing and considering the application of any child, the lawyer and decision-maker should be fully cognisant of the age and maturity of the child and the risk of child-specific persecution.

As mentioned above this chapter is only a guide and introduction to the topic. Other guidance should be considered carefully. Kalvir Kaur's chapter, 'Voice of the Child', in the publication 'Working with refugee children, Current issues in best practice'⁸³, published by the UK based Immigration Law Practitioners' Association (ILPA), is an extremely thorough and helpful starting point.

The interviewing room

An appropriate interviewing room can assist in communicating with a child and put her at ease. As when interviewing adult clients, the interpreter should sit to the side so that the lawyer and child can communicate face to face. The room should be free from outside noise.

Asking a child questions

Try to put the client at ease at the beginning of the interview and be alert throughout the interview in case the client becomes anxious. Maintain eye contact, use appropriate body language and vocal tone. Explain the different roles of each person who is in the room. Ensure that the child is comfortable with all parties present. Check to see if the child is well and whether she has eaten or requires something to drink.

Take some time to reassure the child that you will be working for her and that they are the most important person in the room. Use appropriate language throughout ensuring no terminology or complex legal jargon is used. Encourage the child to ask questions.

The personal statement and child clients

Much of what applies when drafting a personal statement for an adult, applies when drafting a statement for a child. Be aware that it will normally take at least several meetings to have sufficiently detailed instructions for a personal statement, often more appointments than when taking instructions from an adult. It is important that the personal statement reflects the child's voice. Similarly to that of adult clients, it should not include legal or formal language unless used by the client. It may be appropriate to advise the client that detail in the statement may mean the decision-maker will ask fewer questions at the personal interview.

Client care and children

Be aware that the methods used for client care for adult applications may be inappropriate for children. For example the standard client care letter, while a useful foundation for the relationship between yourself and the client, may have to be simplified. Particular terms or ideas can be elaborated on in greater detail orally and when appropriate. It may also be appropriate to explain the protection process using several simple concepts which can then be built on during the application. If the client prefers, and it is appropriate, communication by text message can be a useful way to stay in touch and inform the client of information such as appointment times. It may be appropriate, with the child's consent, to convey details regarding appointment and administrative issues to their guardian and any support worker.

⁸² UNHCR, 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', 2009, paragraph 73

⁸³ Immigration Law Practitioners' Association, 'Working with refugee children Current issues in best practice, January 2012

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Interpreters and children

Similarly to adult applications, it is not suitable to use a family member as an interpreter. Care should be taken to identify a suitable interpreter, who will ensure circumstances conducive to the child giving her instructions openly and without inhibition. Be aware that, as a person who speaks the same language, the interpreter may be an important person to the child, particularly if the child has little contact with others who speak her language. The gender of the interpreter should be chosen by the child. The possibility of having continuity of interpreter, for example the same interpreter being used by any health care professional or social worker, should also be explored. The child should also be made aware of the role of the interpreter and given every opportunity to express any concerns with the interpreter.

Age determination procedures

As a minor is considered to be any person under the age of 18, states often engage in age assessments where the child's status as a minor is in doubt ⁸⁴.

There are large amounts of guidance and literature on age assessment and determination procedure which should be considered in detail if your client is subject to such a procedure.

UNHCR state that such assessments should be conducted in a safe, child- and gender-sensitive manner with due respect for human dignity and that the margin of appreciation needs to be applied in such a manner that, in case of uncertainty, the individual will be considered a child.

The personal interview with a decision-maker

The lawyer should attend the personal interview. It may also be appropriate to have the child's

guardian attend. Time should be taken to explain to the child as to what will happen at the interview. It may also be necessary to contact the decision-maker prior to the interview to try to agree what issues are in dispute, what they will ask questions about and to flag any subject matter that the child finds distressing and to ask that questions not be asked on these topics. If necessary the decision-maker should be reminded that Member States must ensure that interviews with minors are conducted in a child-appropriate manner.

If you feel at the end of the personal interview that the child has not had an opportunity to express her concerns about returning to her country of origin, or any other issue pertinent to the application, it may be necessary to ask the decision-maker to ask a particular question so that the child can properly express themselves and so that her voice can be heard.

