

Judicial protection and vulnerable categories

How vulnerable persons are dealt with before the French National Asylum Court in relation to evidence and credibility assessment

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The French legal and procedural framework takes into consideration vulnerability.

Firstly, asylum seekers need that their claim for asylum remains confidential. The French law enshrines the **principle of confidentiality** the application for asylum is confidential according to the APD (article 30) and the French code (CESEDA¹). OFPRA (Office français de protection des réfugiés et apatrides) and CNDA (Cour nationale du droit d'asile) must not disclose any information on asylum applications to the authors of persecution or serious harm. Moreover, police authorities, when they expulse foreigners whose asylum claim has been rejected, should not disclose the existence of the said claim to the authorities of the country of origin. On the contrary, according to an important ruling of the French Conseil d'Etat, the person could argue, in a subsequent application, that she will be exposed to persecution or serious harm in her country of origin because of the disclosure of that information. The judge would consider his subsequent application is admissible on the ground of this new element and appraise if the argument is well founded or not, i.e. if it has prejudicial consequences on his situation (CE 10 February 2016 M. I. n° 373529 B).

The application for asylum can be registered under ordinary or accelerated procedure. If it has been registered under the accelerated procedure, OFPRA may decide to examine the application for asylum under **ordinary procedure** where it appears necessary, due to past serious violence or the asylum seeker's minority (cf. article 24 APD).

The French National Asylum Court assesses the administrative procedure before OFPRA. The Court exerts full jurisdiction control and substitutes its appreciation to OFPRA's. Consequently, it generally does not quash OFPRA decisions on the ground of procedure. However, it does so where the OFPRA did not examine the application or where the asylum seeker has been deprived of a personal interview (while OFPRA was bound by the law to give the opportunity of a personal interview), or where the applicant has not been able to understand the questions and to answer because of **problems of language**. Consequently, the judge assesses if the linguistic conditions of the interview (when criticized by the applicant) were satisfactory.

- CNDA 18 September 2017 Ms K. n° 17010707 C: in this judgment the Court considered that the applicant, national of Turkey with Kurdish origin, who argued that she should have been interviewed in Kurdish, was able to understand the

¹ Code de l'entrée et du séjour des étrangers et du droit d'asile.

questions posed by the agent of OFPRA and could express her point in Turkish while not heard in Kurdish

- CNDA 13 October 2017 Ms M.T. n° 17027362 C: in that case the applicant, national of the Democratic Republic of Congo, discussed the language of the interview before OFPRA. The Court noted that she indicated in her file that she wanted to be heard in French and refused an interpreter in Lingala; moreover, the record of the personal interview proved that she understood and could answer the questions.

The judge can decide specific measures of instruction to better appraise the vulnerability: he can require medical certificates, certificate made by a psychologist etc. He will also do all necessary researches (COI) to appraise the situation of specific groups of vulnerable persons (victims of human trafficking, LGBT, children exposed to mutilation etc.).

The French National Court of Asylum pays the utmost attention to medical certificates that confirm physical and or psychological traumas. In some cases where CNDA judgments overlook or don't appraise such elements of proof of past persecution/ serious harm and of current physical and/or psychological after-effects the French Conseil d'Etat quashes CNDA judgments: CE 10 April 2015 Mr. B. n° 372864 B for a national of Sri Lanka; CE 11 April 2018 M. A. n° 412933 C for a national of Somalia; CE 21 June 2018 M. and Ms P. n° 413978 C for Russians of Armenian origin.

While the hearing of the applicant is, in most cases, indispensable to appraise the credibility of the case and to grant a protection, in a judgment concerning a national of Rwanda of Hutu origin whose parents were assassinated and who was accused of links with the Hutu opposition and endured persecution, the CNDA relied on a medical certificate that established that the applicant' serious trauma explained that he could not appear before the Court because of his psychological trauma: CNDA 23 December 2013 M. B. n° 12012350 C+. The Court granted him Refugee protection.

e According to French law hearings are public². However, the applicant's vulnerability generally requires that the hearing be confidential, because of past persecutions or serious harm, of subsequent current traumas, of the minority of the applicant etc. When vulnerability is at stake, the **hearing** will generally take place with **closed doors**, either required by the applicant, either decided by the judge.

Moreover, the judge will adapt the questioning to the particular vulnerability of the applicant, the respect due to human dignity, in accordance with the EU Charter and the CJUE case law, in particular for applicants who invoke sexual orientation. He will pay due attention to the psychological situation of the person, taking into consideration past persecution or serious harm and current trauma that result from past violence. He will endeavour to question the applicant with due respect, tact, discretion. While, so far judges were not offered real information, now such training and information are provided.

