

## GROUP-BASED PROTECTION OF AFGHAN WOMEN AND GIRLS UNDER THE 1951 REFUGEE CONVENTION

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**Abstract** The Taliban's takeover of Afghanistan in August 2021 deprived women and girls of their fundamental rights. The Taliban denied or severely restricted women and girls' rights to education, work, healthcare, freedom of movement, opinion and expression, and to protection from gender-based violence. This article argues that the Taliban's treatment of Afghan women and girls amounts to persecution, and all Afghan women and girls should be recognised as refugees under the 1951 Refugee Convention. The article further examines the feasibility of prima facie recognition for Afghan women and girls.

**Keywords:** Afghanistan, Afghan women, refugee status, Taliban, persecution, serious harm, social groups.

### I. INTRODUCTION

The Taliban's return to power in August 2021 brought back horrors, marking the beginning of severe and blatant human rights violations, including for women and girls. Since the takeover, the Taliban has denied or severely restricted women and girls' rights to education, work, healthcare, freedom of movement, opinion, expression and the right to be protected from gender-based violence.<sup>1</sup> These developments raise the question of whether all

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<sup>1</sup> European Union Agency for Asylum (EUAA), 'Country Guidance: Afghanistan' (24 January 2023) 89–92 <<https://euaa.europa.eu/country-guidance-afghanistan-2023>>; UNHCR, 'Guidance Note on the International Protection Needs of People Fleeing Afghanistan – Update I' (14 February 2023) <<https://www.refworld.org/docid/63e0cb714.html>>. United Kingdom, 'Guidance: Country Police and Information Note: Fear of the Taliban, Afghanistan, April 2022' (29 April 2022) <<https://www.gov.uk/government/publications/afghanistan-country-policy-and-information-notes/country-police-and-information-note-fear-of-the-taliban-afghanistan-february-2022-accessible>>.

Afghan women and girls outside the country qualify for refugee status under the Convention relating to the Status of Refugees<sup>2</sup> (1951 Convention). This question requires interpretation of the refugee definition provided in Article 1A(2) of the 1951 Convention and, since there is no single authoritative entity entitled to resolve interpretive questions in the international refugee regime,<sup>3</sup> this task is left to national courts and asylum authorities to decide. Nevertheless, it is possible in view of the existing case law and literature by using interpretation methods provided under the Vienna Convention on the Law of Treaties.<sup>4</sup> The central finding is that the Taliban's treatment of Afghan women and girls amounts to persecution on the basis of their sex or gender,<sup>5</sup> and there is thus no need to assess the individual circumstances of each individual to grant them refugee status.<sup>6</sup>

Following the return of the Taliban, a number of States, including Belgium, Denmark and Germany, initially suspended asylum procedures with respect to Afghan asylum seekers already present, while other countries such as Germany, Finland, the Netherlands, Norway, Sweden and Switzerland suspended return proceedings for rejected asylum seekers.<sup>7</sup> Gradually, throughout 2022, States resumed asylum procedures for Afghan nationals. In September 2022, Austria's Supreme Administrative Court referred a request for a preliminary ruling to the Court of Justice of the European Union (CJEU), Case C-608/22,<sup>8</sup> on the question of whether the various discriminatory measures imposed on Afghan women and girls amounted to acts of persecution for the purposes of Directive 2011/95/EU<sup>9</sup> (Qualification Directive) and, as such, whether all women and girls outside Afghanistan should be accepted as refugees.

<sup>2</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

<sup>3</sup> J Hathaway and M Foster, *The Law of Refugee Status* (CUP 2014) 3.

<sup>4</sup> See Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 115 UNTS 331, arts 31–33; see, on how to interpret the 1951 Convention, J McAdam, 'Interpretation' in A Zimmermann, J Dörschner and F Machts (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol A Commentary* (OUP 2011) 75–117.

<sup>5</sup> Following the Istanbul Convention, 'gender' here refers to the 'socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men'. 'Sex' refers to biological assignation. Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (11 May 2011) Council of Europe Treaty Series No 210 (Istanbul Convention) art 3(c).

<sup>6</sup> This article builds on an earlier blog post of the authors, M Ineli-Ciger and NF Tan, 'Are All Afghan Women and Girls Refugees? An Analysis in Light of the Refugee Convention' (*EJIL: Talk!*, 22 December 2022) <<https://www.ejiltalk.org/are-all-afghan-women-and-girls-refugees-an-analysis-in-light-of-the-refugee-convention/>>.

<sup>7</sup> European Asylum Support Office (EASO), 'Developments in Asylum Procedures in EU+ Countries in Response to the Situation in Afghanistan' (1 December 2021) <[https://euaa.europa.eu/sites/default/files/publications/2021\\_situational\\_update\\_Afghanistan\\_EN.pdf](https://euaa.europa.eu/sites/default/files/publications/2021_situational_update_Afghanistan_EN.pdf)>.

<sup>8</sup> Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 22 September 2022 — AH (Case C-608/22) [2023] OJ C15/23.

<sup>9</sup> 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

Since December 2022, Sweden<sup>10</sup> and, subsequently, Finland<sup>11</sup> and Denmark<sup>12</sup> have acknowledged that Afghan women and girls, as a group, face persecution leading to the grant of refugee status under the 1951 Convention, just as the European Union Agency for Asylum (EUAA)<sup>13</sup> concluded in January 2023 that the Taliban's ill-treatment of women and girls amounts to persecution. In February 2023, the United Nations (UN) High Commissioner for Refugees (UNHCR) concluded that Afghan women and girls are likely to be in need of international refugee protection under the 1951 Convention.<sup>14</sup> On 25 May 2023, UNHCR issued guidance on the concept of persecution on cumulative grounds in light of the current situation for women and girls from Afghanistan in the context of the preliminary ruling reference to the CJEU (C-608/22 and C-609/22), concluding that there now exists a presumption of recognition of refugee status for Afghan women and girls.<sup>15</sup>

This article investigates the question of whether all Afghan women and girls should qualify for refugee status under the 1951 Convention and is primarily focused on the scope for group recognition or simplified and fast-track procedures in the European Union (EU), though this analysis is also relevant to other asylum States relying on individual procedures, including in Europe, North America and Oceania. It has seven sections. Following this first introductory section, section II outlines the current human rights situation for Afghan women and girls, drawing on recent country information and UN reporting to explain the nature of the rights denied to Afghan women and girls under Taliban rule. Section III analyses the key elements in the refugee definition with respect to Afghan women and girls, namely whether the measures imposed by the Taliban reach the level of 'persecution' and whether all Afghan women and girls fleeing Taliban rule can rightly be considered a 'particular social group'. Section IV provides an account of how States responded to the protection claims of Afghan women and girls before and after the fall of Afghanistan to the Taliban in August 2021, through an analysis of relevant decisions across jurisdictions. Section V briefly considers a number of counter-arguments to the conclusion

protection, and for the content of the protection granted (recast) [2011] OJ L337/9 (Qualification Directive).

<sup>10</sup> Finnish Immigration Service, 'Women from Afghanistan to be Granted Asylum in Sweden' (7 December 2022) <<https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/Nyhetsarkiv/2022-12-07-Women-from-Afghanistan-to-be-granted-asylum-in-Sweden.html>>.

<sup>11</sup> Finnish Immigration Service, 'Refugee Status to Afghan Women and Girls' (15 February 2023) <<https://migri.fi/en/-/refugee-status-to-afghan-women-and-girls>>.

<sup>12</sup> Flygtningenævnet, 'Flygtningenævnet giver asyl til kvinder og piger fra Afghanistan' (30 January 2023) <<https://fn.dk/da/Nyheder/Nyhedsarkiv/2023/30012023>>.

<sup>14</sup> UNHCR (n 1).

<sup>15</sup> UNHCR, '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)' (25 May 2023) <<https://www.refworld.org/docid/646f0e6a4.html>>.

that any woman or girl leaving Afghanistan following the Taliban takeover or those who were already abroad can be accepted to have a well-founded fear of persecution for reasons of being a member of a social group. Finally, the normative and practical implications of the finding that all Afghan women and girls are eligible for refugee status are considered in Section VI and the case is made for the group or simplified and fast-track recognition of Afghan women and girls as refugees. Section VII concludes.

