

TRAINING MODULE

"QUESTIONING ON SENSITIVE ISSUES"

HANDOUT

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QUESTIONING ON SENSITIVE ISSUES

TRAINING MODULE

(PART II)*

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QUESTIONING ON SENSITIVE ISSUES

1. INTRODUCTION

Obtaining evidence on sensitive areas of a refugee claim is not easy. For example, there are powerful disincentives to testifying about sexual abuse, including the fear of not being believed and the humiliation of having to talk about such experiences, through an interpreter, and in front of strangers who often do not share the claimant's social and cultural background.

In many societies, sexual assault is seen as a violation of community or family morality. This has two consequences: it identifies the community or family as the victim rather than the individual and it defines the harm done in terms of honour (that of the community or the family) rather than in terms of an assault on the emotional and physical integrity of the individual. One can readily understand why a person brought up with such values would have great difficulty giving testimony about sexual assault and abuse.

While this section focuses on sensitive issues in gender-based claims, the questioning skills are not limited to such claims. In general, there are many potential issues that are or can become difficult to deal with in terms of questioning (eg, torture) in the course of a refugee hearing. Therefore, the skills one develops in this area are readily transferable.

The same questioning techniques employed in these sensitive areas can be used in other areas. However, more care must be exercised in how one questions. The purpose of all questioning is to get relevant evidence on the record that can be relied upon to

make decisions. Inhibitors (both the questioner's and the claimant's) may make this difficult when questioning about sensitive issues. Questioners must learn how to frame questions so as to get the most reliable evidence possible.

Finally, it is important to remember that just because it is difficult to question on certain issues, this does not mean that it should not be done. The job of the CRDD is to make refugee determinations based on relevant and reliable evidence. This requires evidence to be tested. Failing to do this may result in a decision based on evidence that is not very reliable which in turn casts doubt on the decision itself.

2. SETTING THE STAGE:

A) The Composition of the CRDD Panel and the RHO

Being a competent questioner has nothing to do with gender. The mere fact of being a woman is no guarantee that the requisite qualifications of a good questioner on gender issues will be met. Nevertheless, the issue of who should question the claimant and interpret the proceedings has more to do with the attitude of the claimant than with the ability of the officials. A female claimant will not easily tell a male that she has been raped. Women who have been the victims of sexual assaults and those who have been persecuted in other ways because they are women suffer from a sense of powerlessness. Since power is almost always exercised by men, some female claimants may see the male questioner as representative of the power that has led to their persecution. For this reason,

when counsel requests an all female panel, RHO and interpreter for gender cases, the informal policy of the CRDD is to try to accommodate that request.

B) Non-verbal Communication

A substantial portion of nonverbal communication that takes place is not consciously noted. But it is an extremely important aspect of communication for we make many important decisions on the basis of nonverbal cues.

Information is communicated nonverbally through eye contact, facial expressions, body posture and body tension, hand gestures and body movements, and the way we position ourselves in relation to another person. It is in the very nature of a refugee hearing that the CRDD questioner is in a position of enormous power relative to the claimant. The danger to be avoided is allowing that disparity in power to interfere with the communication process.

There are, however, several ways to reduce the risk of this occurring. Choosing the proper physical setting, establishing a sympathetic and open atmosphere at the onset of the hearing, advising the claimant of his/her rights, and allowing the claimant to be represented by counsel are important measures that are applicable to all refugee hearings.

When questioning a woman, the questioner should be conscious of nonverbal mannerisms that convey superiority and skepticism, and consciously attempt to change them. Some examples are the tendency of some people to look or stare aggressively or to look elsewhere

while speaking (suggesting the person to whom they are speaking is not worthy of their attention) and the use of large, sweeping and forceful gestures like pointing. Questioners should avoid these nonverbal cues which convey superiority. Eye contact can be maintained without staring. Facial expressions should be appropriate and responsive to the attitude and testimony of the claimant (no loud sighs or rolling of the eyes!). A natural relaxed body posture should not degenerate into an expression of indifference or disdain (slouching, turning the trunk of the body away from the claimant are two examples to be avoided). And gestures such as pointing, clenching fists, finger tapping, and so forth, are decidedly unhelpful.

