

Case C-621/21

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

6 October 2021

Referring court:

Administrativen sad Sofia-grad (Bulgaria)

Date of the decision to refer:

29 September 2021

Applicant:

WS

Defendant:

Intervyuirasht organ na Darzhavna agentsia za bezhantsite pri Ministerskia savet

Subject matter of the main proceedings

Conditions for granting international protection under Directive 2011/95/EU in the case of gender-based violence against women in the form of domestic violence; alternative possibility of granting subsidiary protection in the light of real threats of honour killing in the event that the applicant returns to her country of origin.

Subject matter and legal basis of the request

Interpretation of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on the basis of the second paragraph of Article 267 TFEU

Questions referred for a preliminary ruling

1. For the purpose of classifying gender-based violence against women as a ground for granting international protection under the 1951 Refugee Convention relating to the Status of Refugees and under 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, do the definitions of terms and concepts in the United Nations Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 and the Council of Europe Convention on preventing and combating violence against women and domestic violence apply in accordance with recital 17 of Directive 2011/95/EU, or does gender-based violence against women, as a ground for granting international protection under Directive 2011/95, have an autonomous meaning which differs from that in the abovementioned instruments of international law?
2. In the case where gender-based violence against women is alleged, must membership of a particular social group as a reason for persecution pursuant to Article 10(1)(d) of Directive 2011/95 be established by taking account solely of the biologically defined sex or socially constructed gender of the victim of persecution (violence against a woman merely because she is a woman), can the specific forms/acts/actions of persecution referred to in the non-exhaustive list in recital 30 be a relevant factor in determining the ‘visibility of the group in society’ – that is to say, can they be its distinguishing feature – depending on the circumstances in the country of origin, or can those acts relate only to the acts of persecution under Article 9(2)(a) or (f) of Directive 2011/95?
3. In the case where the person applying for protection alleges gender-based violence in the form of domestic violence, does that person’s biologically defined sex or socially constructed gender constitute a sufficient ground for determining membership of a particular social group under Article 10(1)(d) of Directive 2011/95, or must an additional distinguishing characteristic be established, on a literal interpretation, to the letter, of Article 10(1)(d) of Directive 2011/95/EU, which provides for the conditions as cumulative in nature and the gender-related aspects as alternative in nature?
4. In the case where the applicant alleges gender-based violence in the form of domestic violence by a non-State actor of persecution within the meaning of Article 6(c) of Directive 2011/95, is Article 9(3) of Directive 2011/95 to be interpreted as meaning that it is sufficient for the purpose of establishing a causal link that there is a link between the reasons for persecution set out in Article 10 and the acts of persecution referred to in paragraph 1 of that article, or is it mandatory to establish absence of protection from the alleged persecution; does the link exist in cases where the non-State actors of persecution do not perceive the individual acts of persecution/violence as such as being gender-based?

5. Can the real threat of an honour killing in the event that the person concerned is returned to the country of origin justify – if the other conditions for this are met – the granting of subsidiary protection under Article 15(a) of Directive 2011/95, read in conjunction with Article 2 of the ECHR (no one is to be deprived of his or her life intentionally), or is that threat to be classified as harm under Article 15(b) of Directive 2011/95, read in conjunction with Article 3 of the ECHR, as interpreted in the case-law of the European Court of Human Rights, in an overall assessment of the risk of further acts of gender-based violence; is it sufficient for the granting of such protection that the applicant has stated that he or she is subjectively unwilling to avail himself or herself of the protection of the country of origin?

Provisions of European Union law relied on

Treaty on the Functioning of the European Union, Article 78(1)

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, in particular recitals 17, 29 and 30 and Article 2(d) and (f), Article 4(3)(c), Article 6, Article 7(2), Article 9(1) to (3), Article 10(1) and (2)

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, in particular Article 33(2) and Article 40(2) and (3)

European Parliament resolution of 8 March 2016 on the situation of women refugees and asylum seekers in the EU (2015/2325(INI)) ('EP Resolution of 8 March 2016'), in particular points 13, 15 and 18

European Parliament resolution of 12 September 2017 on the proposal for a Council decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence

European Parliament resolution of 4 April 2019 seeking an opinion from the Court of Justice on the compatibility with the Treaties of the proposals for the accession by the European Union to the Council of Europe Convention on preventing and combating violence against women and domestic violence and on the procedure for that accession (2019/2678(RSP))

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

Case-law of the Court of Justice of the European Union relied on

Judgment (Grand Chamber) of 14 May 2020, *FMS and Others* (Joined Cases C-924/19 PPU and C-925/19 PPU, EU:C:2020:367), in particular paragraphs 192, 196 and 197

Judgment of 7 November 2013, *X and Others* (Joined Cases C-119/12 to C-201/12, EU:C:2013:720), paragraphs 45 to 47

Judgment of 4 October 2018, *Ahmedbekova* (Case C-652/16, EU:C:2018:801), paragraph 89

Provisions of international law relied on

Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, as supplemented and amended by the Protocol Relating to the Status of Refugees, done at New York on 31 January 1967 ('the Geneva Convention'), in particular the preamble and Article 1(A)(2)

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) ('Convention against discrimination against women'), which was adopted by the General Assembly of the United Nations on 18 December 1979, in particular Article 1

General Recommendations of the CEDAW Committee on the Elimination of Discrimination against Women Nos 19, 24 and 25

Convention on preventing and combating violence against women and domestic violence, adopted by the Committee of Ministers of the Council of Europe on 7 April 2011 ('the Istanbul Convention'), in particular Articles 2, 3, 60 and 61

Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), in particular Articles 2, 3 and 15

Case-law of the European Court of Human Rights relied on

ECtHR, judgment of 9 June 2009, *OPUZ v. Turkey* (No 33401/02), § 97 and 98

ECtHR, judgment of 20 July 2010, *N. v. Sweden* (No 23505/09), § 55, 59, 60, 61 and 62

Provisions of national law relied on

Zakon za ubezhishteto i bezhantsite (Law on asylum and refugees; ‘the ZUB’), in particular Articles 8, 9, 13 and 76b and Paragraph 1(5) and (6), of the Additional provisions for the ZUB

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant, WS, is a national of the Republic of Turkey and is of Kurdish ethnicity, a Sunni Muslim and divorced. In June 2018, she left Turkey in order to travel to Bulgaria, and did so legally with a national passport and a work visa. She arrived in the city of Plovdiv, Bulgaria. With the help of a smuggler, she obtained a one-week visa for Germany and travelled by plane to Berlin to stay with her aunt. On 21 June 2018, she applied for protection in that country, but was readmitted to Bulgaria by decision of the Darzhavna agentsia za bezhantsite (State Agency for Refugees; ‘the DAB’) of 28 February 2019 on the basis of a request to take charge from the Federal Republic of Germany for the purposes of examining her application for international protection.
- 2 In three interviews conducted in October 2019, the applicant stated that she had experienced problems with her ex-husband BS in Turkey, to whom she had been forcibly married by her family and with whom she had three daughters. After several incidents of violence, as a result of which she was repeatedly placed in shelters for victims of violence, she left her husband in September 2016 and took up residence with another man. She entered into a religious marriage with him in 2017, which produced a son. Her biological family did not support her in the disputes with BS. She claimed that she fears for her life and provided evidence that she had been threatened by her [ex-]husband, his family and her biological family, and she stated that she fears that they would kill her if she returned to Turkey. She stated that she has been officially divorced from her first husband since September 2018, when she had already left Turkey.
- 3 By decision of 21 May 2020, the Chairman of the DAB rejected WS’s application for international protection as unfounded. The authority considers that the reasons given for leaving Turkey are irrelevant to the international protection applied for. It takes the view that they could not be linked to any of the grounds provided for in Bulgarian law, namely a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group. Moreover, according to the authority, the applicant did not claim that she had been persecuted because of her gender. After being challenged before the courts, that decision was upheld by the Administrativen sad Sofia-grad (Administrative Court, Sofia City) and the Varhoven administrativen sad (Supreme Administrative Court).
- 4 On 13 April 2021, WS lodged a new application for international protection, attaching nine new pieces of documentary evidence that she considers to be relevant to her personal situation and her country of origin. On the basis of that