## II. RIGHTS DENIED TO AFGHAN WOMEN AND GIRLS

In 2022, Afghanistan ranked last of 146 countries in the Global Gender Gap Index<sup>16</sup> with the worst gender equality in the world, despite Afghanistan having ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>17</sup> Rights absolutely or partially denied by the Taliban towards women and girls in Afghanistan include the right to education, work, healthcare, freedom of movement, opinion and expression<sup>18</sup> and the right to be protected from gender-based violence.<sup>19</sup> These denials and restrictions prevent women from pursuing a humane and dignified life.<sup>20</sup>

The focus here is on the denial of socio-economic rights, including the right to education, work and healthcare, resulting in an inability on the part of Afghan women and girls to earn a living and access education and to have protection from gender-based violence (including forced marriages) and freedom of movement.<sup>21</sup>

### A. Right to Education

The right to education is secured under international human rights instruments, inter alia, Article 26 of the Universal Declaration of Human Rights (UDHR),<sup>22</sup>

<sup>16</sup> World Economic Forum, 'Global Gender Gap Report 2022' (July 2022) <[https://www3.weforum.org/docs/WEF\\_GGGR\\_2022.pdf](https://www3.weforum.org/docs/WEF_GGGR_2022.pdf)>.

<sup>17</sup> The Government of Afghanistan signed the Convention on Elimination of all Forms of Discrimination against Women on 14 August 1980 and ratified on 5 March 2003 without any reservations. Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) para 1.

<sup>18</sup> According to the UNCHR, '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.' UNHCR (n 15) para 5.1.7.

<sup>19</sup> EUAA (n 1); United Kingdom (n 1); UNHCR (n 1).

<sup>20</sup> EUAA *ibid* 86–92.

<sup>21</sup> As will be further explored in Section III, 'discrimination resulting in an inability to earn a living ..., access to education and other basic human rights could amount to persecution'. L Hooper, 'Gender-Based Asylum Claims and *Non-Refoulement*: Articles 60 and 61 of the Istanbul Convention' (Council of Europe, December 2019) 22 <<https://edoc.coe.int/en/violence-against-women/8301-gender-based-asylum-claims-and-non-refoulement-articles-60-and-61-of-the-istanbul-convention.html>>.

<sup>22</sup> Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948): UNGA Res 217 A(III) (10 December 1948) UN Doc A/RES/217(III). The UDHR provides that technical and

Article 28 of the Convention on the Rights of the Child (CRC),<sup>23</sup> Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 10 of the CEDAW.<sup>24</sup> Under these treaties, elementary education must be free and available to all, while secondary and higher education is required to be ‘made generally available’.<sup>25</sup> In view of these provisions and Article 10 of the CEDAW which seeks to eliminate discrimination in access to education,<sup>26</sup> it is clear that States Parties to one or more of these instruments are encouraged to offer secondary and higher education to all and, in any case, cannot make any distinction on the grounds of gender when providing secondary and higher education.

On 23 March 2022, the Taliban barred girls from secondary schools, a measure that affected an estimated 1.1 million Afghan girls.<sup>27</sup> On 20 December 2022, the Taliban banned women from universities in Afghanistan, further restricting the right to education of women and girls.<sup>28</sup> As a result, Afghan women and girls are presently prohibited from pursuing secondary and higher education. These measures violate the right to education under international human rights law and the right to not be subjected to discrimination in accessing secondary and higher education.

### *B. Freedom of Movement*

Freedom of movement of all persons is secured by various international human rights conventions, inter alia, Article 13 of the UDHR<sup>29</sup> and Article 12 of the International Covenant on Civil and Political Rights (ICCPR).<sup>30</sup> Article 15 of

professional education generally be available and higher education to be equally accessible to all on the basis of merit.

<sup>23</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 28(b) and (c). The CRC encourages States Parties to make different forms of secondary education available and accessible to every child, and requires higher education accessible to all on the basis of capacity by every appropriate means.

<sup>24</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 13(2)(b) and (c); CEDAW (n 17) art 10. See also Convention against Discrimination in Education (adopted 15 December 1960, entered into force 22 May 1962) 429 UNTS 93, art 1.

<sup>25</sup> UDHR (n 22) art 26(1); CRC (n 23) art 28(a).

<sup>26</sup> CEDAW (n 17) art 10 obliges parties to ‘take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education’. The same article places an emphasis on the obligation to ensure, on the basis of equality of men and women, the same conditions for access to studies and for the achievement of diplomas in educational establishments of all categories at all levels of education.

<sup>27</sup> EUAA (n 1) 89.

<sup>28</sup> BBC, ‘Afghanistan: Taliban Ban Women from Universities Amid Condemnation’ (21 December 2022) <<https://www.bbc.com/news/world-asia-64045497>>.

<sup>29</sup> UDHR (n 22) art 13 secures the freedom of movement of all persons within the borders of each State.

<sup>30</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 12 provides that everyone lawfully present in a State has liberty of movement within the territory.

the CEDAW requires States Parties to accord men and women the same rights regarding the movement of persons.

A decree issued in May 2022 required all women to wear a hijab (and preferably a burqa) and not leave home when it was not necessary.<sup>31</sup> Moreover, women must be escorted by a close male relative (*mahram*) if they travel further than 72 km.<sup>32</sup> In the Balkh and Herat provinces, women are prohibited from accessing public spaces, such as bathhouses.<sup>33</sup> These developments show that women's and girls' right to freedom of movement is severely restricted in breach of international human rights law.

### C. Right to Work

The right to work is secured under, inter alia, Article 23(1) of the UDHR<sup>34</sup> and Article 6(1) of the ICESCR,<sup>35</sup> whereas Article 15 of the CEDAW requires States to take all appropriate measures to eliminate discrimination against women in the field of employment and ensure the right to work, on the basis of equality of men and women.

The Taliban have introduced serious restrictions on women's access to the labour market and their right to earn a livelihood, including by preventing a significant number of female government workers from returning to work and replacing them with men.<sup>36</sup> The Taliban also banned Afghan women from working with non-governmental organisations in December 2022 and with the UN in April 2023.<sup>37</sup> Deprivation of the right to work for women is particularly important considering the worsening economic situation in Afghanistan, with the World Food Programme (WFP) reporting that 95 per cent of Afghan households experience insufficient food consumption and insecurity.<sup>38</sup> Prevented from working by the many rules introduced by the Taliban, women, especially those in women-headed households, struggle to feed their families, pay rent, and face an increased risk of poverty.<sup>39</sup>

<sup>31</sup> UN Women, 'Women's Rights in Afghanistan One Year after the Taliban Take-over' (15 August 2022) <[https://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](https://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)>.

<sup>32</sup> *ibid* 3; EUAA, 'Key Socio-Economic Indicators in Afghanistan and in Kabul City' (August 2022) <[https://coi.euaa.europa.eu/administration/easo/PLib/2022\\_08\\_EUAA\\_COI\\_Report\\_Key\\_socio\\_economic\\_indicators\\_in\\_Afghanistan\\_and\\_in\\_Kabul\\_city.pdf](https://coi.euaa.europa.eu/administration/easo/PLib/2022_08_EUAA_COI_Report_Key_socio_economic_indicators_in_Afghanistan_and_in_Kabul_city.pdf)>.

<sup>33</sup> EUAA (n 1) 110.

<sup>34</sup> UDHR (n 22) art 23(1) provides 'Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.'

<sup>35</sup> ICESCR (n 24) art 6(1) requires States Parties to recognise the right of everyone to the opportunity to gain their living by work and requires States to take appropriate steps to safeguard this right.

<sup>36</sup> *ibid* 81.

<sup>37</sup> UN, 'Afghanistan: Taliban Must Stop Targeting Afghan Women' (6 April 2023) <<https://www.ohchr.org/en/press-releases/2023/04/afghanistan-taliban-must-stop-targeting-afghan-women>>.

<sup>38</sup> WFP, 'Afghanistan Food Security Update #2' (22 September 2021) <<https://reliefweb.int/report/afghanistan/afghanistan-food-security-update-2-22-september-2021>>.

<sup>39</sup> Human Rights Watch, 'Afghanistan: Taliban Deprive Women of Livelihoods, Identity: Severe Restrictions, Harassment, Fear in Ghazni Province' (18 January 2022) <<https://www.hrw.org/>>

#### D. Access to Healthcare

Article 25 of the UDHR secures the right to a ‘standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services’.<sup>40</sup> Article 12 of the ICESCR requires States Parties to recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and requires them to achieve the full realisation of this right. Moreover, Article 12 of the CEDAW explicitly prohibits discrimination against women in the field of healthcare.

Access to healthcare has long been hindered for many women and men alike in Afghanistan due to a lack of infrastructure, medical supplies, equipment and healthcare professionals.<sup>41</sup> However, women and girls’ access to health services is further restricted by Taliban-imposed discriminatory rules. For instance, in March 2022, the Taliban ordered healthcare institutions to deny medical assistance to female patients without a hijab.<sup>42</sup> Moreover, due to the Taliban gender segregation rules, female patients can only receive treatment from female health workers, seriously limiting access to healthcare for women in the absence of female healthcare professionals.<sup>43</sup> Finally, women cannot travel to emergency and other healthcare providers without being accompanied by a *mahram*.<sup>44</sup> According to UN Women, only 10 per cent of women in Afghanistan can meet their basic health needs.<sup>45</sup>

#### E. Risk of Gender-Based Violence and Absence of Legal Remedies

Gender-based violence is defined by the Committee on the Elimination of Discrimination against Women as: ‘violence which is directed against a woman because she is a woman or that affects women disproportionately’.<sup>46</sup> International human rights law, including the CEDAW, requires that States adopt measures to prevent and criminalise all forms of gender-based violence. Gender-based violence is accepted as a form of discrimination and a State’s failure to protect women against gender-based violence also breaches their right to equal protection before the law.<sup>47</sup> Moreover, in some cases, gender-based violence amounts to torture or cruel, inhuman or degrading treatment, especially in cases of rape and domestic violence.

