



**The Office of United Nations High Commissioner for Refugees ('UNHCR')
Statement on the concept of persecution on cumulative grounds
in light of the current situation for women and girls in Afghanistan**

*Issued in the context of the preliminary ruling reference to the Court of Justice of the European Union
in the cases of AH and FN v. Bundesamt für Fremdenwesen und Asyl (C-608/22 and C-609/22)*

1. Introduction

1.1. On 14 September 2022, the Supreme Administrative Court of Austria referred two questions¹ to the Court of Justice of the European Union ('CJEU') concerning the interpretation of Article 9(1)(b) of Directive 2011/95/EU ('Qualification Directive', 'QD').² In essence, the referring court asks whether the current situation for women and girls in Afghanistan amounts to persecution due to an accumulation of measures within the meaning of this provision; and whether it is sufficient that a woman is affected by such measures merely on the basis of her gender or whether an individual assessment is required.

1.2. This statement is divided into six parts. Following this section, UNHCR's interest and expertise in the matter is set out in Part 2. Part 3 outlines the relevant legal principles underlying the concept of persecution, including on cumulative grounds. Part 4 provides UNHCR's interpretation of a State's specific obligations under international and EU law in cases of gender-related claims. Part 5 responds to the specific questions raised in the preliminary reference in light of the current situation for women and girls in Afghanistan. Part 6 concludes and summarizes UNHCR's position on these questions.

2. UNHCR's interest and expertise in the matter

2.1. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and together with governments to seek solutions for them.³ UNHCR fulfils its mandate, *inter alia*, by supervising the application of international conventions for the protection of refugees.⁴ State parties to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (together, '1951 Convention'), including all EU Member States, are obliged to cooperate with UNHCR in the exercise of its mandate and to facilitate its supervisory role.⁵

2.2. UNHCR's supervisory responsibility is also provided for in EU law, both in primary and secondary law. Article 78(1) of the Treaty on the Functioning of the European Union stipulates that a common policy on asylum, subsidiary protection and temporary protection 'must be in accordance with the [1951] Convention'⁶ and Article 18 of the Charter of Fundamental Rights of the European Union states that 'the right to asylum shall be guaranteed with due respect for the rules of the [1951]

¹ See *Requests for a preliminary ruling in the cases of AH and FN v. Bundesamt für Fremdenwesen und Asyl (C-608/22)*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=269282&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=3078354>, 22 September 2022.

² European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, OJ L 337/9-337/26, 20 December 2011, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>.

³ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para. 1 ('UNHCR Statute'), www.refworld.org/docid/3ae6b3628.html.

⁴ *Ibid.*, para. 8(a).

⁵ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, www.refworld.org/docid/3be01b964.html, Article 35 and *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, www.refworld.org/docid/3ae6b3ae4.html, Article II.

⁶ European Union, *Consolidated Version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>.

Convention.’⁷ Further, Recital 22 QD states that consultations with UNHCR ‘may provide valuable guidance for Member States when determining refugee status’ and Article 29 of Directive 2013/32/EU obliges Member States to allow UNHCR to present its views on individual applications, ‘in the exercise of its supervisory responsibilities’, ‘at any stage of the procedure’.⁸ EU legislation and the CJEU have considered that UNHCR documents are ‘particularly relevant in the light of the role conferred on the UNHCR by the [1951] Convention’.⁹

3. The concept of persecution, including on cumulative grounds

3.1. While the term ‘persecution’ is not expressly defined in the 1951 Convention, it can be considered to involve serious human rights violations, including a threat to life or freedom as well as other kinds of serious harm. In addition, other forms of harm may *cumulatively* constitute persecution.¹⁰ For example, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms) combined with other adverse factors (e.g. the general atmosphere of insecurity in the country of origin). What amounts to persecution on cumulative grounds cannot be stated in the abstract. As with every refugee claim, what amounts to persecution will depend on the circumstances of the case, including the age, gender, opinions, feelings and psychological make-up of the applicant.¹¹

3.2. According to Article 9(1) QD, ‘in order to be regarded as an act of persecution within the meaning of Article 1(A) of the [1951] Convention an act must:

- a) be sufficiently serious by its nature or repetition as to constitute a *severe violation of basic human rights*, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
- b) be an *accumulation of various measures*, including violations of human rights which is *sufficiently severe* as to affect an individual in a similar manner as mentioned in point (a)’ [emphasis added].

3.3. Article 9(2) QD states that acts of persecution can, *inter alia*, take the form of physical or mental violence, including acts of sexual violence, discriminatory legal or administrative measures, prosecution or punishment which is disproportionate or discriminatory, and acts of a gender-specific nature.¹² UNHCR notes that persecution is not confined to acts of physical violence, as demonstrated by the non-exhaustive list of persecutory acts in Article 9(2) QD. As the Australian High Court noted in *S395/2002 v Minister for Immigration and Multicultural Affairs*, ‘[p]ersecution covers many forms of harm, ranging from physical harm to the loss of intangibles, from death and torture to State sponsored or condoned discrimination in social life and employment’.¹³

3.4. In assessing acts of persecution, this Court has not drawn sharp distinctions between Articles 9(1)(a) and (b) QD and rather focused on the ‘nature of the repression inflicted on the individual and its

⁷ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, www.refworld.org/docid/3ae6b3b70.html.

⁸ European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 180/95; 29.6.2013, 2013/32/EU, <https://www.refworld.org/docid/51d29b224.html>.

⁹ For the latest restatement of this in CJEU case law, see *Commission v. Hungary* [GC], C-808/18, 17 December 2020, <https://curia.europa.eu/juris/liste.jsf?num=C-808/18>, para. 115; for earlier instances, see also *Bilali*, C-720/17, 23 May 2019 <https://curia.europa.eu/juris/liste.jsf?num=C-720/17>, para. 57, and *Halaf*, C-528/11, 30 May 2013, <https://curia.europa.eu/juris/liste.jsf?num=C-528/11&language=EN>, para. 44.

¹⁰ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4, www.refworld.org/docid/5cb474b27.html, para. 53.

¹¹ UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, <https://www.refworld.org/docid/50348afc2.html>, para. 16.

¹² Article 9(2)(a), (c) and (f) QD.