Evidence and submissions on behalf of children

A child should not be rushed when giving instructions and it may be necessary to request early in the application that the decision-maker give additional time for submissions to be made or a personal statement prepared. UNHCR state that the child should have sufficient time to prepare and reflect on her experiences.

If it is in the best interests of your client, consider requesting that the decision-maker process the application, when submitted, as a priority. UNHCR state that applications made by child applicants, whether they are accompanied or not, should normally be processed on a priority basis, as they often will have special protection assistance needs.⁸⁵

⁸⁴ UNHCR, 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', 2009, paragraph 75

⁸⁵ UNHCR, 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees',

As children are not always able to articulate the reasons why they have been subject to persecution, there is an onus on the decision-making authorities to gather relevant COI to inform their decision.⁸⁶ Be mindful of the limitations of COI in children's cases. Be aware that much COI does not focus on child-specific issues.⁸⁷ It is essential to conduct research into appropriate COI, reviewing material produced by NGOs and agencies working specifically on children's issues. For example, UNICEF has published a tool, known as 'Child Notices' that provide child-specific COI.⁸⁸ As noted above it may be necessary to flag with the decision-maker that child-specific persecution has been experienced and direct them to any applicable COI or documentary evidence.

It may be necessary to request that the decision-maker assume a greater burden of proof when establishing the application. UNHCR states that if the facts of the case cannot be established, the examiner needs to make a decision on the basis of all known circumstances, which may call for a liberal application of the benefit of the doubt. UNHCR also states that the child should be given the benefit of the doubt should there be some concern regarding the credibility of parts of her application.

The lawyer should consider whether it is appropriate to commission a medical report or expert report relating to the child. If necessary a person who has supported the child in the protection process, such as a guardian or social worker, can offer an insight in to the trauma that the child has experienced and can be useful to the decision-maker.

Useful Resources

Relevant Legislation

- 2005 Procedures Directive and its 2013 recast
- 2004 recast Qualification Directive

Further Reading

- UNHCR, 'The Heart of the Matter: Assessing Credibility When Children Apply for Asylum in the European Union' December 2014
- ILPA, 'Resource Guide for Legal Practitioners Working with Refugee Children', March 2014
- UNICEF Netherlands, 'Child Notices'
- ECRE, 'Right to Justice: Quality Legal Assistance for Unaccompanied Children – Comparative Report', 2014
- Connect Project Report, 'Identification, Reception and Protection of Unaccompanied Children', 2014
- EASO, 'Age Assessment Practice in Europe', Luxembourg 2014
- ILPA, 'Working with refugee children Current issues in best practice' Second edition, Syd Bolton, Kalvir Kaur, Shu Shin Luh, Jackie Peirce and Colin Yeo, January 2012

⁸⁶ UNHCR, 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', 2009, paragraph 74

⁸⁷ Ibid. paragraph 74

⁸⁸ UNICEF, Child Notices, 2013. An example of a Child Notice for Afghanistan is available from Refworld: UNICEF, Child Notice Afghanistan 2013, 2013

Annex

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Sample Initial Client Care Letter

Dear [client name]

This letter confirms that we are willing to act as your lawyer in relation to your application for protection.

This letter explains our terms and conditions while we are working for you. Our terms and conditions are a type of contract between ourselves and our client and sets out the manner in which we provide our services to you. Please read this letter very carefully. To prevent any misunderstandings at a later stage, it is important that you know what to expect and what our service involves. We will be happy to answer any questions you may have on any aspect of this letter.

Who is responsible for your application?

You will be represented by [name of lawyer]. You can contact [name of organisation] on [telephone number] and [email]. Our normal working hours are [state working hours].

Discussing your Expectations

Having agreed to take on your application, we will discuss your expectations about the range of outcomes from your application and tell you whether we think these are realistic. It is extremely important that you understand at all times what is happening in your application. To prevent any confusion or worry, we will regularly give you information about your application as it progresses.

This means that we will advise you in relation to your application for protection, and usually, where resources allow, provide you with assistance in completing the application form and accompany you to your personal interview.

Before your interview, we will usually assist you prepare a 'personal statement', setting out the full extent of your application for protection to the decision-maker in writing in your own words. We may also lodge submissions on your behalf after your interview.