[news/2022/01/18/afghanistan-taliban-deprive-women-livelihoods-identity>](https://www.refworld.org/docid/52d920c54.html); EUAA, ‘Afghanistan – Targeting of Individuals: Country of Origin Information Report’ (August 2022) <[https://coi.europa.eu/administration/easo/PLib/2022\\_08\\_EUAA\\_COI\\_Report\\_Afghanistan\\_Targeting\\_of\\_individuals.pdf](https://coi.europa.eu/administration/easo/PLib/2022_08_EUAA_COI_Report_Afghanistan_Targeting_of_individuals.pdf)>.<sup>40</sup> UDHR (n 22) art 25(1).<sup>41</sup> EUAA (n 1) 108–9.<sup>42</sup> *ibid* 88.

<sup>43</sup> UN Women (n 31) 5.

<sup>44</sup> UNHCR (n 1) para 10.

<sup>45</sup> UN Women (n 31) 2.

<sup>46</sup> CEDAW, ‘General Recommendation No. 19: Violence against Women’ (1992) <<https://www.refworld.org/docid/52d920c54.html>>.

<sup>47</sup> *Opuz v Turkey* App No 33401/02 (ECtHR, 9 June 2009) para 191; Hooper (n 21) 14.



Forced marriage has also been accepted as a form of gender violence.<sup>48</sup> Forced marriage runs contrary to Article 16(2) of the UDHR, Article 23(2) of the ICCPR, Article 10 of the ICESCR and Article 16 of the CEDAW, which emphasise the need for full consent of both parties to enter into marriage. Furthermore, women's right to a life free from gender-based violence is closely connected with the rights to life, health, liberty and security of the person.<sup>49</sup>

Since taking over Afghanistan, the Taliban has terminated institutional and legal support for women facing gender-based violence.<sup>50</sup> As a result, more women and girls are subject to domestic violence, exploitation and abuse.<sup>51</sup> Although a decree issued by the Taliban on 3 December 2021 stated that women should not be forced into marriage, in practice the number of women and girls forced to marry is on the rise.<sup>52</sup> Reports of gender-based violence, including rape, violence, and forced and child marriages, have not been investigated, as women's access to justice is generally limited.<sup>53</sup> According to the UN Assistance Mission in Afghanistan, between 5 August 2021 and 15 June 2022, there were 87 reported cases of murder, rape, suicide, forced marriage, child marriage, assault and battery, and two cases of honour killings, though none of these cases has been brought before a court or punished.<sup>54</sup>

### III. ARE AFGHAN WOMEN AND GIRLS REFUGEES UNDER THE 1951 CONVENTION?

A refugee is defined in Article 1A(2) of the 1951 Convention as a person 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.

To be recognised as a refugee, a person must show a fear of persecution for one of the five enumerated grounds. Moreover, they must be outside their country of nationality, have a 'well-founded fear' and show a lack of State protection. As these latter elements are readily established, the following analysis focuses on two crucial questions: (a) does the Taliban's treatment of Afghan women or

<sup>48</sup> C Dauvergne and J Millbank, 'Forced Marriage as a Harm in Domestic and International Law' (2010) 73(1) *ModLRev* 57.

<sup>49</sup> CEDAW, 'General Recommendation No. 35 (2017) on Gender-Based Violence against Women, Updating General Recommendation No. 19 (1992)' (26 July 2017) paras 15–16 <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no-35-2017-gender-based>>.

<sup>50</sup> EUAA (n 1) 90.

<sup>51</sup> *ibid.*

<sup>52</sup> UN General Assembly, 'Situation of Human Rights in Afghanistan' (9 September 2022) UN Doc A/HRC/51/6, para 31; UNHCR (n 1) para 15.

<sup>53</sup> EUAA (n 1) 90.

<sup>54</sup> UNAMA, 'Human Rights in Afghanistan Report' (July 2022) <<https://unama.unmissions.org/human-rights-monitoring-and-reporting>>; EUAA (n 1) 90.



girls amount to persecution? and (b) does ‘Afghan women or girls’ constitute a particular social group?

### A. The Meaning of ‘Persecution’

There is no universally accepted definition of persecution.<sup>55</sup> In light of the human rights-oriented reading of the 1951 Convention, supported by, *inter alia*, Hathaway in 1991<sup>56</sup> and later elaborated by Hathaway and Foster in 2014,<sup>57</sup> ‘the sustained or systemic denial of basic human rights demonstrative of a failure of state protection’ amounts to persecution.<sup>58</sup> This formulation is endorsed by many others,<sup>59</sup> including the United Kingdom (UK) House of Lords in the leading case of *Islam*, which provided the formula ‘Persecution = Serious Harm + Failure of State Protection’.<sup>60</sup>

However, the precise meaning of ‘serious harm’ is also open to interpretation. It is generally recognised that discrimination can contribute to persecution, although in itself ‘discrimination will not amount to persecution’.<sup>61</sup> According to UNHCR, when discriminatory measures lead to consequences of a substantially prejudicial nature for the person concerned, including serious restrictions on a person’s right to earn a livelihood, practice their religion, or access normally available educational facilities, this leads to persecution.<sup>62</sup> In light of Article 33(1) of the 1951 Convention, which codifies the principle of non-refoulement, a threat to life or freedom on account of Convention grounds can be classified as serious harm, as well as persecution.<sup>63</sup> Hathaway and Foster interpret serious harm with reference to international human rights and note that a risk of persecution exists as long as

<sup>55</sup> For an analysis of various definitions of the term ‘persecution’, see H Storey, ‘What Constitutes Persecution? Towards a Working Definition’ (2014) 26(2) *IJRL* 272.

<sup>56</sup> JC Hathaway, *The Law of Refugee Status* (Butterworths 1991) 108.

<sup>57</sup> Hathaway and Foster (n 3) 195.

<sup>58</sup> See, for others adopting this approach, *Canada (Attorney General) v Ward* [1993] 2 SCR 689; *R v Immigration Appeal Tribunal, ex parte Shah* [1999] 2 AC 629, 653 (Lord Hoffmann); *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 495 (Lord Hope); Storey (n 55) 278.

<sup>59</sup> This, for instance, includes Canadian Federal Court (*Sagharichi v Canada (Minister of Employment and Immigration)*) [1993] FCJ No 796 (QL); New Zealand Refugee Appeals (Refugee Appeal No 71404/99, Refugee Status Appeals Authority (29 October 1999)); H Lambert, ‘The Conceptualisation of “Persecution” by the House of Lords: *Horvath v. Secretary of State for the Home Department*’ (2001) 13(1) *IJRL* 16, 19; A Zimmermann and C Mahler, ‘Art. 1 A para. 2’ in A Zimmermann, J Dörschner and F Machts (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 346–7.

<sup>60</sup> *Islam v Secretary of State for the Home Department and R v Immigration Appeal Tribunal, ex parte Shah* [1999] 2 AC 629, 655; Hathaway and Foster (n 3) 185; Lambert *ibid* 30.

<sup>61</sup> Joined Cases C-199/12, C-200/12 and C-201/12 *X, Y and Z v Minister voor Immigratie en Asiel* EU:C:2013:720, para 53; R Dowd, ‘Dissecting Discrimination in Refugee Law: An Analysis of its Meaning and its Cumulative Effect’ (2011) 23(1) *IJRL* 28, 32; Storey (n 55) 280.

<sup>62</sup> 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’ (February 2019) UN Doc HCR/1P/4/ENG/REV. 4, para 55.

<sup>63</sup> *ibid*, para 51.

the risk of denial of a broadly accepted international human right is ‘ongoing or it is endemic to the political or social system’.<sup>64</sup>

Similarly, UNHCR notes that serious violations of human rights can constitute persecution. This approach is also found in EU law, in particular the Qualification Directive.<sup>65</sup> Article 9 of the Directive defines an act of persecution with reference to non-derogable rights under the European Convention on Human Rights (ECHR), requiring the conduct:

- (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.

