Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

16 January 2024*

(Reference for a preliminary ruling – Area of freedom, security and justice – Common asylum policy – Directive 2011/95/EU – Qualification for refugee status – Article 2(d) – Reasons for persecution – 'Membership of a particular social group' – Article 10(1)(d) – Acts of persecution – Article 9(1) and (2) – Link between the reasons for and acts of persecution or between the reasons for persecution and the absence of protection against such acts – Article 9(3) – Non-State actors – Article 6(c) – Qualification for subsidiary protection – Article 2(f) – 'Serious harm' – Article 15(a) and (b) – Assessment of applications for international protection for the purpose of granting refugee status or subsidiary protection status – Article 4 – Gender-based violence against women – Domestic violence – Threat of 'honour killing')

In Case C-621/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Sofia-grad (Sofia Administrative Court, Bulgaria), made by decision of 29 September 2021, received at the Court on 6 October 2021, in the proceedings

WS

v

Intervyuirasht organ na Darzhavna agentsia za bezhantsite pri Ministerskia savet,

intervening party:

Predstavitelstvo na Varhovnia komisar na Organizatsiyata na obedinenite natsii za bezhantsite v Bulgaria,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, K. Jürimäe, C. Lycourgos, E. Regan, F. Biltgen and N. Piçarra (Rapporteur), Presidents of Chambers, M. Safjan, S. Rodin, P.G. Xuereb, I. Ziemele, J. Passer, D. Gratsias, M.L. Arastey Sahún and M. Gavalec, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

* Language of the case: Bulgarian.

having regard to the written procedure,

after considering the observations submitted on behalf of:

– WS, by V.B. Ilareva, advokat,

– Predstavitelstvo na Varhovnia komisar na Organizatsiyata na obedinenite natsii za bezhantsite v Bulgaria, by M. Demetriou, J. MacLeod, BL, and C.F. Kroes, advocaat,

– the German Government, by J. Möller and R. Kanitz, acting as Agents,

– the French Government, by A.-L. Desjonquères and J. Illouz, acting as Agents,

– the European Commission, by A. Azéma and I. Zaloguin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 April 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of recital 17, Article 6(c), Article 9(2)(a) and (f), Article 9(3), Article 10(1)(d) and Article 15(a) and (b) of 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 (OJ 2011 L 337, p. 9).

2 The request has been made in proceedings between WS and Intervyuirasht organ na Darzhavna agentsia za bezhantsite pri Ministerskia savet (Interviewing Body of the State Agency for Refugees at the Council of Ministers; 'the DAB') concerning a decision refusing to open a procedure for granting international protection further to a subsequent application made by WS.

Legal context

International law

The Geneva Convention

3 Article 1A(2) of the Convention relating to the Status of Refugees, which was signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954, and was supplemented by the Protocol relating to the Status of Refugees, which was concluded in New York on 31 January 1967 and entered into force on 4 October 1967 ('the Geneva Convention'), provides that 'for the purposes of the present Convention, the term "refugee" shall apply to any 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'.

The CEDAW

4 Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women ('the CEDAW'), which was adopted by the United Nations General Assembly on 18 December 1979 and entered into force on 3 September 1981 (*United Nations Treaty Series*, Vol. 1249, No 1–20378, p. 13) and to which all Member States are party, provides that 'for the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

The Istanbul Convention

5 Article 2 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, which was concluded in Istanbul on 11 May 2011, signed by the European Union on 13 June 2017 and approved on behalf of the European Union by Council Decision (EU) 2023/1076 of 1 June 2023 (OJ 2023 L 143 I, p. 4) ('the Istanbul Convention'), and which entered into force, so far as the European Union is concerned, on 1 October 2023, provides:

'1 This Convention shall apply to all forms of violence against women, including domestic violence, which affects women disproportionately.

2 Parties are encouraged to apply this Convention to all victims of domestic violence. Parties shall pay particular attention to women victims of gender-based violence in implementing the provisions of this Convention.

…'

6 Article 60 of that convention, headed 'Gender-based asylum claims', reads as follows:

'1 Parties shall take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1A(2) of the [Geneva Convention] and as a form of serious harm giving rise to complementary/subsidiary protection.