Communicating with your lawyer

You can contact us by phone, email or letter. To avoid any confusion, in making contact with us, please give us your full name, telephone number and reference number which will always be at the top of any communication you receive from us. If you contact us by telephone and we are not available, please leave a message and we will return your call as soon as possible. If the matter is urgent, please ask to speak to another member of our team.

Giving instructions to your lawyer

It is crucially important that you give us full, clear and accurate instructions from the very beginning and also when you get any new information that may affect your application. Such new information may include a change in circumstances in your country of origin, a change in your personal circumstances or those of a family member.

We will do our best to carry out your instructions and to give you a timely, professional and friendly service. When we receive your instructions, we will explain your legal options to you. The protection process can be confusing, as can legal proceedings. It is very important that if there is something that you do not understand that you tell us right away so that we can answer your questions. We will then agree the actions to be taken with you.

We will need to obtain further instructions from you from time to time, sometimes at short notice, as your application progresses. It is very important that you are contactable and available to give us your

Sample Initial Client Care Letter

instructions as they are needed. If you are not available to give us your instructions, this may damage the outcome of your application.

It is very important that you are active in your own application. There may be documents or information which are/is within your power to obtain and we may advise you to do so, if it is safe and possible, in the interests of your application.

Confidentiality

You are our client and we will take instructions only from you and at all times act in your best interests, only.

We will treat your application confidentially and will not reveal any details that could identify you unless you have given us permission to do so. From time to time we may wish to pass information to other organisations and bodies in respect of the outcomes of our clients' applications; however we will only do this in a way that will not identify you personally. If you have any concerns about this we would be happy to discuss the matter with you further.

Key dates and timeframes

We will always provide you, insofar as is possible, with an estimate of how long your application is likely to take and what the next steps are. We will inform you of any issues or events that are likely to delay your application.

In some situations, however, your application for protection can move very quickly and it is likely that we will need to have a number of consultations with you over a short time frame in order to assist you prepare for your interview. Timeframes are also very short when appealing a decision and for lodging a judicial review application [if appropriate]. Again, at such times it will likely be necessary to have a number of consultations with you over a short time frame in order to prepare your application.

Your rights and responsibilities

As our client you have certain rights and responsibilities. Your rights include:

- (i) You can expect to receive expert legal advice on your application throughout the period of time that you have instructed your lawyer.
- (ii) You will be advised of the prospects of success of your application, insofar as is possible, and be given an informed opinion as to the various scenarios you will encounter in your application.
- (iii) You can expect a professional, timely, courteous service at all times. You have the right to complain about our service if you think it necessary.

Your responsibilities include:

- (i) To provide us with full and accurate instructions, if you do not do so it will be impossible for us to advise and represent you properly and may lead to the termination of our services.
- (ii) To inform us as soon as possible if you receive any updates or documents from the authorities on your application, or if new issues arise which may affect your application. This includes if you receive any documents from your home country or any other document that can corroborate your application. It is important that we are aware of these documents as soon as possible after you have received them.
- (iii) To inform us in good time in advance, if you cannot attend an appointment with us.
- (iv) To inform us immediately if you change your address or telephone number. If you do not do this there is no way that we can inform you of any developments in your application or obtain your up to date instructions.

Permission to act on your behalf

Now that we are acting on your behalf, we will assume that we have permission to take various actions on your behalf. For instance our role as your lawyer may involve:

- (i) Holding information about you on our records, including sensitive data such as medical information.
- (ii) Engage experts, such as doctors, on your behalf.
- (iii) Using information technology, including email, to guarantee the best quality and most efficient service.
- (iv) Please note that we will use any personal information solely to help your application. We will engage other experts only with your permission, and we will select professionals who we believe to be competent.
- (v) Once your application is concluded we will keep a copy of your paperwork in storage for at least 6 years. You are entitled to a full copy of all records we hold on you, at any time – please ask us if you would like copies of your documents.

Complaints and problems with our service

If at any time you are not satisfied with the service you receive from us please discuss the matter with your lawyer in the first instance. If this is not sufficient to resolve it, please ask your lawyer to register a formal complaint, which will be brought to the attention of the lawyer's manager, who will ensure it is investigated and dealt with.

