

Gender Equality: Recent Reactions From the CJEU in the Context of the Right to Asylum – Afghan Women’s Case law and the new Taliban Regime

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Abstract: Asylum seekers present their cases in words, but within those words lie the human stories of suffering. Forced to flee, they seek a common space of protection, values, and solidarity in the European Union. To be granted an international protection they must meet legal requirements, demonstrating a causal link between their claimed reasons and the persecution they have suffered or fear suffering. In a Europe where equality is a fundamental value and part of the European soul, it is worth asking whether this gender-based discrimination could be a reason for persecution and justify the right to asylum. This study examines the Court of Justice of the European Union's (CJEU) response to pressing issue concerning Afghan women seeking refuge.

Keywords: Gender Equality; Discrimination; Court of Justice of the European Union; Refugees; Afghan Women.

1. Introduction

The European Union's common asylum policy is an integral part of the Area of Freedom, Security and Justice, which constitutes an EU objective and a shared competence between the Union and the Member States. Outlined in Article 3 of the Treaty on European Union (TEU) (European Union 2007), this policy applies to nationals of third countries seeking international protection within the EU. This field is particularly influenced by European values and fundamental rights, rooted in the principle of solidarity between Member States.

Indeed, under Article 78 of the Treaty on the Functioning of the European Union (TFEU) (European Union, 2007), the Union develops a Common Policy on Asylum and other forms of international protection, aiming to grant uniform protection status to those in need, while upholding the principle of *non-refoulement* – which ensures that no one can be returned to a State or territory where they may face death penalty, torture, or other inhumane treatment or punishment.

The Common European Asylum System (CEAS) is based on the 1951 Geneva Convention (United Nations, 1951) relating to the Status of Refugees and the 1967 New York Protocol (United Nations, 1967), which constitute the cornerstone of the international protection regime. It is worth highlighting that although the Universal Declaration of Human Rights (UDHR) (Pacheco, F., 2018) had already proclaimed the right to seek and benefit from asylum, the 1951 convention did not oblige States to grant asylum, despite enshrining the obligation not to return applicants under Article 33 (United Nations, 1951).

The CEAS took a step forward by establishing common criteria that Member States must comply with and transpose into their domestic legislation, while ensuring the individualised and thorough analysis of each request. To recognise refugee status or another form of protection for an applicant, EU secondary law - Directive (2011/95/EU) (European Parliament, 2011) - established common criteria for identifying people who are effectively in need of international protection, as well as the minimum level of protection to be granted. Similarly, common procedures for granting or withdrawing said statutes were established in another Directive (2013/32/EU) (European Parliament, 2013).

Under Article 18 of the Charter of Fundamental Rights of the European Union (CFREU) (European Union 2016), all individuals who meet the requirements set out in this Directive may acquire the fundamental right to asylum upon recognition of refugee status. If they fail to meet these requirements, they may instead benefit from subsidiary protection, an additional form of protection to asylum. Regarding the determination of the protective scope of various legal instruments that constitute the CEAS, it must be noted that the CJEU is responsible for their correct interpretation. As such it has been tasked with clarifying the meaning of certain key concepts (e.g. act of persecution, personal situation, specific social group, individual threat, serious common crime), a role has carried out in a particularly activist manner (Barata, M. S., & Alves, D. R., 2023; Pacheco, F., & Alves, D. R. 2021).

Built on the unconditional value of human dignity, the common asylum policy respects the rights and principles recognised in the CFRUE. In turn, the Charter is based on specific, non-hierarchical values (Pacheco, F., 2023;

Alves, D. R., & Pacheco, F. 2019), among which we highlight equality, which constitutes the heading of Title III in the context of this discussion. Closely linked to the idea of justice, the principle of equality is not a fluid concept but is of central importance for the realisation of human dignity. Indeed, within the framework of the rule of law, it must be assumed that we are all equal before the law and that discrimination based on various suspect criteria, particularly sex, is prohibited. To this end, the Union must ensure *de facto* equality between men and women, axiologically structured, in all activities. The core question we must now address is this: can gender, in and of itself, constitute a reason for persecution that leads to the subjective right to obtain asylum?