The appraisal and the final decision should not be affected by the applicant's vulnerability. His / her **difficulties to expose his/ her case**, remember elements of facts, be very precise, because of his/ her vulnerability, will be **taken into consideration** by the judge.

² Conversely, the personal interview before the OFPRA is confidential.

In the end, the **drafting of the judgment** should avoid clumsy expressions or extensive developments on past persecutions that could hurt a vulnerable person.

The case law provides many examples of how **the judge takes into account the applicants' vulnerability and vulnerable applicants. In many cases, the French National Asylum Court grants an international protection to vulnerable asylum seekers and applicants.**

Refugee protection is generally granted on the ground of membership of a particular social group, but also on a political or ethnic ground.

In the absence of a conventional ground (Geneva Convention), in particular because no particular social group can be identified, where the victim endured serious harm falling under article 15 a) or b) of the QD applicants are granted **subsidiary protection**.

In many cases vulnerable persons are **persecuted because of their gender**: gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting, for example, in genital mutilation, forced marriage. According to article 10 QD gender related aspects, including gender identity, is given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.

➤ **Victims of forced marriage → Refugee Protection**

In two very important judgments, classified R in the French Administrative judiciary Data Base, that is the highest level³, the **French National Asylum Court ruled that, where forced marriage flows from well-established customs and constitutes a social rule, women that refuse a forced marriage, are members of a particular social group**: CNDA 20 July 2018 Ms E. n° 15031912 R for a national of the Republic of Guinea (Conakry) and CNDA 20 July 2018 Ms D. n° 17042624 R for a national of Mali.

The Court considered that they are victims of a **gender related persecution**. Consequently, they fall under the Geneva Convention and not any more under subsidiary protection. In fact, before that important ruling, women victims of a forced marriage were granted international protection. But according to CNDA case law, where the CNDA identified a particular social group (because of strong customs and traditions, approved or tolerated by the authorities) it granted the Refugee Status as members of a particular social group (CRR⁴ SR 29 Juillet 2005 Ms T. n° 04046266/519803 R. On the contrary, it granted subsidiary protection because of serious harm falling under that article 15 b) of the QD). Such an alternative was highly open to criticism as those women generally endured the same painful treatments, threats or violence and fled their country to escape such a forced marriage. It seems it did not pay sufficient attention to the particular vulnerability of those women and to the gender-related persecution they had fled. Of course, at this time, the law was not so clear, so assertive about gender-related persecutions.

³ The French Administrative Judiciary Data Base gives 3 levels for Conseil d'Etat judgments: A, the highest, then B and C; and 3 levels for other courts (Cour administrative d'appel, Tribunaux administratifs and Cour Nationale du Droit d'Asile): R, the highest, then C+ and C.

⁴ CRR Commission des recours des réfugiés (former CNDA); SR = Sections réunies (grand chamber).

It appears that the new case law which is more protective, as it grants **Refugee protection**, gives full consideration to the situation of this particular category of vulnerable persons. The judgment reproduces the judicial principles of appraisal of the notion of particular social group that results from the French Conseil d'Etat case law⁵ and is in conformity with EU law and CJUE jurisprudence. The highest Administrative Court did not rule on the issue of forced marriage since the entry into force of new EU provisions on vulnerable categories and victims of gender related persecutions that constitute women forced to a marriage they refuse.

➤ **Victims of genital mutilation and/or forced marriage → Refugee Protection**

- CNDA 18 May 2017 Ms H. n° 15013446 C: a woman, national of Djibouti, exposed to a forced marriage,
- CNDA 19 April 2017 Ms C. n° 16034664 C: a woman, national of Ivory Coast exposed to genital mutilation and forced marriage,
- CNDA 2 February 2018 Ms A. n° 17034030 C: a minor woman (represented by her mother before the Court), national of Chad, victim of genital mutilation aged 8 years and exposed to forced marriage at the age of 12.

➤ **Minor girls, born in France, exposed to genital mutilation in case they were sent to their parents' country → Refugee Protection**

In several very important 2012 rulings, the French Conseil d'Etat, in its highest chamber (Assemblée), judged that minor girls, born in France, that would be exposed to genital mutilation if sent to their country of origin (in Africa), fall under the Geneva Convention as **members of a particular social group** and must be granted **Refugee protection**: CE Assemblée 21 December 2012 Ms D.F. n° 332491 A. The case concerned a girl, national of Ivory Coast.