Termination of services

If you decide for any reason to transfer to another lawyer please let us know so we can transfer a full copy of your file to them.

In the event that we feel we can no longer represent you, we will discuss this with you and send you a formal letter of disengagement.

In the event that you do not wish to continue your application for whatever reason, we will discuss this with you, advise you of your options/possible consequences of your decision if appropriate, and send you a formal letter of disengagement.

Please return the enclosed copy of this letter signed by you by way of acceptance of our terms of business.

We are very pleased to offer our services to you and look forward to working with you. Once again, if you have any further questions please contact us.

Yours sincerely

[name of lawyer]

Declaration

I, (insert name) confirm receipt of this letter. Its contents have been read to me in a language I understand. I confirm that I am happy for [name of lawyer or lawyer's organisation] to act as my lawyer, to request and submit information to the decision-maker, and to advocate on my behalf in relation to my application to be recognised as a refugee. I understand and agree to the terms and conditions as detailed in this letter.

Name: _____

Date: _____

Schedule of Documents and Chronology

Schedule of Documents

Description of document [e.g. passport, identity card, membership card etc.]	Date of document [e.g. state the date of issue of passport, identity card, membership card etc.]	Original or copy	Date of submission to decision-maker [if applicable]

Chronology

Date of event [e.g. date of birth, marriage, arrest, detention, departure, arrival in chronological order]	Brief description of event	Source of description [e.g. application form, personal statement, personal interview. Sometimes the event will be described in more than one document, if so list both so they can be cross referenced]

Sample Pre-Personal Interview Letter to Decision-Maker

Dear Sir or Madam,

We write in relation to our client, named [name of client], whose application for protection is currently before your office.

Please find enclosed a completed personal statement which we submit in advance of her substantive personal interview, which is scheduled for [date of personal interview].

We request that [male or female] interpreter in the [language and dialect of interpreter] be provided for our client's interview, to ensure clear and accurate interpretation.

As stated in her personal statement, our client is a victim of torture and awaits an appointment for completion of a medico-legal report. We request that no decision be made or issued on our client's application before that report is submitted.

We request that our client's personal interview be conducted with due regard to her personal circumstances, particularly that she is a victim of torture.

In addition, we submit that the recent deterioration in the security situation in our client's country of origin indicates that our client has a well founded fear of persecution and is in need of protection. Submissions relating to our client's case will be submitted after our client's personal interview. I [name of lawyer] will be attending our client's personal interview.

Please do not hesitate to contact me if you require further information.

Yours faithfully

Sample Template of Post-Personal Interview Submissions

Dear Sir or Madam

As you are aware we represent the [name client].

We make the following brief submissions in light of our client's interview on the [insert date].

Enclosed bundle of documents:

[refer to any documents submitted e.g. country information, news reports and government statements. If documents are numbered state how the document is referred to in the submissions, e.g. "where a document is cited in these representations, the quotation will be followed by brackets containing the relevant page number (e.g.[1]). The relevant quotation is also underlined in red ink."]

Application summary:

[give a brief, clear summary of your client's application here]

Application under the Refugee Convention and subsidiary protection:

[give a summary of the persecution experienced and feared and a link to the refugee convention and subsidiary protection]

[if your client has a particular profile that requires highlighting e.g. she is particularly vulnerable, do so here]

[highlight here the Convention reason that your client engages]

[refer to any case law that supports your submissions]

[set out any risk to any dependent family member]

State protection and internal protection:

[If state protection and internal protection are being considered by the decision-maker, for example a particular area of your client's country was suggested to her as being safe during the personal interview, reference here why it would not be appropriate.]

Country of origin information:

[Summarise and reference supporting country of origin information here. Make sure that the material refers to your client's particular circumstances rather than general material. If material is particularly relevant quote it in full.]

Supporting evidence

[Reference here any supporting evidence such as a medical report or country expert, its relevance and the authority of its author.]

Thank you for your consideration of these submissions.

Yours faithfully

Sample Code of Conduct for Interpreters

Code of conduct for interpreters

Introduction

The role of the interpreter is an integral part of the service which is offered to clients of [name of organisation]. This Code of Practice has been developed to ensure that the interpretation services provided reflect as much as possible established best practice.

