

## **Chapter 5 Judicial Constructions of ‘Well-Founded Fear of Being Persecuted’ in Situations of Contemporary Armed Conflicts**

### **5.1 Introduction**

Having explored how appellate authorities in the EU conceptually consider situations of armed conflicts when determining asylum appeals in the previous Chapter, this Chapter examines how they interpret the first element of the Refugee Convention definition, namely the ‘well-founded fear of being persecuted’. Despite the general support for the proposition that the application and interpretation of the Refugee Convention definition is identical whether asylum applicants fear individual or group-based risks and that singling-out is not a requirement of the Refugee Convention definition, this Chapter demonstrates that appellate authorities in the EU continue to consistently interpret a ‘well-founded fear of being persecuted’ as requiring ‘individual’ risk in the sense that asylum appellants have been singled-out for persecution and that this approach is tantamount to equating the standard of proof with the assessment of credibility. Appellate authorities’ perception of armed conflicts through a conventional warfare lens and consequently that violence against civilians is indiscriminate and indirect explored in Chapter 4 may partly explain the focus of judicial determination on past events and the assessment of credibility. However, this constitutes a major obstacle to refugee protection for persons fleeing situations of widespread violence in the context of armed conflicts as the standard of proof is effectively conflated with the assessment of credibility.

This Chapter starts by reviewing the law regarding the ‘well-founded fear of being persecuted’ element of the Refugee Convention definition. As persons at risk of violence in situations of armed conflict are likely to be fleeing in large numbers due to characteristics shared by many other similarly situated individuals, the discussion incorporates the notion of group-based risk of harm. Judicial misconceptions regarding the application of the Refugee Convention to persons fleeing armed conflicts is revealed as appellate authorities assess the widespread violence almost exclusively with regards to subsidiary protection rather than the Refugee Convention. In support of the proposition that the refugee definition does not require singling-out, the enquiry turns to the interpretation of ‘real risk’ in European human rights law before setting out in more detail judicial practice of requiring singling-out in the EU and more briefly how the assessment of credibility of appellants’ accounts could be influenced by appellate authorities’ rejection of any deviation from gender norms. The final Section demonstrates how

appellate authorities in the EU have unjustifiably heightened the standard of proof under the Refugee Convention by requiring appellants to meet a standard of ‘concrete’ risk.

## 5.2 ‘A Well-Founded Fear of being Persecuted’ and Widespread Violence

The Refugee Convention provides that a refugee is a person who,

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.<sup>623</sup>

Zimmerman and Mahler have noted that assessing a person’s fear entails a ‘forward-looking expectation of risk’.<sup>624</sup> Although national jurisdictions define the risk test slightly differently, Hathaway and Foster suggest that there is broad agreement on the standard of proof in the Refugee Convention definition and they adopt the formulation of ‘real chance’.<sup>625</sup> This is supported by UNHCR that suggests persecution must be proved to be ‘reasonably possible’ to establish a well-founded fear of being persecuted.<sup>626</sup> The CJEU has described the test as one of ‘reasonable fear’.<sup>627</sup>

UNHCR has traditionally described the assessment of an asylum applicant’s risk of being persecuted as both subjective (the applicant’s perception of risk on return) and objective (based on the actual circumstances in the country of origin).<sup>628</sup> Despite this approach being adopted by many common law jurisdictions, Hathaway and Foster make the case that the concept of well-founded fear is inherently objective.<sup>629</sup> EASO suggests that the CJEU’s approach is not

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<sup>623</sup> Article 1A(2) Refugee Convention.

<sup>624</sup> Andreas Zimmermann and Claudia Mahler, ‘Article 1A, para. 2 (Definition of the Term Refugee)’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2010) 341; see also UNHCR, Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, para. 18.

<sup>625</sup> For example the terms ‘reasonable possibility’ (USA, Canada, South Africa), ‘reasonable likelihood’ (UK, Germany), ‘serious possibility’ (Canada), ‘real chance’ (Australia, New Zealand), see discussion in Hathaway and Foster, *The Law of Refugee Status* (n 20) 113-114.

<sup>626</sup> UNHCR, Note on Burden and Standard of Proof (n 624) para. 17.

<sup>627</sup> Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Abdulla and others v Bundesrepublik Deutschland* [2011] QB 46, para. 89; Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y & Z* [2013] 1 CMLR 5, para. 76; Joined Cases C-199/12 to C-201/12 *Minister voor Immigratie en Asiel v X, Y and Z* [2014] QB 1111, para. 72.