The behaviour and approach described here can intimidate women and inhibit their testimony. Such conduct, however, has another and perhaps more pernicious effect. Since women are often in a subordinate or dependent position, they become adept in reading signs of approval or displeasure and may attempt to respond with answers that will please the questioner and avoid subjects that will cause disapproval.

C) Explaining the Reason for Your Questions

When it is necessary to go into detail about the circumstances surrounding the abuse to which the claimant has been subjected, it is important to set the stage for your questions. The claimant will be more at ease if she understands why she is being asked to explain what happened to her. Consider the following scenario which attempts to put the questioning in perspective while at the

same time emphasizing to her the importance of her evidence.

- The reason we are asking you to tell us what happened to you in detention is that we need as many of the facts as possible to help us to make a fair and accurate decision about your claim. You will recall that this hearing is held in camera so that no one outside this hearing room is allowed to know anything you say, or to have access to the tapes that are being made, without your permission. Is there anything you wish to ask us about that?

- Please tell us as much about your detention as you can.

- Is there anything else that you would like to tell us at this time? Please go ahead.

3. QUESTIONING

The starting point for all refugee hearings is to assume that the claimant is credible. The normal rules for assessing credibility are to examine the testimony for internal consistency and agreement with known facts, to consider the fluency of the testimony (that is, the incidence of hesitation) as well as its clarity and detail, and lastly, to assess the demeanour of the claimant. All of these standard measures present problems in assessing the credibility of a woman who is the victim of sexual assault, a common form of gender-based persecution. There are two main reasons for this difficulty:

A. The relative paucity of information on the forms of persecution women are uniquely subjected to and the myths about rape that are widely, and erroneously, accepted as fact;

B. The effects of rape trauma syndrome.

A. Although this is slowly changing, few refugee documentation centres have detailed information on the position of women in a

given country, the incidence of gender-based persecution in that country, and the consequences that may befall a woman in the claimant's alleged position if she were to return. This absence of reliable information makes a woman's story difficult to verify but it should not detract from the claimant's credibility. The problem is further exacerbated by the erroneous assumption that certain myths about rape are factually based. Several of these myths that touch upon the credibility of a claimant are:

Myth: Rape is an act motivated by sexual desire.

No. Rape is an act of violence and aggression, of domination and humiliation. Sex is merely the means of assault. Rape is not based on a need for a sexual relationship; it is based on a desire to degrade and control a woman by forcing her to have sex against her will.

Myth: Only certain kinds of women get raped.

Rape can happen to any women regardless of her age, physical appearance, character, lifestyle, ethnic origin or place of residence.

Myth: Women frequently make false allegations of rape.

This is not borne out by statistics or studies. Quite the contrary is true; women are usually extremely reluctant to tell anyone they have been raped. In many countries this natural reluctance is heightened by the consequences of having been raped which may be even more severe than the rape itself.

B. Women who have been sexually assaulted may exhibit a pattern of symptoms that are described as rape trauma syndrome. These include persistent fear, a loss of self-confidence and self-esteem, difficulty in concentration, an attitude of self-blame, and a pervasive feeling of loss of control. When being questioned at a refugee hearing, a woman suffering from this syndrome may show

increasing signs of anxiety as the hearing progresses, such as long periods of silence, blocking of associations, minor stuttering and physical distress. All of these symptoms, if misunderstood, could be used to discredit the testimony of the claimant even though their appearance should, if anything, heighten her credibility.

A final word on the credibility of a claimant: demeanour is the least reliable indicator. Some individuals who have been tortured become emotionally overcome when recalling their ordeals; others can tell of similar experiences as if they happened to a third party. Both can be credible. Some claimants may, out of nervousness, smile or even laugh at inappropriate times. A claimant's culture may influence his/her eye contact and facial gestures. If you focus on what is being said and how it is said rather than on the person who is speaking, you can be more confident that your assessment of credibility is not affected by your own cultural biases. An adverse finding of credibility should only be arrived at after rape trauma, medical reports and the claimant's explanations have been considered and ruled out.

