

CJEU Delivers Pivotal Decision on Women's Rights and International Protection: Judgment C-646/21

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–Virginia Lemme, University of Siena

Is being a woman who believes in the value of gender equality sufficient for recognition of international protection in the context of refugee status?

On June 11, 2024, the Court of Justice of the European Union (CJEU) issued a decision^[1], pertaining to the case C-646/21, addressing once again the recognition of women as members of a “particular social group” and as such beneficiaries of international protection.

The case involved an application for international protection by two sisters, K and L, born in 2003 and 2005 respectively, and of Iraqi nationality. The sisters arrived in the Netherlands in 2015, and in November of the same year, their parents sought international protection for themselves and their daughters. These applications were denied on February 17, 2017. Subsequently, on April 4, 2019, following the finalization of the rejection decisions, K and L renewed their applications for protection, which were again rejected by the Secretary of State for Justice and Security in 2020. Consequently, the sisters initiated legal proceedings before the District Court of the Hague to contest the rejection of their applications.

As the main ground of their appeal, K and L relied on their internalization of the value of gender equality. Indeed, during their uninterrupted stay in the Netherlands, which since their young age was particularly important for the formation of their personalities, they had assimilated the norms and behaviors adopted in the host country. This internalization meant that, if forced to return to Iraq, they would struggle to conform to the country's highly discriminatory laws. As a result, K and L feared persecution on the grounds that they belonged to a “particular social group” as defined in Article 10(1)(d) of Directive 2011/95^[2]. Additionally, given their young age, they believed that relocation would significantly impact their lives, as they had become deeply integrated into Dutch society.

Given the complex legal and humanitarian issues involved, the Hague Tribunal decided to suspend the proceedings and refer several questions to the CJEU concerning the interpretation of both Article 10(1)(d) of Directive 2011/95 and Article 24(2) of the Charter of Fundamental Rights of the European Union. I will focus on the first and second questions, namely those concerning the interpretation of Directive 2011/95. Specifically, the issue was whether women who identify with the value of gender equality could be considered part of a “particular social group” and thus subject to potential persecution in their country of origin.

As a preliminary matter, the Court emphasized that the Directive must be interpreted in conjunction with relevant treaties, including the Geneva Convention, the Istanbul Convention, and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

The CJEU then clarified that under art 10 (1) (d) of Directive 2011/95, two cumulative criteria must be met for the recognition of refugee status: firstly, that members of the group share an innate characteristic, an immutable common history, or a belief so fundamental to identity and conscience that a person should not be forced to renounce it; and secondly, that the group possesses a distinct identity in the country, being perceived as different by the surrounding society. Moreover, the Directive explicitly recognizes that gender considerations must be taken in due consideration in determining membership of a particular social group.

After considering the evidence of the case and focusing on the centrality of the adolescent period for the formation of one's identity, the CJEU affirms that, according to Directive 2011/95, depending on the conditions in the country of origin, women, including minors, who share a common characteristic of identifying with the values of gender equality, acquired during their residence in a Member State, may be considered to belong to a “particular social group” and, as such, be eligible for refugee status.

This ruling marks a significant advancement in the international protection of women. Aligning with the principles set forth in the United Nations High Commissioner for Refugees (UNHCR) Guidelines No. 1^[3] and 2^[4] of 2002, subsequently codified in Directive 2011/95, international protection now increasingly incorporates a gender perspective. This perspective acknowledges that migration affects men and women differently and that the process is not gender neutral.

The necessity of including a gender perspective is further emphasized by the CEDAW Committee's Recommendation No. 32^[5] and the Istanbul Convention^[6], which the European Union ratified in 2023. This ratification is particularly significant as it guides the interpretation of EU law in a manner consistent with the Istanbul Convention, a principle recently affirmed in judgment C-621/21^[7].

One of the critical legal questions in Case C-646/21 pertains to the possibility of recognizing women as members of a “particular social group”. However, this raises a broader question: does such recognition genuinely benefit the status of women, or does it risk reinforcing a stereotyped view of women as victims? Some scholars argue that categorizing women as a separate group may contribute to their marginalization by solely defining them through their vulnerability^[8]. This categorization could create a monolithic view of women as passive and powerless, potentially depoliticizing and diminishing their agency^[9]. Additionally, perceiving women as a homogeneous group may overlook the diversity among them and the various forms of gender-based violence they experience.

Despite these concerns, the decision in question is significant because it links the recognition of women's rights to criteria of territorial presence (residency in a Member State) rather than citizenship. This is crucial since in migration matters, citizenship often serves as a basis for exclusion rather than inclusion.

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^[1] <https://curia.europa.eu/juris/document/document.jsf?text=&docid=286987&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2055743>

^[2] <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ.L:2011:337:0009:0026:en:PDF>.

^[3] <https://www.unhcr.org/media/guidelines-international-protection-no-1-gender-related-persecution-within-context-article-1a>

^[4] <https://www.unhcr.org/media/guidelines-international-protection-no-2-membership-particular-social-group-within-context>

^[5] <https://www.refworld.org/legal/general/cedaw/2014/en/102146>

^[6] <https://rm.coe.int/168008482e>

^[7] <https://curia.europa.eu/juris/document/document.jsf?sessionId=39774669CFAAEFA83EBE27A99856B225?text=&docid=281302&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2992852>

^[8] <https://research-portal.najah.edu/migrant/1767/>

^[9] <https://www.fmreview.org/gender-and-displacement/crawley>; <https://doi.org/10.1093/rsq/hdac021>.

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