application and evidence, WS asserts that there are grounds for granting her refugee status (under Article 8(1) of the ZUB) due to her membership of a particular social group, namely that of women who have experienced domestic violence and of women who are potential victims of honour crimes. It is stated in the application that her persecutors are non-State actors from whom the Turkish State cannot protect her, irrespective of what measures it takes. The application objects to her possible return to Turkey, where the foreigner has no one to rely on and she fears being killed by her ex-husband or being the victim of an honour killing by his or her biological family or being forced to marry again. She considers that her situation has since worsened as she has given birth to a child by a man to whom she is not married. She points to Turkey's withdrawal from the Istanbul Convention in March 2021 as a new circumstance. WS submits that she meets the requirements for the grant of humanitarian status under Article 9(1)(1) and (2) of the ZUB, as she would be exposed to violations of Articles 2 and 3 of the ECHR in the event that she were to be returned to Turkey.

- 5 The Intervyuirasht organ pri Darzhavna agentsia za bezhantsite (Interviewing Body of the DAB) refused WS's subsequent application to open the procedure for granting international protection. WS's action before the referring court is directed against that refusal. The judgment of that court cannot be challenged by an appeal in cassation. It is final and takes effect from the date of its delivery.

The essential arguments of the parties in the main proceedings

- 6 The applicant seeks the annulment of the decision of the Interviewing Body of the DAB. She considers that, by her subsequent application for protection, she has submitted new documentary evidence concerning her personal situation and her country of origin. She submits that the statutory requirements for granting refugee status are met in her case and that, moreover, she has submitted new evidence demonstrating that she meets the requirements for granting humanitarian status under the ZUB.
- 7 The defendant contests the action and claims that it should be dismissed. It takes the view that the documentary evidence has been examined in the contested decision and that the applicant has not presented any new circumstances concerning her personal situation and country of origin which would constitute grounds for granting her refugee status and humanitarian status under the ZUB and which had not already been taken into account in the previous refusal to grant international protection.
- 8 The referring court considers that the conditions for submitting a request for a preliminary ruling to the Court of Justice of the European Union ('the Court') are met.

The referring court takes the view that the request for a preliminary ruling is admissible because the factual and legal situation in the present case comes within the scope of EU law, namely Directive 2013/32/EU and Directive 2011/95/EU.

The adjudicating Chamber states that it has not been able to identify any judgments of the Court on identical issues that would be of assistance in resolving the dispute before it.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 9 According to the referring court, the assessment of the existence of new elements in the applicant's refugee history is directly linked to the examination of whether she meets the substantive conditions for the grant of international protection under Directive 2011/95/EU. Having regard to recital 17 of that directive, the referring court outlines the body of instruments of international law which are binding on the Member States under that provision. In addition to the Geneva Convention and its Protocol Relating to the Status of Refugees, those instruments are the Convention against discrimination against women and the Istanbul Convention (particularly in view of the legal definitions contained in Articles 34 to 40 thereof). Although the latter Convention is not applicable in Bulgaria (since, as held in a decision of the Bulgarian Konstitutsionen sad (Constitutional Court), it is not compatible with the Bulgarian Constitution and cannot therefore be ratified), the referring court takes the view that it is relevant in the light of Article 10(1)(d) of Directive 2011/95 in order to take into account the conditions in the country of origin in the event that the applicant were to be returned there (in particular in view of Turkey's withdrawal from that convention).
- 10 The main question that arises in relation to the applicable international treaties in the present case is whether the referring court may base its assessment of the concept of 'gender-based violence against women' on the legal definitions of the Convention against discrimination against women and the Istanbul Convention, or whether that concept has its own autonomous meaning. **The first question referred** was formulated in order to clarify those aspects.
- 11 With regard to the **second question referred**, the adjudicating Chamber considers that General Recommendations Nos 19, 24 and 25 of the United Nations Committee on the Elimination of Discrimination against Women ('the CEDAW Committee') provide useful interpretative guidance. According to those recommendations, gender-based violence is defined, on the one hand, as violence that is directed against a woman because she is a woman or that affects women disproportionately, and, on the other hand, as violence that is directed against groups of women who belong to vulnerable or disadvantaged groups or against groups of women who, in addition to suffering discrimination directed against them as women, may also suffer multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age or other factors.
- 12 On the one hand, the Istanbul Convention also defines 'gender-based violence against women' as violence that is directed against a woman because she is a woman, and 'violence against women' as a violation of human rights. The