A superficial analysis might lead us to fear that answering this question positively would, at least in the abstract, imply that all persecuted foreign women could benefit from refugee status within European territory, a scenario that would have unsustainable repercussions. However, if we consider that these are women of Afghan nationality fleeing the new Taliban regime, such fears may be alleviated. We will, therefore, examine how the CJEU resolved this specific preliminary question presented by the Austrian Supreme Administrative Court in cases C-608/22 and C-609/22 (AH and FN v Bundesamt für Fremdenwesen und Asyl, 2024).

2. The Principle of Equality and Non-discrimination: a Very Brief Approach

The principle of equality is a corollary of human dignity that binds public authorities to its observance. Without unconditional respect for human dignity, it would not be possible to achieve the Union's objectives. Article 2 of the TEU states that equality is one of the founding values of Europe, addressing all individuals and referring, in its final segment, to equality between men and women. Thus, everyone has equal dignity and must, therefore, everyone be equal before the law. Article 20 of the Charter enshrines equality before the law (formal equality), later associated with the principle of non-discrimination, which distinguishes between permitted and prohibited criteria for differentiating between individuals (Martins, A., 2010), only allowing distinctions based on legitimate and non-arbitrary criteria (Pinto, R. L., 2013; Mestre, B., 2020; Hepple, B., 2011; De Schutter, O., 2003).

The principle of equality calls for the prohibition of arbitrariness (discrimination without a serious and legitimate reason) and also for the obligation of differentiation, to ensuring equal treatment for those in similar circumstances and unequal treatment for those in different circumstances, where failing to do so would risk undermining justice. Within the Union, the principle of non-discrimination has an autonomous aspect, that is, not dependent on the invocation of another right, meaning it even though derives from the principle of equality, and it is generally enshrined in Article 21 of the Charter. Therefore, everyone has the right not to be discriminated against or deprived of the enjoyment and exercise of any right on the basis of their membership in a particular group or category, such as sex (among other criteria specified in the article), given that such membership is beyond the individual's control (e.g. pregnancy status).

It should be noted that the application of the general principle of non-discrimination – when an unjustified breach of equality is at stake – may necessitate the adoption of normative measures of positive action (positive discrimination), without which true substantive equality will be impossible. To this end, it must be assessed whether there is a genuine need for such measures, whether they are appropriate for achieving their objective, and whether they are proportionate to the intended outcome. In short, the realisation of the fundamental right to equality requires adherence to a justified basis for differentiation (Novais, J. R., 2019).

This is an area of legislative overlap, both national and international, particularly within Europe, which brings together primary law provisions, as well as a broad range of Directives (Pacheco, 2024) and other legal instruments, alongside an extensive body of jurisprudence that has become increasingly dense in relation to the protective scope of the principle. In effect, the CJEU has demonstrated- in an original and particularly activist manner that forms of discrimination can be direct or overt forms, that is, those based on explicitly prohibited criteria (e.g. prohibiting serving coffee to Romani individuals), as they constitute ethically and legally reprehensible conduct.

However, discrimination may also take indirect or seemingly neutral forms, where measures produce effects equivalent to direct discrimination having a disproportionate impact on a specific group or on suspect categories (e.g. race). It should be noted here that, at the level of secondary law, harassment, instructions to discriminate, and the prohibition of retaliation are subcategories of discriminatory behaviour, the detailed analysis of which falls outside the scope of this discussion.

It should not be noted that the Charter also states, in its own Article (Article 23), the principle of equality between men and women, incorporating an obligation for public authorities not to discriminate on the basis of sex and providing for the possibility of adopting positive action measures to redress gender imbalances. This

provision is based on Article 157 of the TFEU (equal pay for the same work), the European Social Charter and the Community Charter of Fundamental Social Rights of Workers (adopted in 1989), with its influence extending to the legal orders of the Member States. To this end, gender equality is a fundamental human right and an integral part of European social policy, which includes social protection (e.g. maternity leave), aimed at promoting equality between men and women and combating discrimination based on sex, in all matters falling within the Union's competence.