¹³ *S395/2002 v Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, Australia: High Court, 9 December 2003: www.refworld.org/cases/AUS_HC.3fd9eca84.html, para. 40.

consequences’.¹⁴ What matters for the assessment of whether an act constitutes persecution is not so much the qualification of the right infringed as ‘basic’ or not, but the ‘severity of the measures and sanctions adopted or liable to be adopted against the person concerned’.¹⁵

3.5. Concretely, the Court has considered that a term of imprisonment punishing homosexuality which is actually applied amounts to disproportionate or discriminatory punishment and therefore persecution.¹⁶ It also ruled that, while not all interference with the right to religious freedom represents an act of persecution, a genuine risk of, *inter alia*, being prosecuted or subject to ill-treatment upon the exercise of that religious freedom might constitute an act of persecution.¹⁷ It further ruled that legislation, such as a law on apostasy, which imposes the death penalty or a custodial sentence may in itself constitute persecution, provided that such penalties are actually applied.¹⁸

3.6. When assessing a real risk of ill-treatment under Article 3 ECHR, the European Court of Human Rights has long applied the notion of cumulative risks.¹⁹ In *J.K. and Others v. Sweden*, it held that

‘although a number of individual factors may not, when considered separately, constitute a real risk, *the same factors may give rise to a real risk when taken cumulatively* and when considered in a situation of general violence and heightened security’.²⁰ [emphasis added]

According to the ECtHR, specific risk factors to be taken into account when assessing such ‘cumulative persecution’ are the age and gender of the person, as well as membership of a persecuted group.²¹

3.7. National courts have equally recognized persecution based on cumulative grounds. For example, following the CJEU’s *Y and Z* ruling and referring to UNHCR’s Handbook, the German Federal Administrative Court stated that various discriminatory acts or measures in their cumulative effect can constitute persecution, even if they do not individually constitute human rights violations.²² In the specific case, concerning religious freedom, it held that various forms of discrimination, including regarding access to educational or health facilities, but also occupational or economic restrictions on earning a living, can cumulatively meet the threshold of persecution.²³ Similarly, the Irish High Court has held that it is ‘well established as a matter of refugee law that cumulative acts of discrimination may, taken together, amount to persecution’.²⁴

3.8. The ‘cumulative approach’ has also been applied in cases of gender-related persecution. For example, the French National Court of Asylum recognized a Nigerian female victim of trafficking as a refugee due to an accumulation of different discriminatory measures which constituted persecution in the

¹⁴ CJEU, *Y and Z* [GC], Joined Cases C-71/11 and C-99/11, 5 September 2012, <https://curia.europa.eu/juris/liste.jsf?num=C-71/11>, para. 65.

¹⁵ *Y and Z*, note 14 above, para. 66. See also CJEU, *Fathi*, C-56/17, 4 October 2018, <https://curia.europa.eu/juris/liste.jsf?num=C-56/17>, para. 94 and CJEU, *E.Z.*, C-238/19, 19 November 2020, <https://curia.europa.eu/juris/liste.jsf?num=C-238/19>, para. 22.

¹⁶ As per Article 9(2)(c) QD, see *X, Y and Z*, Joined Cases C-199/12 to C-201/12, 7 November 2013, <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-199/12%20to%20C-201/12&td=ALL>, paras 55–59.

¹⁷ *Y and Z*, Joined Cases C-71/11 and C-99/11, note 14 above, para. 72.

¹⁸ *Fathi*, C-56/17, note 15 above, paras 96–97, quoting *X, Y, Z*, C-199/12, note 16 above, paras 56–57.

¹⁹ See, for example, ECtHR, *N.A. v. the United Kingdom*, Application no. 25904/07, 17 July 2008, <https://hudoc.echr.coe.int/eng?i=001-87458>, para. 130.

²⁰ ECtHR [GC], *J.K. and Others v. Sweden*, Application no. 59166/12, 23 August 2016, <https://hudoc.echr.coe.int/fre?i=001-165442>, para. 95.

²¹ *Ibid.*

²² Germany, Federal Administrative Court, *Case 10C 23.12*, 20 February 2013, <https://www.bverwg.de/en/200213U10C23.12.0>. See also Switzerland, Federal Administrative Tribunal, *Case No. E-3850/2018*, 13 November 2018, <https://jurispub.admin.ch/publiws/download?decisionId=585cd2f1-4b0b-45d1-b8c2-9521a6b51a00>.

²³ Germany, Federal Administrative Court, note 22 above, para. 36.

²⁴ Ireland, High Court, *G.V. & I.V. v Refugee Appeals Tribunal & Minister for Justice, Equality and Law Reform*, [2011] IEHC 262, 1 July 2011, www.asylumlawdatabase.eu/en/case-law/ireland-high-court-1-july-2011-gv-iv-v-refugee-appeals-tribunal-minister-justice-equality. The court also held that ‘that a fear of persecution may arise from “the cumulative effects of various measures of discrimination where they may have seriously prejudicial consequences.”’ (para. 14).

meaning of Article 9 QD.²⁵ In a case concerning a woman from Kyrgyzstan, the Czech Supreme Administrative Court relied on Article 9(1)(b) QD to find that she faced persecution on the cumulative grounds of a forced marriage, domestic violence and the situation in her country of origin.²⁶ In another judgment that is particularly relevant to the questions before this court, the Austrian Supreme Administrative Court considered that the sum of discriminatory measures against women during the first Taliban rule (e.g. arbitrary violence, systematic restrictions to medical care, etc.) amounted to persecution.²⁷

4. Gender-based persecution

4.1. As noted in the UNHCR Guidelines on International Protection concerning Gender-related Persecution, it is an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to accurately determine refugee claims.²⁸ This approach has been endorsed by UNHCR's Executive Committee, of which all EU Member States are members.²⁹ Even though gender is not specifically mentioned in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims.³⁰

4.2. Certain acts of a gender-based nature have been clearly characterized as serious abuses amounting to persecution under international human rights law and international criminal law. For example, there is no doubt that rape, domestic violence, human trafficking for the purpose of sexual exploitation and female genital mutilation inflict severe pain and suffering – both mental and physical – and have been used as forms of persecution, whether perpetrated by State or private actors.³¹

4.3. The QD clearly recognizes the importance of a gender-sensitive approach to international protection. Article 4(3) QD requires an individual assessment of asylum applications which takes into account 'factors such as [...] gender and age'. Article 9(2)(f) QD notes that acts of persecution can be of a gender-specific nature. Article 10(1)(d) QD on the definition of a particular social group specifies that '[g]ender related aspects [...] shall be given due consideration' (see also corresponding Recital 30).