2 Parties shall ensure that a gender-sensitive interpretation is given to each of the Convention grounds and that where it is established that the persecution feared is for one or more of these grounds, applicants shall be granted refugee status according to the applicable relevant instruments.

…'

European Union law

7 Recitals 4, 10, 12, 17, 29, 30 and 34 of Directive 2011/95 state:

‘(4) The Geneva Convention and the Protocol provide the cornerstone of the international legal regime for the protection of refugees.

…

(10) … it is appropriate, at this stage, to confirm the principles underlying [Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12)] as well as to seek to achieve a higher level of approximation of the rules on the recognition and content of international protection on the basis of higher standards.

…

(12) The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for those persons in all Member States.

…

(17) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party, including in particular those that prohibit discrimination.

…

(29) One of the conditions for qualification for refugee status within the meaning of Article 1(A) of the Geneva Convention is the existence of a causal link between the reasons for persecution, namely race, religion, nationality, political opinion or membership of a particular social group, and the acts of persecution or the absence of protection against such acts.

(30) It is equally necessary to introduce a common concept of the persecution ground “membership of a particular social group”. For the purposes of defining a particular social group, issues arising from an applicant’s gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant’s well-founded fear of persecution.

…

(34) It is necessary to introduce common criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.'

8 As set out in Article 2(a), (d) to (i) and (n) of that directive:

'For the purposes of this Directive the following definitions shall apply:

(a) "international protection" means refugee status and subsidiary protection status as defined in points (e) and (g);

…

(d) "refugee" means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country …;

(e) "refugee status" means the recognition by a Member State of a third-country national or a stateless person as a refugee;

(f) "person eligible for subsidiary protection" means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

(g) "subsidiary protection status" means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection;

(h) "application for international protection" means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;

(i) "applicant" means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;

…

(n) "country of origin" means the country or countries of nationality or, for stateless persons, of former habitual residence.'

9 Contained in Chapter II of that directive, headed 'Assessment of applications for international protection', Article 4 of that directive, headed 'Assessment of facts and circumstances', provides, in paragraphs 3 to 4:

'3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

…

4. The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.'

10 Article 6 of the same directive, headed 'Actors of persecution or serious harm', provides:

'Actors of persecution or serious harm include:

(a) the State;

(b) parties or organisations controlling the State or a substantial part of the territory of the State;

(c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.'

11 Article 7 of Directive 2011/95, headed 'Actors of protection', reads as follows:

'1. Protection against persecution or serious harm can only be provided by:

(a) the State; or

(b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State;

provided they are willing and able to offer protection in accordance with paragraph 2.

2. Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.

…'

12 Article 9 of that directive, headed 'Acts of persecution', provides:

'1. In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must:

(a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms[, signed in Rome on 4 November 1950 ('the ECHR')]; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).

2. Acts of persecution as qualified in paragraph 1 can, inter alia, take the form of:

(a) acts of physical or mental violence, including acts of sexual violence;

…

(f) acts of a gender-specific … nature.

3. In accordance with point (d) of Article 2, there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1 of this Article or the absence of protection against such acts.'

13 As set out in Article 10 of that directive, headed 'Reasons for persecution':

'1. Member States shall take the following elements into account when assessing the reasons for persecution:

…

(d) a group shall be considered to form a particular social group where in particular:

– members of that group 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, and

– that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group;

…

2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the … social … characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.'

14 Article 13 of the same directive, headed 'Granting of refugee status', provides:

'Member States shall grant refugee status to a third-country national or a stateless person who qualifies as a refugee in accordance with Chapters II and III.'

15 Article 15 of Directive 2011/95, headed 'Serious harm', provides:

'Serious harm consists of:

(a) the death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; …

…'

16 Article 18 of that directive, headed 'Granting of subsidiary protection status', reads as follows:

'Member States shall grant subsidiary protection status to a third-country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V.'

Bulgarian law

17 It is apparent from the order for reference that Article 8(1), (3) to (5) and (7) of the Zakon za ubezhishteto i bezhantsite (Law on asylum and refugees; 'the ZUB') transposes Article 2(d) and Articles 6, 7 and 9 of Directive 2011/95 into the Bulgarian legal system and that Article 9(1) of that law transposes Article 15 of that directive.

