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New ECJ Case Law concerning Women's Right to Asylum

Case C 646/21 and Joined Cases C-608/22 and C-609/22

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Preface

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A. Introduction

The right to asylum has been legally recognized as a fundamental human right since its inclusion in the 1948 Universal Declaration of Human Rights (UDHR).[1] However, despite its formal recognition, States have often failed to uphold it. This failure can be reflected, for instance, in the inadequacy of the asylum processes when it comes to acknowledging gender-based matters as a reason for persecution.[2] In this regard, the 1951 Convention Relating to the Status of Refugees (Refugee Convention), which remains the cornerstone for international protection,[3] notably omits gender as a ground for persecution. It exclusively recognizes race, religion, nationality, political opinion and membership in a particular social group (PSG) as motives.

This legal absence of gender as a specific reason for persecution means that, in many cases, applicants with gender-related claims must fit into narrowly defined categories – typically, membership of a PSG, a concept historically viewed from a male-centric perspective.[4] As a result, women seeking international protection because of these grounds often face legal and procedural barriers that undermine their right to asylum.[5]

The purpose of this paper is to address this normative gap by looking at how gender-based persecution is treated in asylum law and contribute to the growing body of literature that calls for a more gender-sensitive approach in this field.[6] Advancing such a perspective requires not only legislative changes, but also progressive jurisprudence that interprets the law in a gender-oriented way. In this context, the European Court of Justice (ECJ) plays an important role. Although its case-law addressing the intersection between gender and asylum remains limited,[7] two recent judgements indicate a tendency towards a more gender-sensitive outlook: *Case C-646/21* – concerning two Iraqi girls whose identification with the fundamental value of gender equality was considered a potential ground for refugee status – and *Joined Cases C-608/22*

[1] See Article 14 of the UDHR.
[2] *European Parliament*, Briefing: The gender dimension of asylum claims, January 2025, p. 2.
[3] *Edwards*, in: Moeckli/Shah/Sivakumaran (eds.), p. 563.
[4] *Crawley*, RSQ 2022, 355 (365); *Firth*/*Mauthe*, IJRL 2013, 470 (483).
[5] CoE Parliamentary Assembly, Res. 1765 (2010), *Gender-related claims for asylum*, paras. 6-12.
[6] *Giegerich*, jean-monnet-saar, 2022; *Gleeson*, AJIL 2024, 41 (93); *Losch*, VerfBlog 2024; *Raimondo*, VerfBlog 2024.
[7] *Warin*, IJRL 2024, 93 (94).

and C-609/22 – concerning Afghan women whose risk of facing systematic discrimination under the Taliban regime was considered a sufficient motive for qualifying as refugees.

By critically examining these two rulings, this essay tries to answer whether they mark a true evolution towards a more gender-sensitive approach within the European Union (EU) asylum system. To do so, the following structure has been adopted. First, gender-based persecution is defined and a contextual background on Afghanistan and Iran – the countries central to the case-law discussed – is provided. Second, the relevant legal framework regarding gender-based asylum claims is outlined. Third, a case-law analysis of the two cited judgements is conducted, beginning with an overview of the facts of each case, the questions raised by the referring court for a preliminary ruling, and the Court of Justice's decision, followed by a critical assessment of the jurisprudence. Finally, conclusions based on the case-law analysis are drawn, stressing the implications of these decisions for advancing gender-sensitivity in the EU, pointing out their limitations and suggesting how future judgements could address these gaps.

B. Background: Gender-based Persecution and the Cases of Iraq and Afghanistan

I. The concept of gender-based persecution

The definition of gender-based persecution is not enshrined in any legally binding text. This reflects the historical marginalization of gendered experiences within refugee law and stresses the need to find a clear definition.[8]

Nevertheless, interpretations offered by bodies like the United Nations High Commissioner for Refugees (UNHCR), can provide guidance. The UNCHR defines this concept as encompassing a "range of different claims in which gender is a relevant consideration in the determination of refugee status".[9] Here, gender should be understood broadly, including, not only the traditional categories of women and men, but also LGBTIQ+[10] and non-binary people.[11] Although people

[8] *Firth*/*Mauthe*, IJRL 2013, 470 (478).
[9] UNCHR, Master Glossary of Terms, https://www.unhcr.org/glossary (last accessed on 27/04/2025).
[10] Acronym for lesbian, gay, bisexual, transgender, intersex, queer and other diverse identities.
[11] UN Women*, Identifying Gender Persecution in Conflict and Atrocities*, academic paper, December 2021, p. 12.

from any gender can file asylum claims grounded on gender elements, the majority of them are made by women.[12]

There are many different types of gender-related persecution, such as sexual and domestic violence, female genital mutilation, forced marriages, punishment for deviating from established gender roles, mandatory dress codes or discrimination against LGBTIQ+ people. While all these examples represent forms of discrimination, not every type of gender-based discrimination will amount to persecution.[13] This will depend on the specific circumstances of each case and will usually occur when the discrimination leads – or potentially does – to an intolerable or substantially harmful situation for the individual in question.[14] Moreover, when discriminatory measures are systematic or cumulative, they may also amount to persecution.[15]

II. Overview of the Iraq and Afghanistan cases

To illustrate how gender persecution can manifest, the following section provides a brief overview of this matter in the contexts of Iraq and Afghanistan, as these are the countries relevant to the case-law that will be analyzed further.

1. Iraq

According to the latest report by the EU Agency for Asylum (EUAA) on Iraq, the situation of women and girls in this country is governed by entrenched social, cultural and moral codes that, in many cases, lead to gender-based discrimination.[16] Violence against women is widespread and has been further aggravated since 2003 due to ongoing armed conflicts.[17]

Women and LGBTIQ+ people who are perceived as transgressing moral codes – such as dressing in a non-traditional manner, engaging in public activism, having social media presence or asserting independence in personal choices – often face harassment, threats and attacks.[18]

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[12] UNCHR, *Guidelines on International Protection No. 1*: *Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2002, UN Doc. HCR/GIP/02/01, para. 3.
[13] Ibid., paras. 3, 14.
[14] UNCHR, Master Glossary of Terms, https://www.unhcr.org/glossary (last accessed on 27/04/2025).
[15] UNCHR, Guidelines on International Protection No. 1, 2002, UN Doc. HCR/GIP/02/01, para. 16.
[16] *EUAA*, Country Guidance: Iraq, November 2024, section 3.11.1.
[17] Ibid.
[18] Ibid., section 3.7.