4.4. Obligations on States in respect of gender-based violence³² are not restricted to action by or on behalf of Governments, but entail a due diligence obligation to protect women from violence (including from private parties, such as family members) and to prevent, prosecute and eliminate violence against

²⁵ France, National Court of Asylum, *Mlle E*, Case N. 10012810, 24 March 2015, <https://www.asylumlawdatabase.eu/sites/default/files/alddfiles/CNDA%2C%2024%20march%202015%2C%20no.10012810%20.pdf>.

²⁶ Czech Republic, Supreme Administrative Court, *R.S. v Ministry of Interior*, 6 Azs 36/2010-274, 25 January 2011, www.asylumlawdatabase.eu/en/case-law/czech-republic-supreme-administrative-court-25-january-2011-rs-v-ministry-interior-6-azs. On forced marriages, see the Opinion of Advocate General Richard De La Tour in C-621/21, delivered 20 April 2023, <https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-621/21&jur=C>, para. 77.

²⁷ Austria, Supreme Administrative Court, Case No. 99/20/0483, 16 April 2002, www.ris.bka.gv.at/Dokumente/Vwgh/JWT_1999200483_20020416X00/JWT_1999200483_20020416X00.pdf, para. 5.

²⁸ UNHCR, *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*, 7 May 2002, HCR/GIP/02/01, www.refworld.org/docid/3d36f1c64.html, para. 2.

²⁹ The Executive Committee of the High Commissioner's Programme ('ExCom') was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. Its Conclusions on International Protection are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. See ExCom Conclusions No. 73, 77 (g), 79 (o), and 87 (n), all of which are contained in *Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 (Conclusion No. 1 – 114)*, October 2017, www.refworld.org/docid/5a2ead6b4.html.

³⁰ UNHCR, *Guidelines on Gender-Related Persecution*, note 28 above, para. 6.

³¹ UNHCR, *Guidelines on Gender-Related Persecution*, note 28 above, para. 9.

³² Gender-based violence is an 'umbrella term' for violence directed against a person because of that person's gender or that affects one gender disproportionately. It includes domestic violence, which 'is one of the most insidious forms of violence against women', as well as 'battering, rape, other forms of sexual assault, mental and other forms of violence'. CEDAW, *CEDAW General Recommendation No. 19: Violence against women*, 1992, <https://www.refworld.org/docid/52d920c54.html>, paras 6-7 and 23.

women.³³ Even though a particular State may have prohibited a persecutory practice, the State may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively. In such cases, the practice would still amount to persecution.³⁴ For example, while the de facto authorities in Afghanistan prohibited forced marriages in late 2021, forced and child marriages have sharply increased since then (see also paragraph 5.1.10. below).

4.5. This is also the case where the State's failure to protect fundamental rights is based on discriminatory governmental policies or practices. If the State, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution.³⁵

4.6. In assessing gender-related claims, the following are relevant: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic and Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC). These instruments require States to eliminate discrimination against women and girls in the political and public life and ensure equal participation in political decision making;³⁶ to ensure protection from gender-based and domestic violence;³⁷ to prevent forced marriages;³⁸ to ensure equal access to gainful employment;³⁹ to ensure equal access to health facilities;⁴⁰ to ensure equal access to education;⁴¹ to ensure freedom of movement;⁴² to protect freedom of religion, including the freedom to have or to adopt a religion or belief of their choice;⁴³ and to ensure equal access to leisure and sports activities.⁴⁴

4.7. The CEDAW Committee has noted that violence is one of the major forms of persecution experienced by women. It recognized as 'legitimate grounds for international protection': forced/early marriage, threats of violence and/or so-called 'honor crimes', rape and other forms of sexual assault, serious forms of domestic violence, the imposition of the death penalty or other physical punishments existing in discriminatory justice systems, political or religious persecution for holding feminist or other views, and the persecutory consequences of failing to conform to gender-prescribed social norms and mores.⁴⁵ It recommended that 'State parties should interpret the definition of a refugee in the 1951

³³ Article 2(e) CEDAW; CEDAW, *General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women*, 5 November 2014, CEDAW/C/GC/32, www.refworld.org/docid/54620fb54.html, para. 27.

³⁴ UNHCR, *Guidelines on Gender-Related Persecution*, note 28 above, para. 11; CEDAW, *General Recommendation No. 32*, note 33 above, paras 27, 8, 15, 22-23. See also Article 6(c) QD, recognizing that actors of persecution may also be non-state actors where the State is 'unable or unwilling to provide protection against persecution', and CJEU, *O.A.*, C-255/19, 20 January 2021, <https://curia.europa.eu/juris/liste.jsf?num=C-255/19>, para. 38, ruling that for the assessment of whether fear of persecution is well-founded it must be verified whether State actors take 'reasonable steps to prevent the persecution' and 'operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution'. See further, Austria, Supreme Administrative Court, 2003/20/0550, 21 December 2006, and 2006/20/0832, 4 March 2010, https://www.ris.bka.gv.at/Dokumente/Vwgh/JWT_2006200832_20100304X00/JWT_2006200832_20100304X00.pdf.

³⁵ UNHCR, *Guidelines on Gender-Related Persecution*, note 28 above, para. 15.

³⁶ Article 7 CEDAW, Article 25 ICCPR.

³⁷ The UN Committee Against Torture has applied Article 2 CAT regarding the States' obligations to prevent acts of torture, to 'States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.' See UN Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, www.refworld.org/docid/47ac78ce2.html, para. 18. See also CEDAW General Recommendation No. 19, note 32 above. See also Article 19 in conjunction with Article 2 CRC.

³⁸ Article 1(c) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery recognizes forced marriages as a form of slavery. See also, Human Rights Council, *Preventing and Eliminating Child, Early and Forced Marriage, Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/26/22, 2 April 2014, <https://undocs.org/en/A/HRC/26/22>, para. 21.

³⁹ Article 11 CEDAW, Article 3 in conjunction with Article 6 ICESCR.