OVERCOMING INHIBITIONS

As we have already seen, women may be inhibited from giving evidence for a variety of reasons. Careful and sympathetic attention to the setting and planning of the hearing, and the adoption of an appropriate attitude by the questioner, will all help to put the claimant at ease.

Further necessary measures are deciphering what the claimant is actually saying (or trying to say) and carefully choosing questions in any given exchange. For example:

Questioner: What happened after the soldier followed you into your house? (1)

Claimant: He looked all over for guns but I told him we didn't have any. He became very angry. (2)

Questioner: Did he threaten you or hurt you? (3)

Claimant: Yes . . . he hurt me. (4)

Questioner: What did he do to you? (5)

Claimant: He treated me badly. (6)

Questioner: What do you mean by "badly"? (7)

Claimant: no response (8)

Questioner: Did he rape you? (9)

Claimant: I think so (10)

Questioner: You think so? Don't you know? (11)

Claimant: I fainted. (12)

This exchange reveals a number of mistakes on the part of the questioner.

The first problem arises with response (3). A question may have been unnecessary. The claimant's previous reply suggests

further testimony will be forthcoming and she may have been searching for the right words to describe a painful experience. If after several seconds she did not continue, minimal encouragement such as a simple "yes" or "go on" probably would have sufficed. The question is also leading in that it introduces an idea (abuse of the claimant) that she has not mentioned herself and is suggestive or what the interviewer considers important. If a question was necessary, it should have been open-ended such as "What did he do then?"

Question (5) is too direct in the context of this particular verbal exchange. A more tentative question such as "Could you tell me what he did?" would convey a more sympathetic attitude.

The claimant's way of responding (6) should have alerted the questioner to the possibility that the claimant was the victim of a sexual assault.

In questions (7) and (11) the questioner is cross-examining the claimant and the questions are unnecessarily hostile. Instead of confronting the claimant with the response (9), the questioner should have shown more sensitivity by again offering minimal encouragement to continue and, if necessary, with a subsequent response like, "I know this is very difficult for you but your testimony is very important; can you continue?".

If a claimant is reluctant or unable to testify, the presiding member may consider the following measures. Shift the focus of the questioning to a non-threatening subject until the claimant regains her composure. Offer verbal reassurance and, if needed, a recess.

Hold a mid-hearing conference, off the record, to decide how to proceed. In extreme cases, adjourn the hearing for a medical or psychiatric evaluation. Depending on the results, it may be appropriate to consider alternatives to oral testimony, i.e., statutory declaration, video-taped statement, etc..

SAMPLE QUESTIONS FOR DIFFERENT SEXUAL ASSAULT SCENARIOS

1. *Sexual Assault is suspected but the claimant has only mentioned being interrogated and insulted while in detention.*

QUESTION: We know that women in your country have sometimes had very bad experiences with the authorities. We also understand that it can be hard to talk about such things because it means re-living painful experiences. Is there anything else that happened to you in detention that you want to tell us about?

QUESTION: If others in your village found out what happened to you in detention how would they treat you and your family?

In question (1) the claimant is being led to an event which she may be reluctant to testify about because it evokes painful memories. At the same time, the questioner is careful not to put words in the claimant's mouth, i.e., sexual assault is not mentioned.

In question (2) a more indirect approach is taken. It may be less threatening for the claimant to describe the social consequences to her of the suspected sexual assault. It is often possible to establish that sexual abuse did take place once the claimant has explained what consequences would flow if her experience in detention were known in her community.

2. *If a sexual assault has been indicated by the claimant but no details have been given thus far.*

QUESTION: We would like to know a little more about the circumstances related to the assault. It is important for us to understand what happened to you. Can you tell us where you were when the incident took place?