Consequently, following the French Conseil d'Etat ruling, many CNDA judgments grant Refugee protection to minor girls, born in France or in their parents' country, who are exposed to mutilation in case they were sent to their country:

- CNDA 13 February 2014 Ms K n° 12022774 for a minor girl, national of Ivory Coast,
- CNDA 9 June 2016 Ms D. n° 16001323 for a minor girl, national of the Republic of Guinea (Conakry).

➤ **Persecutions on the ground of sexual orientation (members of a particular social group) → Refugee Protection**

The French Council of State (Conseil d'Etat) quashed a judgment of the CNDA considering that the Court did not pay the required attention to the applicant's declarations that were clear, detailed and coherent. While the Conseil d'Etat only decides on points of law and does not appraise facts ("juge de cassation"), it ruled that the Court had distorted the facts of the case ("dénaturation des pièces du dossier"): CE 17 June 2016 Mr. O. n°391534 C. It sent back the case to the Court.

But, in many cases, where the sexual orientation and the risk of persecution are satisfied the applicant is granted Refugee Protection.

⁵ In cases dealing with genital mutilation and homosexuality.

- **Countries where homosexuality is criminalized: → Refugee Protection**
 - CNDA 2 February 2017 M. O. n° 14033258 C+: national of Nigeria (judgment rendered following CE 17 June 2016 Mr. O. n°391534),
 - CNDA 30 May 2017 M. S. D. S. n°16015675 C: national of Syria,
 - CNDA 31 May 2017 M. S. n° 17002801 C : national of Jordan,
 - CNDA 19 July 2018 M. N. n° 17025388 C : national of Liberia.
- **Countries where homosexuality is not criminalized but not admitted among society: → Refugee Protection**
 - CNDA 7 March 2017 M. L. A. n°16023776 C+: national of Ukraine,
 - CNDA. 31 May 2017 M. O. n° 16014463 C: national of Mongolia,
 - CNDA 14 May 2018 M.F. n°17052687 C: national of Venezuela.

The French National Asylum Court identified more **particular social groups related to other vulnerable categories** such as victims of human trafficking, slaves and former slaves, albinos.

➤ **Victims of human trafficking → Refugee Protection**

In a grand chamber ruling, the French National Asylum Court decided that Nigerian young women who were enrolled in a human trafficking network whose members forced them to prostitution and could escape it (or were currently trying to, for instance denouncing their members to the French police or lodging a complaint before courts), belong to a particular social group: CNDA grand chamber 30 March 2017 Ms F. n° 16015058 R. The Court paid consideration to their **particular vulnerability**. In fact, women enrolled in those networks who hope to get through poverty and help their family, are **often victims of trickery, of physical and psychological constraint** (on the side of their family who hope they will send back a lot of money they will earn in Europe; and on the side of the procurers, men or women, “mama”); moreover those who come from Edo State were submitted to a **witchcraft ritual** called “juju” that put on them very significant moral and psychological pressure (threats of reprisals towards their families). Nigerian law and measures reveal helpless while unsuccessful women, who escape from the networks and come back without money but instead with heavy so-called debts towards the network (for the costs of the journey) are rejected by their families and the society. The applicant was granted **Refugee protection**.

A similar approach is applied for women, victims of human trafficking, who come from:

- **Kosovo:** CNDA 15 March 2012 Ms O. n° 11017758; CNDA 8 April 2016 Ms H. n° 15034770,
- **Ukraine:** CNDA 12 July 2012 Ms Z. n° 11026228; CNDA 15 November 2013 Ms B. n°13015620,
- **Albania:** CNDA 19 May 2015 Ms V. H. n° 13027429; several other judgments, for instance, CNDA 17 December 2015 Ms I. n°15019916.

In all these case, the Court grants Refugee protection on the ground of membership of a particular social group.

➤ **Slaves and former slaves → Refugee Protection**

- **Negro Mauritians, enslaved by Arabic tribes (“Maures”) in Mauritania**, are granted Refugee protection on the ground of membership of a particular social group: CNDA 9 March 2011 M. S. n° 09023872 C,
- CNDA 4 July 2017 M. I. M. n°16014605 C: the Court ruled that slaves and former slaves coming from **Niger**, who constitutes very a vulnerable category of persons, belong to a particular social group; in fact they endured social discrimination, full denial of human rights; Refugee protection was granted to a **Touareg** whose ancestors were enslaved,
- CNDA 10 April 2018 M. T. n° 17035868 C: the Court granted Refugee protection on the ground of membership of a particular social group to a **Soninke**, member of an inferior cast within his ethnical group and enslaved by other Soninke, members of a higher cast within the population of Soninke.

