

## ASSESSMENT OF AN ASYLUM APPLICATION

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### The assessment of an asylum application

The Commissioner General for Refugees and Stateless Persons examines each application for asylum **individually**. To this end, he or she takes into account all elements in the administrative file and considers the concrete situation in the country of origin at the time of the decision. In this investigation, the Commissioner General always takes into account whether the applicant belongs to a vulnerable group and/or whether they require special procedural guarantees.

The applicant is subject to an **obligation to cooperate**. At the start of the procedure they must provide all elements to substantiate their application as soon as possible, to allow the Commissioner General to take a decision after examining the case. The elements consist of statements and all documents the applicant has regarding his or her age, background, also that of relevant relatives, identity, nationality/ies, country/ies and previous place(s) of residence, previous applications for international protection, travel routes, travel documents, and the reasons why they are applying for international protection.

The CGRS gathers the relevant elements accompanying the application together with the applicant. The **obligation to collaborate** implies that the CGRS uses its investigation methods to collect all necessary information in order to, together with the elements provided by the applicant, assess the credibility of the application and then decide on the merits of the application for international protection.

The main consequence of the obligation to cooperate is that the CGRS collects accurate and up-to-date information about the general situation and all relevant facts in the applicant's country of origin and, if necessary, about the countries of transit.

The **burden of proof** with respect to the merits of the application lies with the applicant. He or she has to demonstrate that the application is justified and provide the concrete elements for their individual case. The applicant's statements must be correct and coherent and not contrary to generally known facts. Where possible, the applicant must provide documents.

First of all, the Commissioner General will study the **credibility** of the statements and assess the probative value of submitted documents. When an applicant fails to support some of his or her statements with documentary or other evidence, their story will be considered credible and they will be granted the benefit of the doubt by the Commissioner General if they fulfil all of the conditions below:

- they are making a genuine effort to substantiate their application;
- they submit all relevant information or provide a satisfactory explanation for not doing so;
- they make coherent and plausible statements;
- they are considered credible on the whole.

Then, the Commissioner General tests the application against the national, European and international legal criteria for the granting of a protection status. The Commissioner General determines whether the applicant qualifies for the refugee status. If this is not the case, the Commissioner General examines whether the applicant qualifies for the subsidiary protection status.

## Assessment of the refugee status

Applicants are eligible for refugee status when they simultaneously fulfil the following **criteria**:

- they have a well-founded fear;
- of persecution;
- they fear persecution because of their race, religion, belonging to a certain social group, political opinions or nationality;
- they are outside their country of origin;
- they cannot or do not want to ask for protection from their country of origin.

If the applicant complies with these criteria, the Commissioner General studies whether he or she does not fall under one of the exclusion clauses under Article 1 D, E or F of the Geneva Convention.

### Well- founded fear

A personal and well-founded fear of persecution is decisive to be recognised as a refugee. Applicants cannot prove this by merely referring to high-risk profiles, human rights reports and the general situation in the country of origin.

The fear is always tested against **objective observation** of the situation in the country of origin. First of all, applicants must demonstrate that there are facts and circumstances that constitute a well-founded fear of persecution. The fear must still **exist at the time of the investigation**. In this investigation the Commissioner General bases his or her judgement on the actual situation in the country of origin at the time of the decision as well as on the applicant's individual situation and personal circumstances.

The fear is well-founded when there is a reasonable likelihood that the applicant will be persecuted on his or her return.

The finding that the applicant has already been persecuted or threatened directly with persecution in the past is a clear indication that the fear is well-founded, unless there are good reasons to assume that this persecution will not occur again.

If, according to objective assessment, the risk of persecution is deemed not to comply with the criterion for well-founded fear, subjective elements can play a role. This can be the case, for instance, when the applicant's subjective fear is related to traumas or specific vulnerabilities.

### Persecution

There is persecution if serious violations of human rights occur. Not every violation of human rights is considered persecution. In the assessment of whether there is persecution, the main question is not whether a human right has been violated, but which human right, to what extent, and in what way.

The seriousness of the violation can be deduced from the nature or the repetition of the acts. Acts of persecution must be of such a serious nature or occur so often that they constitute a violation of basic human rights (e.g. the right to life, the prohibition of torture, the prohibition of inhumane or degrading treatment, prohibition of slavery or forced labour).