<sup>628</sup> UNHCR, *Handbook* (n 24) para. 38.

<sup>629</sup> Hathaway and Foster, *The Law of Refugee Status* (n 20) 92; Holzer also endorses this approach in Holzer, *Refugees from Armed Conflict* (n 22) 108.

to require a subjective fear in addition to the objective fear.<sup>630</sup> In any event, it is generally agreed that to undertake the assessment of fear there is a need to consider both the personal circumstances of the applicant and the conditions in the country of origin, including any situation of armed conflict.<sup>631</sup>

Furthermore, there is a broad consensus that past persecution is not required to demonstrate a well-founded fear of being persecuted because persons may be at risk on return without necessarily having been the subject of persecution in the past.<sup>632</sup> Nevertheless, past persecution may be relevant in demonstrating a continued fear of being persecuted. The Qualification Directive establishes that if an asylum applicant can show that they have already been subject to persecution or serious harm or to direct threats of such persecution or such harm, this is considered ‘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’.<sup>633</sup>

UNHCR considers that in situations of armed conflict, it is more likely that entire groups are at risk of serious harm due to violence being widespread and the inability of weak States to provide protection or due to the excessive exercise of force by States to suppress the armed opposition.<sup>634</sup> However, the issue of whether persons fleeing from situations of armed conflict are refugees under the terms of the Refugee Convention continues to raise questions as asylum decision-makers are reticent to award refugee protection to persons fleeing in large numbers.<sup>635</sup> Holzer has noted that decision-makers frequently require individuals to be singled-out for persecution and consider that fearing harm from the general conditions of violence in their country of origin does not amount to a well-founded fear of persecution.<sup>636</sup> As a result of this rationale, entire groups of individuals at risk in situations of widespread violence are excluded from refugee protection.<sup>637</sup>

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<sup>630</sup> EASO, ‘Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis’ December 2016 <<https://www.easo.europa.eu/sites/default/files/QIP%20-%20JA.pdf>> accessed 12 July 2021, 82.

<sup>631</sup> Vincent Chetail, ‘Armed Conflict and Forced Migration: A Systematic Approach To International Humanitarian Law, Refugee Law, And International Human Rights Law’ in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 722; Holzer, *Refugees from Armed Conflict* (n 22) 109.

<sup>632</sup> UNHCR, Note on Burden and Standard of Proof (n 624) para. 19.

<sup>633</sup> Article 4(4) Qualification Directive.

<sup>634</sup> UNHCR, *Guidelines on International Protection No. 12* (n 5) para. 19.

<sup>635</sup> Hathaway and Foster, *The Law of Refugee Status* (n 20) 174

<sup>636</sup> Holzer, *Refugees from Armed Conflict* (n 22) 6

<sup>637</sup> Hathaway and Foster, *The Law of Refugee Status* (n 20) 174-175.

However, as set out in Chapter 2, the historical development and context of international refugee law is rooted in group refugee situations and the Refugee Convention itself was adopted based on a need for protection of persons due to ‘group-based risks’. Furthermore, there is a general agreement within refugee law scholarship that requiring refugees to be singled-out for persecution has no basis in law. Grahl-Madsen originally articulated the proposition that the Refugee Convention definition does not require persecution to be ‘individual’ in the sense that the person has been personally targeted by actors of persecution, instead it merely requires a risk of sufficiently serious harm and a causal connection to a person’s race, religion, nationality, membership of a particular social group or political opinion, irrespective of how many others are at risk of the same or similar measure.<sup>638</sup> Grahl-Madsen thus rejected the proposition which restricted the understanding of ‘persecution’ to ‘direct’ and ‘individual’ measures.<sup>639</sup>

As maintained by Hathaway, the text of the Refugee Convention in light of its context and purpose, the Convention’s historical context, the logic of protection and practice in other jurisdictions do not justify such an approach.<sup>640</sup> The text of the Refugee Convention does not distinguish between times of peace or war and the drafters of the Convention had in mind that persons fleeing armed conflicts and violence may have a well-founded fear of being persecuted for a Convention reason.<sup>641</sup> The historical event preceding the adoption of the Refugee Convention was the end of World War II and thus persons fleeing situations of armed conflict were at the forefront of the drafters’ minds.<sup>642</sup> The UNHCR Guidelines on Claims for Refugee Status related to Situations of Armed Conflict and Violence also support an interpretation of the refugee definition which does not require persons fleeing armed conflict to be ‘singled-out’ or targeted for persecution. The Guidelines note that ‘the fact that many or all members of particular communities are at risk does not undermine the validity of any particular individual’s claim’.<sup>643</sup> UNHCR considers that the Refugee Convention should have an inclusive meaning in accordance with its primary purpose of providing international protection to all those who need it.<sup>644</sup>

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<sup>638</sup> Grahl-Madsen (n 470) 213; see also Hathaway, ‘Generalized Oppression’ (n 20); Jackson (n 216).