18 Paragraph 1(5) of the supplementary provisions for the ZUB, in the version in force since 16 October 2015 (DV No 80 of 2015), provides that 'the concepts of "race, religion, nationality, a particular social group and political opinion or beliefs" are those within the meaning of the [Geneva Convention] and Article 10(1) of Directive [2011/95]'.

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 WS is a Turkish national, of Kurdish ethnicity, a Sunni Muslim and divorced. She arrived legally in Bulgaria in June 2018. Thereafter, she joined a family member in Berlin (Germany), where she lodged an application for international protection. By a decision of the DAB of 28 February 2019, adopted following a request from the German authorities, WS was taken back by the Bulgarian authorities for the purpose of examining her application for international protection.

20 During three interviews conducted by the DAB in October 2019, WS stated that she had been forcibly married at the age of sixteen and had three daughters. Her husband allegedly beat her during their married life, but her biological family, who were aware of the situation, gave her no assistance. WS fled the marital home in September 2016, entered into a religious marriage in 2017 and had a son from that marriage in May 2018. After leaving Türkiye, she officially divorced her first husband in September 2018, despite his objections. She stated that, for those reasons, she fears that his family would kill her if she were to return to Türkiye.

21 Before the DAB, WS produced the decision, which had become final, of the Turkish civil court which granted her divorce, together with the complaint which she had lodged against her husband, her biological family and her former husband's family in January 2017 with the Public Prosecutor's Office in Torbali (Türkiye), the minutes of which, drawn up on 9 January 2017, refer to the threatening telephone messages which her husband had sent her. She also produced a decision of a Turkish court of 30 June 2017 placing her in a house for women who are victims of violence, in which she claimed not to feel safe.

22 By a decision of 21 May 2020, the President of the DAB rejected WS's application for international protection, taking the view, first, that the reasons relied on by WS for leaving Türkiye, in particular acts of domestic violence or death threats by her husband and by members of her biological family, were not relevant for the purpose of granting that status, since they could not be linked to any of the reasons for persecution set out in Article 8(1) of the ZUB. Furthermore, WS did not claim to be the victim of acts of persecution based on her gender.

23 Second, the President of the DAB refused to grant WS subsidiary protection status. He considered that she did not satisfy the conditions required for that purpose since 'neither the official authorities nor certain groups had taken action against the applicant that the State is not in a position to control' and she 'had been subject to criminal assaults of which she had not even informed the police and in respect of which she had not lodged a complaint and … had left Türkiye legally'.

24 By judgment of 15 October 2020, upheld on 9 March 2021 by the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) and now final, the Administrativen sad Sofia grad (Sofia Administrative Court, Bulgaria) dismissed the action brought by WS against the decision referred to in paragraph 22 above.

25 On 13 April 2021, WS made a subsequent application for international protection based on new evidence, claiming a well-founded fear of persecution by non-State actors on account of her membership of a 'particular social group', namely women who are victims of domestic violence and women who are potential victims of 'honour killings'. She asserted that the Turkish State was not able to defend her against those non-State actors and argued that her return to Türkiye would expose her to an 'honour killing' or a forced marriage and, therefore, to an infringement of Articles 2 and 3 ECHR.

26 In support of that application, WS adduced, as new evidence, a decision of a Turkish criminal court imposing on her former husband a five-month custodial sentence for committing the offence of threatening behaviour against her in September 2016. That sentence was suspended, and he was placed on probation for five years, given the absence of previous convictions, his personal characteristics and his acceptance of that sentence. WS annexed to that application articles from the *Deutsche Welle* newspaper dating from 2021 which referred to violent murders of women in Türkiye. Furthermore, WS relied on the withdrawal of the Republic of Türkiye from the Istanbul Convention in March 2021 as a new circumstance.

27 By a decision of 5 May 2021, the DAB refused to reopen the procedure for granting international protection following WS's subsequent application on the ground that WS had not made reference to any significant new evidence relating to her personal situation or her country of origin. The DAB pointed out that the Turkish authorities had assisted her on several occasions and had indicated that they were prepared to assist her by all lawful means.

