Consolidating Group-Based Refugee Protection

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Two pending cases before the Court of Justice of the European Union (CJEU) provide an opportunity for the CJEU to consolidate group-based refugee protection. However, the nature of the preliminary reference questions also demonstrates the persistence of certain flawed assumptions in gender-based violence cases. The request for a preliminary ruling by the Supreme Administrative Court of Austria (C-608/22 and C-609/22) and the corresponding Opinion of Advocate General De La Tour show that gender cases continue to be at the forefront of jurisprudential developments in international refugee law. At the heart of the cases is a concern with granting refugee protection to groups of persons based on their inherent characteristics, in this case women and girls from Afghanistan. However, as the joined cases of AH and FN highlight, this is often due to an apprehension amongst asylum decision makers over the grant of protection to large groups of persons based on sex and misconceptions surrounding gender-based violence and discrimination.

The Preliminary Reference Questions

In its first question, the Supreme Administrative Court of Austria asks the CJEU to clarify the interpretation of "acts of persecution" under Article 9(1)(b) of the Qualification Directive (2011/95) in the context of women and girls being subjected to an accumulation of discriminatory acts in Afghanistan. The measures include restricting women and girls' access to education, "gainful employment and healthcare, which limit their participation in public and political life, their freedom of movement and their right to take part in sports, and which require them, moreover, to cover their entire bodies and faces and deprive them of protection against gender-based and domestic violence" (§4).

With its second question, the Austrian Court asks the CJEU whether it is "sufficient, for the granting of asylum status, that a woman is affected by those measures in the country of origin merely on the basis of her gender, or is it necessary to assess a woman's individual situation in order to determine whether she is affected by those measures– to be considered in their entirety – within the meaning of Article 9(1)(b) of Directive 2011/95/EU?".

The Advocate General's Opinion

In his Opinion, Advocate General De La Tour indicates that some of the discriminatory measures against women in Afghanistan "blatantly constitute an act of persecution within the meaning of Article 9(1)(a) of Directive 2011/95" (§38). He points to the examples of forms of persecution listed in Article 9(2) of the Qualification Directive, which clearly encompass the measures currently imposed on women in Afghanistan (§41). Reviewing the CJEU's case-law, he highlights that the meaning of persecution is not limited to violations of absolute rights, although any interference with a qualified right must be "sufficiently serious" and have a "significant effect on the person concerned" (§48). He concludes that it is necessary to evaluate whether the consequences on the individual are as severe as breaches of absolute rights by reason of the measures' cumulative effect (§52). Importantly, the Advocate General re-iterates the CJEU's principle that EU Member States must also examine "the nature and severity of the penalties the person faces when he or she does not comply with the limitations and restrictions imposed" (§53). The Advocate General concludes that the repression Afghan women and girls face for failing to comply with the restrictions imposed by the Taliban may result in "serious and intolerable harm" and therefore amounts to an act of persecution under Article 9(1)(a) Qualification Directive. He further asserts that the discriminatory acts and measures themselves are sufficiently severe both in

their intensity and cumulative effect and the consequences they have on women and girls to be comparable to breaches of absolute human rights (§54).

On whether the status of being a woman is sufficient for the grant of asylum, the Advocate General unpacks the Austrian Court's second question by noting that the Court envisages some women and girls may not be affected by *all* existing discriminatory measures imposed by the Taliban because of their individual circumstances and accordingly, the accumulation of the remaining applicable measures may not be sufficient to amount to persecution under Article 9 Qualification Directive. Moreover, the Attorney General notes that the question is grounded in a concern as to whether the requirements of Article 4(3) Qualification Directive entitle EU Member States to grant international protection to an Afghan woman without "an individual assessment of her situation, given the fact that some women may not reject, or may even approve of, the measures adopted or tolerated by the Taliban, which therefore might not affect the actual situation of those women" (§28). In other words, the measures would not have sufficiently serious consequences for those women and thus would not constitute persecution. The Attorney General concludes that EU Member States' obligations to examine the individual status and personal circumstances of each asylum applicant under Article 4(3)(c) Qualification Directive does not preclude a finding that women are at risk because of their gender/sex without any further distinguishing circumstances or characteristics (§75, 78).

How Serious Must (Gender-based) Discrimination be to Constitute 'Persecution'?

The Advocate General's Opinion provides a welcome review of the CJEU's case-law of when discrimination may amount to persecution and a reminder that asylum authorities must also examine harm caused by the consequences of failing to abide by discriminatory restrictions. Importantly, the Advocate General clearly draws the links between breaches of socio-economic rights, which asylum authorities rarely consider acts of persecution, and their serious consequences affecting absolute rights and the right to human dignity. The Advocate General thus explains how lack of access to healthcare, education and work and the absence of legal protection against gender-based and domestic violence exposes Afghan women and girls to violations of the right to life and the prohibition of inhuman and degrading treatment, affecting their physical and mental health, and survival (§55). Overall, the discriminatory measures adopted by the Taliban since August 2021 have the intention and effect of excluding women and girls from society, depriving them of their most basic rights and thereby undermining "full respect for human dignity" (§56-59).