Acts of persecution can take the form of:

- acts of physical or mental violence, including acts of sexual violence;
- legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

- prosecution or punishment which is disproportionate or discriminatory;
- denial of judicial redress, resulting in a disproportionate or discriminatory punishment;
- prosecution or punishment for refusal to perform military service, in particular during a conflict, when performing military service would include crimes or acts falling within the scope of the grounds for exclusion;
- acts of a gender-specific or child-specific nature.

Discrimination and the denial of certain rights do not constitute persecution in themselves. However, discriminatory measures which are so systematic and far-reaching that fundamental human rights are violated, making the applicant's life in the country of origin unbearable, do constitute persecution.

There can be persecution on the part of the State. Likewise, non-State actors can be actors of persecution on condition that the State or organisations that control the territory are unable or unwilling to offer protection.

Applicants do not necessarily need to be targeted personally by the actor of the persecution. The fear of persecution can also be based on experiences of family and friends or other members of the same ethnic or social group.

## Reasons for persecution

The definition of refugee presupposes a relationship between the fear of persecution or the lack of protection and one or more of the following five reasons: race, religion, nationality, belonging to a certain social group or political conviction.

The fear of persecution can be directly related to one or several of these five reasons. It is also possible that the fear is connected to one or more of the reasons imputed to the applicant by the actor of the persecution.

## Being outside the country of origin or main residence

A refugee is **outside the country** of which he or she is a national or outside the country of his or her main residence in the case of a stateless person. A 'refugee sur place' can be granted a protection status based on new developments or activities after leaving his or her country of origin.

## Actors of protection

The Commissioner General examines whether protection is available in the country of origin. Taking into account the substitute nature of international protection refugee status is only granted when the applicant cannot or does not want to ask for protection from his country. Actors of protection are the State or parties or organisations, including international organisations, which control a substantial part of the territory.

The Commissioner General assesses whether the actor of protection is taking reasonable steps to prevent persecution, such as an effective legal system for the detection, prosecution and punishment. The applicant must also have access to the protection. The protection offered by the national authority must be effective. The protection does not need to be absolute and prevent any act committed by third parties.

Even if sufficient protection is available in the country of origin, it is possible that the applicant does not wish to avail himself or herself of this protection. The reasons for this can be related to a fear of persecution.

## Assessment of the subsidiary protection status

Applicants are eligible for subsidiary protection status when they simultaneously comply with the following criteria:

- they are not refugees;
- in case of a return to their country of origin or main residence there are substantial grounds for a real risk of serious harm;
- they cannot or do not want to ask for protection from their country of origin.

The Commissioner General examines whether the applicant who complies with the criteria for the subsidiary protection status does not fall under one of the exclusion clauses contained in the Aliens Act.

### No refugee

Each application for international protection is automatically first examined in the framework of the refugee status and then examined according to the criteria for subsidiary protection.

Subsidiary protection is subsidiary to the protection offered by the Geneva Convention and must only be analysed once it has been established that the applicant does not qualify for refugee status.

### Substantial grounds for a real risk

The terms 'substantial grounds' and 'real risk' are based on the jurisprudence of the European Court of Human Rights (ECHR) on Article 3 of the European Convention on Human Rights (ECHR). The decisions of the Court of Justice of the European Union also serve as a guide.

The burden of proof of a real risk lies with the applicant. Mere reference to the general situation in the country of origin does not suffice to conclude that the applicant is exposed to a real risk of serious harm in case he or she returns.

Substantial grounds imply a **real, personal and foreseeable risk**. The Commissioner General takes into account the general circumstances in the country of origin and the applicant's personal circumstances at the moment the decision is taken. There must be more than a mere possibility. The risk must **exist at the current time** and not be a mere possibility. Applicants cannot prove that a real risk of serious harm exists by merely referring to possible future events.

The finding that the applicant has already suffered serious harm or been threatened directly with such harm in the past is a clear indication that the risk of serious harm is real, unless there are good reasons to assume that this serious harm will not occur again.

### Serious harm

Serious harm consists of:

- death penalty or execution;
- torture or inhumane or degrading treatment or punishment;
- a serious threat to a citizen's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

There can be serious harm on the part of the State. Likewise, non-State actors can be actors of serious harm on condition that the State or organisations that control the territory are unable or unwilling to offer protection.

For persons who suffer from a serious illness and cannot be treated in their country of origin or residence, there is a specific procedure, namely a request for authorisation to stay addressed to the Minister or authorised representative based on Article 9ter of the Aliens Act. This does not fall within the competences of the CGRS.