Moreover, forced and child marriage is still a common practice, and even though the Iraqi Personal Status Law establishes 18 as the minimum age for marrying,[19] judges may allow marriages of 15-year-old girls in certain circumstances.[20]

Finally, the country lacks a comprehensive legal framework to effectively protect against gender-based violence and punish the perpetrators. In this regard, the State has prohibited the term "gender", which restricts the ability of humanitarian organizations to address gender-related matters.[21] Although the Kurdish Regional Government has passed a law to combat domestic violence, the Iraqi Federal Government – which comprises most of the territory of the country – has no legislation in this matter.[22] Furthermore, the Iraqi Penal Code considers rape within marriage and honour crimes as mitigating circumstances for these crimes, whereas sexual assault charges may be dropped if the perpetrator marries the victim.[23]

2. Afghanistan

Following the Taliban's return to power in summer of 2021, and in accordance with the last EUAA report on Afghanistan, the position of women in this country has deteriorated dramatically – compared to their situation with the previous government.[24] The Taliban regime, as stated by the cited EUAA report and several EU Parliament briefings, has systematically dismantled women's most fundamental rights, severely restricting their access to education, employment, healthcare and participation in public life, among many other discriminatory measures.[25] Women are prohibited from traveling or appearing publicly without a *mahram* (male companion), [26] gender-based violence reporting systems have been suspended[27] and one of women's few income sources, beauty salons, have been closed.[28]

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[19] See Article 7 of the Personal Status Law (Iraq), 1959, https://www.refworld.org/legal/legislation/natlegbod/1959/en/122534 (last accessed on 25/06/2025).
[20] *EUAA*, Country Guidance: Iraq, November 2024, section 3.11.3.
[21] Ibid., section 3.8.
[22] Ibid., section 3.11.1.
[23] Ibid., section 3.11.2.
[24] *EUAA*, Country Guidance: Afghanistan, May 2024, section 3.15.
[25] Ibid.; *European Parliament*, Briefing: Women's rights in Afghanistan: An ongoing battle, September 2024, p. 1; *European Parliament*, At a Glance: Refugee Status all female Afghan asylum seekers, May 2023, p. 1.
[26] *EUAA*, Country Guidance: Afghanistan, May 2024, section 3.15.
[27] Ibid.
[28] *European Parliament*, Briefing: Women's rights in Afghanistan: An ongoing battle, September 2024, p.7.

To make matters worse, in August 2024, the country passed a law, the "Vice and Virtue Law", which formally codified these and other severe human rights violations, such as banning women from speaking or singing in public, forbidding same-sex relationships between women, and restricting eye contact between unrelated men and women.[29]

Overall, this systematic and structural discrimination imposed by the Taliban against women and girls has amounted to what the United Nations (UN) has classified as "gender apartheid".[30] The segregation of women from public life, restrictions on their freedom of movement and the denial of their basic rights have institutionalized a system of gender-based oppression that affects every aspect of their lives.

C. Relevant Legal Framework

To properly understand the current state of international protection due to gender-based persecution, it is essential to first identify what the legal framework for such protection is and how each of the applicable norms relates to the gender of the individuals requesting protection. Although there are different normative sources that recognize the right to international protection, this paper will focus exclusively on international and regional instruments, with a focus on the European regional system. The justification for this choice is based on their relevance regarding the ECJ jurisprudence that will be analyzed subsequently.

I. International legal framework

1. Convention on the Status of Refugees (Refugee Convention)

The Refugee Convention – supplemented by its 1967 Protocol – is the main instrument governing the right to international protection.[31] Drafted in the aftermath of the Second World War, it was adopted by the UN in Geneva in 1951 and came into force in 1954. This legal text is grounded in Article 14 of the UDHR – the right to seek and enjoy asylum – and, while only

[29] See Articles 13 and 22 of the Law on the Promotion of Virtue and Prevention of Vice (Afghanistan), 2024, https://www.afghanistan-analysts.org/en/wp-content/uploads/sites/2/2024/08/Law-on-Virtue-and-Vice-Basic.pdf (last accessed on 25/06/2025).
[30] UN, Gender Apartheid Must Be Recognised as a Crime Against Humanity, UN Experts Say, press release, 6 February 2024.
[31] *Edwards*, in: Moeckli/Shah/Sivakumaran (eds.), p. 563.

alluding to the right of asylum in its preamble, it clearly defines who is eligible for protection and what that protection entails.[32]

One of the core elements of this convention is the definition of "refugee", provided in its Article 1(A)(2), which indicates that it is someone who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country […]".

Thus, three conditions shall be fulfilled for an individual to be classified as a refugee: (i) they must be outside their country of origin; (ii) they must have a well-founded fear of persecution – based on race, religion, nationality, political opinion or membership in a PSG; and (ii) they must be unwilling or unable to look for protection from their home country. As can be seen, the five grounds for persecution outlined in the Refugee Convention exclude gender, which reflects the gender-insensitive perspective with which the text was drafted.[33] This male-centric framing of the Convention can be further reflected on the exclusive use of the masculine pronoun "his" in this provision.

Nevertheless, legal interpretations of the Refugee Convention have, over time, increasingly recognized that gender-based matters may qualify as reasons for refugee status or subsidiary protection within the context of "membership in a PSG".[34] In this regard, the UNHCR, entrusted to interpret and monitor the application of international conventions for the protection of refugees,[35] has pointed out that the membership in a PSG included in Article 1A(2) of the Refugee Convention should be interpreted in a dynamic and evolutionary way, adaptable to the changing characteristics of groups across different societies and evolving human rights standards,[36] which allows the inclusion of gender-based persecution as a grounds for protection.

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[32] *Den Heijer* in: Peers et al. (eds), The EU Charter of Fundamental Rights: A Commentary, Art. 18, para. 11.
[33] *Giegerich*, jean-monnet-saar, 2022.
[34] See, as an example, *Giegerich*, supra note 29.
[35] *Edwards*, in: Moeckli/Shah/Sivakumaran (eds.), p. 563; Preamble of the Refugee Convention.
[36] UNHCR, Guidelines on International Protection No. 2: "Membership of a Particular Social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 2002, UN Doc. HCR/GIP/02/02, para. 3.

2. Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)

CEDAW, signed in 1979 by the UN, is a gender-specific human rights instrument[37] whose main aim is to oblige States to actively end discrimination against women and girls in all fields – mainly, political, social, economic and cultural – by adopting all appropriate measures to safeguard their full development and advancement.[38] Widely acknowledged as the "international bill of women's human rights",[39] CEDAW is the only legally binding universal norm that focuses entirely on gender-based discrimination.