28 The referring court states at the outset that, while WS's subsequent application for international protection was rejected as inadmissible, an interpretation of the substantive preconditions for granting international protection is nevertheless necessary to enable it to determine whether WS has submitted new evidence or facts justifying the grant of such protection.

29 In that regard, it states that the Court has never ruled on the issues raised by the present case, 'relating to gender-based violence against women in the form of domestic violence and the threat of honour killings, as a ground for granting international protection'. The referring court is uncertain whether, in order to find that a woman who is the victim of such violence is a member of a particular social group, as a reason for persecution, within the meaning of Article 10(1)(d) of Directive 2011/95, biologically defined sex or socially constructed gender is sufficient and whether acts of persecution, including domestic violence, may be decisive in establishing the visibility of that group in society.

30 In that context, the referring court asks, first of all, whether, for the purpose of interpreting that provision and in the light of recital 17 of Directive 2011/95, the CEDAW and the Istanbul Convention should be taken into consideration, even though the Republic of Bulgaria is not a party to the latter convention.

31 That court observes that the acts listed in Articles 34 to 40 of the Istanbul Convention, namely, in particular, physical or sexual violence, forced marriage or harassment, are forms of gender-based violence against women which are referred to, non-exhaustively, in recital 30 of Directive 2011/95 and may be classified as 'acts of persecution', within the meaning of Article 9(2)(a) and (f) of that directive.

32 Next, the referring court is uncertain as to the interpretation of Article 9(3) of Directive 2011/95 where gender-based acts of persecution, which take the form of domestic violence, are carried out by non-State actors, within the meaning of Article 6(c) of that directive. It asks, in particular, whether the 'link' required by Article 9(3) presupposes that non-State actors recognise that their acts of persecution are determined by the biologically defined or socially constructed gender of the victims of those acts.

33 Lastly, in the event that it is not established that a woman who is the victim of domestic violence and the potential victim of an honour killing is a member of a 'particular social group', within the meaning of Article 10(1)(d) of Directive 2011/95, the referring court states that WS could be

returned to her country of origin only after it has been established that that return would not expose her to a real risk of 'serious harm', within the meaning of Article 2(f) of that directive. In that context, it asks, in particular, whether the threat of an 'honour killing' constitutes a real risk of serious harm under Article 15(a) of that directive, read in conjunction with Article 2 ECHR, or of Article 15(b) of the same directive, read in conjunction with Article 3 ECHR.

34 In those circumstances, the Administrativen sad Sofia-grad (Sofia Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) For the purpose of classifying gender-based violence against women as a ground for granting international protection under the [Geneva Convention] and [Directive 2011/95], do the definitions of terms and concepts in [the CEDAW] and the [Istanbul Convention] apply in accordance with recital 17 of [Directive 2011/95], 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) [and] (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, 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 [Article 9(1) of that directive], 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 ECHR …, or is that threat to be classified as harm under Article 15(b) of Directive 2011/95, read in conjunction with Article 3 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?'

Consideration of the questions referred

The first to third questions

35 By its first three questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 10(1)(d) of Directive 2011/95 must be interpreted as meaning that, depending on the circumstances in the country of origin, women in that country may be regarded, as a whole, as belonging to 'a particular social group' as a 'reason for persecution' capable of leading to the recognition of refugee status, or whether the women concerned must share an additional common characteristic in order to belong to such a group.

36 As a preliminary observation, it is apparent from recitals 4 and 12 of Directive 2011/95 that the Geneva Convention is the cornerstone of the international legal regime for the protection of refugees and that that directive was adopted in order, inter alia, to ensure that all Member States apply common criteria for the identification of persons genuinely in need of international protection (judgment of 19 November 2020, *Bundesamt für Migration und Flüchtlinge (Military service and asylum)*, C-238/19, EU:C:2020:945, paragraph 19).

37 Directive 2011/95 must, for that reason, be interpreted not only in the light of its general scheme and purpose, but also in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. Those treaties include, as is apparent from recital 17 of that directive, those which prohibit discrimination with respect to the treatment of persons falling within the scope of that directive (see, to that effect, judgments of 26 February 2015, *Shepherd*, C-472/13, EU:C:2015:117, paragraph 23, and of 19 November 2020, *Bundesamt für Migration und Flüchtlinge (Military service and asylum)*, C-238/19, EU:C:2020:945, paragraph 20).