referring court takes the view that that violation of human rights can be related to the acts of persecution under Article 9(1) of Directive 2011/95/EU. On the other hand, the Istanbul Convention defines ‘domestic violence’ as all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim. The referring court takes the view that the specific acts of gender-based violence against women thus regulated correlate with the acts of persecution referred to in Article 9(2)(a) and (f) of Directive 2011/95/EU.

- 13 Next, the referring court takes into account the EP Resolution of 8 March 2016. That resolution highlights that gendered forms of violence and discrimination, including but not limited to sexual violence, forced marriage, domestic violence, so-called honour crimes and state-sanctioned gender discrimination, constitute persecution and should be valid reasons for seeking asylum in the European Union. However, the Chamber also takes into account the Opinion of Advocate General G. Hogan of 11 March 2021 in Opinion procedure 1/19, initiated following a request made by the European Parliament (EU:C:2021:198). According to point 161 of that opinion, as matters stand, EU law does not provide for a general obligation to take account of violence against women as one of the forms of persecution that may give rise to refugee status.
- 14 With regard to the classification of gender-based violence against women as a ground for granting international protection, the referring court has doubts as to how the concept of membership of a particular social group pursuant to Article 10(1)(d) of Directive 2011/95 is to be interpreted. In particular, it has doubts as to whether the biologically defined sex/socially constructed gender of the victim of persecution (violence against a woman merely because she is a woman) is sufficient to establish such membership. Or can the specific forms/acts/actions of persecution be decisive for the ‘visibility of the group in society’ (that is to say, can they be its distinguishing feature), taking into account the circumstances in the country of origin. Lastly, it has doubts as to whether those acts can relate only to acts of persecution under Article 9(2)(a) and (b) of Directive 2011/95. In other words, whether an additional distinguishing characteristic of the group would have to be established, taking into account a literal interpretation, to the letter, of Article 10(1)(d) of Directive 2011/95.
- 15 In its reasoning for the **third question referred**, the adjudicating Chamber states that Article 10(1)(d) of Directive 2011/95 defines membership of a particular social group by establishing two conditions which must be met cumulatively. First, members of that group must share an ‘innate characteristic’, or a ‘common background that cannot be changed’, or share a characteristic or belief that is ‘so fundamental to identity or conscience that a person should not be forced to renounce it’. Second, that group must have a distinct identity in the relevant third country, because it is perceived as being ‘different’ by the surrounding society.

- 16 At the same time, the same provision expressly refers to gender-related aspects, including gender identity, as being relevant to the concept, but does so through the use of the conjunction 'or', which is an indication of the existence of alternatives: for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.
- 17 The referring court emphasises that the definition of membership of a particular social group cannot be considered in isolation from the circumstances in the country of origin. However, it states that, in attempting to categorise the alleged domestic violence as a form of gender-based violence, account must be taken of the fact that it affects women at all levels of society, irrespective of their age, education, income, social status or country of origin. Yet, in some societies, domestic violence is too often considered a personal problem and is too easily tolerated. This makes it even more difficult for the referring court to accept the assumption that the specific form/act of gender-based violence (domestic violence) is decisive for the 'visibility of the group in society' as an element of the definition in Article 10(1)(d) of Directive 2011/95. By contrast, a specific feature of the alleged gender-based persecution is that the perpetrator of the violence is a person already known to the victim, and the victim is often in a position of economic or other form of dependence on the perpetrator, which increases her fear of reporting the violence. As a result, the victim is at risk of being re-victimised by the perpetrator or by the family. In that regard, the referring court finds additional arguments militating against the assumption that, in respect of the domestic violence specifically alleged in the present case, the form/acts of gender-based persecution is/are decisive for the group's 'visibility' in society for the purposes of the provision of Directive 2011/95 at issue.
- 18 In its reasoning for the **fourth question referred**, the referring court draws the intermediate conclusion that, in the present case, the only relevant factor in determining membership of a particular social group is the biologically defined sex or socially constructed gender of the applicant. The referring court considers that recital 30 and Article 4(3)(c) of Directive 2011/95 provide an indication of the validity of that interpretation. In particular, the referring court takes the view that violence against a woman because she is a woman constitutes the relevant reason for persecution. The victim suffered a number of concrete forms/acts/actions of gender-based persecution, including the alleged domestic violence and threat of honour killing. Where those specific acts/actions, by their nature or repetition, reach the level of seriousness under Article 9(1) of Directive 2011/95 and can be classified as a severe violation of basic human rights, gender-based violence is a ground for granting refugee status, provided that the applicant demonstrates a well-founded fear of such persecution.
- 19 Notwithstanding the above, the adjudicating Chamber is reluctant to classify the alleged gender-based violence in the form of domestic violence as a ground for granting international protection. The question that arises is how the causal link under Article 9(3) of Directive 2011/95/EU is to be established in cases of alleged violence by a non-State actor of persecution within the meaning of Article 6(c) of