Do you remember what you were doing just before you were assaulted?

Was anyone else - family or friend - with you at the time of the attack? If yes, who, and what happened to them?

Did your assailants speak to you? If so, what did they say?

Do you remember what you did immediately after the assault?

Did you tell anyone about the incident?

It is unnecessary to hear intimate details of the sexual assault itself, e.g., Was there penetration? By focussing the questions on the events surrounding the assault any necessary gaps can be filled in and a concrete picture of the larger incident can emerge. Although the questions listed above do not focus on the assault itself, they do require the claimant to provide specific details about the circumstances which can help to establish her credibility. A combination of open and closed questions can establish a rhythm and help the exchange flow more smoothly.

3. *Sexual assault is not mentioned in the claimant's PIF and it comes up for the first time in the claimant's oral testimony.*

QUESTION: Can you explain why there is no mention of the sexual assault in your PIF?

Credibility may be an issue when a sexual assault is not mentioned in the PIF. Rather than asking about this omission at the outset, go through the questioning outlined in scenario number 2. It is advisable to give the claimant the chance to describe what happened to her before asking why the alleged sexual assault was not mentioned in the PIF. In this way, the focus is kept on why she fears persecution rather than on how the evidence is being presented.

CASE STUDY ONE

Background Supplied by the Claimant

The claimant is a 17-year-old married female from a central African country. Three years ago she entered into an arranged marriage with a much older man and the couple have a two-year-old daughter. The claimant's husband and child remain in her country of origin. The claim is based on the ongoing civil war underway in the claimant's country. She states in her PIF that she is afraid of being killed in the rising violence. However, the civil war has not affected her region and is not likely to in the future.

At the hearing:

During the course of questioning the claimant, the following exchange takes place:

Question: Since being in Canada have you made any efforts to communicate with your family?

Response: No.

Question: Why not?

Response: Because I didn't need my daughter now.

Question: Why didn't you need her?

Response: Because I don't like the way I had her.

Question: Can you please explain that for me – what do you mean?

Response: Because the way I suffered, it means she is the one that makes me suffer more.

Question: In what sense does she make you suffer more?

Response: Because if I go to someone to ask for help they tell me to go home and obey my husband and look after my child.

INSTRUCTIONS:

- (1) Is there anything in the claimant's testimony that causes you concern? If so, what is that concern?
- (2) Set out questions you would ask in order to further explore this area and any procedural steps you might take.

HOW NOT TO QUESTION

Questioner: What happened after the soldier followed you into your house? (1)

Claimant: He looked all over for guns but I told him we didn't have any. He became very angry. (2)

Questioner: Did he threaten you or hurt you? (3)

Claimant: Yes . . . he hurt me. (4)

Questioner: What did he do to you? (5)

Claimant: He treated me badly. (6)

Questioner: What do you mean by "badly"? (7)

Claimant: no response (8)

Questioner: Did he rape you? (9)

Claimant: I think so. (10)

Questioner: You think so? Don't you know? (11)

Claimant: I fainted. (12)

CASE STUDY TWO

Background supplied by the the Claimant:

The claimant is a 38-year-old male homosexual from an Eastern European country. The claimant has been detained on four occasions by police officers when leaving his partner's apartment building. The claimant's sexual orientation is well known in his neighbourhood but he is not an activist. During the last two detentions the claimant was sexually assaulted in his jail cell by two of the detaining police officers.

At the hearing:

The claimant has provided the following testimony:

- the police force and general population are anti-homosexual
- to his knowledge the police officers that sexually assaulted him are not homosexual.

The documentary evidence confirms that physical abuse occurs in police custody but there is no mention of sexual assault against homosexual by the police.

INSTRUCTIONS:

Discuss your approach to questioning the claimant about the sexual assault.

International Human Rights Instruments Dealing with Violence Against Women

The Universal Declaration of Human Rights (1948)

Article 3 Everyone has the right to life, liberty and security of person.