We recognise that a client's proficiency in [state here the native language of the country the lawyer is working in] may be insufficient to accurately relate their personal history to the level of detail demanded by the protection process. In such circumstances, it is our policy to engage the services of interpreters. The role of the interpreter is to enable effective communication between the client and lawyer.

Confidentiality

We have a legal duty to protect the confidentiality of all personal information disclosed by our clients in the course of accessing our legal services.

Interpreters, in consenting to accept work, agree to preserve the absolute confidentiality of all information gleaned through their work. In particular you, the interpreter, agree to the following:

- Everything said during a consultation is subject to absolute confidentiality and must not be revealed to third parties under any circumstances;
- You must not discuss the particulars of an individual client's application with anyone, including other staff – your role is to facilitate communication, not to give your opinion on the information being communicated;
- Where you have previously met, interacted with, or heard information about the client (or any member of his / her family) you must immediately reveal this, in private, to the staff member who is conducting the interview. If this becomes apparent to you during a consultation you must stop the interview immediately so that you can speak to the lawyer in private outside the consultation room;
- You must not reveal that any individual is (or was) a client of [name of organisation]. If you meet a client of [name of organisation] outside of the office you must take particular care not to inadvertently disclose this to third parties.

Role of interpreters

The role of an interpreter is to convey the words spoken by the lawyer and client accurately, completely and objectively without altering, omitting, adding, editing or summarising anything stated or written by the parties, and without adding your own explanation.

Interpreters shall limit themselves to interpreting or translating, and shall not give legal advice, express personal opinions to individual clients for whom they are interpreting, or engage in any other activity which may be construed to constitute a service other than interpreting or translating when serving as an interpreter.

An interpreter may not solicit information not otherwise sought by the lawyer or volunteered by the client or attempt to limit the flow of any information.

Sample Code of Conduct for Interpreters

Role at Initial Interview

- Please arrive at least 10 minutes before the scheduled appointment. We would ask that interpreters wait in a different area to that of the client. Interpreters should not speak to clients prior to the interview.
- Your initial interaction with the client should be in the presence of the lawyer who engaged you. At this time, if the lawyer does not introduce you, you should be asked to be introduced and for it to be explained that you are an interpreter and for a description of your role.
- If you already know the client, or have met them previously under any circumstances, it is important that you make the lawyer aware of this immediately.
- At this initial introductory stage, you should also try to establish if there are any real or perceived communication difficulties or conflict of interest between yourself and the client.
- Please ensure that your mobile is off before commencing interpretation.

Role during an interview

- You should always use the first person singular when interpreting. If the lawyer refers to you, you should use the third person singular, referring to yourself as 'the interpreter' and not 'me, or I'.
- Always interpret as close to the original speech and its meaning as possible, saying things in the same order as the client did.
- Never embellish or add to what was said. You should not correct erroneous facts or statements that may occur.
- If a word is used that you do not know, never guess what it is. Stop, and tell the lawyer that you need clarification and ask the client to explain the word or expression to you. However, do not enter into lengthy conversations with either party unless necessary for communication purposes, in which case you would inform the other party of your behaviour and intention.
- If the client or the lawyer speaks too fast or for too long, gently stop them. If necessary, you should explain to the lawyer or client that they need to speak more slowly or say only one or two phrases at a time, so that you can interpret what has been said as accurately as possible.
- Do not hesitate to ask the lawyer to clarify or repeat what she has said if you do not understand the meaning of what has been said. If you do not understand something the client has said, tell the lawyer and she can then rephrase or repeat the question. It is extremely important that there are no misunderstandings or miscommunications during the consultation.
- If you feel uncomfortable with any aspect of the interview, please let the lawyer know immediately.

Interaction with clients outside of appointments

- If the client asks for your phone number, or requests to meet with you, should indicate that you are not permitted to do so.
 - If you meet the client outside of an appointment by chance, you are not permitted to acknowledge that they are a client, or to discuss their application with them.
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Declaration

I have read and understood this Code of Conduct and agree to adhere to every aspect of it during my work as an interpreter.

Signature

Date

Name

Notes