38 In that context, in the light of the role conferred on the United Nations High Commissioner for Refugees (HCR) by the Geneva Convention, the documents issued by him are particularly relevant (see, to that effect, judgments of 23 May 2019, *Bilali*, C-720/17, EU:C:2019:448, paragraph 57, and of 12 January 2023, *Migracijos departamentas (Reasons for persecution on the ground of political opinion)*, C-280/21, EU:C:2023:13, paragraph 27).

39 In accordance with Article 2(d) of Directive 2011/95, which reproduces Article 1A(2) of the Geneva Convention, 'refugee' means, inter alia, a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country. Article 10(1) of that directive lists, for each of those five reasons for persecution capable of leading to the recognition of refugee status, elements which the Member States must take into account.

40 As regards, in particular, the reason relating to 'membership of a particular social group', it is apparent from the first subparagraph of Article 10(1)(d) that a group is to be considered a 'particular social group' where two cumulative conditions are satisfied. First, the members of the

relevant group must share at least one of the three following identifying features, namely an 'innate characteristic', a 'common background that cannot be changed' or 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 country of origin 'because it is perceived as being different by the surrounding society'.

41 In addition, the second subparagraph of Article 10(1)(d) states, inter alia, that 'gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group'. That provision is to be read in the light of recital 30 of Directive 2011/95, according to which gender identity may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion.

42 Furthermore, paragraph 30 of the HCR Guidelines on International Protection No 1 concerning gender-related persecution within the context of Article 1A(2) of the Geneva Convention, states, with regard to the concept of 'social group' referred to by that convention and defined in Article 10(1)(d) of Directive 2011/95, that 'sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men. … Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries'.

43 It is in the light of those preliminary observations that the questions posed by the referring court are to be answered.

44 In the first place, in view of the doubts expressed by that court as to the relevance of the CEDAW and the Istanbul Convention for the interpretation of Article 10(1)(d) of Directive 2011/95, it must be pointed out, first, that while the European Union is not a party to the first convention, all the Member States have ratified it. The CEDAW is thus one of the relevant treaties referred to in Article 78(1) TFEU, in accordance with which that directive, in particular Article 10(1)(d) thereof, must be interpreted.

45 Furthermore, according to recital 17 of that directive, with respect to the treatment of persons falling within its scope, Member States are bound by obligations under instruments of international law to which they are party, including in particular those that prohibit discrimination, which include the CEDAW. The Committee on the Elimination of Discrimination against Women, which is responsible for monitoring implementation of the CEDAW, has stated that that convention reinforces and complements the international legal protection regime applicable to women and girls, including in the context of refugees.

46 Secondly, as regards the Istanbul Convention, which has been binding on the European Union since 1 October 2023, it must be pointed out that that convention lays down obligations coming within the scope of Article 78(2) TFEU, which empowers the EU legislature to adopt measures relating to a common European asylum system, such as Directive 2011/95 (see, to that effect, Opinion 1/19 (Istanbul Convention) of 6 October 2021, EU:C:2021:832, paragraphs 294, 302 and 303). Thus, that convention, in so far as it relates to asylum and non-refoulement, is also one of the relevant treaties referred to in Article 78(1) TFEU.

47 In those circumstances, the provisions of that directive, in particular Article 10(1)(d) thereof, must be interpreted consistently with the Istanbul Convention, even though some Member States, including the Republic of Bulgaria, have not ratified that convention.

48 In that regard, it should be noted, first, that Article 60(1) of the Istanbul Convention provides that gender-based violence against women is to be recognised as a form of persecution within the meaning of Article 1A(2) of the Geneva Convention. Secondly, Article 60(2) of that convention requires parties to ensure that a gender-sensitive interpretation is given to each of the reasons for persecution prescribed by the Geneva Convention and that where it is established that the persecution feared is for one or more of those reasons, applicants are to be granted refugee status.

49 In the second place, as regards the first condition for identifying a 'particular social group', laid down in the first subparagraph of Article 10(1)(d) of Directive 2011/95 and referred to in paragraph 40 of the present judgment, namely sharing at least one of the three identifying features referred to in that provision, the fact of being female constitutes an innate characteristic and therefore suffices to satisfy that condition.