⁴⁰ Article 12 CEDAW, Article 3 in conjunction with Article 12 ICESCR, Article 24 in conjunction with Article 2 CRC.

⁴¹ Article 10 CEDAW, Article 3 in conjunction with Article 13 ICESCR, Article 28 in conjunction with Article 2 CRC.

⁴² Article 15 CEDAW, Article 3 in conjunction with Article 12(1) ICCPR, Article 14 CRC.

⁴³ Article 3 in conjunction with Article 18 ICCPR.

⁴⁴ Article 13(c) CEDAW, Article 31 in conjunction with Article 2 CRC.

⁴⁵ CEDAW, *General Recommendation No. 32*, note 33 above, para. 15. See also CEDAW/CRC, *Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices*, on harmful practices in the context of GBV, para. 54 (m).

Convention [...] in line with obligations of non-discrimination and equality; fully integrate a gender-sensitive approach while interpreting all legally recognized grounds; [and] classify gender-related claims under the ground of membership of a particular social group, where necessary.’⁴⁶

4.8. Similarly, the Istanbul Convention, which the EU signed in respect of asylum and *non-refoulement* matters,⁴⁷ requires that ‘[p]arties shall take the necessary legislative or other measures to ensure that gender-based violence against women may be recognized as a form of persecution [...]’.⁴⁸ It further states that ‘[p]arties shall ensure that a gender-sensitive interpretation is given to each of the Convention grounds and that where it is established that the persecution feared is for one or more of these grounds, applicants shall be granted refugee status’.⁴⁹

4.9. In many gender-related claims, the persecution feared could be for one or more of the Convention grounds. For example, a claim for refugee status based on transgression of social or religious norms may be analyzed in terms of religion, political opinion or membership of a particular social group. The claimant is not required to identify accurately the reason why he or she has a well-founded fear of being persecuted.⁵⁰

4.10. Gender specific restrictions, such as clothing requirements, restrictions on movement, harmful traditional practices, or unequal or discriminatory treatment, including subjection to discriminatory laws and/or punishment, may all be relevant when assessing claims in relation to religion.⁵¹ In certain States, religion assigns particular roles or behavioral codes to women and men respectively. Where a woman does not fulfil her assigned role or refuses to abide by the codes, and is punished as a consequence, she may have a well-founded fear of being persecuted for reasons of religion. Failure to abide by such codes may be perceived as evidence that a woman holds unacceptable religious opinions regardless of what she actually believes. She could equally be perceived as holding unacceptable political opinions, hence the importance of assessing the case holistically.⁵² Courts have long recognized persecution in such instances.⁵³

4.11. The particular situation of girls subject to gender-based violence and discrimination must be highlighted. As noted in UNHCR’s Guidelines for International Protection on child asylum claims: ‘While children may face similar or identical forms of harm as adults, they may experience them differently. Actions or threats that might not reach the threshold of persecution in the case of an adult may amount to persecution in the case of a child because of the mere fact that s/he is a child.’⁵⁴

⁴⁶ CEDAW, General Recommendation No. 32, note 33 above, para. 38.

⁴⁷ Council Decision (EU) 2017/866 of 11 May 2017 on the signing, 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 asylum and non-refoulement, 11 May 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D0866&from=EN>.

⁴⁸ Article 60(1) Istanbul Convention, which, as Advocate General Hogan notes in Opinion C-1/19, provides that ‘signatory parties must [...] recognise that gender-based violence against women can be recognised as a form of persecution [...] and [...] serious harm’. <https://curia.europa.eu/juris/liste.jsf?num=C-1/19>, para. 108. See further para. 160.

⁴⁹ Article 60(2) Istanbul Convention. See also the European Parliament’s 2016 Resolution on the situation of women refugees and asylum seekers in the EU, highlighting that ‘gendered forms of violence and discrimination, including but not limited to rape and sexual violence, FGM, forced marriage, domestic violence, so-called honor crimes and state-sanctioned gender discrimination, constitute persecution and should be valid reasons for seeking asylum in the EU’. European Parliament, *The Situation of Women Refugees and Asylum Seekers in the EU*, 8 March 2016, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016IP0073&from=EN>, para. 13.

⁵⁰ UNHCR, Guidelines on Gender-Related Persecution, note 28 above, para. 23.

⁵¹ UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol*, 28 April 2004, www.refworld.org/docid/4090f9794.html, para. 24; UNHCR, Guidelines on Gender-Related Persecution, note 28 above, para. 25.

⁵² UNHCR, Guidelines on Gender-Related Persecution, note 28 above, para. 7.

⁵³ See, for example, France, National Court of Asylum, *Case No. 21022972*, 8 December 2021, recognizing the refugee status of an Afghan woman who refused, after the death of her husband, to marry his brother and thereby did not comply with religious customs, giving rise to a risk of persecution due to her religious beliefs and transgressing social norms, www.cnda.fr/content/download/186741/1798583/version/1/file/CNDA%208%20d%C3%A9cembre%202021%20Mmes%20M.%20et%20Mrs%20M.%20%20n%C2%B021022972%20C.pdf. See also Dutch Council of State, *Case No. 201701423/1/V2*, 21 November 2018, <https://uitspraken.rechtspraak.nl#!details?id=ECLI:NL:RVS:2018:3735>; and Belgium, CALL, *Case No. 278 653*, 12 October 2022, www.rvv-cce.be/sites/default/files/arr/a278653.an.pdf.

⁵⁴ UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, www.refworld.org/docid/4b2f4f6d2.html, para. 15.