Article 9(2) of the Qualification Directive further provides that acts of persecution can take the form of, among others, ‘legal, administrative, police, and/or judicial measures which are in themselves discriminatory, or which are implemented in a discriminatory manner’ and ‘acts of a gender-specific or child-specific nature’. The rights referred to in Article 15(2) of the ECHR are the non-derogable right to life (Article 2), prohibition of torture, inhuman degrading treatment and punishment (Article 3), prohibition of slavery and forced labour (Article 4) and the prohibition against punishment without law (Article 7). However, the fact that a denied right is not listed in Article 15(2) of the ECHR does not automatically mean there is no persecution. A sufficiently severe violation of a basic human right can constitute persecution, as well as the accumulation of various measures that, as a consequence, would affect the applicant similarly, and may lead to persecution.<sup>66</sup> According to many national courts,<sup>67</sup> a well-founded fear of persecution can exist on cumulative grounds,<sup>68</sup> meaning various measures not in themselves amounting to persecution can lead to persecution when combined with other factors relating to the country of origin or the person concerned.<sup>69</sup>

<sup>64</sup> Hathaway and Foster (n 3) 195.

<sup>65</sup> UNHCR (n 62) para 51; Qualification Directive (n 9) art 9(1).

<sup>66</sup> EASO, ‘Practical Guide: Qualification for International Protection’ (April 2018) <<https://euaa.europa.eu/sites/default/files/easo-practical-guide-qualification-for-international-protection-2018.pdf>>; UNHCR *ibid* 284; Refugee Appeal No 2039/93 Re MN, Refugee Status Appeals Authority (12 February 1996) para 16; Dowd (n 61) 42.

<sup>67</sup> *Shirazi-Parsa v I.N.S.* [1994] 14 F.3d 1424, 1428 (9th Cir. 1994); *Sangha v Immigration and Naturalization Service* [1997] 103 F.3d 1482, 1487 (9th Cir. 1997); *Sarmis v Canada (Minister of Citizenship and Immigration)* [2004] FC 110, FCJ No 109 (QL); Dowd (n 61) 42.

<sup>68</sup> For an analysis on the concept of accumulation, see Dowd (n 61) 39.

<sup>69</sup> UNHCR (n 62) para 53; EASO (n 66) 20.

*B. Do Afghan Women or Girls Have a Well-Founded Fear of Persecution?*

Questions of which human rights breaches can constitute serious harm and lead to persecution are key to this analysis. Under Taliban rule, Afghan women and girls are denied access to secondary and higher education, most Afghan women are prohibited from working outside of their homes and cannot earn a living due to various Taliban-imposed measures such as gender segregation, strict dress code and limited freedom of movement. In general, freedom of movement among women and girls is severely restricted, and they are forced to rely on male relatives to appear in public and access healthcare. Furthermore, many Afghan women and girls are at risk of gender-based violence, including domestic violence and forced marriage, without functional venues to deter and punish such violence.

According to Hathaway and Foster, if the denied or restricted right is codified by a widely ratified international human rights treaty, persecution is more likely.<sup>70</sup> As outlined above, the rights absolutely or partially denied by the Taliban towards women and girls in Afghanistan include the right to education, work, healthcare, freedom of movement and expression and the right to be protected from gender-based violence. As has been shown, these rights are secured under myriad core international human rights law instruments, including the UDHR, ICCPR, ICESCR, CEDAW and CRC, and the cumulative effect of the measures imposed by Taliban rule prevents women and girls from pursuing a humane and dignified life.

Rights which the Taliban deprive Afghan women of include socio-economic rights. Although denial of socio-economic rights, including the right to adequate food, housing, education and health, may not intuitively fit the concept of persecution, it is well established that deprivation of socio-economic rights to certain individuals and groups can lead to serious harm and persecution.<sup>71</sup> According to McHugh J of the Australian High Court in *Chan*:

Measures ‘in disregard’ of human dignity may, in appropriate cases, constitute persecution. ... [T]he denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason.<sup>72</sup>

<sup>70</sup> Hathaway and Foster also support an assessment on whether the denial of or restrictions on a right is textually permissible, or is it taken in the context of a national emergency. See Hathaway and Foster (n 3) 204–5.

<sup>71</sup> M Foster, *International Refugee Law and Socio-economic Rights: Refuge from Deprivation* (1st edn, CUP 2007) 87–155; Storey (n 55) 284.

<sup>72</sup> *Chan v Minister for Immigration and Ethnic Affairs* [1989] 169 CLR 379 (Aus. HC, 9 December 1989).

Similarly, as noted by Goodwin-Gill, McAdam and Dunlop, aside from the threat of deprivation of life or physical freedom, persecution may also arise from ‘less overt measures’ such as denial of access to employment or education.<sup>73</sup> Measures introduced by the Taliban cumulatively restrict fundamental rights so severely that all Afghan women and girls are at risk of serious harm.<sup>74</sup>

Following this assessment on the risk of serious harm, it is also necessary to look at the failure of State protection, which concerns the existence of an actor that can provide protection to the asylum seeker from serious harm.<sup>75</sup> An analysis of State protection requires an assessment of a State’s ability and willingness to respond effectively to the risk of serious harm.<sup>76</sup> In the case of Afghanistan, denials of fundamental rights towards women and girls are ‘taken, promoted or tolerated by the Taliban, which exercises de facto governmental power in Afghanistan’.<sup>77</sup> Thus, Afghan authorities cannot or will not provide protection to Afghan women and girls. As serious harm to Afghan women and girls emanates from the Taliban as a de facto government, there is no State protection for Afghan women and girls seeking international protection. Hence, it is argued that every Afghan woman and girl is at risk of being subjected to persecution upon their return to Afghanistan.<sup>78</sup>

### *C. Is ‘Afghan Women and Girls’ a Particular Social Group?*

As with persecution, the concept of ‘particular social group’ carries no universally accepted definition and is generally considered the ‘Convention ground with the least clarity’.<sup>79</sup> Two dominant approaches to identifying which persons fall under the concept of ‘particular social group’ have historically been used. In 1985, the US Board of Immigration Appeals in *Re Acosta* employed the protected characteristics approach, defining the concept with primary reference to the other grounds in Article 1(A)(2), that is, race, religion, nationality and political opinion. Under this approach, a particular social group refers to a category of persons sharing a ‘common, immutable’ characteristic, that ‘either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed’.<sup>80</sup>

<sup>73</sup> G Goodwin-Gill, J McAdam and E Dunlop, *The Refugee in International Law* (4th edn, OUP 2021) 70.

<sup>74</sup> See, for a similar conclusion, UNHCR (n 15) para 5.1.13. <sup>76</sup> *ibid* 293.

<sup>75</sup> Hathaway and Foster (n 3) 291.

<sup>77</sup> Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) (n 8) para 31.

<sup>78</sup> See, for a similar conclusion, EUAA (n 1) 86–92.

<sup>79</sup> UNHCR, ‘Summary Conclusions: Membership of a Particular Social Group’ (June 2003) para 1. For an overview of gender-related claims, see J Rikhof and A Geerts, ‘Protected Groups in Refugee Law and International Law’ (2019) 8(4) *Laws* 25.

<sup>80</sup> *Matter of Acosta* 19 I. & N. Dec. 211 (BIA, 1985). See further M Foster, ‘The Ground with the Least Clarity: A Comparative Study of Jurisprudential Developments Relating to “Membership of a Particular Social Group”’ (UNHCR, Division of International Protection, 2012) 6–8.

In other jurisdictions, the ‘social perceptions’ approach was more dominant, with focus laid not only on the *inherent* characteristics of the group of individuals, but on broader *external* views of the collection of persons. The Australian High Court in *Applicant A*, for example, defined ‘particular social group’ by its ordinary meaning as ‘a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large’.<sup>81</sup> Emphasis here is placed on not only shared characteristics but also external perceptions of the group as distinguishable from wider society.<sup>82</sup> The UNHCR’s 2002 Guidelines on Gender-Related Persecution sought to allow for both strands of interpretation, concluding:

29. ... a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.<sup>83</sup>

The UNHCR’s approach thus sees the two dominant approaches as alternatives, while maintaining that a particular social group ‘cannot be defined exclusively by the persecution that members of the group suffer’.<sup>84</sup> In other words, ‘persecution must exist independently of, and not be used to define, the social group’.<sup>85</sup> Equally, there is no requirement that every person in the social group actually faces a risk of persecution.<sup>86</sup>

Moreover, there has been general acceptance for decades that sex or gender may form a particular social group for the purposes of Article 1A (2) of the 1951 Convention.<sup>87</sup> As early as 1985, UNHCR’s Executive Committee acknowledged that ‘women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a “particular social group”’.<sup>88</sup> UNHCR’s 2002 Guidelines thus find that women are ‘a clear example of a social subset defined by innate and immutable characteristics’. Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries.<sup>89</sup>

At the international level, there is a lack of guidance on sex or gender as a particular social group. UNHCR’s Guidelines on Gender-Related Persecution

<sup>81</sup> *Applicant A and Another and Refugee Review Tribunal (joining) v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 241.