50 That does not rule out the possibility that women who share an additional common feature such as, for example, another innate characteristic, or a common background that cannot be changed, such as a particular family situation, or a characteristic or belief that is so fundamental to identity or conscience that those women should not be required to renounce it, may also belong to a 'particular social group' within the meaning of Article 10(1)(d) of Directive 2011/95.

51 In the light of the information in the order for reference, it should be noted, in particular, that the fact that women have escaped from a forced marriage or, for married women, have left their homes, may be regarded as a 'common background that cannot be changed' within the meaning of that provision.

52 In the third place, as regards the second condition for identifying a 'particular social group', relating to the 'distinct identity' of the group in the country of origin, it is clear that women may be perceived as being different by the surrounding society and recognised as having their own identity in that society, in particular because of social, moral or legal norms in their country of origin.

53 That second condition will also be satisfied by women who share an additional common characteristic, such as one of the characteristics mentioned in paragraphs 50 and 51 above, where the social, moral or legal norms in their country of origin have the result that those women, on account of that common characteristic, are perceived as being different by the surrounding society.

54 In that context, it should be made clear that it is for the Member State concerned to determine which surrounding society is relevant when assessing whether such a social group exists. That society may coincide with the entirety of the third country of origin of the applicant for international protection or be more restricted, for example to part of the territory or population of that third country.

55 In the fourth place, in so far as the referring court asks the Court whether acts such as those referred to in recital 30 of Directive 2011/95 may be taken into consideration in order to determine the distinct identity of a 'social group' within the meaning of Article 10(1)(d) of that

directive, it must be stated that membership of a particular social group is to be established independently of the acts of persecution, within the meaning of Article 9 of that directive, of which the members of that group may be victims in the country of origin.

56 The fact remains that discrimination or persecution suffered by persons sharing a common characteristic may constitute a relevant factor where, in order to ascertain whether the second condition for identifying a social group laid down in Article 10(1)(d) of Directive 2011/95 is satisfied, it is necessary to assess whether the group in question appears to be distinct in the light of the social, moral or legal norms of the country of origin in question. That interpretation is supported by paragraph 14 of the HCR Guidelines on International Protection No 2, relating to 'membership of a particular social group' in the context of Article 1A(2) of the Geneva Convention.

57 Consequently, women, as a whole, may be regarded as belonging to a 'particular social group', within the meaning of Article 10(1)(d) of Directive 2011/95, where it is established that, in their country of origin, they are, on account of their gender, exposed to physical or mental violence, including sexual violence and domestic violence.

58 As the Advocate General observed in point 79 of his Opinion, women who refuse forced marriages, where such a practice may be regarded as a social norm within their society, or who transgress such a norm by ending that marriage, may be regarded as belonging to a social group with a distinct identity in their country of origin if, on account of that behaviour, they are stigmatised and exposed to the disapproval of their surrounding society resulting in their social exclusion or acts of violence.

59 In the fifth place, for the purpose of assessing an application for international protection based on membership of a particular social group, it falls to the Member State concerned to ascertain whether the person relying on that reason for persecution has 'a well-founded fear' of being persecuted, in his or her country of origin, by reason of that membership, within the meaning of Article 2(d) of Directive 2011/95.

60 In that regard, in accordance with Article 4(3) of that directive, the assessment of whether an applicant's fear of being persecuted is well-founded must be individual in character and be carried out on a case-by-case basis with vigilance and care, solely on the basis of a specific evaluation of the facts and circumstances, in accordance with the rules set out not only in paragraph 3 but also in paragraph 4 of that article, in order to determine whether the established facts and circumstances constitute such a threat that the person concerned may reasonably fear, in the light of his or her individual situation, that he or she will in fact be the victim of acts of persecution if he or she were to return to his or her country of origin (see, to that effect, judgment of 21 September 2023, *Staatssecretaris van Veiligheid en Justitie (Political opinions in the host Member State)*, C-151/22, EU:C:2023:688, paragraph 42 and the case-law cited).