Although this instrument is not specific to refugee law, the CEDAW Committee – monitoring body of the Convention – issued in 2014 the General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, which highlights the need to incorporate a gendered perspective when interpreting the definition of refugee under the previously mentioned Refugee Convention.[40] This means that States parties shall interpret all five grounds of persecution – race, religion, nationality, membership of a PSG and political opinion – considering gender, and recognize gender as a basis for identifying membership of a PSG. While CEDAW's recommendations are not legally binding, they appear very useful for States to interpret the instrument in an evolving manner and to align their asylum legal framework with international human rights standards.[41]

II. Regional legal framework (Europe)

Building upon international law, regional instruments concerning the right to asylum offer additional layers of protection regarding gender-based asylum claims, strengthening – and sometimes even expanding –[42] the provisions laid down in international norms. In the European

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[37] CEDAW Committee*,* General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality, and statelessness of women, CEDAW/C/GC/32, para. 5.
[38] UNGA Res. 34/180, Convention on the Elimination of All Forms of Discrimination against Women of 18/12/1979, UN Doc. A/RES/34/180, Art. 3.
[39] OHCHR/IPU, The Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol: Handbook for Parliamentarians No. 36, 2023, UN Doc. HR/PUB/23/2. p. 18
[40] CEDAW Committee*, Gen. Rec. No. 32*, para. 13.
[41] UN Women, General Recommendations Adopted by the Committee on the Elimination of Discrimination against Women, https://www.un.org/womenwatch/daw/cedaw/recommendations/index.html, (last accessed on 27/04/2025).
[42] *Giegerich*, jean-monnet-saar, 2022.

context, the two main bodies that have adopted norms on gender-related international protection are the Council of Europe and the EU.

1. Council of Europe

a) European Convention on Human Rights (ECHR)

First, the ECHR, adopted in 1950, does not specifically regulate the right to asylum but plays an important role in safeguarding asylum seekers' fundamental rights. Specifically, its Article 3 prohibits torture and inhuman or degrading treatment, and has been widely interpreted by the European Court of Human Rights (ECtHR) to prevent the *refoulement* of individuals to their home countries – or to a third country – when they face a real risk of serious harm there.[43]

In the case-law that will be analyzed subsequently, the ECJ draws attention to this instrument on several occasions, particularly when interpreting the severity of an "act of persecution". The influence of the ECHR – and the ECtHR's jurisprudence – on EU asylum law is evident. In this regard, it can be said that the institution of asylum in the EU has become inseparable from general human rights standards: the treatment of the applicants, the eligibility criteria and the procedural safeguards are all informed by the ECHR.[44] This demonstrates the central role of this instrument in defining the broader European framework for asylum.

b) Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)

Second, the Istanbul Convention, promulgated in 2011, is the first legally binding document in Europe aimed at preventing and combatting gender-based violence, protecting victims and holding perpetrators of such violence accountable. While this convention touches upon various aspects of gender-based violence throughout its twelve chapters, Chapter VII – titled "Migration and asylum" – recognizes the specific needs of female asylum seekers who face gender-based persecution.

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[43] *Callewaert*, General presumption of compliance vs. systemic flaws – Judgment of the ECtHR in the case of H.T. v. Germany and Greece, https://johan-callewaert.eu/general-presumption-of-compliance-vs-systemic-flaws-judgment-of-the-ecthr-in-the-case-of-h-t-v-germany-and-greece/ (last accessed on 27/04/2025).
[44] *Den Heijer* in: Peers et al. (eds), The EU Charter of Fundamental Rights: A Commentary, Art. 18, para. 35.

In particular, its Article 60 outlines three obligations States parties must comply with: (i) gender-based violence must be recognized as a form of persecution under the Refugee Convention; (ii) the five reasons for persecution included in the Refugee Convention must be interpreted through a gender-sensitive lens; and (iii) gender-sensitive reception and asylum procedures shall be adopted, including refugee status determination and the application for international protection.[45]

As can be observed, both the General Recommendation No. 32 of CEDAW – at the international level – and the Istanbul Convention – at the European level – provide for an evolving interpretation of the concept of "refugee" enshrined in Article 1(A)(2) of the Refugee Convention, stating clearly that the grounds of persecution must be interpreted via a gender-sensitive approach. However, only the Istanbul Convention is legally binding, which makes the mandate requiring States to approach the Refugee Convention in a gender-aware manner, particularly significant in the European context. This mandate has become even more relevant in the light of the EU's accession to the Convention in 2023,[46] which now commits the EU and its institutions to uphold these obligations, potentially influencing the Member States that have not ratified it yet. In this regard, the Istanbul Convention may be crucial in improving protections for female asylum seekers and those from diverse gender identities.[47]

2. European Union

In the context of the EU, several norms are relevant concerning gender-based persecution in asylum claims.

a) Charter of Fundamental Rights of the EU (CFREU)

As part of the EU's primary law, the CFREU – adopted in 2000 and legally binding since the Lisbon Treaty of 2009 – stands as the central instrument of protection of fundamental rights within the EU. Article 18 of the CFREU safeguards the right to asylum, which encompasses

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[45] *European Commission*, EU law in light of Istanbul Convention: legal implications after accession, 2025, p. 112.
[46] Council Decision (EU) 2023/1076 of 1 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, asylum and non-refoulement, OJ L 143I, 2/06/2023, p. 4.
[47] *Warin*, IJRL 2024, 93 (105).

various rights, such as access to the procedure, status, and protection from *refoulement*[48] –although the latter is specifically protected in Article 19(2) CFREU.

When examining cases involving gender-related elements, including those involving asylum claims, the ECJ has frequently used Articles 21 and 23 of the CFREU.[49] These address, respectively, the prohibition of discrimination, based on, inter alia, gender and equality between women and men. Additionally, in asylum cases involving minors, Article 24(2) CFREU is also commonly invoked, and it is interpreted to mean that the child's best interest must be a primary consideration when assessing applications for international protection. This last provision will be relevant for one of the cases assessed later.

b) Secondary legislation: Directive 2011/95/EU (Qualification Directive) and Directive 2013/33/EU (Asylum Procedures Directive)

Regarding EU's secondary legislation, there is a broad legal framework – the Common European Asylum System (CEAS) – that further develops the system for international protection within the Union. The CEAS includes several directives and regulations, but for the purposes of this paper, only Directives 2011/95/EU (Qualification Directive) and 2013/32/EU (Asylum Procedures Directive) will be addressed. These two legal texts, together with the Directive 2013/33/EU (Reception Conditions Directive), are the only CEAS norms that include gender-sensitive aspects.[50]

On the one hand, the Qualification Directive recognizes that gender-related elements, such as gender, gender identity or sexual orientation, can be central to an individual's experience of persecution.[51] By doing so, it calls for these factors to be considered when examining asylum applications, particularly with regard to the definition of "persecution" and the concept of "membership of a particular social group". These two concepts – enshrined in Articles 9 and 10 of this directive – will be explored further in the next section.