<sup>82</sup> Foster (n 71) 9–12.

<sup>83</sup> 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) UN Doc HCR/GIP/02/01, para 29.

<sup>84</sup> *ibid.*

<sup>85</sup> *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, ex parte Shah* [1999] UKHL 20, 656 (Lord Hope). See further Hathaway and Foster (n 3) 425.

<sup>86</sup> UNHCR (n 83) para 17.

<sup>87</sup> Hathaway and Foster (n 3) 436; UNHCR, ‘Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees’ (April 2001) para 29.

<sup>88</sup> UNHCR, ‘Refugee Women and International Protection’ No. 39 (XXXVI) (18 October 1985) para k.

<sup>89</sup> UNHCR (n 83).

date back to 2002 and, while in need of updating, remain an important source of international guidance in this area. In 2019, the Council of Europe also produced guidance on gender-based asylum claims in the context of the Istanbul Convention.<sup>90</sup> Hathaway and Foster report that there is contemporary ‘widespread state practice’ reflecting the notion that women, sex or gender may constitute a particular social group for the purposes of refugee law.<sup>91</sup>

While there is often a reluctance to accept an entire national group of women as a particular social group, UNHCR’s 2002 Guidelines point out that this argument has ‘no basis in fact or reason’ as the other Convention grounds are not similarly limited.<sup>92</sup> Indeed, more recent jurisprudence has acknowledged that women as a particular social group need not be narrowed down to a specific subgroup within society. The Canadian Supreme Court in *Ward* listed gender as a clear example of a particular social group sharing an innate or unchangeable characteristic.<sup>93</sup> In the leading UK case of *Islam*, the House of Lords accepted ‘women in Pakistan’ as a particular social group.<sup>94</sup> While both UNHCR guidelines and State practice allow for the recognition of women in a particular country to be recognised as a particular social group in principle,<sup>95</sup> in practice national authorities tend to narrow the class of particular social group tailored to the individual facts of the case.<sup>96</sup>

However, it seems that in this case it is precisely the social group of ‘Afghan women and girls’ that is subject to such extraordinary discriminatory measures amounting to persecution. While it may be possible in concrete cases to distinguish between ‘women’ and ‘girls’ (for example in relation to access to secondary schools), the Taliban’s persecutory treatment of all women and girls is on the basis of their sex or gender and not aimed at a particular subset of the female population.

Finally, additional grounds for political opinions and religion may be relevant. Afghan women and girls who have left the country since August 2021, for example, may face a risk of persecution on the basis of imputed political opinion by virtue of their exile alone, where the Taliban authorities interpret the act of leaving Afghanistan as an expression of political dissent or opposition.<sup>97</sup> Equally, specific risk profiles, such as those of female journalists and judges, may also fall under political opinion.<sup>98</sup> Moreover, one could argue that Afghan women and girls face persecution given the ‘close link between the restrictions enforced on women and girls and the religious

<sup>90</sup> Hooper (n 21) 31–2. <sup>91</sup> Hathaway and Foster (n 3) 437. <sup>92</sup> UNHCR (n 83).

<sup>93</sup> *Canada (Attorney General) v Ward* [1993] 2 SCR 689 (30 June 1993) 739.

<sup>94</sup> *Islam v Secretary of State for the Home Department, and Regina v Immigration Appeal Tribunal and Another ex parte Shah* [1999] 2 AC 629 (HL) 635 (Lord Steyn).

<sup>95</sup> Zimmermann and Mahler (n 59) 417–19.

<sup>96</sup> Hathaway and Foster (n 3) 439–40.

<sup>97</sup> In February 2022, for example, a Taliban spokesperson said that Afghans leaving the country had ‘no excuse’ and that they would be prevented from leaving. EUAA (n 1) 78.

<sup>98</sup> *ibid* 16–17, 19.

norms imposed by the Taliban'.<sup>99</sup> The EUAA, for example, lists religion as the primary nexus for a finding of refugee status with respect to Afghan women and girls.<sup>100</sup> However, this argument is weakened by a close reading of the refugee definition in Article 1A(2) which refers to persecution 'for reasons of'—claims relying on the grounds of religion would need to show that persecution was for reasons of the asylum seeker's religion, rather than the dogma of the ruling authorities. For these reasons, it would be difficult to argue that *all* Afghan women and girls face persecution on the basis of their religion or political opinion and hence these arguments are not dealt with in depth here, while acknowledging that they may serve as alternative or additional grounds in individual cases.

#### IV. STATE RESPONSES TO AFGHAN WOMEN AND GIRLS' PROTECTION CLAIMS

Prior to the Taliban takeover, there were many issues for women and girls in accessing basic rights in Afghanistan. Indeed, even before the Taliban's return to power, Afghan women and girls were often entitled to refugee status on an individual basis due to their personal circumstances. Rather than attempting an exhaustive account of how States dealt with the asylum claims of Afghan women and girls, the focus here is on key themes emerging from the case law since the first Taliban rule of 1996–2001.

In a 2002 case, Austria's Supreme Administrative Court considered the situation of a female doctor who sought asylum in Austria in 1997.<sup>101</sup> The Court granted her refugee status in light of the *general* situation of women in Afghanistan under the first iteration of Taliban rule, finding:

If one considers the Taliban's interventions in the living conditions of Afghan women as a whole, there can be no doubt that this is one of the cases in which a number of regulations against a certain population group in connection with the nature of their implementation is of such an extreme nature that the discrimination reaches the extent of persecution within the meaning of the Refugee Convention.<sup>102</sup>

The Court thus recognised the qualification of all Afghan women for refugee status as a group under the first iteration of Taliban rule, concluding that 'it was sufficient, for the purpose of granting asylum, that the person concerned was affected by the measures in question solely on the basis of being a woman'.<sup>103</sup>

Since the US invasion of Afghanistan in 2001 and the installation of the transitional government, courts have decided the asylum cases of Afghan women and girls on individual grounds, rather than the general conditions in

<sup>99</sup> *ibid* 91.

<sup>101</sup> Verwaltungsgerichtshof (VwGH) 99/20/0483 (16 April 2002) ECLI:AT:VWGH:2002:1999200483.X01.

<sup>102</sup> *ibid*.

<sup>100</sup> *ibid*.

<sup>103</sup> *ibid*.



the country. Three strands of jurisprudence are worth highlighting here: granting of refugee status due to the risk of forced marriage; gender-based violence, including domestic violence; and claims based on the 'westernisation' of Afghan women who have spent several years outside the country.

First, case law in a number of jurisdictions addresses the risk of forced marriage for Afghan women and girls, both before and after the return of the Taliban. Forced marriage generally amounts to persecution.<sup>104</sup> By 2002, UNHCR identified 'women without effective male protection in Afghanistan' as particularly vulnerable, including the risk of forced marriage.<sup>105</sup> In the 2004 UK case of *NS*, for example, the Asylum and Immigration Tribunal found that the risk of forced marriage gave rise to a risk of persecution for a single Afghan mother and her two young daughters.<sup>106</sup> In a 2011 case, Germany's Augsburg Administrative Court held that an Afghan woman fleeing a forced marriage had a well-founded fear of persecution as 'forced marriage affects both the woman's right to self-determination and autonomous living, as well as her right to sexual self-determination'.<sup>107</sup> In a 2017 case, Denmark's Refugee Appeals Board found that an Afghan widow faced a risk of forced marriage from her deceased husband's father and thus a risk of persecution as a member of the particular social group of widows at risk of forced marriage.<sup>108</sup> These cases are emblematic of asylum States' approaches to Afghan women and girls facing an individual risk of forced marriage.

Secondly, further case law focuses on gender-based violence against women and girls. UNHCR guidance from 2009 indicated that up to 80 per cent of Afghan women suffered domestic violence.<sup>109</sup> As a result, there is significant case law on this question, including whether Afghan women have an internal flight alternative. In the European Court of Human Rights case of *N v Sweden*, for example, the applicant presented a risk of ill-treatment due to her extramarital affair. The Court held that forcible return would be a violation of Article 3 of the ECHR, as she faced the risk of gender-based violence from her husband, his family, her own family and from society at large.<sup>110</sup> In a June 2022 case, the Administrative Court of Bremen held that a young, single woman 'of

<sup>104</sup> Hathaway and Foster (n 3) 220. On forced marriage in the asylum context, see KT Seelinger, 'Forced Marriage and Asylum: Perceiving the Invisible Harm' (2010) 42 *ColumHumRtsLR* 55; Dauvergne and Millbank (n 48) 57–88.

<sup>105</sup> UNHCR, 'Preliminary Position Paper: Considerations Relating to the Return of Afghan Nationals who are Currently Outside their Country of Origin, in Countries of Asylum not in the Immediate Region' (13 February 2002) para 13.