4.12. Gender-based violence has long been recognized by courts as potentially amounting to torture or cruel, inhuman or degrading treatment,⁵⁵ and potentially impairing or nullifying the enjoyment by women of other rights, including the right to life.⁵⁶ In interpreting the relevant ECHR provisions, the ECtHR has ruled that a State's failure to provide protection against domestic violence violated not only the prohibition of discrimination, but also the right to life and the prohibition of ill-treatment.⁵⁷ It also held, in numerous cases, that sexual violence, including rape, amounted to violations of the prohibition of ill-treatment under Article 3 ECHR.⁵⁸

4.13. Courts across Europe have equally recognized acts of sexual violence as acts of persecution.⁵⁹ In particular, forced marriages have been widely held to constitute persecution by courts across Europe,⁶⁰ including on cumulative grounds under Article 9(1)(b) QD.⁶¹ In one particularly relevant decision, the Administrative Court of Augsburg recognized an Afghan woman to be at risk of persecution upon return to Afghanistan, due to the risk of being forcibly married, which it considered to be a serious violation of basic human rights in the sense of Article 9(1)(b) QD.⁶² In a recent decision, the Administrative Court of Bremen recognized an Afghan single woman of 'marriageable age' as a refugee, due to the considerable

⁵⁵ Examples include: ECtHR, *N. v. Sweden*, Application no. 23505/09, 20 July 2010, where the Court considered that the deportation of an Afghan woman who claimed to be at risk of ill-treatment due to her extramarital affair would constitute a violation of Article 3 ECHR, due to the risk of gender-based violence from her husband, his family, her own family and from society at large: www.refworld.org/cases/ECHR_4c4d4e4e2.html. Greece, Special Appeal Committee, 26 June 2011, *Application No. 95/126761*, where the Committee considered that the disproportionately harsh punishment that an Iranian woman would face upon return due to an extramarital affair (whipping or stoning) would amount to torture and constitutes a serious form of gender-based persecution. Belgium, Council for Alien Law Litigation (CALL), *Case No. 253.776*, 30 April 2021, www.rvv-ccc.be/sites/default/files/arr/a253776.an.pdf, in which the CALL granted international protection to a victim of domestic violence based on the insufficient State protection against femicide, honour crimes and gender-based violence in Turkey. Italy, Court of Cassation, Civil Section, *Judgment No. 06109/2022*, 16 December 2021, <https://www.italgiure.giustizia.it/sncass/>, in which the court states that domestic violence can amount to inhuman and degrading treatment where state authorities fail to provide protection as a result of local customs.

⁵⁶ See Italy, Court of Cassation, Civil Section, *Judgment No. 8980*, 18 March 2022, which held that FGM violates a number of human rights, including the right to non-discrimination, protection from physical and psychological violence, health and, in the most extreme cases, the right to life.

⁵⁷ ECtHR, *Opuz v. Turkey*, Application no. 33401/02, 9 June 2009, <https://hudoc.echr.coe.int/fre?i=001-92945>. These are provisions under which no derogation is possible under Article 15(2) ECHR, which makes them qualify as 'basic human rights' under Article 9(1)(a) QD. See also Article 14 ECHR which states that Contracting States must secure the enjoyment of the rights and freedoms set forth in this Convention without discrimination, including based on sex.

⁵⁸ See, ECtHR [GC], *Aydın v. Turkey*, Application no. 23178/94, 25 September 1997, <https://hudoc.echr.coe.int/fre?i=002-6215>, and *Maslova and Nalbandov v. Russia*, Application no. 839/02, 24 January 2008, <https://hudoc.echr.coe.int/fre?i=002-2283>.

⁵⁹ See for example, Belgium, CALL, *Case No. 156.927*, 24 November 2015, www.rvv-ccc.be/sites/default/files/arr/A156927.AN.pdf, para. 4.5, which recognized the rape of a woman from Côte d'Ivoire as persecution on political grounds; Belgium, CALL, *Case No. 96.572*, 4 February 2013, which recognized the rape of a minor male applicant from Afghanistan as an 'affront to human dignity' and, therefore, persecution due to 'the nature, intensity and repeated character of the sexual abuse': www.rvv-ccc.be/sites/default/files/arr/A96572.AN.pdf, p. 6. See also Switzerland, Federal Administrative Court, *D-6021/2017*, 15 April 2019, https://caselaw.euaa.europa.eu/Lists/CaseLawDocLib/8d11de21-802d-49a7-9091-d232586db9b8/D-6021_2017.pdf, which considered rape to constitute inhuman and degrading treatment which, in turn, constituted persecution. See also Italy, Court of Cassation, Civil Section, *Judgment No. 18803*, 10 September 2020, which recognized gender-based violence, including sexual violence, as persecution.

⁶⁰ See for example, France, National Court of Asylum, *Case No. 20002635*, 21 June 2022, in which the court recognized the refugee status of an Iraqi woman who fled a forced marriage in a context in which this practice constitutes a social norm, www.cnda.fr/content/download/192024/1827091/version/1/file/CNDA%2021%20juin%202022%20Mme%20S.%20%C3%A9pouse%20N.%20n%C2%B020002635%20C.pdf; France, National Court of Asylum, *Case No. 20030921*, 5 May 2021, in which the court granted refugee protection to a woman who fled a forced marriage in Mali, where forced marriages are a common practice despite being prohibited by law, www.cnda.fr/content/download/182722/1776510/version/1/file/20030921.pdf. See also Denmark, Refugee Appeals Board, *Case No. afg/2017/20/ceb*, 16 January 2017, which granted refugee status to a widowed Afghan woman based on the threat of forced marriage to the deceased husband's brother upon return to Afghanistan. Italy, Court of Cassation, Civil Section, *Judgment No. 28152*, 24 November 2017, recognizing refugee status of a Nigerian woman fleeing a forced marriage and related gender-based violence: www.questionegiustizia.it/data/doc/1545/cassazione_28152_2017.pdf. See also the recent Opinion by Advocate General Richard De La Tour, note 26 above, fn 54.

⁶¹ See, for example, Czech Republic, Supreme Administrative Court, *R.S. v Ministry of Interior*, 6 Azs 36/2010-274, 25 January 2011, www.asylumlawdatabase.eu/en/case-law/czech-republic-supreme-administrative-court-25-january-2011-rs-v-ministry-interior-6-azs, which concluded, referring to Article 9(1)(b) QD, that a woman from Kyrgyzstan faced persecution due to a forced marriage in cumulation with the domestic violence she was exposed to and the situation in her country of origin.

