

BOFAXE

Are All Options Exhausted? (PART 1)

How an ECJ Ruling Affects the Lives of Afghan Women

Following the European Parliament's [resolution](#) on the situation of Afghan women after implementation of the [Virtue and Vice Law](#), the European Court of Justice (ECJ) ruled on 4th October 2024 in cases [C-608/22](#) and [C-609/22](#) that Afghan women are persecuted by the Taliban on account of their gender and are therefore at a general risk of persecution, more precisely: nationality and gender are sufficient for refugee status within the meaning of [Directive 2011/95/EU](#).

The Virtues and Vices Act has tightened the previously restrictive measures against women in Afghanistan: they are not allowed to sing, read aloud or speak in public. Their faces must be completely covered, they may not look at strangers nor be transported without a *mahram* (male relative). Women in Afghanistan suffer [social, legal and societal marginalization](#). Against this background, the treatment of Afghan women under the Taliban regime has been characterized by the European Parliament as [gender apartheid](#).

Despite the landmark ECJ ruling in favor of Afghan women, the questions remain: What does this ruling exactly mean in an international legal respect? How much is this protection worth if the women themselves are trapped in their country of origin? Or is it the beginning of the international pressure that is needed to push through new impulses for the treatment of women in accordance with human rights, hopefully with a different outcome than the occupation in the 2000s?

(Legal) Impact of the Ruling

The decision to recognize the general risk of persecution for an entire population group and to open the way for unconditional asylum has not been seen in previous ECJ jurisdiction. In this regard, [Sweden, Denmark and Finland](#) are pioneers, having reacted quickly to the [EUAA's recommendation](#) in 2023. To implement this approach, the ECJ has modified previous international law provisions. To what extent must be examined:

Considering a doctrinal viewpoint of the ruling, the ECJ extended the criterion "well-founded fear of persecution" under Art. 1 A No. 2 Refugee Convention by the rebuttable presumption that all Afghan women are exposed to a general risk of persecution and therefore cannot reasonably be expected to return. A rebuttable presumption is not contained in the Geneva Refugee Convention. Provided the decision is consistently applied in national practice, the administrative process will be faster, as the individual case examination is no longer necessary in the context of asylum applications of Afghan women. However, as an exception, this must be interpreted narrowly. Whether this could be applied in another case is uncertain, but also unlikely; at least it can be said that in no other country women's rights are restricted to such an extent that a further exception appears justified.

Another doctrinal particularity is that the interpretation of refugee law by the ECJ can be seen as a form of subsequent practice that is relevant within the meaning of Art. 31 para. 3 lit. b Vienna Convention on the Law of Treaties (see [here](#) and [here](#)). However, this can also lead to the practice being circumvented by deliberately not applying it, so that the refugee status and asylum application of an applicant must be examined individually.

This ruling's effects are not limited to a legal level, it also has a high political significance: With this landmark decision, the ECJ fulfilled its duty as a harmonizing force to enforce a uniform asylum practice in the EU. It led to a higher awareness of gender-based persecution within the member state, whereby other states may reconsider the application of potentially discriminatory measures against the female or vulnerable population (cf. [Interview with ECJ](#)). This also sends an important signal to the Taliban regime that the international community condemns these human rights violations.

Critics

Since the Supreme Administrative Court in Austria referred the case to the ECJ resulting in a declaratory judgment, critical voices followed from Austrian politicians.

According to the far right Freedom Party of Austria (FPÖ) – which was in [coalition negotiations](#) with the Austrian's Peoples Party (ÖVP) in January to mid-February 2025 – the ruling is "out of touch with reality" and ensures that their male relatives are also brought in by way of family reunification. Thereby, it neglects the opinion of the population with regard to the migration issue, which is why they reject implementing the ruling (see [here](#) for the detailed statement).

This must be objected in threefold: About the non-implementation, it should be emphasized that the ECJ ruling facilitates the work of the federal migration offices due to the definition of the legal terms and the provision that Afghan women are persecuted in their entirety. The authorities are not prevented to assess individual cases. Whether they ultimately come to a different conclusion remains to be seen.

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Are All Options Exhausted? (PART 2)

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— Prospects of Legal Measures

Even though the ruling affects many fates, it has no direct impact on those who need it most. Considering that Afghan women cannot move freely in their country of origin, making it more difficult for them to leave it. Realistically, it can be assumed that the decision is advantageous for Afghan women who have already been in the EU so that they are not exposed to the risk of expulsion. It is still crucial how cooperative the member states are in their asylum practices. In order to change the Afghan women's situation seriously, active support measures such as targeted reception programs, diplomatic pressure on the Taliban and long-term strategies must be developed (i.e. see [here](#)). In view of the political situation in Europe and the strong right-wing extremist tendencies, this is difficult to implement. It is also not clear whether the ECJ's refugee jurisdiction will be continuously supported by the will of the member states (official doubts see [here](#) and [here](#)).

This does not mean that the women living in Afghanistan have been forgotten. After the Virtue and Vice Law was passed, the international community did not freeze in horror but set the first stones rolling. The European Parliament drafted a [resolution](#) with various demands: the abolition of the law, sanctioning of the Taliban by the EU, participation of Afghan women in international forums and negotiations by the member states and support for the recognition of gender apartheid by the EU. Germany, Australia, Canada and the Netherlands have also responded by taking the Taliban to the ICJ for breach of CEDAW (see here for a detailed [article](#)). Despite the problematic enforceability of international judgments, the isolation of the Taliban by states could contribute on that (on the enforceability of international law [here](#)).

Since gender apartheid was mentioned by the EU Parliament, the Taliban should be considered punishable under the ICC Statute. As a world court, the ICC has the competence to examine the criminal liability of the Taliban regime regarding a crime against humanity on account of gender. In this case, it is more realistic for the ICC prosecutor to investigate, as it is doubtful that the UN will submit a case to the ICC due to China's and Russia's relations with Afghanistan. The Human Rights Watch's criminal liability assessment shows a promising outcome (see [here](#)).

Finally, it is important to emphasize [Huckerby's](#) internal approach that the international community can reconsider its own measures by ensuring that no Taliban programs are funded that exclude women and girls, e.g. in education aid, and that any foreign policy towards Afghanistan includes a plan to improve opportunities for women and girls.

Conclusion

Obviously, this is an area of tension between a legal decision and political reality. Despite all the repression, the voices of Afghan women have not been silenced. The bright side of social media has enabled them to respond to the Virtues and Vices Act with "resounding" [resistance](#). It is to be hoped that the joint resistance will build up sustained pressure against the Taliban regime as well as right-wing tendencies to create new momentum in the fight against gender discrimination.