<sup>106</sup> *Afghanistan v Secretary of State for the Home Department*, CG [2004] UKIAT 00328 (30 December 2004). <sup>107</sup> Administrative Court Augsburg, 16 June 2011, Au 6 K 30092.

<sup>108</sup> Danish Refugee Appeals Board's decision of 16 January 2017.

<sup>109</sup> UNHCR, 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan' (July 2009) 31 <[https://www.ecoi.net/en/file/local/1006611/90\\_1248363936\\_unhcr-guidelines-200907-afg.pdf](https://www.ecoi.net/en/file/local/1006611/90_1248363936_unhcr-guidelines-200907-afg.pdf)>.

<sup>110</sup> *N v Sweden* App No 23505/09 (ECtHR, 20 July 2010).

marriageable age' who had left Afghanistan almost four years previously faced a risk of gender-based persecution.<sup>111</sup>

Thirdly, a number of cases address claims based on 'westernisation' of Afghan women and the subsequent risk of persecution. UNHCR's 2009 guidelines on Afghan asylum seekers highlighted the risks for women who have adopted a 'less culturally conservative lifestyle' and are perceived as 'transgressing entrenched social and religious norms'.<sup>112</sup> As a result, for example, the Dutch Council of State in 2018 held that an Afghan woman is a Convention refugee where she has adopted a western lifestyle, that lifestyle is an expression of a religious or political conviction or she 'can no longer fully adapt in the country of origin as a result of behavioural characteristics that are extremely difficult or practically impossible to change or to hide'. As recently as 12 October 2022, the Belgian Council for Alien Law Litigation<sup>113</sup> held that a 'well-developed Western lifestyle is not enough to be recognised as a refugee, unless the applicant can demonstrate that the Western behaviour is an expression of religious or political belief', but in the concrete case recognised the applicant as facing a risk of being persecuted on the grounds of political belief.<sup>114</sup>

Most recently, the focus has also turned to the question of whether Afghan women and girls qualify as a group for refugee status. In its June 2022 decision, mentioned above, the Administrative Court of Bremen was agnostic on the question, finding 'it can be left undecided whether the current state of knowledge now allows the conclusion that every Afghan woman would be exposed to gender-specific persecution'.<sup>115</sup> A recent report finds that Afghan asylum seekers have been granted refugee status, following an individual assessment, in Germany in late 2021 and throughout 2022 on the basis of the likelihood of persecution based on gender and being perceived as westernised.<sup>116</sup>

In a series of decisions in late 2022, Austrian courts rejected the identification of a particular social group of 'women in Afghanistan' giving rise to the grant of refugee status.<sup>117</sup> On 22 September 2022, Austria's Supreme Administrative Court referred a request for a preliminary ruling to the CJEU, Case C-608/22, on the question of whether the measures imposed on Afghan women and girls amounted to acts of persecution under the Qualification Directive and, as such,

<sup>111</sup> VG Bremen, 24 June 2022, 3 K 1386/20.

<sup>112</sup> UNHCR (n 109) 32.

<sup>113</sup> *X v Commissioner General for Refugees and Stateless Persons (CGRS)* [2022] CALL No 278 653.

<sup>114</sup> *ibid.*

<sup>115</sup> 3 K 1386/20 (n 111).

<sup>116</sup> *ibid.*; VG Freiburg, 21 September 2021, A 14 K 9391/17; and Verwaltungsgericht Cottbus, 5 July 2022, VG 8K 2058/16.A, 8; C King, 'Assessing Legal Grounds for Protecting Afghan Asylum Seekers in Europe', European Council on Refugees and Exiles (ECRE) Working Paper 18 (March 2023) 9 <<https://ecre.org/wp-content/uploads/2023/03/ECRE-Working-Paper-Assessing-legal-grounds-for-protecting-Afghan-asylum-seekers-in-Europe-March-23.pdf>>.

<sup>117</sup> For examples, see University of Ghent migration law clinic and ECRE, Afghans' asylum claims since September 2021 (Taliban takeover) on file with the authors.

whether all women and girls should be accepted as refugees.<sup>118</sup> The case concerned an Afghan woman who had arrived in Austria as a minor in 2015 and had subsequently been granted subsidiary protection status, though not refugee status. In the referral, drawing on previous case law from the Austrian Supreme Administrative Court from the Taliban's first period in power, the applicant argued that group persecution of women is being carried out in Afghanistan solely on the basis of their gender.

On 7 December 2022, Sweden became the first State to recognise that Afghan women and girls are in need of international protection and recognised, as a group, as refugees under the 1951 Convention.<sup>119</sup> In a legal opinion, the Swedish Migration Agency cited the accumulation of discriminatory restrictions on women and girls' access to earning a living, healthcare and education and to seek protection from violence. The opinion cited recent further restrictions, including a bar on women from accessing certain university studies and visiting parks, gyms and public baths. The opinion noted the hardening of the Taliban's positions, with no signs of change, finding that Afghan women's basic rights are violated through a range of discriminatory 'legal, administrative, police and/or judicial measures' and that the accumulation of these measures amounts to persecution. As a result, the Agency found that 'an asylum-seeking woman or girl from Afghanistan must be assessed as a refugee due to belonging to a particular social group, ie gender'.<sup>120</sup> Finland followed suit with the Finnish Immigration Service concluding that Afghan women and girls are 'categorically subject to persecution in Afghanistan' on the basis of gender alone.<sup>121</sup>

In response, on 15 December 2022 the Danish Refugee Appeals Board announced that it would continue with individual processing of asylum applications from Afghan women and girls but, in light of the serious deterioration of conditions under the Taliban, with a lowered standard of proof for establishing a risk of persecution in such cases.<sup>122</sup> On 25 January 2023, the EUAA released its updated country information on Afghanistan, concluding that 'the accumulation of various measures introduced by the Taliban, which affect the rights and freedoms of women and girls in Afghanistan, amounts to persecution'.<sup>123</sup>

Against the backdrop of the EUAA's conclusions and other country information, the Danish Refugee Appeals Board reconsidered its position, falling in line with the Swedish, Finnish and EUAA conclusions. As a result,

<sup>118</sup> Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) (n 8).

<sup>119</sup> Finnish Immigration Service, Women from Afghanistan to be Granted Asylum in Sweden, (n 10).

<sup>120</sup> Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) (n 8) 1–2.

<sup>121</sup> Finnish Immigration Service, Refugee Status to Afghan Women and Girls, (n 11).

<sup>122</sup> Flygtningenævnet, 'Lempet bevisvurdering ved Flygtningenævnets behandling af asylansøgninger fra kvinder og piger fra Afghanistan' (15 December 2022) <<https://fln.dk/da/Nyheder/15122022>>.

<sup>123</sup> EUAA (n 1) 91.

Afghan women and girls seeking asylum in Denmark (including previously rejected protection seekers) now receive refugee status. In February 2023, UNHCR concluded that ‘Afghan women and girls are likely to be in need of international refugee protection under the 1951 Convention’.<sup>124</sup> Most recently, the Norwegian Immigration Appeals Board, in a single case, recognised the Convention status of an Afghan woman with regard to the general conditions in the country on the basis of her gender alone, with direct reference to Danish and Swedish practice.<sup>125</sup> These promising developments in Scandinavian jurisdictions have yet to find support in other asylum States in Europe, North America and Oceania.

#### V. ADDRESSING COUNTER-ARGUMENTS

This section addresses potential counter-arguments to the claim that Afghan women and girls, as a group, are entitled to Convention status. There are three legal and policy arguments against such an approach. The first is that there may be a class of Afghan women who do not qualify for refugee status as, due to religious, social or family reasons, they were intentionally not exercising their basic rights to education, work, freedom of movement or freedom of expression, even prior to the return of the Taliban. Should such an individual be recognised as a refugee despite the absence of a change in her circumstances since the Taliban takeover?

Lord Stein, in *Islam*, noted that ‘generalisations about the position of women in particular countries are out of place in regard to issues of refugee status. Everything depends on the evidence and findings of fact in the particular case.’<sup>126</sup> However, girls and women in Afghanistan following the Taliban’s takeover constitute an exception to this general position. Deprivation of the right to education based on gender is unique. Although in many societies women are subject to discrimination, including deprivation of their basic rights such as freedom of expression and freedom of movement, Afghanistan is the only country in the world depriving all women and girls of secondary and higher education.<sup>127</sup> The UN special rapporteur on the human rights situation in Afghanistan noted the ‘staggering regression in women and girls’ enjoyment of civil, political, economic, social and cultural rights since the Taliban took power’.<sup>128</sup> Even for women beyond school age, the bar on university education coupled with the denial of the right to work, access to

<sup>124</sup> UNHCR (n 1) para 9.

<sup>125</sup> Norwegian Immigration Appeals Board Decision of 3 February 2023, on file with the authors.

<sup>126</sup> *Islam v Secretary of State for the Home Department* (n 94) 635 (Lord Steyn).