⁶² Germany, Augsburg Administrative Court, *Case No. Au 6 K 11.30092*, 16 June 2011, www.asylumlawdatabase.eu/sites/default/files/aldfiles/19031.pdf.

likelihood of gender-specific persecution upon return, and the risk of human rights violations or discriminations which would cumulatively amount to serious violations of basic human rights.⁶³ Similarly, the French National Court of Asylum recognized the refugee status of an Afghan women who refused, after the death of her husband, to marry his brother and thereby did not comply with religious customs, giving rise to a risk of persecution.⁶⁴

5. The questions raised by the preliminary reference

5.1. Cumulative persecution and the current situation for women and girls in Afghanistan

5.1.1. In its Guidance Note on the International Protection Needs of People Fleeing Afghanistan – Update I of February 2023, UNHCR states the following on the overall situation in Afghanistan:

‘The Taliban de facto authorities are reported to have committed serious human rights violations, including extrajudicial killings, arbitrary arrest and detention, torture and other forms of ill-treatment. In addition, the de facto authorities have imposed restrictions on the rights of Afghans to freedom of opinion, freedom of speech, and freedom of assembly, in violation of Afghanistan’s obligations under international human rights law.’⁶⁵

5.1.2. On the particular situation for women and girls, the UN Special Rapporteur on the situation of human rights in Afghanistan expressed, in a September 2022 report, ‘grave concern about the staggering regression in women and girls’ enjoyment of civil, political, economic, social and cultural rights since the Taliban took power’, noting that ‘[i]n no other country have women and girls so rapidly disappeared from all spheres of public life, nor are they as disadvantaged in every aspect of their lives.’⁶⁶ The Special Rapporteur’s most recent report of February 2023 further confirms this:

‘The recent edicts banning women and girls from all education beyond the primary level, access to parks, gyms and public baths and working for NGOs deepen existing flagrant violations of women’s human rights, already among the most draconian in the world. The discriminatory denial of women and girls’ fundamental human rights may amount to gender persecution, a crime against humanity.’⁶⁷

5.1.3. Specifically on restrictions to freedom of movement and dress code, the de facto authorities issued a directive on 7 May 2022 requiring all women to wear the hijab and fully cover their faces except the eyes when outside the house. The directive also noted that the most effective form of the Islamic hijab was not to leave home, except in cases of necessity.⁶⁸ Violations of this decree lead to punishment by male relatives, essentially making women’s male guardians responsible for enforcing the directive by policing

⁶³ Germany, Administrative Court of Bremen, *Case No. 3 K 1386/20*, 24 June 2022, www.verwaltungsgericht.bremen.de/gerichtsentscheidung-en/geschlechtsspezifische-verfolgung-von-frauen-in-afghanistan-3-k-1386-20-urteil-vom-24-06-2022-23506?asl=bremen73.c.13039.de, para. 2(b). See also Austria, Supreme Administrative Court, *Ra 2014/18/0118*, 15 December 2015, https://www.ris.bka.gv.at/Dokumente/Vwgh/JWT_2014180118_20151215L00/JWT_2014180118_20151215L00.pdf, considering, in relation to a woman and her daughter from Iraq, that a risk of forced marriage must be considered when assessing the risk of persecution.

⁶⁴ France, National Court of Asylum, *Case No. 21022972*, 8 December 2021, www.cnda.fr/content/download/186741/1798583/version/1/file/CNDA%208%20d%C3%A9cembre%202021%20Mmes%20M.%20et%20Mrs%20M.%20%20n%C2%B021022972%20C.pdf.

⁶⁵ UNHCR, *Guidance Note on the International Protection Needs of People Fleeing Afghanistan (Update I)*, February 2023, www.refworld.org/docid/63e0cb714.html, para. 3.

⁶⁶ Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Afghanistan*, 9 September 2022, <https://undocs.org/en/A/HRC/51/6>, para. 21.

⁶⁷ Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Afghanistan*, 9 February 2023, <https://www.ohchr.org/en/documents/country-reports/ahrc5284-situation-human-rights-afghanistan-report-special-rapporteur> para. 14.

⁶⁸ UN Women, *Women’s Rights in Afghanistan One Year after the Taliban Take-Over*, 15 August 2022, www.unwomen.org/sites/default/files/2022-08/Gender-alert-2-Womens-rights-in-Afghanistan-one-year-after-the-Taliban-take-over-en_0.pdf, p. 3.

their clothing.⁶⁹ On 22 August 2022, the de facto Ministry for the Propagation of Virtue and the Prevention of Vice announced the establishment of a female moral police department to ‘guide’ women, with this de facto authority reportedly also inspecting women’s clothing underneath their burqas in public places, including in schools.⁷⁰ In addition, women are required to be accompanied by a close male relative (mahram) when travelling further than 78 kilometers.

5.1.4. These restrictions have had serious consequences for the enjoyment of other human rights, including access to health care. Women who are unable to arrange for being accompanied by a mahram are reportedly unable to travel to clinics, even for emergency medical care, or are turned away or denied treatment.⁷¹ A March 2022 Taliban decree has ordered healthcare institutions to deny medical assistance to female patients without a hijab.⁷² In addition, women’s access to healthcare has been impacted by the fact that only female doctors are allowed to treat female patients.⁷³

5.1.5. On education, public schools remain closed as of December 2022 and the vast majority of girls are unable to attend secondary schools which were ordered to close in March 2022. In December 2022, the de facto authorities also announced that women would no longer be allowed to attend university.⁷⁴ UNHCR recalls that a systematic denial of the right to education for girls could amount to persecution, given the fundamental importance of this right and the significant impact a denial may have for the girl’s future.⁷⁵

5.1.6. On employment, the de facto authorities have significantly restricted women’s participation in the workforce, restricting them from working outside the home. In December 2022, they also announced that women could no longer work for NGOs.⁷⁶ EUAA provided the following:

‘[a]lready before the takeover, women who worked outside the home, in general, encountered frequent sexual harassment and abuse at the workplace and could be considered by society as transgressing moral codes, as bringing dishonour to the family (e.g. women in law enforcement), and as being non-Afghan or Western (e.g. women in journalism). Most women in public roles faced intimidation, threats, violence, or killings. Since 15 August 2021, Afghan women have been largely excluded from political life and the general workforce’.⁷⁷

5.1.7. On freedom of expression, women participating in peaceful protests have faced harassment and physical attacks by the de facto authorities. The impact of media restrictions ‘has been far worse for women’ and 84% of female journalists have lost their jobs since the Taliban takeover on 15 August 2021. Female human rights defenders are reported to be at particular risk of violence and intimidation.⁷⁸

5.1.8. Ninety per cent of all women in Afghanistan are estimated to have experienced gender-based violence, the majority through intimate partner violence.⁷⁹ Reports show that this was a ‘pervasive problem’ already before the Taliban takeover, and that perpetrators enjoy impunity. Women’s access to justice, courts, and legal assistance for gender-based violence are reportedly generally limited, with

⁶⁹ UN Women, *ibid.*, p. 3; EUAA, *Country Guidance: Afghanistan*, January 2023, <https://euaa.europa.eu/country-guidance-afghanistan-2023>, p. 87. See also, UN Special Rapporteur’s report of February 2023, note 67 above, para. 20, noting that this ‘policy is intended to compel men and boys to control the behaviour, attire and movement of women and girls, thus pitting men against women, normalizing discrimination and violence against women and girls and taking away their agency.’