### **Death penalty or execution**

A death penalty means that the applicant will be put to death by the State as their official punishment for a crime through a judicial decision (death sentence). In the case of an execution no judicial decision is involved. This does not mean that these applicants automatically receive subsidiary protection. The exclusion criteria need to be applied to some of them.

### **Torture or inhumane or degrading treatment or punishment**

This form of serious harm results from Article 3 ECHR. Article 3 of the ECHR contains the absolute prohibition to send someone back to a territory where there is a risk of torture, inhumane or degrading treatment or punishment. This prohibition also applies when a person is returned to a State which will, in turn, send him back to a territory where there is a risk of such treatment. The definition of torture can be found in Article 1 of the Convention against Torture.

The applicant must provide sufficient concrete elements to demonstrate that he or she is personally exposed to a risk of inhumane or degrading treatment in case of return. In analogy with Article 3 ECHR, such treatment consists of an assault on someone's physical integrity or freedom. A mere claim or simple fear of inhumane treatment in themselves is not enough to constitute a violation of Article 3 ECHR. There must be specific individual circumstances from which an increased risk of treatment contrary to Article 3 ECHR can be deduced.

Only in the exceptional case where an applicant belongs to a group which is systematically exposed to ill-treatment is it unnecessary for the applicant to prove that their situation is different from that of others. Belonging to such a group is sufficient to determine that there is a real risk.

### **Indiscriminate violence in the context of armed conflict**

Armed conflict is defined as confrontations between the official armed forces of a State and one or more armed groups, or between two or more armed groups. The level of organisation of the armed forces in question or the duration of the conflict are irrelevant.

The existence of an armed conflict can only lead to the granting of a status when the armed confrontations involve indiscriminate violence. This implies that the violence is directed at citizens regardless of their identity or personal circumstances. The applicants do not need to prove that the violence is aimed directly at their person. However, the violence must constitute a serious threat to the applicant. In other words, an individual threat is not required, but the applicant does have to prove that there is a link to his or her person.

The CGRS examines various objective elements in order to assess the real risk, such as the number of civilian victims, the number of incidents, the intensity of these incidents, the parties involved in the conflict, the targets aimed for, suicide attacks in civilian areas, aerial bombings, the impact of the violence on daily life, etc.

When indiscriminate violence in the conflict situation occurs at an exceptionally large scale, it is assumed that all citizens risk suffering serious harm merely as a result of being present. In such case, the Commissioner General does not (or hardly) take into account applicants' personal circumstances.

In other cases of violence, where such an exceptional level of violence is not reached, the individualisation criterion is met when asylum seekers belong to a group of potential victims or when there are elements that indicate that they are particularly affected due to factors that are specific to their personal circumstances.

The more widespread the violence is, the less individualisation will be required.

A mere reference to the applicant's nationality is not enough. The finding that applicants have not come recently from an area of conflict is not a reason to deny them subsidiary protection status. However, they do have to provide a correct description of their situation before they left their country, in order to enable the Commissioner General to assess the need for protection.

Finally, being a civilian is a necessary condition for subsidiary protection status to be granted.

### Being outside the country of origin or main residence

The definition does not require applicants who are eligible for subsidiary protection to be outside the country of their nationality or main residence.

However, this condition can be deduced from the other aspects of the definition, namely: **on return to the country of origin** the applicant must demonstrate that there are substantial grounds for a real risk of serious harm.

### Actors of protection

The Commissioner General examines whether protection is available in the country of origin. Taking into account the substitute nature of international protection a status is only granted when the applicant cannot or does not want to ask for protection from his country. Actors of protection are the State or parties or organisations, including international organisations, which control a substantial part of the territory. The Commissioner General assesses whether the actor of protection is taking reasonable steps to prevent persecution, such as an effective legal system for the detection, prosecution and punishment. The applicant must also have access to this protection. The protection offered by the national authority must be effective. The protection does not need to be absolute and prevent all acts committed by third parties.

In circumstances where there is a risk of serious harm that comes from the state, or in a situation of indiscriminate violence in the context of armed conflict, it is generally assumed that no protection is available.

Even if sufficient protection is available in the country of origin, it is possible that the applicant does not wish to apply for this protection. The reasons for this can result from the serious harm or the vulnerable situation suffered.