61 To that end, as stated in point x of paragraph 36 of the HCR Guidelines on International Protection No 1, country of origin information should be collected that has relevance for the examination of women's applications for refugee status, such as the position of women before the law, their political rights, their social and economic rights, the cultural and social mores of the country and consequences for non-adherence, the prevalence of such harmful traditional practices, the incidence and forms of reported violence against women, the protection available to them, any penalties imposed on those who perpetrate the violence, and the risks that a woman might face on her return to her country of origin after making such a claim.

62 In the light of the reasons set out above, the answer to the first three questions is that Article 10(1)(d) of Directive 2011/95 must be interpreted as meaning that, depending on the circumstances in the country of origin, women in that country, as a whole, and more restricted groups of women who share an additional common characteristic may be regarded as belonging to 'a particular social group', as a 'reason for persecution' capable of leading to the recognition of refugee status.

The fourth question

63 By its fourth question, the referring court asks, in essence, whether Article 9(3) of Directive 2011/95 must be interpreted as requiring, where an applicant claims a fear of being persecuted in his or her country of origin by non-State actors, that a link be established, in all cases, between the acts of persecution and at least one of the reasons for persecution set out in Article 10(1) of that directive.

64 It should be specified at the outset that, under Article 6(c) of Directive 2011/95, for non-State actors to be classified as 'actors of persecution or serious harm', it must be shown that the actors of protection referred to in Article 7 of that directive, which include the State, are unable or unwilling to provide protection against those acts. As the Advocate General observed in point 87 of his Opinion, it follows from Article 7(1) that actors of protection must be not only able but also willing to protect the applicant concerned from the persecution or serious harm to which he or she is exposed.

65 That protection must, in accordance with Article 7(2), be effective and of a non-temporary nature. That is generally the case where the actors of protection, referred to in Article 7(1), take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system to which the applicant for international protection has access, enabling such acts to be detected, prosecuted and punished.

66 In accordance with Article 9(3) of Directive 2011/95, read in conjunction with Article 6(c) and Article 7(1) of that directive, and in the light of recital 29 of that directive, recognition of refugee status presupposes that a link be established either between the reasons for persecution set out in Article 10(1) of that directive and the acts of persecution within the meaning of Article 9(1) and (2), or between the reasons for persecution and the absence of protection by the 'actors of protection', against such acts of persecution perpetrated by 'non-State actors'.

67 Thus, in the case of an act of persecution perpetrated by a non-State actor, the condition laid down in Article 9(3) of Directive 2011/95 is satisfied where that act is based on one of the reasons for persecution mentioned in Article 10(1) of that directive, even if the absence of protection is not based on those reasons. That condition must also be regarded as being satisfied where the absence of protection is based on one of the reasons for persecution set out in the latter provision, even if the act of persecution perpetrated by a non-State actor is not based on those reasons.

68 That interpretation is consistent with the objectives of Directive 2011/95, set out in recitals 10 and 12 thereof, which seek to ensure a high level of protection for refugees and to identify all persons genuinely in need of international protection.

69 That interpretation is also supported by paragraph 21 of the HCR Guidelines on International Protection No 1, which states that 'where there is a risk of being persecuted at the hands of a non-State actor (e.g. husband, partner or other non-State actor) for reasons which are related to one of the [Geneva Convention] grounds, the causal link is established, whether or not the absence of State protection is [Geneva Convention] related. Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to a [Geneva Convention] ground, but the inability or unwillingness of the State to offer protection is for reasons of a [Geneva Convention] ground, the causal link is also established'.

70 In the light of the foregoing, the answer to the fourth question is that Article 9(3) of Directive 2011/95 must be interpreted as meaning that where an applicant claims a fear of being persecuted in his or her country of origin by non-State actors, it is not necessary to establish a link between one of the reasons for persecution referred to in Article 10(1) of that directive and such acts of persecution, if such a link can be established between one of those reasons for persecution and the absence of protection against those acts by the actors of protection referred to in Article 7(1) of that directive.

The fifth question

71 By its fifth question, the referring court asks, in essence, whether Article 15(a) and (b) of Directive 2011/95 must be interpreted as meaning that the concept of serious harm covers the real threat to the applicant of being killed or subjected to acts of violence inflicted by a member of his or her family or community due to the alleged transgression of cultural, religious or traditional norms, and that that concept is therefore capable of leading to the recognition of subsidiary protection status, within the meaning of Article 2(g) of that directive.