<sup>127</sup> UN News, ‘Afghan Girls and Women Made Focus of International Education Day: UNESCO’ (19 January 2023) <<https://news.un.org/en/story/2023/01/1132637>>.

<sup>128</sup> Office of the UN High Commissioner for Human Rights, ‘Situation of Human Rights in Afghanistan – Report of the Special Rapporteur on the Situation of Human Rights in Afghanistan’ (9 September 2022) UN Doc A/HRC/51/6, para 21.

healthcare and freedom of movement and expression are so severe that there is a substantial persecution risk. The overall effect of the Taliban's measures together with the deprivation of the right to secondary and higher education on the basis of gender alone creates a risk of persecution for Afghan women and girls.

The second is that there may be a narrow class of Afghan women who do not oppose, or indeed even support, the discriminatory measures adopted by the Taliban. For example, an Afghan woman who identifies as a Taliban supporter or is part of the Taliban elite may not view the current treatment of women and girls as persecution, but rather as religious dogma. In such a case, one could argue that the individual involved lacks relevant subjective fear of persecution. In this scenario, it may be unlikely that a female Taliban supporter would flee Afghanistan and seek asylum in the first place. Alternatively, females close to the Taliban elite (such as wives and close family members) may qualify for inclusion under Article 1A(2) but be subsequently excluded from refugee status on the basis of their support for or participation in crimes perpetrated by the Taliban regime under Article 1F of the 1951 Convention.

A third challenge is whether it is feasible to argue that more than 11 million women and girls in Afghanistan would be entitled to international protection if they succeeded in fleeing the country. Decision-makers have at times been concerned that the individualised definition of a refugee will be lost if gender is recognised as a basis for a particular social group because there would simply be too many women who qualify for asylum.<sup>129</sup> However, such 'floodgates' arguments are policy-based and not legal in nature: as Godfrey notes, 'the possible size of the recognizable social group should not be of judicial concern in asylum claims'.<sup>130</sup> State obligations under the 1951 Convention do not change depending on the number of refugees.<sup>131</sup>

#### VI. IMPLICATIONS OF ALL AFGHAN WOMEN AND GIRLS BEING GRANTED REFUGEE STATUS: THE CASE FOR PRIMA FACIE RECOGNITION

All Afghan women and girls outside Afghanistan irrespective of their age, education, occupation, status, marital status, etc., should be recognised as refugees. In view of this, one can make the case for prima facie recognition to make seeking protection simpler and more effective for both women and

<sup>129</sup> *Sanchez-Trujillo v I.N.S.* 801 F.2d 1571, 1577 (B.I.A. 1986); *Perdomo v Holder*, 611 F.3d 662, 669 (9th Cir. 2010); PC Godfrey, 'Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees' (1994) 3 *JL&Poly* 257, 280; J Imbriano, 'Opening the Floodgates or Filing the Gap: *Perdomo v. Holder* Advances the Ninth Circuit One Step Closer to Recognizing Gender-Based Asylum Claims' (2011) 56(2) *VillanovaLRev* 327, 350.

<sup>130</sup> Godfrey *ibid.*

<sup>131</sup> For an analysis whether mass influx can be accepted as a reason for derogation under the 1951 Convention, see M Ineli-Ciger, *Temporary Protection in Law and Practice* (Brill 2017) 98–103.

girls fleeing the Taliban as well as asylum States. This final section makes the argument for group recognition for Afghan women and girls or, if this is not possible, simplified or accelerated procedures.

First, Afghan women and girls could be recognised as refugees on a *prima facie* basis. The UNHCR defines the *prima facie* approach as ‘the recognition by a State or UNHCR of refugee status on the basis of readily apparent, objective circumstances in the country of origin’.<sup>132</sup> There is nothing in the 1951 Convention that precludes *prima facie* recognition of refugees,<sup>133</sup> although States in the Global North overwhelmingly favour refugee status determination on an individual basis.<sup>134</sup> *Prima facie* recognition is usually associated with the large-scale movement of refugees, resulting in mass influx situations in a particular asylum State or region.<sup>135</sup> However, even in the absence of a mass influx, it may also be an appropriate response for the protection of similarly situated individuals who share a readily apparent common risk of harm.<sup>136</sup> As a result, since each Afghan woman or girl has a clear need for international protection, *prima facie* recognition is a useful mechanism to satisfy their protection needs in States party to the 1951 Convention.<sup>137</sup>

A *prima facie* approach can be applied within individual refugee status determination procedures, although it is more often used as part of group recognition.<sup>138</sup> *Prima facie* recognition of Afghan women could be implemented simply: once a female applies for asylum and establishes her identity as an Afghan national, she would be granted refugee status unless there is evidence to the contrary that suggests she should not be considered as a refugee.<sup>139</sup> Doing this may prove easier in the Global South, since some regions, notably in Africa, regularly recognise refugees on a *prima facie* basis.<sup>140</sup> According to Albert, Lesotho, Liberia, Tanzania, South Africa, Uganda, Zambia and Zimbabwe all allow for *prima facie* recognition on the basis of ministerial declaration, while Kenya, Sierra Leone and Burundi include *prima facie* recognition within their respective national refugee instruments.<sup>141</sup> UNHCR has also used *prima facie* recognition in a number of

<sup>132</sup> UNHCR, ‘Guidelines on International Protection No. 11: *Prima Facie* Recognition of Refugee Status’ (24 June 2015) UN Doc HCR/GIP/15/11, para 1.

<sup>133</sup> M Albert, ‘Governance and *Prima Facie* Refugee Status Determination: Clarifying the Boundaries of Temporary Protection, Group Determination, and Mass Influx’ (2010) 29(1) *RefugSurvQ* 61, 61–2.

<sup>134</sup> UNHCR (n 132) para 1.

<sup>135</sup> *ibid*, para 9; Albert (n 133) 63; J-F Durieux, ‘The Many Faces of “*Prima Facie*”: Group-Based Evidence in Refugee Status Determination’ (2008) 25(2) *Refuge* 151, 152.

<sup>136</sup> UNHCR (n 132) para 10.

<sup>137</sup> *ibid*, para 1; Durieux (n 135) 153.

<sup>138</sup> UNHCR (n 132) para 2.

<sup>139</sup> *ibid*, paras 18–19.

<sup>140</sup> C Costello, C Nalule and D Ozkul, ‘Recognising Refugees: Understanding the Real Routes to Recognition’ (2021) 65 *ForcedMigrRev* 4, 5; L Jubilut and JC Jarochinski Silva, ‘Group Recognition of Venezuelans in Brazil: An Adequate New Model?’ (2020) 65 *ForcedMigrRev* 42, 43.

<sup>141</sup> M Albert, ‘*Prima Facie* Determination of Refugee Status: An Overview and its Legal Foundation’ (Refugee Studies Centre Working Paper No 55, January 2010) <<https://www.rsc.ox.ac.uk/files/files-1/wp55-prima-facie-determination-refugee-status-2010.pdf>>.

its operations in the context of ‘large influx situations of asylum-seekers from the same nationality group or profile and where individual refugee status determination is not feasible in view of UNHCR’s limited resources’.<sup>142</sup>

In the EU context, group recognition is more complex to implement in light of the existing supranational asylum framework. Group recognition in the EU is explicitly foreseen in the context of temporary protection but not international protection (which includes refugee status). Council Directive 2001/55/EC<sup>143</sup> (Temporary Protection Directive) foresees group recognition where the European Council adopts a decision determining that there is a mass influx situation and that asylum systems are struggling to cope with demand stemming from the large-scale arrivals of displaced persons, risking a negative impact on the efficient operation of Member States’ asylum systems.<sup>144</sup> In response to Ukrainians fleeing Russian aggression, the Council activated the Temporary Protection Directive for the first time on 4 March 2022.<sup>145</sup> For an individual fleeing the war in Ukraine to be granted temporary protection in the Union, they simply need to prove they are a Ukrainian national who fled after a cut-off date (24 February 2022) or held international protection status in Ukraine prior to the invasion.<sup>146</sup> Temporary protection status holders enjoy rights and entitlements including temporary residence permits, emergency healthcare, shelter, social benefits and education, as well as limited access to the labour market and a limited right to family reunification.<sup>147</sup> Registration processes for those fleeing Ukraine as temporary protection beneficiaries generally ranged from 30 minutes to a few days, although in several Member States these procedures took longer.<sup>148</sup>

<sup>142</sup> UNHCR, ‘Fair and Fast: UNHCR Discussion Paper on Accelerated and Simplified Procedures in the European Union’ (25 July 2018) 8 <<https://www.refworld.org/docid/5b589eef4.html>>.

<sup>143</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12 (Temporary Protection Directive).  
<sup>144</sup> *ibid.*, art 5.