3. The European Union's Responses to International Protection

Under the 1951 Geneva Convention relating to the Status of Refugees, a forcibly displaced person seeking international protection must be present in the State where they submit their request, providing proof that they fled due to a well-founded fear of persecution (Gil, A. R., 2021; Oliveira, A. S. P., 2009; Oliveira, A. S. P., 2016; Pacheco, F., 2023) for one of the following reasons: race, religion, nationality, membership of a specific social group or political opinion. Such persecution must be both severe (ACNUR, 2019) and discriminatory, meaning that instances of indiscriminate violence that affect the entire population do not fall within the legal definition of persecution. A causal link must also be demonstrated between the stated reasons and acts of persecution suffered by the applicant, or the absence of protection against such acts.

We are, therefore, dealing with a legal framework based on the concept of a well-founded fear of persecution (Gil, A. R., 2020), but only for one of the five specified reasons, thereby limiting its scope of protection, since the reasons compelling a person to flee may not fall within these categories. Nevertheless, the convention had the merit of defining what constitutes a refugee and prohibiting *non-refoulement*, recognising the human right of individuals not to be returned to a country «(...) where their life or freedom is threatened by virtue of their race, religion, nationality, membership of a certain social group or political opinions».

This development led to the Qualification Directive extending its provisions to individuals considered to be at real risk of suffering a serious offence, such as the death penalty or execution; torture or inhuman or degrading treatment or punishment; or a serious and individual threat to the life or physical integrity of a civilian, resulting from indiscriminate violence in situations of international or internal armed conflict. These individuals became eligible for subsidiary protection, provided that the exceptions outlined in Article 17 did not apply to them (e.g. commission of serious crimes) (Pacheco, F. & Baltazar, I., 2023).

The questions that guided this study were:

1. On the one hand, to clarify what the CJEU understands as an “act of persecution”, under the terms of Article 9, paragraph 1, subparagraph a) of the Directive, when the request for asylum is made by a woman who, if returned, faces the risk of suffering a “series of discriminatory measures” restricting her fundamental rights, knowing that such measures have been imposed by the Taliban in Afghanistan since 2021.
2. 2). On the other hand, to determine whether, in the individual analysis of an asylum request, the national authority, after carefully assessing the situation, can conclude that there is a “well-founded fear of persecution” solely due to the applicant's gender, without considering other individual elements that substantiate persecution, under the terms of Article 4, § 3 of the same directive.

In other words, the study seeks to determine whether asylum can be automatically granted based solely on an applicant's gender and their Afghan nationality, in which case there would be a presumption (ACNUR, 2023) of refugee status recognition for these women.

4. In the Veil of Misfortune: Serious and Systematic Discrimination of Women in Afghanistan

Article 9 of the directive, under the heading “Acts of Persecution,” provides that an act must be “sufficiently serious by its nature or persistence to constitute a severe violation of fundamental human rights (...) or constitute an accumulation of various measures, including violations of human rights, sufficiently serious (...)”. It then provides examples, specifying that such acts may include “physical or mental violence, including acts of sexual violence; legal, administrative, police and/or judicial measures, when they are discriminatory or applied in a discriminatory manner (...); disproportionate or discriminatory sanctions; acts committed specifically due to gender (...)”.

In this case, the issue concerned the assessment of two decisions denying refugee status to two Afghan women who had fled their homeland to Iran - one because her father had sold her, and the other because she wished to study - and subsequently from Iran to Austria, as they had not proven a fear of persecution if they returned to Afghanistan, under Article 2(d) of the Qualification Directive. In other words, they had not demonstrated a well-founded fear of being persecuted on account of one of the five stipulated reasons (race, religion, nationality, political opinions, or membership of a particular social group).

This denial of recognition ~~would have~~ occurred in 2021, at a time when the country had not yet fallen under the new Taliban regime, although they were granted subsidiary protection status by Austria. Dissatisfied, they appealed to the Supreme Administrative Court, arguing that they had adopted Western values as an inseparable part of their identities and that the Taliban regime itself should justify the granting of asylum based on their gender, thereby eliminating the need for an individual assessment.