72 As a preliminary point, it should be noted that that question is relevant, for the purposes of the dispute in the main proceedings, only if the referring court were to conclude that WS does not qualify for refugee status. Since, in accordance with Article 13 of Directive 2011/95, Member States are to grant that status to applicants who satisfy the requirements of that directive, without having any discretion in that respect (see, to that effect, judgments of 24 June 2015, *T.*, C-373/13, EU:C:2015:413, paragraph 63, and of 14 May 2019, *M and Others (Revocation of refugee status)*, C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 89), it is only in that situation that it would still be necessary to ascertain whether WS should be granted subsidiary protection status.

73 Article 2(f) of Directive 2011/95 provides that a person eligible for subsidiary protection means a third-country national who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that that person, if returned to his or her country of origin, would face a real risk of suffering serious harm as defined in Article 15 of that directive, and is unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

74 Article 15(a) and (b) of Directive 2011/95, read in the light of recital 34 of that directive, defines 'serious harm' as 'the death penalty or execution' and 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin'.

75 Article 15(a) of that directive refers to harm which leads to the death of the victim, whereas Article 15(b) makes reference to acts of torture, regardless of whether those acts lead to the death of the victim. However, those provisions do not establish any distinction according to whether the harm is caused by a State actor or by a non-State actor.

76 Furthermore, in view of the objective of Article 15(a) of Directive 2011/95 of ensuring protection for persons whose right to life would be threatened if they were to return to their country of origin, the term 'execution' in that provision cannot be interpreted as excluding harm to a person's life solely on the ground that it is caused by non-State actors. Thus, where a woman runs a real risk of being killed by a member of her family or community because of the alleged transgression of cultural, religious or traditional norms, such serious harm must be classified as 'execution' within the meaning of that provision.

77 By contrast, where the acts of violence to which a woman risks being exposed because of the alleged transgression of cultural, religious or traditional norms are not likely to result in her death, those acts must be classified as torture or inhuman or degrading treatment or punishment within the meaning of Article 15(b) of Directive 2011/95.

78 As regards, moreover, the recognition of subsidiary protection status within the meaning of Article 2(g) of Directive 2011/95, Article 18 of that directive requires Member States, after carrying out an assessment of the application for subsidiary protection in accordance with the provisions of Chapter II of that directive, to grant that status to a third-country national or a stateless person who fulfils the conditions laid down in Chapter V of that directive.

79 Since the rules in Chapter II, applicable to the assessment of applications for subsidiary protection, are the same as those governing the assessment of applications for the recognition of refugee status, it is necessary to refer to the interpretation of those rules, set out in paragraphs 60 and 61 of the present judgment.

80 In the light of the foregoing, the answer to the fifth question is that Article 15(a) and (b) of Directive 2011/95 must be interpreted as meaning that the concept of 'serious harm' covers the real threat to the applicant of being killed or subjected to acts of violence inflicted by a member of his or her family or community due to the alleged transgression of cultural, religious or traditional norms, and that that concept is therefore capable of leading to the recognition of subsidiary protection status, within the meaning of Article 2(g) of that directive.

Costs

81 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 10(1)(d) of 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,**

must be interpreted as meaning that depending on the circumstances in the country of origin, women in that country as a whole and more restricted groups of women who share an additional common characteristic may be regarded as belonging to 'a particular social group', as a 'reason for persecution' capable of leading to the recognition of refugee status.

2. Article 9(3) of Directive 2011/95

must be interpreted as meaning that where an applicant claims a fear of being persecuted in his or her country of origin by non-State actors, it is not necessary to establish a link between one of the reasons for persecution referred to in Article 10(1) of that directive and such acts of persecution, if such a link can be established between one of those reasons for persecution and the absence of protection from those acts by the actors of protection referred to in Article 7(1) of that directive.

3. Article 15(a) and (b) of Directive 2011/95

must be interpreted as meaning that the concept of 'serious harm' covers the real threat to the applicant of being killed or subjected to acts of violence inflicted by a member of his or her family or community due to the alleged transgression of cultural, religious or traditional norms, and that that concept is therefore capable of leading to the recognition of subsidiary protection status, within the meaning of Article 2(g) of that directive.

[Signatures]