[48] *Den Heijer* in: Peers et al. (eds), The EU Charter of Fundamental Rights: A Commentary, Art. 18, para. 30.
[49] Ibid., Art. 21, para. 9.
[50] *European Parliament*, Briefing: The gender dimension of asylum claims, January 2025, p. 5-6.
[51] See Recital 30 of the Qualification Directive.

On the other hand, the Asylum Procedures Directive incorporates a procedural dimension to this gender-sensitive framework by providing specific guarantees for applicants whose claims involve gender-specific elements.[52] For example, in its Articles 10 and 15, it states that national authorities, when assessing applications, may seek expert advice on gender-based matters, and that, when interviewing applicants, they must guarantee that circumstances such as gender identity or sexual orientation are considered.

D. Analysis of ECJ Case Law: Gender-based Asylum Claims

Following the overview of the legal framework, the next section examines how these norms have been interpreted by the ECJ in the context of gender-based asylum claims.

The analysis focuses on two ECJ rulings, both of which originate from requests for a preliminary ruling submitted to the Court of Justice pursuant to Article 267 of the Treaty on the Functioning of the EU (TFEU), one from The Hague District Court of the Netherlands, and the other from the Supreme Administrative Court of Austria.

I. ECJ, K and L v Staatssecretaris van Justitie en Veiligheid, Case C-646/21, Judgment of 11 June 2024

1. Breakdown of the case

a) Facts and questions referred for a preliminary ruling

The first case concerns the applications for international protection in the EU of two Iraqi sisters, K and L, who were born in 2003 and 2005, respectively.

In September of 2015, the applicants – along with their parents and aunt – moved from Iraq to the Netherlands and, since then, have stayed there continuously.[53] In November of 2015, their parents filed asylum applications for themselves and for their daughters, but these were finally rejected in 2018 by the Council of State of the Netherlands.[54] A year later, K and L lodged subsequent asylum applications which were also rejected as manifestly unfounded in December

[52] See Recital 29 of the Asylum Procedures Directive.
[53] ECJ, *K, L*, Judgement of 11 June 2024, Case C–646/21, para. 23.
[54] Opinion of AG *Collins*, *K, L*, Case C–646/21, para 5.

of 2020.[55] The applicants challenged these rejection decisions before The Hague District Court, arguing that, during their long stay in the Netherlands, over five and a half years, they had adopted the values, conduct and norms of Dutch girls their age and had become, therefore, "westernized".[56] As such, they claimed that the values they had embraced during these very identity-formative years of their lives made them realize the freedom they had, as girls, to decide for themselves whether to, inter alia, associate with boys, marry, pursue education and career, work, or express their political or religious views freely and in public.[57] Considering that these vital choices constitute a core part of their identity and conscience, they argued that they would not be able – or would be unwilling – to renounce them if they were returned to Iraq, and that they would fear persecution because of them in their home country.[58] For all these reasons, they consider themselves members of a PSG, in the meaning of Article 10(1)(d) of the Qualification Directive, and as such, seek international protection.[59]

The Hague District Court then decided to stay the proceedings and, pursuant to Article 267 TFEU, referred five questions to the ECJ for a preliminary ruling.[60] In this analysis, only the four first ones will be considered, as the fifth one was found inadmissible by the Court.[61] The questions at issue can be summarized as follows:

(i) Can "Western" values adopted by third-country nationals during their identity-forming years in an EU Member State be considered as a common background that cannot be changed or as characteristics that are so fundamental to identity that a person should not be forced to renounce them, in the meaning of the first subparagraph of Article 10(1)(d) of the Qualification Directive?

(ii) Can individuals who have adopted such "Western" values be regarded as members of a particular social group, in the meaning of Article 10(1)(d) of the Qualification Directive? Does the burden of proving whether the applicant has a "distinct identity", lie within the applicant or the Member State assessing his or her application? Must that "westernization" stem from religious or political grounds to qualify for refugee status?

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[55] ECJ, *K, L*, Judgement of 11 June 2024, Case C–646/21, para. 24.
[56] Ibid.
[57] Opinion of AG *Collins*, *K, L*, Case C–646/21, para 6.
[58] Ibid., para. 24.
[59] Ibid., para. 25.
[60] Ibid., para. 32.
[61] Ibid., para. 86.

(iii) Is it compatible with EU law – particularly with Article 24(2) of the CFREU – for national authorities to assess a child's best interests in general terms, without first having to determine them in an individual basis, when evaluating a minor's application for international protection?

(iv) Pursuant to Article 24(2) CFREU, *when* and *how* should the child's best interests be considered during the application for international protection?

b) Consideration of the questions referred and judgement of the Court

To clarify the referring court's doubts regarding the interpretation of several EU law provisions, the ECJ proceeds to assess the questions submitted.

In the first place, the Court begins by jointly analyzing Questions 1 and 2, due to their substantive overlap: both intend to clarify the meaning of Article 10 of the Qualification Directive. Before assessing the questions themselves, it points out that what the referring court means with "Western" values and norms that third-country nationals – here, young women from Iraq – embrace whilst staying in a Member State for a significant period of their lives, is, in essence, "the fact that those women identify with the fundamental value of equality between women and men".[62]

Therefore, it goes on and examines whether Article 10(1)(d) and (2) of the cited directive must be interpreted in a way that third-country women who share as a common characteristic the identification with the fundamental value of gender equality – guaranteed by Article 2 of the Treaty on EU (TEU) – can be considered as members of a PSG, qualifying as a ground for persecution, and thus, allowing for the granting of refugee status. In this regard, the ECJ stresses the need to interpret the Qualification Directive in light of the Refugee Convention, the Istanbul Convention and CEDAW – following the mandate of Article 78(1) of the TFEU and previous jurisprudence by the Court – and also in accordance with the CFREU, particularly with Article 21(1), which prohibits discrimination based on gender.[63]

[62] ECJ, *K, L*, Judgement of 11 June 2024, Case C–646/21, para. 33.
[63] Ibid., paras. 36-38.

The ECJ then proceeds to thoroughly interpret the wording of Article 10(1) of the referred directive. An individual must meet two combined conditions to be regarded as a member of a PSG: (i) sharing either an innate characteristic, a common unchangeable background, or a belief that is so central to identity that should not be given up, and (ii) having a distinct identity in the "relevant country", being seen as different by the surrounding society.