<sup>145</sup> The Council decided the following groups to enjoy temporary protection in the Union in March 2022: (a) Ukrainian nationals residing in Ukraine who have been displaced on or after 24 February 2022 and their family members, and (b) stateless persons and third-country nationals who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022 and who have been displaced from Ukraine on or after 24 February 2022, and their family members. See Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L71/1, art 2.

<sup>146</sup> European Commission, Solidarity with Ukraine, ‘Fleeing Ukraine: Your Rights in the EU’ (2022) <[https://eu-solidarity-ukraine.ec.europa.eu/information-people-fleeing-war-ukraine/fleeing-ukraine-your-rights-eu\\_en](https://eu-solidarity-ukraine.ec.europa.eu/information-people-fleeing-war-ukraine/fleeing-ukraine-your-rights-eu_en)>.

<sup>147</sup> Temporary Protection Directive (n 143) Ch III.  
<sup>148</sup> ‘As of August 2022, in 21 of the 26 countries monitored, the registration process takes between 30 minutes to a few days. In the remaining five countries, however, the process could last a few weeks to four months.’ UNHCR Regional Bureau for Europe, ‘The Implementation of the Temporary Protection Directive: Six Months On (October 2022) 11 <<https://reliefweb.int/report/poland/unhcr-regional-bureau-europe-implementation-temporary-protection-directive-six-months-october-2022>>.



Today, more than five million people fleeing Ukraine enjoy temporary protection status in the EU.<sup>149</sup>

By not requiring individual status determination, the Temporary Protection Directive granted persons displaced by the war in Ukraine immediate access to crucial rights without going through lengthy individual status determination procedures. Member States, by not being obliged to process nearly five million asylum applications, saved time, administrative resources and money. This example illustrates the benefits of group recognition for both host States and displaced persons.

Temporary protection should not, however, be confused with *prima facie* refugee recognition. For Afghan women and girls fleeing the Taliban, temporary protection is not a viable option, as the temporary protection regime can only be activated in a mass influx situation. Moreover, as it is suggested that Afghan women and girls fit the refugee definition, granting them time-limited status with fewer rights compared to other refugees under the 1951 Convention may violate Member State obligations under the 1951 Convention in the absence of a mass influx situation.<sup>150</sup> It should be also noted that the European Parliament's position on the Proposal for a Regulation addressing situations of crisis and *force majeure* in the field of migration and asylum,<sup>151</sup> presently under negotiation, aims to introduce the granting of *prima facie* international protection to manage a situation of crisis including large-scale arrival of refugees to the borders of the Union.<sup>152</sup>

In light of the above, the question remains whether EU Member States can grant Afghan women and girls fleeing the Taliban *prima facie* refugee status under the current legal modalities. Both the Qualification Directive and Directive 2013/32/EU (Procedures Directive)<sup>153</sup> require that the assessment of an asylum application be carried out on an individual basis with individual decisions rendered in respect of each application.<sup>154</sup> Although Member States may introduce or retain more favourable standards relating to qualification and procedures, these standards must be compatible with these two Directives.<sup>155</sup> Therefore, Member States granting international protection to Afghan women and girls without *any* individual assessment seems contrary to existing EU law. However, Member States are free to examine the asylum applications of Afghan

<sup>149</sup> This is as of May 2023. UNHCR, 'Ukraine Refugee Situation' <<https://data.unhcr.org/en/situations/ukraine>>.

<sup>150</sup> See Ineli-Ciger (n 131) Ch 2.  
<sup>151</sup> European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Addressing Situations of Crisis and *Force Majeure* in the Field of Migration and Asylum' COM(2020) 613 final.

<sup>152</sup> European Parliament, 'Legislative Train Schedule' <<https://www.europarl.europa.eu/legislative-train/spotlight-JD22/file-crisis-and-force-majeure-regulation>>.

<sup>153</sup> Qualification Directive (n 9); 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) [2013] OJ L180/60 (Procedures Directive).

<sup>154</sup> Qualification Directive (n 9) art 4; Procedures Directive *ibid*, art 10.

<sup>155</sup> Qualification Directive *ibid*, art 3; Procedures Directive *ibid*, art 5.

women and girls through simplified or accelerated procedures, provided that their national laws allow for such an approach.<sup>156</sup> This individualised but simplified approach is presently being taken by national asylum authorities in Denmark, Finland and Sweden.<sup>157</sup>

Asylum States outside the EU have initiated various approaches to protect Afghans fleeing Taliban rule, though none presently includes group, simplified or accelerated procedures. The United States led an airlift operation evacuating tens of thousands of Afghans, including to a range of third States.<sup>158</sup> Other States, including Belgium, Denmark, France, Finland, Germany, Italy, the Netherlands, Norway, Lithuania, Poland, Romania, Spain and Switzerland, carried out their own evacuations focused on Afghans linked to those States' military and diplomatic presence in Afghanistan.<sup>159</sup> A number of States increased the resettlement of Afghan refugees. Canada, most notably, launched a specialised programme to resettle 40,000 Afghans through both State resettlement and private sponsorship.<sup>160</sup> The United Kingdom also committed to resettle 20,000 Afghans over a number of years.<sup>161</sup> Other countries, such as Finland, Italy, Ireland and Switzerland, increased resettlement places for Afghans in 2021.<sup>162</sup>

Pursuing simplified or accelerated procedures would mean that the asylum claims of Afghan women and girls will be processed with the presumption that their claims are founded.<sup>163</sup> This would also provide an evidentiary benefit since Afghan women and girls would not be required to prove an individual risk of persecution before national administrative authorities.<sup>164</sup> For asylum States, using the prima facie approach through group recognition or accelerated or simplified individual procedures in this context would save time, money and administrative resources. Pursuing such an approach can also increase the fairness of asylum procedures by increasing decision-making consistency.<sup>165</sup> For Afghan women and girls, group recognition or simplified or fast-track procedures could ensure rapid access to the rights

<sup>156</sup> The Procedures Directive *ibid*, foresees accelerated procedures to apply in a limited number of instances: for asylum seekers whose applications are already deemed manifestly unfounded, those involving serious national security or public order concerns, or subsequent applications. However, there is no obstacle for Member States to use simplified or fast track procedures for certain groups that are clearly in need of international protection. See further UNHCR (n 142).

<sup>157</sup> See, for example, *Flygtningenævnet* (n 12).

<sup>158</sup> NF Tan, 'The Temporary Hosting of Evacuated Afghans in Third Countries: Responsibility Sharing or Externalisation?' (*Refugee Law Initiative Blog on Refugee Law and Forced Migration*, 15 September 2021) <<https://rli.blogs.sas.ac.uk/2021/09/15/the-temporary-hosting-of-evacuated-afghans-in-third-countries-responsibility-sharing-or-externalisation/>>. A Kumar, 'Evacuate At-Risk Afghans' (Human Rights Watch, 24 August 2021) <<https://www.hrw.org/news/2021/08/24/evacuate-risk-afghans>>.

<sup>159</sup> EASO (n 7).  
<sup>160</sup> Government of Canada, 'Supporting Afghan Nationals: About the Special Programs' <<https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/afghanistan/special-measures.html>>.

<sup>161</sup> United Kingdom Home Office, 'Afghan Citizens Resettlement Scheme' (18 August 2021) <<https://www.gov.uk/guidance/afghan-citizens-resettlement-scheme>>.

<sup>163</sup> UNHCR (n 132) para 40.

<sup>164</sup> *ibid*, para 40.

<sup>165</sup> Durieux (n 135) 160.

provided under the 1951 Convention, avoiding the stresses associated with full in-merits asylum procedures, which often include long wait times, uncertainty and multiple interviews.

#### VII. CONCLUSIONS

This article has crafted a principled argument for the recognition of Afghan women and girls as refugees based on the persecution at the hands of the Taliban on the basis of their sex or gender. The article began by outlining the current rights situation for women and girls in Afghanistan, showing denials or severe restrictions with respect to their rights to education, work, healthcare, freedom of movement, opinion, expression and right to be protected from gender-based violence. It then addressed critical elements of the refugee definition contained in the 1951 Convention, arguing that the above restrictions, cumulatively, amount to persecution and that ‘Afghan women and girls’ are a particular social group for the Convention, and tackled counter-arguments to this claim.

The article finally addressed the normative and practical implications of the finding that all Afghan women and girls outside the country presently qualify for refugee status. The 1951 Convention leaves open the possibility for States to carry out *prima facie* recognition of refugees and this would be an appropriate response for the protection of Afghan women and girls, where national asylum systems allow such an approach. In the EU, the recent activation of the Temporary Protection Directive for those displaced from Ukraine shows the benefits of group-based protection mechanisms. While the use of group refugee recognition is not currently possible under existing EU law, the use of simplified and fast-track procedures would allow EU Member States to maintain an individual procedure while implementing swift, simplified procedures to protect Afghan women and girls.