<sup>639</sup> Grahl-Madsen (n 470) 213.

<sup>640</sup> Hathaway, ‘Generalized Oppression’ (n 20).

<sup>641</sup> UNHCR, *Summary Conclusions* (n 26) para. 6.

<sup>642</sup> Jackson (n 216), see detailed discussion in Sections 2.3.1. and 2.3.2. in Chapter 2.

<sup>643</sup> UNHCR, *Guidelines on International Protection No. 12* (n 5) para. 17.

<sup>644</sup> Türk, Edwards and Wouters, ‘Introduction’ (n 2) 21.

Hathaway and Foster have argued that evidence of risk to persons similarly situated to an asylum claimant may be sufficient to demonstrate that the claimant has a well-founded fear of persecution.<sup>645</sup> They argue that once a group of persons, generally sharing racial, ethnic, religious, social or political characteristics has been shown to suffer persecution in the claimant's country of origin, that claimant merely needs to establish inclusion in that group.<sup>646</sup> They thus conclude that if those two elements are established, the Refugee Convention definition does not require any additional condition, such as the claimant demonstrating a higher or differentiated risk to others similarly situated.<sup>647</sup> UNHCR has stressed that in a situation where many individuals may be similarly at risk the focus of the enquiry by decision-makers should remain on whether they have a well-founded fear of being persecuted for a Refugee Convention reason rather than whether a person is differentiated from the rest of those at risk.<sup>648</sup>

Although being singled-out or individually targeted for persecution is not a condition of being recognised as a refugee, there are many instances of persons having a well-founded fear of persecution because they are personally targeted by actors of persecution. On the other hand, there are situations where entire groups of persons have a well-founded fear of persecution for a Refugee Convention reason because they share one or more personal characteristics such as sex, ethnicity, religion or political opinion without having been individually identified as a target for persecution. The former situation is described here as an 'individual risk' and the latter situation is described as one of 'group-based' risk. Nonetheless, members of groups at risk are also individually at risk in the sense of the Refugee Convention definition, meaning that each individual from the group is able to demonstrate that they are personally at risk, even if the reasons leading to the risk of harm are shared with many others and they have not personally been singled-out. Thus, an individual risk of being persecuted as a pre-condition of refugee status is not synonymous with being singled-out for persecution.

Both individual risks and group-based risks may arise in times of peace or in times of armed conflicts, although situations of widespread violence which characterise armed conflicts are likely to increase group-based risks.<sup>649</sup> Whether the risk of harm arises in situations of armed conflict or in times of peace thus does not alter the application and interpretation of the Refugee

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<sup>645</sup> Hathaway and Foster, *The Law of Refugee Status* (n 20) 169.

<sup>646</sup> *Ibid* 170.

<sup>647</sup> *Ibid* 172.

<sup>648</sup> Türk, Edwards and Wouters, 'Introduction' (n 2) 9.

<sup>649</sup> UNHCR, *Guidelines on International Protection No. 12* (n 5) para. 17.

Convention definition although it may impact on its assessment and type of evidence considered. More specifically, although the legal test remains the same irrespective of the conditions in the country of origin, demonstrating that one has been singled-out is likely to involve evidence specific to the asylum applicant whereas the existence of a group-based risk may be established by evidence of the treatment of persons similarly situated who share the same personal characteristics such as sex, ethnicity, religion or political opinion or who are considered to share those same characteristics. Despite the general consensus within the refugee law literature that singling-out is not required however, ‘the circumstance(s) of persons fleeing war continues to challenge refugee law doctrine’.<sup>650</sup>