As for the first requirement – which constitutes an internal aspect of a group –[64] the Court argues that being female, on its own, is already an innate trait, and hence, is sufficient to meet this criterion.[65] However, it observes that, in the case at hand, the Iraqi sisters share an additional identifying feature: a belief that is so central to identity that one should not be required to abandon it. Following the line of argumentation set out by Advocate General Collins,[66] the Court states that the girls' identification with the fundamental value of gender equality may be regarded as such a belief.[67] Moreover, it considers that the fact that the sisters spent a formative period of their lives in a Member State – during which they genuinely adopted that value – may also amount to a common background that cannot be changed.[68] In light of the above reasons, the ECJ concludes that these women satisfy the first condition for qualifying as members of a PSG.[69]

Regarding the second requirement, which constitutes an external aspect of a group,[70] the Court assumes that "relevant country" refers to the country of origin of the applicant, and stresses that, depending on the circumstances of that specific country, women may be perceived as different by the surrounding society – aspect which is for the Member States to delimit particularly given that country's legal, social and moral standards.[71] Thus, as the Iraqi applicants are women, and women may be perceived as a distinct group within Iraqi society, the ECJ holds that the second criterion of this provision is also met.[72]

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[64] Opinion of AG *Collins*, *K, L*, Case C–646/21, para 24.
[65] This conclusion follows the previous line of case-law of the Court, namely ECJ, *WS*, Judgement of 16 January 2024, C-621/21, para. 41.
[66] Opinion of AG *Collins*, *K, L,* Case C–646/21, para 34.
[67] ECJ, *K, L*, Judgement of 11 June 2024, Case C–646/21, para. 44.
[68] Ibid., para. 45.
[69] Ibid., para. 46.
[70] Opinion of AG *Collins*, *K, L,* Case C–646/21, para 24.
[71] ECJ, *K, L*, Judgement of 11 June 2024, Case C–646/21, para. 48.
[72] Ibid., para. 49.

As for the burden of proving the referred "distinct identity" in the applicant's country of origin, the Court affirms that it lies upon both the applicant and the national authorities assessing the application.[73] In fact – and considering Article 4 of the Qualification Directive and Article 10(3)(b) of the Asylum Procedures Directive – it points out that, in most of the cases, Member States are more equipped than the applicant to evaluate the circumstances in his or her home country,[74] and they should do so by, inter alia, obtaining detailed and recent information from different sources, like EUAA and UNHCR.[75] Thus, the applicant should not be expected to bear the full responsibility to prove that he or she belongs to a PSG or that such membership exposes him or her to a risk of persecution, in the meaning of Article 10 of the Qualification Directive.[76]

Finally, as for the referring court's doubt of whether "westernization" – or as the ECJ reads it, the identification with the value of gender equality –[77] must be rooted in religious or political grounds for it to qualify as a ground for refugee status, the Court clearly answers negatively, stating that such identification can constitute a reason for persecution – pursuant to Article 10 of the cited Directive – regardless of its political or religious motives.[78]

In the second place, the ECJ answers the third and fourth questions, which are also addressed together, as both seek clarification of the meaning of Article 24 of the CFREU.

It first observes that Article 24 of the CFREU, which mandates placing the child's best interests as a primary consideration in all actions relating to children, is explicitly mentioned in the Qualification Directive's recitals,[79] which showcases the importance of this principle in the assessment of asylum applications by minors. Moreover, the Court clarifies that the term "best interests of the child" – which originates from of Article 3 of the International Convention of the Rights of the Child – is a concept which encompasses three dimensions: a substantive right, a legal standard for interpretation, and a procedural rule.[80] Then, the ECJ starts addressing the questions by focusing on Article 4(3)(c) of the Qualification Directive. In response to the doubt

[73] Ibid., para. 58.
[74] Ibid., para. 57.
[75] Ibid., para. 60.
[76] Opinion of AG *Collins*, *K, L,* Case C–646/21, para 44.
[77] ECJ, *K, L*, Judgement of 11 June 2024, Case C–646/21, para. 33.
[78] Ibid., para. 52.
[79] Namely, Recitals 16 and 18 of the Qualification Directive.
[80] ECJ, *K, L*, Judgement of 11 June 2024, Case C–646/21, para. 73.

of *when* the best interests of the child should be considered – in the context of an application for international protection – it answers that it must be during the assessment of the merits of that application.[81] And, regarding *how* to assess those best interests of the child, it affirms that it should be done through an individual assessment and on a case-by-case basis, considering the specific circumstances of the minor in question, rather than in a general way, as also indicates Article 10(3) of the Asylum Procedures Directive.[82]

In sum, the Court rules that the interpretation of Article 10(1)(d) and (2) of the Qualification Directive, on the one hand, and Article 24(2) of the CFREU, on the other, must be as follows. As for the first provision, it shall be understood as meaning that, depending on the circumstances of their home country, women and girls who, during their stay in a Member State, identify themselves with the fundamental value of gender equality, may be considered as members of a PSG, qualifying as a ground for persecution, and potentially giving rise to the granting of refugee status.[83] Regarding the second provision, the Court declares that it must be interpreted as obliging Member States, when deciding upon an application for international protection submitted by a minor, to first consider the child's best interests through an individual, case-by-case assessment, taking into account the specific and concrete circumstances of the child in question.[84]

2. Relevance of the case in the light of EU asylum law

It is evident that Case C–646/21, following the line of case-law initiated with Case C-621/21,[85] paves the way to advancing towards a more gender-sensitive approach to asylum within the Union. The weight given throughout the ruling to gender equality – enshrined in Articles 2 and 3(3) of the TEU – and recognizing it as something central to the girls' identity and conscience, reflects ECJ's determination to establish this value as essential within the EU's common asylum

[81] Ibid., para. 78.
[82] Ibid.
[83] Ibid., para. 64.
[84] Ibid., para. 84.
[85] ECJ, *WS*, Judgement of 16 January 2024, C-621/21.

policy. In this regard, it will be crucial for the outcome of future rulings concerning women asylum seekers.[86]

Moreover, the broadening of the concept of PSG to include individuals who genuinely identify with the belief of gender equality indicates a step forward in acknowledging the specific risks of persecution faced by women in some countries, such as Iraq, where, by reason of this identification, may be seen as transgressing moral codes, and are more likely to be exposed to threats and attacks from conservative groups.[87] Therefore, the widening of this notion reinforces the idea that persecution can arise from not only innate attributes, but also from genuine commitment to values that shape one's identity.

Finally, the ECJ's reliance on CEDAW and the Istanbul Convention for rendering its decision – identifying them as "relevant treaties" pursuant to Article 78(1) TFEU –[88] reflects the Court's will to build a harmonized legal framework across the world regarding the intersection between asylum and gender, as well as the growing normative influence of these gender-related instruments on the EU, possibly because of the EU's recent accession to the Istanbul Convention.[89]

3. Critical assessment

However, despite the potential of this judgement to contribute to a more gender-sensitive asylum law in the EU, the ECJ also leaves some gaps and raises concerns that require attention.