Directive 2011/95. In view of the use of the conjunction ‘or’ in recital 29 and Article 9(3) of Directive 2011/95, the causal link is interpreted as: (i) a link between the reasons for the persecution and the acts of persecution; or (ii) a link between the reasons for the persecution and the absence of protection from the acts of persecution in cases where there is no link between the reasons and the acts of persecution.

- 20 However, according to the definition in Article 6(c) of Directive 2011/95, in the case where persecution by non-State actors is alleged, it must be demonstrated that the actors mentioned in points (a) and (b) are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7. Thus, in the specific case of violence, a causal link with the absence of protection in the country of origin would necessarily have to be established. In that regard, the referring court also asks the question whether it is relevant for the purpose of establishing the causal link under Article 9(3) of the directive that neither the non-State actors of persecution nor the victims consider the individual acts of persecution/violence as such to be gender-specific or directed against the victim solely because of his or her biologically defined sex or socially constructed gender. In particular, how is that question to be answered in the case where the applicants do not state that they have had ‘gender-based problems’ when presenting the facts of their refugee history? Accordingly, in the present case, the administrative authority also found that ‘the applicant is of full age and has not reported having been persecuted because of her gender’.
- 21 **The fifth question referred** is raised by the referring court in the event that the alleged persecution in the form of gender-based violence – domestic violence – does not prove to be a ground for granting refugee status. In that case, it would be necessary to examine whether the conditions for granting subsidiary protection are met, that is to say, whether the applicant would face a real risk of suffering serious harm within the meaning of Article 2(f) of Directive 2011/95, read in conjunction with Article 15(a) and (b) thereof, in the event that she is returned to her country of origin. In that respect, the Chamber has due regard for recital 34 of Directive 2011/95, in conjunction with Articles 2 and 3 of the ECHR, as well as Article 3(a) of the Istanbul Convention and paragraphs 1 and 7 of General Recommendation No 19 of the CEDAW Committee. Those provisions define gender-based violence as a violation of fundamental human rights and freedoms.
- 22 In that connection, the adjudicating Chamber asks the question as to how the alleged threat of honour killing is to be classified for the purposes of subsidiary protection, namely whether such a threat is sufficient to establish a real risk of suffering serious harm under Article 15(a) of Directive 2011/95 or whether it is to be interpreted as inhuman or degrading treatment within the meaning of Article 15(b) of Directive 2011/95, read in conjunction with Article 3 of the ECHR, in the light of the risks, as alleged by the applicant, of another forced marriage, stigmatisation in a society which disapproves of single women who have had a child out of wedlock, and in the light of the fear of being re-victimised by her ex-husband or his or her family.

In particular, the referring court seeks to ascertain whether the subjective element of the definition in Article 2(f) of Directive 2011/95 ('unwilling to avail himself or herself of the protection of that country'), including an applicant's refusal to avail himself or herself of refuges for victims of domestic violence, because of the prospect of years of quasi-imprisonment, which leads many to return to violent family relationships in the absence of support from a male or from family, is sufficient to grant subsidiary protection where there is a real threat of honour killing, which concerns a single successful act by the perpetrator.

WORKING DOCUMENT