However, it is less clear whether the forthcoming CJEU judgment, if it adopts a similar perspective, will impact the practice of asylum decision makers in granting *refugee* protection to women and girls experiencing serious discrimination in other countries of origin more widely due to the particularly severe and all-encompassing measures adopted by the Taliban in the particular context of Afghanistan. Indeed, Attorney General De La Tour notes that the Taliban regime has been "described as being unlike any other" (§73).

Although the request for a preliminary ruling provides the CJEU with an opportunity to re-iterate an established principle of international refugee law of relevance to groups of persons fleeing persecution, the nature of the Austrian Court's questions reveal asylum decision makers' misconceptions about gender-based violence and discrimination.

Ignoring the Continuum of Violence

Firstly, it breaks down discriminatory acts and measures as one-off breaches of socio-economic rights unconnected to each other, ignoring the continuum of violence that affect women and girls. One of the few examples of a person who might not be the subject of all discriminatory acts and measures that currently exist in Afghanistan (not many come to mind) is a primary school age girl who may still be entitled and able to attend primary school. However, once she grows up, she will eventually be subjected to the ban on education. Another example is a woman who may not want to participate in political office and political

decision-making processes. Nonetheless, the ban on female political engagement has a broader impact on law and policy, which perpetuates the exclusion of women and girls from Afghan society. As the Attorney General says, the Taliban's aim is to design a system of gender segregation and oppression (§56). As can be seen from the nature of the questions to the CJEU, the underlying perspective of the Austrian judicial authorities suggests that, seen in isolation, each measure is a less serious socio-economic right. In fact, the Taliban have created a State whose laws and regulations actively exclude women and girls from most aspects of life in a manner which denies their human dignity contrary to Article 1 EU Charter. Significantly, although AH and FN have gone through a lengthy asylum and appellate procedure, no asylum decision maker considered that some of the discriminatory measures are by themselves sufficiently serious to amount to persecution, as pointed out by the Attorney General himself (§38). For example, restrictions on healthcare in Afghanistan are so severe that they expose women and girls to inhuman or degrading treatment or punishment (§55).

A Fake Dichotomy

Secondly, the premise of the Austrian Court's second question is based on a misconception that examining risk on return 'merely' on the basis of sex/gender does not constitute an individual assessment of the asylum claim. This creates a fake dichotomy between group-based and individual assessments. It appears that because the distinguishing characteristic is that of sex, the cases have been treated differently. This becomes apparent through a simple comparison with asylum claims based on a well-founded fear of being persecuted for reasons other than (or additional to) sex. For example, courts across Europe have granted refugee protection on the basis of nationality or ethnicity without further examination of the individuals' personal circumstances if country of origin information demonstrates a systematic practice of persecution of all nationals or all members of that ethnicity. For example, Syrian men fleeing forced conscription were granted refugee status in Germany based solely on the establishment of their sex, age and nationality. In the UK, establishing Darfuri ethnicity is sufficient to be granted refugee protection as the Upper Tribunal concluded that all non-Arab Darfuris are at risk of persecution in Darfur and cannot reasonably be expected to relocate elsewhere in Sudan. Several European countries granted international protection to all Syrian men between 18 and 42 years of age, even if some Syrian men did not reject, or even approved of, compulsory military service in al-Assad's Syria.

The idea that there may be a sufficiently high number of Afghan women who do not reject or even approve of being segregated and excluded from civil society and deprived of the right to lead a dignified and decent life in Afghanistan (§56) but who may nonetheless want to gain an immigration advantage by claiming asylum such that their views should firstly be investigated in the asylum procedure draws a distinction with other groups of persons in need of international protection based on inherent characteristics, such as the examples based on nationality or ethnicity given above. The comparison demonstrates the differential treatment afforded to groups of refugees where the group in question is comprised of women. It thereby gives the impression that male draft evaders are more deserving of refugee protection than women denied full respect for human dignity as only the latter group requires additional checks.

Consolidating Refugee Protection for Groups of Persons at Risk

Despite the inherent misconceptions regarding gender-based violence and discrimination and evident apprehension at the potentially large number of women being declared in need of refugee protection, the request for a preliminary ruling will provide the CJEU with an opportunity to consolidate the protection of groups of persons sharing similar characteristics and fleeing widespread violence. If the CJEU follows the Advocate General's Opinion (§73-74), it will re-assert an important principle of international refugee law that individuals who have a well-founded fear of being persecuted in the context of widespread violence affecting large groups of persons who are

similarly-situated do not need to show they have been individually targeted. Establishing the systematic persecution of a group and the individual's membership of the group concerned is sufficient to warrant protection. Although most commentators would agree, it is essential that the CJEU enshrines the position in its case law as recent research demonstrates that EU Member States continue to require that asylum seekers show they have been singled out before being granted refugee protection.

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