➤ **Albinos → Refugee Protection**

Refugee protection was granted to a national of Nigeria who was Albinos and suffered persecutions because of his specific characteristic on the ground of membership of a particular social group CNDA 13 February 2017 M. E. n° 16017097 C. In fact, Albinos are exposed to prejudices, ritual practices and/or discriminations and are very vulnerable.

➤ **Vulnerable isolated women persecuted under ethnical and/or political grounds → Refugee Protection**

Where a particular social group related to gender issues cannot be identified refugee status is however granted if the **sexual violence is motivated by political and/or ethnic considerations**. The CNDA, in grand chamber, decided that **in the North and the East of Sri Lanka, Tamul isolated women** (with no family, widows etc.) are particularly vulnerable and may be persecuted by members of the military forces because of their family links with LTTE fighters. The applicant was granted **Refugee protection** related to political reason: CNDA GF 8 December 2016 Mme K. n° 14027836 C+.

➤ **Victims of violence when they were minors → Refugee Protection or Subsidiary Protection**

Some adult applicants were victims of moral and/or physical violence, including sexual violence (rape, trafficking) at the time they were children and still have real and current threats related to their past persecutions or serious harm. Accordingly, they may be granted Refugee Protection or Subsidiary Protection depending on the identification of a reason falling under the Geneva Convention.

In this way, the French National Asylum Court granted **Refugee protection** to an **applicant of Democratic Republic of Congo who came from North Kivu and, while a child, had been enrolled by force** in the “Congrès national pour la défense du peuple” (CNDP) and forced to commit crimes. When he came back to his village, he received threats of death on the part of the population and the family house was burnt down. The Court ruled that his threats fell under the Geneva Convention as **he was attributed the political opinions of the group that he forcibly integrated**. The judge paid consideration to his **situation of**

particular vulnerability and constraint at the time he was a child, consequently decided that the exclusion clause was not relevant and it granted him Refugee protection: CNDA 20 December 2010 M. N. n° 10004872 C+.

In the same way, the French National Asylum Court granted **Refugee protection** to a **young Afghan** adult who fled his country at the age of 16 and had been a **victim of “Bacha Bazi”** which is kind of custom or practice in use among men, during parties, to have children or teenagers they forced to dance dressed like young girls and generally abuse them. The applicant, an only child, orphan, who lived with his mother, had been a **victim of such practices, including sexual violence, at the age of 15** and then rejected by the local community and religious authorities who **accused him of being homosexual and have practices prohibited by the Coran**. He had also been raped during his journey to France. He was victim of a heavy psychological trauma. The CNDA ruled that he justified real and current threats of persecution founded on a **religious reason**: CNDA 21 June 2016 M. S.Q. n° 15004692 C.

In another judgment the Court granted **Subsidiary protection** to a **young man, national of the Democratic Republic of Congo and living in Kinshasa**, who lost his parents when he was ten and then as he wandered in streets was **forcibly enrolled in a gang of young criminals called “Kuluna”, victim of physical violence, including sexual violence and forced to commit crimes and use of violence**. As he escaped the gang, he feared extra judiciary execution on the part of the authorities and on the side of the victims of his past crimes. The Court considered, on the one hand, that his fears had **no reason falling under the Geneva Convention** but under Subsidiary protection and, on the other hand, that exclusion of Subsidiary protection was not relevant as he committed crimes while he was a minor child and under physical and psychological constraint. He was granted Subsidiary protection a) and b): CNDA 18 October 2016 M. V.N. n° 15031596 C.

There are **other examples of Subsidiary Protection** granted on the ground of a **serious harm**, falling under article 15 a) or b) QD where a particular social group cannot be identified.

- CNDA 21 December 2016 Ms A. n° 15026470 C: women of Sahraoui origin, born in a refugee camp in Tindouf (Algeria) and living in West Sahara controlled by Polisario, victim of **domestic violence** on the part of her father in law,
- CNDA 15 September 2017 Ms A. A. n° 17015488 C: woman, national of Libya, victim of **rape and violence from gangs of criminal** that operate in Libya after they killed her husband who fought them,

CNDA 23 March 2018 Ms S. n° 17037345 C: woman, national of Somalia, **charged of adultery and condemned to death penalty by an Islamic court**.