First, the underlying assumption that equates "western norms" with "equality between men and women" – which forms the basis of the ruling – appears problematic. The identification of the Iraqi teenagers with the fundamental value of gender equality as a result of their "westernization" during their stay in the Netherlands,[90] introduces a clear division between the "West" and "East". This framing reinforces a dichotomy that categorizes the world into the "progressive" West, and the "backward" East.[91] Although the Advocate General, in his Opinion, explicitly

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[86] *Ertuna/Nicolosi*, A Further Step to Gender-Sensitive EU Asylum Law: The Case of 'Westernised Women', https://eulawanalysis.blogspot.com/2024/06/a-further-step-to-gender-sensitive-eu.html (last accessed on 27/04/2025).
[87] *EUAA*, Country Guidance: Iraq, November 2024, section 3.3.
[88] ECJ, *K, L*, Judgement of 11 June 2024, Case C–646/21, para. 36.
[89] *Warin*, IJRL 2024, 93 (97).
[90] ECJ, *K, L*, Judgement of 11 June 2024, Case C–646/21, para. 24.
[91] *Losch*, VerfBlog 2024.

rejects the use of this term,[92] the Court does not. This omission raises important questions: does the Court imply that non-Western cultures are incapable of embracing gender equality as a fundamental value? If so, does this risk downplaying or ignoring violence against women in "Western" nations?[93]

Second, the confinement of gender-based claims within the category of "membership of a PSG" poses several concerns. It is true that the ECJ's acknowledgment that gender-based persecution does not need to be religious or political in character can be an important advancement in some areas. It can potentially open the door for claims such as those arising from the so-called "climate refugees" which, due to natural disasters or other environmental threats, have to flee their homes and search for asylum someplace else.[94] Nevertheless, this approach also presents limitations. As noted by some academics,[95] the Iraqi girls' commitment to gender equality could have directly been interpreted as a ground for persecution based on political opinion, without needing to look at it from the "membership of a PSG" perspective. This emphasis on the PSG risks depoliticizing gender-based claims, neglecting political reasons that, in many cases, may be the actual root for seeking asylum.[96]

Moreover, and given the recent EU's accession to the Istanbul Convention, this narrow interpretation of gender-related claims as exclusively falling into the PSG category does not properly align with that Convention. This instrument requires States to interpret every one of the reasons of persecution listed in the 1951 Refugee Convention – race, religion, nationality, political opinion and membership in a PSG – in a gender-sensitive manner,[97] not just PSG alone. This mandate, though, is not reflected in EU Law, which restricts gender-based matters to the PSG category.[98]

Finally, the Court does not explicitly address the situation in Iraq regarding women and girls. While this omission may stem from the limitations of the ECJ's competences – confined to interpreting EU law, as enshrined in Articles 19(3)(b) of the TEU and Article 267(a) of the

[92] Opinion of AG *Collins*, *K, L*, Case C–646/21, para. 18.
[93] *Crawley*, RSQ 2022, 355 (368).
[94] *Losch*, VerfBlog 2024.
[95] *Raimondo*, VerfBlog 2024.
[96] UNHCR, Guidelines on International Protection No. 1, 2002, UN Doc. HCR/GIP/02/01, para. 28.
[97] See Article 60(2) of the Istanbul Convention.
[98] *Raimondo*, VerfBlog 2024.

TFEU – it nevertheless falls short in denouncing the discrimination they face in many aspects of their lives, as highlighted previously when outlining the current context of Iraq. At the very least, the Court could have mentioned existing evidence found in EUAA country reports to provide a more comprehensive assessment of gender-based persecution.

II. ECJ, *AH and FN v Bundesamt für Fremdenwesen und Asyl*, Joined Cases C-608/22 and C-609/22, Judgment of 4 October 2024

1. Breakdown of the case

a) Facts and questions referred for a preliminary ruling

The second case also involves asylum applications in the EU, but this time, of two Afghan women. Although originally two separate cases, the Court decides to join them given their substantive similarities.

The applicants in the main proceedings are AH and FN. AH was born in 1995 in Afghanistan, and when she was 14 years old, she fled to Iran with her mother escaping a forced marriage arranged by her father. In 2015 she entered Austria and applied for international protection there – mainly because her husband was already living in that country[99]. Meanwhile, FN was born in 2007 and, although an Afghan national, she has never lived in Afghanistan. It was in Iran where she – together with her mother and sisters – lived till 2020, when she fled to Austria on the grounds that, inter alia, she could not receive an education in Iran. That same year, she applied for international protection in Austria. In her application, she argued that, if she were to be returned to her country of origin (Afghanistan), she would fear abduction, would not be able to go to school and would lose her freedom as a woman.[100]

In 2018 and 2020, respectively, the Austrian Office for Immigration and Asylum rejected both applications for refugee status. However, it granted both applicants subsidiary protection, a lesser form of protection, on the basis that they would encounter economic and social struggles if returned to Afghanistan.[101]

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[99] ECJ, *AH and FN*, Judgement of 4 October 2024, Joined Cases C–608/22 and C-609/22, para. 19.
[100] Ibid., para. 20.
[101] Ibid., para. 21.

In challenging these decisions, AH and FN brought their appeals, first, before the Federal Administrative Court of Austria – which dismissed them –[102] and finally, before the Supreme Administrative Court.[103] As arguments for their claim, they both similarly affirmed that, during their stay in Austria, they had integrated "Western" values and lifestyle and, that, most importantly, after the return of the Taliban in the summer of 2021, women, like themselves, faced widespread persecution in Afghanistan, and thus should not be sent back.[104]

The Supreme Administrative Court then decided to suspend proceedings in both cases and, by virtue of Article 267 TFEU, referred the following questions, summarized below, to the ECJ:[105]

(i) Is the accumulation of measures adopted by a State in respect of women – such as forced marriages, lack of legal protections against gender-based violence, restriction of freedom of movement, access to healthcare and access to education, mandatory body and face coverings, and denial of participation in politics – sufficiently serious to be classified as an "act of persecution", in the meaning of Article 9(1) of the Qualification Directive?