⁷⁰ UN Special Rapporteur’s report of February 2023, note 67 above, para. 18.

⁷¹ UNHCR, *Afghanistan Guidance Note (Update I)*, note 65 above, para. 10 and sources quoted therein.

⁷² EUAA, *Afghanistan: Targeting of Individuals*, August 2022, coi.euaa.europa.eu/administration/easo/PLib/2022_08_EUAA_COI_Report_Afghanistan_Targeting_of_individuals.pdf, p. 120.

⁷³ UNHCR, *Afghanistan Guidance Note (Update I)*, note 65 above, para. 10 and sources quoted therein.

⁷⁴ UNHCR, *Afghanistan Guidance Note (Update I)*, note 65 above, para. 11 and sources quoted therein.

⁷⁵ UNHCR Guidelines on Child Asylum Claims, note 54 above, para. 36. See also *Ali v. Minister of Citizenship and Immigration*, IMM-3404-95, Canada, Federal Court, 23 Sep. 1996, www.refworld.org/docid/4b18e21b2.html concerning a 9 year-old girl from Afghanistan, where the Court concluded that ‘[e]ducation is a basic human right and I direct the Board to find that she should be found to be a Convention refugee.’ See also, *RRT Case No. V95/03256*, [1995] RRTA 2263, Australia, RRT, 9 Oct. 1995, <http://www.unhcr.org/refworld/docid/4b17c13a2.html>, para. 47.

⁷⁶ UNHCR, *Afghanistan Guidance Note (Update I)*, note 65 above, para. 12 and sources quoted therein.

⁷⁷ EUAA *Country Guidance Afghanistan*, note 69 above, p. 87.

⁷⁸ UNHCR, *Afghanistan Guidance Note (Update I)*, note 65 above, para. 13 and sources quoted therein.

⁷⁹ UNHCR, *Afghanistan Guidance Note (Update I)*, note 65 above, para. 14 and sources quoted therein.

informal justice mechanisms frequently discriminating against women. Under Taliban rule, violence against women reportedly increased, including due to unemployment and drug abuse. In addition, institutional and legal support for women facing violence were ended, which reportedly forced many to return to their abusers or to remain in situations where they were at risk of experiencing gender-based violence.⁸⁰ Numerous cases of intentional killings and domestic violence leading to death were also reported, with the actual number likely higher as many cases are expected to go unreported.⁸¹

5.1.9. Specifically on sexual violence, the UN Special Rapporteur reported cases of young women reportedly found dead, with indications of having been sexually violated. In one such case, a young girl was reportedly taken in broad daylight by authorities, raped, returned to her family and later committed suicide, presumably owing to the stigma attached to having been sexually violated.⁸² Reports confirm that ‘[s]haria does not differentiate between consensual sexual relations outside marriage and rape. Both are defined as *zina* and punishable with stoning or lashing.’⁸³

5.1.10. In addition, ‘[t]raditional marriage practices, such as betrothal as a child, polygamy, exchanging of unmarried daughters between families [...] are common in Afghanistan and can often create or lead to situations of forced marriage and violence against women’.⁸⁴ While in December 2021, the de facto authorities issued a decree forbidding forced marriages, forced and child marriages sharply increased across Afghanistan, reportedly due to poverty and a worsening humanitarian and economic situation, combined with a lack of other opportunities for girls as a result of the restrictions on women’s rights.⁸⁵

5.1.11. Given the widespread human rights violations committed by the de facto authorities, UNHCR does not consider that they are willing or able to provide protection to Afghan women and girls at risk of persecution, including societal forms of persecution at the hands of family members and other members of the community. Further, in light of the wide range of increasingly restrictive measures imposed by the de facto authorities in violation of human rights, UNHCR considers Afghan women and girls are likely to be in need of international refugee protection under the 1951 Convention.⁸⁶ In other words, UNHCR considers that there is a presumption of recognition of refugee status for Afghan women and girls.

5.1.12. Similarly, the January 2023 EUAA Country Guidance on Afghanistan concludes that ‘[t]he accumulation of various measures introduced by the Taliban, which affect the rights and freedoms of women and girls in Afghanistan, amounts to persecution. Such measures affect their access to healthcare, work, freedom of movement, freedom of expression, girls’ right to education, among others. Some women and girls in Afghanistan may also face other forms of ill-treatment amounting to persecution (e.g. forced marriage, such as child marriage, honour-based violence). For women and girls in Afghanistan, well-founded fear of persecution would in general be substantiated.’⁸⁷

5.1.13. In light of all the above, UNHCR submits that the accumulation of measures listed in the order for reference amounts to persecution within the meaning of Article 9(1)(b) QD. While some measures individually amount to persecution under Article 9(1)(a) QD,⁸⁸ others, cumulatively, meet the threshold under Article 9(1)(b) QD.

⁸⁰ EUAA Country Guidance Afghanistan, note 69 above, p. 90.

⁸¹ UN Special Rapporteur’s report of February 2023, note 67 above, para. 23.

⁸² UN Special Rapporteur’s report of February 2023, note 67 above, para. 22.

⁸³ EUAA Country Guidance Afghanistan, note 69 above, p. 90.

⁸⁴ EUAA Country Guidance Afghanistan, note 69 above, p. 90.

⁸⁵ UNHCR, Afghanistan Guidance Note (Update I), note 65 above, para. 15 and sources quoted therein; see also UN Special Rapporteur’s report of February 2023, note 67 above, para. 24.

⁸⁶ UNHCR, Afghanistan Guidance Note (Update I), note 65 above, para. 9.