Consequently, this court sought clarification from the CJEU on whether “membership of a particular social group” constituted grounds for persecution for these women and whether the accumulation of measures imposed by the Taliban— including the lack of legal instruments to protect against gender-based violence and domestic violence, forced marriages, lack of employment opportunities, limited access to healthcare, education, and sports facilities, restrictions on public movement, absence of freedom of expression, and the obligation to cover the face and body—could be considered a violation of their fundamental rights. By its nature and persistence, such should be classified as an “act of persecution” capable of affecting their non-derogable human rights, as provided in Article 15(2) of the ECHR (Charter of Fundamental Rights of the European Union, 2016), if the applicants were returned.

Furthermore, under the Directive, the States concerned must assess the credibility of each claim by considering the applicant's personal circumstances (*Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie Elgafaji*, 2008; *CF and DN v Bundesrepublik Deutschland*, 2021), to determine whether they could be exposed to the previously identified acts of persecution. However, in the opinion of the Advocate General (*AH and FN v Bundesamt für Fremdenwesen und Asyl*, 2024¹), as Afghan women are subject to severe and systemic discrimination, it could be argued that special protection measures might replace the need for individual assessment. This would mean that national authorities could conclude—immediately—that there was a well-founded fear of persecution for the applicants in their country of origin solely based on their gender.

At this point, it is worth highlighting that the Istanbul Convention (Council Decision (EU) 2023/1076, 2023) - — which enshrines the principle of equality between men and women and prohibits discrimination against women— recognises that “violence against women” constitutes a violation of their human rights and must be regarded as a form of discrimination, encompassing any act of gender-based violence that may cause “physical, sexual, psychological, or economic harm or suffering to women, including the threat of such acts, coercion, or arbitrary deprivation of liberty, whether in public or private life.”

The CJEU, considering the referring body's view on classifying Afghan women as “a particular social group” within the meaning of Article 10(1)(d) of Directive 2011/95 (European Parliament, 2011), ruled that there is a causal link between the “ground of persecution” and the “acts of persecution” to which Afghan women could be exposed. Thus, once again, the CJEU ruled in accordance with human dignity, demonstrating awareness of the tragic situation of Afghan women who live oppressed and marginalised in a society that denies them their most fundamental rights.

5. Conclusion

After the return of the new Taliban regime, the situation of Afghan girls and women became intolerable, rendering gender equality a mere illusion. Shrouded in misfortune, women suffer severe persecution that justifies their flight and their fear of returning to Afghanistan, where they are prevented from leading their lives with dignity.

The CJEU, in its most recent ruling (*AH e FN contra Bundesamt für Fremdenwesen und Asyl*, 2024), held that the discriminatory and restrictive measures imposed on women by the Taliban regime in Afghanistan—such as exclusion from the workforce, limitations on mobility and education, and the lack of protection against gender-based violence—constitute “acts of persecution” under Directive 2011/95. The Court found that these cumulative restrictions violate human dignity and justify granting refugee status to Afghan women without requiring a detailed individual assessment.

The decision also reaffirms that Afghan women constitute a "specific social group" eligible for international protection, aligning with the Geneva Convention, CEDAW, and the Istanbul Convention, which mandate protection against gender discrimination and violence. By adopting this interpretation, the CJEU enhances the protection of women's human rights, recognising the severity of gender-based persecution under oppressive regimes and promoting a more inclusive and context-sensitive right to asylum for women facing institutionalised violence.

While gender-based asylum claims have gained recognition, alternative migration routes remain highly restrictive. The EU Blue Card system, which aims to attract skilled workers, is inaccessible to most Afghan women due to its stringent requirements, reinforcing the necessity of a robust asylum framework.

To this end on the one hand, the accumulation of discriminatory measures that affect women must be classified as an "act of persecution" that violates their human dignity. On the other hand, considering the discriminatory measures to which they have been or may be subjected in the event of return, the requested Member State concerned is not obliged to analyse elements other than their sex and nationality. Once again, the CJEU has proven itself to be an instrument in the service of justice.

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