(ii) For the granting refugee status, is it enough that a woman, solely because of her gender, is subject to such measures in her country of origin, or must an individual assessment be made to decide whether those measures amount to persecution under Article 9(1)(b) of the Qualification Directive?

b) Consideration of the questions referred and judgement of the Court

Firstly, in connection with Question 1, and in a similar way as in the previous case, the Court begins by observing the importance of interpreting the Qualification Directive taking into consideration several international and regional instruments – namely, the 1951 Refugee Convention, the Istanbul Convention and CEDAW, as well in light of the CFREU.[106]

[102] Ibid., paras. 22-23.
[103] Ibid., para. 24.
[104] Ibid.
[105] Ibid., para. 30.
[106] Ibid., paras. 33-36.

Then, the Court outlines the different scopes of paragraphs (a) and (b) of Article 9(1) of the referred directive.[107] The former indicates that an act will fall into the category of "persecution" when, due to its nature or repetition, it results in a serious violation of basic human rights – particularly those non-derogable under the ECHR. The latter, meanwhile, broadens this definition by recognizing that a combination of various acts, which individually do not constitute violations of basic rights, may also amount to persecution, provided their cumulative effect is sufficiently severe to produce consequences like those described in paragraph (a).

Considering the above, the ECJ points out that some of the restrictive measures indicated by the referring court classify, on their own, as "acts of persecution" for the purposes of Article 9(1)(a) of the Qualification Directive.[108] In particular, the absence of legal protection against gender-based violence, comparable to a way of inhuman and degrading treatment under Article 3 ECHR,[109] and forced marriage, comparable to slavery under Article 4 ECHR.[110]

Although the Court indicates that the preceding considerations would be enough to establish the existence of "acts of persecution" under Article 9(1)(a) of the cited directive,[111] it nevertheless goes on to analyze the rest of the restrictions – namely, denial of access to politics, healthcare and education, and obligation to cover one's body and face[112]. Pursuant to Article 9(1)(b) of that directive, the Court declares that, considered together, these measures subject women to a treatment comparable in severity to a violation of basic human rights.[113] Hence, it answers the first question by declaring that individual, State-adopted, gender-discriminatory measures, when taken as a whole, do fall under the scope of "acts of persecution" enshrined in Article 9(1)(b) of the Qualification Directive.[114]

Secondly, regarding Question 2, which seeks to clarify the meaning of Article 4(3) of the Qualification Directive, the ECJ starts by establishing the purpose of that provision, that is, to set out rules for the assessment of asylum applications. As regards to *how* this assessment should

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[107] Ibid., paras. 37-42.
[108] Ibid., para. 43.
[109] ECtHR, *Opuz v. Turkey*, No. 33401/02, Judgement of June 9, 2009, para. 176.
[110] UNHCR, Adverse Impact of Forced Marriage on the Full and Effective Enjoyment of All Human Rights by All Women and Girls, 2023, UN Doc. A/HRC/52/50, paras. 8-9
[111] ECJ, *AH and FN*, Judgement of 4 October 2024, Joined Cases C–608/22 and C-609/22, para. 43.
[112] Ibid., para. 44.
[113] Ibid.
[114] Ibid., para. 46.

be made, the wording of the Article is clear: "on an individual basis".[115] This means that applications need to be examined case-by-case, taking into account the personal circumstances of the individual in question, as well as the prevailing situation in his or her country of origin.[116] This last aspect is further developed in Article 10(3)(b) of the Asylum Procedures Directive, which requires States to obtain updated and accurate data from, inter alia, the EUAA and the UNHCR.[117]

However, as the Court suggests, there is an exception to this general rule in Article 3 of the Qualification Directive, which indicates that Member States can adopt more favorable standards when granting refugee status. The ECJ, in line with the Advocate General's view,[118] interprets this as meaning that the national authorities, in response to the particularities of each case, may modify the methods of assessing the applications to be more flexible and lenient towards the applicant. In this concrete case – and after mentioning a EUAA's Report on Afghanistan[119] and a UNCHR's statement –[120] the Court concludes that "there is a presumption for recognition of refugee status for Afghan women",[121] due to the oppression, denial of human rights and segregation that women face in Afghanistan.[122]

Therefore, the ECJ rules that Article 4(3) of the Qualification Directive shall be interpreted as allowing national authorities – when assessing the application for international protection of a woman whose country of origin exposes her to discriminatory measures that amount to persecution – to only consider the applicant's gender and nationality, not being necessary to prove that she is in fact at risk of persecution.[123]

2. Relevance of the case in the light of EU asylum law

With this judgement, the ECJ demonstrates a step forward in acknowledging the specific difficulties Afghan women face when applying for international protection in the EU. It does so by

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[115] Ibid., para. 48.
[116] Ibid., para. 49.
[117] Ibid., para. 52.
[118] Opinion of AG *de la Tour*, *AH, FN*, Joined Cases C–608/22 and C-609/22, para. 71-78.
[119] *EUAA*, Country Guidance: Afghanistan, January 2024, section 3.15.
[120] UNHCR, Statement on the concept of persecution on cumulative grounds in light of the current situation for women and girls in Afghanistan, May 2023, para. 5.1.11.
[121] ECJ, *AH and FN*, Judgement of 4 October 2024, Joined Cases C–608/22 and C-609/22, para. 56.
[122] Ibid., para. 44.
[123] *N.N.*, beck-actuell, 2024.

recognizing that being potentially subject to severe discriminatory measures in their home country can directly amount to persecution. Moreover, it opens the door to more standardized safeguards in the EU for women and girls fleeing oppressive environments. Beyond strengthening the protections to women from Afghanistan, this ruling also stresses the Union's commitment to defend the most basic rights to all those escaping persecution and advances gender mainstreaming[124] within EU asylum law, building on the progress initiated with Case C-621/21 and continued in Case C-464/21.

Furthermore, this decision holds political significance,[125] as it reflects the alignment of the jurisprudence with the ongoing social and legal changes taking place across the EU. Before the judgement, countries such as Sweden, Finland or Denmark, had already adopted guidelines to grant refugee status to Afghan women without requiring a detailed, individual assessment in each case.[126] By issuing such a decision, the rest of Member States are more likely to follow this tendency, fostering a more harmonized approach throughout the Union.

Finally, the Court's perspective also contributes to a perspective more closely linked with international human rights law, by consistently referencing key human rights instruments like the ECHR or CEDAW throughout the ruling,[127] bringing a more human-rights approach into the asylum system.