Article 5 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 7 All are equal before the law and are entitled without any discrimination to equal protection of the law.

The International Covenant on Civil and Political Rights (1966)

Article 7 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment ...

Article 9 1. Everyone has the right to liberty and security of person ...

Article 26 All persons are equal before the law and are entitled without any discrimination to the equal protection of the law ... the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Economic, Social and Cultural Rights (1966)

Article 12 (1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

The Convention on the Elimination of All Forms of Discrimination against Women (1979)

Article 3 States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 5 States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

The U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

Article 16 requires inter alia, that the state “prevent ... acts of cruel, inhuman, or degrading treatment or punishment ... when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official...”

The Declaration on the Elimination of Violence against Women (1993)

- this is the first set of international standards dealing specifically with violence against women.
- affirms that violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms.
- recognizes that effective implementation of the Convention on the Elimination of All Forms of Discrimination against Women would contribute to the elimination of violence against women.

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994)

Article 7 Sets out State obligations re the eradication of gender-based violence.

Article 8 Sets out additional obligations re education and the development of a mass consciousness in relation to violence against women.

Article 10 Obliges States parties to include in their national reports to the Inter-American Commission of Women information on measures adopted to prevent and prohibit violence against women and to assist women affected by violence, difficulties in applying the measures, and the factors that contribute to violence against women.

Article 12 Provides for an individual right of petition and a right for non-governmental organizations to lodge complaints with the Inter-American Commission of Human Rights.

Convention on the Rights of the Child (1989)

Article 19 **Protection from Abuse and Neglect:**

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse ...

Article 34 **Sexual Exploitation**

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse ...

International Human Rights Instruments Dealing with Violence Against Women

The Universal Declaration of Human Rights (1948)

Article 3 Everyone has the right to life, liberty and security of person.

Article 5 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

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Article 37 **Torture and Deprivation of Liberty**

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment ...

B. Canadian Jurisprudence Re Domestic Violence

Supreme Court of Canada

R. v. Lavallée [1990] 1 S.C.R. 852

Madam Justice Bertha Wilson wrote this decision for a unanimous court in 1990. This was the case of a woman tried for shooting her common-law husband. They had been in a volatile relationship for several years, and she had a history of being battered. She took a shotgun to him one night after he suggested to her that either she would shoot him or he would shoot her. She defended her criminal charge on the basis that she had a reasonable apprehension of bodily harm and had acted in self defense. The issue before the Supreme Court was what was reasonable for a battered woman to do in circumstances like hers, because the test she had to satisfy under the statute was "Would a reasonable person in these circumstances do what she did?" This inevitably leads to the question "why would a woman remain in a relationship in which she was repeatedly beaten?" The Court says we have to consider the perspective of the battered woman as well as the scientific evidence about the "battered woman syndrome". In the words of Madam Justice Wilson:

"Expert evidence on the psychological effect of battering on wives and common-law partners must, it seems to me, be both relevant and necessary in the context of the present case. How can the mental state of the Appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called "battered wife syndrome". We need help to understand it and help is available from trained professionals. "

The Court found that Ms. Lavallée's actions were objectively reasonable in the circumstances.

Federal Court of Canada

In Guerra, the Court found that the CRDD did not err when it found that there were adequate safeguards in place in Trinidad to ensure the adult claimant's protection. The panel had placed particular reliance on the existence of the Domestic Violence Bill of 1991. Although the claimant expressed the opinion that the legislation would not be enforced, there was no evidence that the legislation in question did not have its intended effect. The opinion of the claimant, that because of the history of conjugal violence in Trinidad the legislation wouldn't be enforced, was of interest to the Board but not determinative of the issue.

Guerra, Beverly v. S.S.C. (F.C.T.D., no. IMM-6759-93), Noël, October 27, 1994

In Narvaez, the Court, after referring extensively to Ward and to the Chairperson's Guidelines, found that "women subject to domestic violence in Ecuador" constitute members of a particular social group. In Diluna,