⁸⁷ EUAA Country Guidance Afghanistan, note 69 above, p. 91.

⁸⁸ For example, acts of domestic or sexual violence, where condoned by the State, are violations so serious that they can meet the required threshold in themselves. Some acts also correspond to the human rights listed in Article 15(2) ECHR, from which no derogation is possible and which are sufficiently serious by their nature as to amount to persecution. This is the case, for example, for rape and forced marriages as violations of the prohibition of ill-treatment and slavery, see also case law quoted in notes 58-64 above. In such cases, there is no need for cumulation of measures under Article 9(1)(b) QD.

5.2. The requirement of individual examinations and recognition on the basis of gender

5.2.1. What amounts to a well-founded fear of persecution will depend on the particular circumstances of each individual case.⁸⁹ UNHCR acknowledges that ‘adopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status.’⁹⁰ The risk assessment that States must undertake must take into account the personal circumstances of the applicant as well as the elements relating to the situation in the country of origin.⁹¹

5.2.2. The same is required under EU law. Article 4(3) QD requires that asylum applications are assessed on an individual basis, taking into account all relevant facts as they relate to the country of origin, the applicant’s submissions, and the ‘individual position and personal circumstances of the applicant, including factors such as background, gender and age’.⁹² As this Court has stated, it is ‘settled case-law that every decision on whether to grant refugee status or subsidiary protection status must be based on an individual assessment’.⁹³

5.2.3. This does not, however, preclude a finding that an applicant is affected by discriminatory measures solely on the basis of gender. There is no contradiction between an individual assessment and recognition of a refugee on the basis of gender. If the persecutory acts, or the State’s failure to protect, are based on the person’s gender this is sufficient to establish a causal link with the 1951 Convention.

5.2.4. While with some gender-related claims, applicants will be at risk of persecution due to their particular circumstances – e.g. punishment for transgression of social mores; domestic violence – others will face this risk due to the general situation of discrimination and gender-based violence in a country. In such cases, where an individual assessment establishes that the applicant is a member of a group which is persecuted, then refugee status should be granted. The fact that many or all members of a particular group are at risk does not undermine the validity of any particular individual’s claim.⁹⁴ As recently stated by Advocate General Richard De la Tour in the context of gender-based persecution and recognition of women as a particular social group,

‘[t]he fact that that social group is made up of women in a given society (and not by ‘women’ in general) does not in my view constitute in itself a barrier to recognition of the distinct identity of that group solely because of its size. The concept of ‘distinct identity’ of a group [...], cannot be interpreted as entailing a quantitative assessment.’⁹⁵

5.2.5. Indeed, in a context where gender-based violence and discrimination is pervasive, and a State either condones such violence, fails to protect due to discriminatory policies or practices or carries out persecutory acts itself, protection may need to be granted on the basis of gender alone. Such is the situation in Afghanistan in light of the pervasive human rights violations described above.

5.2.6. A number of EU Member States have already recognized this. In December 2022, the Swedish Migration Agency issued a legal opinion concluding that the accumulation of discriminatory measures imposed by the Taliban amount to persecution, and that applications by female Afghan asylum seekers would henceforth be assessed on the basis of membership to a particular social group defined by gender.

⁸⁹ UNHCR Handbook, note 10 above, para. 44.

⁹⁰ UNHCR, Guidelines on Gender-Related Persecution, note 28 above, para. 4. See also Opinion by Advocate General Richard De La Tour, note 26 above, fn 44.

⁹¹ UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, www.refworld.org/docid/3ae6b3338.html, paras 18-19.

⁹² Article 4(3) QD. CJEU, *Y and Z*, note 14 above, para. 68.

⁹³ CJEU, *Ahmedbekova*, C-652/16, 4 October 2018, <https://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-652/16>, para. 48, and the case law cited there, as well as *Y and Z*, note 14 above, para. 68.

⁹⁴ UNHCR, *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, 2 December 2016, <https://www.refworld.org/docid/583595ff4.html>, para. 17.

⁹⁵ Opinion of Advocate General Richard De La Tour, note 26 above, para. 72.

Afghan women would thus be granted refugee status, regardless of other circumstances.⁹⁶ In January 2023, the Danish Refugee Appeals Board adopted a similar position, announcing that it would henceforth be granting refugee status to Afghan women and girls solely because of their gender, given their continuously worsening situation in Afghanistan.⁹⁷ In a series of decisions of January and February 2023, the Danish Refugee Appeals Board granted international protection to Afghan women on the basis that they would face persecution solely based on their gender.⁹⁸ Most recently, in February 2023, Finland adopted the same approach, concluding that ‘all women are considered in the prevailing circumstances as categorically subject to persecution in Afghanistan [...] on the basis of their gender alone.’⁹⁹

6. Conclusion

6.1. UNHCR submits that the accumulation of measures taken by the Taliban in the context of the current situation in Afghanistan meets the threshold of persecution within the meaning of the 1951 Convention as well as Article 9(1) QD. While certain persecutory measures amount to persecution on a cumulative basis within the meaning of Article 9(1)(b) QD, others meet the threshold of sufficient seriousness by single act within the meaning of Article 9(1)(a) QD.

6.2. UNHCR further submits that while EU law requires that every asylum application is carried out on an individual basis, this does not affect the conclusion that protection may be granted solely on the applicant’s gender. In light of the current situation for women and girls in Afghanistan, UNHCR submits that protection is presumed to be required due to the persecutory measures taken by the de facto authorities in Afghanistan which affect women and girls solely on the basis of their gender.

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25 May 2023

⁹⁶ Swedish Migration Agency, *Legal Position on the Protection Needs Assessment for Nationals from Afghanistan*, RS/089/2021, <https://lifos.migrationsverket.se/dokument?documentSummaryId=47090>.

⁹⁷ Denmark, Refugee Appeals Board, *The Refugee Board Grants Asylum to Women and Girls from Afghanistan*, 30 January 2023, <https://fln.dk/da/Nyheder/Nyhedsarkiv/2023/30012023>.

⁹⁸ See <https://fln.dk/da/Praksis?country=Afghanistan>.

⁹⁹ Finnish Immigration Service, *Refugee Status to Afghan Women and Girls*, 15 February 2023, <https://migri.fi/en/-/refugee-status-to-afghan-women-and-girls>.