3. Critical assessment

Despite all the previous considerations, this ruling also encounters limitations. It is true that in *AH and FN* the ECJ adopts a firm stance by explicitly condemning the Taliban's brutal measures against women,[128] and recognizing that Afghan women – by the mere fact of being Afghan and female – should be granted refugee status in the EU. However, while some scholars have interpreted this as obliging Member States to automatically grant refugee status to Afghan women,[129] this reading does not really align with the Court's actual wording. The Court states

[124] For a broader understanding of the term "gender mainstreaming" see *Den Heijer* in: Peers et al. (eds), The EU Charter of Fundamental Rights: A Commentary, Art. 23, para. 32.
[125] *Koymali*, Völkerrechtsblog, 2025.
[126] *European Parliament*, At a Glance: Refugee Status all female Afghan asylum seekers, May 2023.
[127] ECJ, *AH and FN*, Judgement of 4 October 2024, Joined Cases C–608/22 and C-609/22, paras. 34-35.
[128] Ibid., para. 44.
[129] *Esmailian*, EJIL:Talk!, 2024; *Gupta*, EJIL:Talk!, 2024.

that national authorities "are entitled to consider",[130] when the situation in the country of origin justifies it, only gender and nationality in assessing such applications. This does not equate to Afghan women being automatically refugees. Rather, it leaves discretion to States. Although some of them have already adopted laws granting automatic refugee status to Afghan women, as stated previously, others, especially those who have not ratified the Istanbul Convention, will likely be more reluctant to do so.

Moreover, while the ruling may constitute a shift towards a more gender-orientated asylum process in the EU, the Court also fails to address the very root of the humanitarian emergency in Afghanistan. Although this may partly result from the Court's limited mandate, restricted to interpreting Union law, its focus is inevitably limited to Afghan women who are able to make it to the EU's borders. But, what about Afghan women "trapped" in their country? The Taliban's apartheid regime, further reinforced by the recently adopted "Vice and Virtue" law, segregates women and men, confines women to their homes and prohibits them from traveling alone. Thus, for many women – and arguably, most of them – the act of fleeing itself could be life threatening. Because of this, a ruling which recognizes refugee status only once they manage to escape is partial justice. Women should not have to risk their lives to access protection. The EU and the international community must go beyond passive recognition and take active steps to address the urgent situation in Afghanistan. Mere sanctions, diplomatic condemnations or funding freezes, risk deepening the country's already big isolation and, by extension, the critical situation of Afghan women.

Finally, the decision raises concerns about the threshold applied to determine what constitutes "acts of persecution". The Court ultimately concludes that measures such as restriction – or, in some cases, denial – of healthcare, education, or freedom of movement, do not, taken alone, amount to "acts of persecution".[131] This approach risks overlooking the severity of these actions. The Court, as did the Advocate General in his Opinion,[132] should have offered a different interpretation by stressing that these measures may also independently breach fundamental human rights under the ECHR, and thus, constitute acts of persecution pursuant to Article 9(1)(a)

[130] ECJ, *AH and FN*, Judgement of 4 October 2024, Joined Cases C–608/22 and C-609/22, para. 57.
[131] Ibid., para. 44.
[132] Opinion of AG *de la Tour*, *AH and FN*, Joined Cases C–608/22 and C-609/22, para. 55.

of the Qualification Directive. For example, the denial of access to healthcare could in itself constitute an inhuman or degrading treatment under Article 4 of the ECHR.[133]

In connection with this, focusing only on those measures that violate absolute rights protected by the ECHR risks neglecting other types of gender-based discrimination that, while less "exotic"[134] to the eyes of Western societies, still constitute gender discrimination. By only focusing on the most extreme forms of discrimination –like forced marriages or lack of prevention against gender-based and domestic violence – the Court, and the EU in general, risks normalizing or smoothing other systemic gendered power structures that also affect women in their own societies but might be less visible or exotic. It appears easier to condemn those practices that are "far away" from our cultures than critically looking inward and deconstructing our own "western" or "European" contexts to unveil other gender-based discriminations that still reinforce gender inequalities.

E. Conclusions

As underlined in the introduction, jurisprudence of the Court of Justice tackling gender-related matters in asylum cases is insufficient. This makes the two judgements examined in this paper, Case C-464/21 (*K, L*) and Joined Cases C-608/22 and C-609/22 (*AH and FN*), particularly relevant.

Not only do they address an overlooked aspect of asylum law, namely gender, but they also indicate a shift towards a more gender-sensitive approach of international protection within the EU. In *K, L*, the Court broadens the interpretation of "particular social group" to include women who genuinely identify with the fundamental value of gender equality, acknowledging the specific forms of persecution women may face for transgressing patriarchal norms and reaffirming gender equality as a foundational value of the EU legal order. In turn, *AH and FN* explicitly recognizes the structural and systematic discrimination faced by Afghan women under the Taliban regime, concluding that such blatant gender-based discrimination is enough to grant them refugee status. Moreover, the Court's reliance, in both rulings, on other international and regional instruments to interpret EU law – the Refugee Convention, CEDAW, the Istanbul

[133] Ibid.
[134] *Crawley*, 2022, 355 (369).

Convention and the ECHR – signals an emerging jurisprudential trend that aligns EU law with human rights standards in gender-related issues.

Nevertheless, as assessed in the main section of this paper, these rulings also reveal significant gaps. First, they largely benefit women asylum-seekers who have been able to reach the EU borders, leaving those confined in countries like Afghanistan or Iraq without the same protections. While this may reflect the Court's boundaries regarding its competences, it still echoes a broader institutional failure to account for the realities of those who are unable to flee and hence remain invisible in legal protection frameworks. Furthermore, they do not address fully the serious and severe circumstances of women unable to escape these situations, which is a crucial gap in the Court's approach. In this regard, while the ECJ explicitly denounces the systemic discrimination suffered by Afghan women under the Taliban regime, it remains silent on the situation for women and girls in Iraq. This discrepancy could be explained by the fact that the Afghan case presents a more extreme and internationally condemned example of gender-based discrimination,[135] which may have made it less politically sensitive for the Court to adopt a harsher stance. However, this inconsistency suggests a depoliticized perspective to gender-based persecution, where the Court only intervenes or makes a stance in the most extreme and severe discrimination cases, potentially overlooking the less visible, yet still existent, gender-based violence women face in other regions, including Europe.

Thus, regarding the question raised in the beginning of this paper – whether these judgements mark a true evolution towards a more gender-sensitive approach within EU asylum system – the answer is a cautious yes. While, in general, they do contribute to building a more gendered understanding of asylum law, they also reveal the need for further development in judicial, institutional and jurisprudential approaches to gender-based forms of persecution. It is necessary for the EU to adopt an even higher stance on gender-related matters, highlighting the intersectional, transversal, cross-cutting application of gender considerations across all sectors, including asylum and refugee law. Only through such a gender-mainstreaming perspective can the EU guarantee that its legal framework – and, thus, its policy one too – truly reflects and safeguards the intersectional realities of people that seek asylum.

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[135] *European Parliament*, Briefing: Women's rights in Afghanistan: An ongoing battle, September 2024, p. 9.

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