In the EU, the existence of a distinct subsidiary protection regime aimed at protecting civilians fleeing serious and individual threats to their life or person by reason of indiscriminate violence in situations of international or internal armed conflict<sup>651</sup> has led appellate authorities to analyse the conditions in the country of origin, in particular the characteristics of armed conflict, almost exclusively under this complementary regime. The limited number of cases in the sample overall in which appellate authorities considered the application of the Refugee Convention definition in light of the general situation of armed conflicts indicates that judicial misconception regarding the application of the Refugee Convention to persons fleeing armed conflicts continues to exist. As will be discussed in more detail below, appeals were generally fully determined under the Refugee Convention only where the assessment of the credibility of appellants’ account led to the conclusion that they had been the subject of past persecution or experienced individual threats or targeting in the past. This trend shows that appellate authorities in the EU perpetuate the misconception that persons fleeing armed conflicts do not fall within the Refugee Convention definition in the absence of individual targeting or singling-out. As large numbers of persons flee situations of armed conflicts that are characterised by widespread violence directed at particular groups sharing common characteristics but without having been singled-out, this misconstruction of the Refugee Convention definition results in a failure to protect persons fleeing armed conflicts contrary to EU Member States’ obligations in international law.

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<sup>650</sup> Hathaway and Foster, *The Law of Refugee Status* (n 20) 177.

<sup>651</sup> Article 15(c) Qualification Directive.

### 5.3 Group-Based Risk of Harm in Complementary Protection

As noted previously, EU Member States must determine an asylum application sequentially, by firstly assessing a person's entitlement to refugee status and only if this is refused, assess whether they are eligible for subsidiary protection. Accordingly, asylum applicants generally claim that their removal from the territory of the Contracting State would expose them to a risk of serious harm in addition to a risk of persecution for a Refugee Convention reason, and by extension, asylum decision makers are likely to consider different types of international protection within a single determination. The Qualification Directive provides for subsidiary protection where a person 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 would face a real risk of suffering serious harm.<sup>652</sup> Article 15(b) of the Qualification Directive defines serious harm as 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin', which draws on EU Member States' obligations under Article 3 of the European Convention on Human Rights ('ECHR'). Although the ECHR is relevant to international protection in a way that merely complements refugee protection,<sup>653</sup> the jurisprudence of the ECtHR is closely related to the development of international refugee law and national practice in interpreting the Refugee Convention definition. Durieux has highlighted the 'relative inter-penetration' between human rights norms and international refugee law.<sup>654</sup> This Section explores how a real risk of serious harm has been interpreted in this jurisprudence because the test has either been considered stricter than or equivalent to the 'well-founded fear of being persecuted' and thus relevant to understand how appellate authorities in the EU are interpreting the law.

Article 3 ECHR states that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'.<sup>655</sup> Article 3 ECHR has been partly incorporated into EU law as Article 15(b) Qualification Directive is closely based on Article 3 ECHR and defines 'serious harm' as 'torture or inhuman or degrading treatment or punishment of an applicant in the

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<sup>652</sup> Articles 2(f) and 15 Qualification Directive.

<sup>653</sup> Article 2 and 3 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No. 005 as amended by Protocols 1 (ETS No. 009), 4 (ETS No. 046), 6 (ETS No. 114), 7 (ETS No. 117), 12 (ETS No. 177), 13 (ETS No. 187), 14 (STCE 194), 15 (CETS No. 213) and 16 (CETS No. 214) ('ECHR') have been transposed into the subsidiary protection regime in the EU through Article 15(a) and 15(b) Qualification Directive.

<sup>654</sup> Jean-Francois Durieux, 'Salah Sheekh is a Refugee: New Insights into Primary and Subsidiary Forms of Protection' (2008) 49 Refugee Studies Centre Working Paper Series 11, 9.

<sup>655</sup> Article 3 ECHR; for more information see Nuala Mole, *Asylum and the European Convention on Human Rights* (4th edn, Council of Europe 2007).

country of origin'. Consequently, asylum decision makers interpret international refugee law in the EU through a legal regime which incorporates different but complementary forms of protection, some of which are drawn from the ECHR, a regional human rights treaty. Any developments in the ECtHR's jurisprudence thus potentially influences how asylum decision makers apply and interpret the Refugee Convention definition. This Section therefore briefly explores the legal standards established by the ECtHR in expulsion and extradition cases under Article 3 ECHR as relevant to asylum seekers and refugees, in particular regarding the requirement of 'individualised' risk of suffering treatment contrary to Article 3 ECHR on return to a person's country of origin. It concludes that the evolving jurisprudence of the ECtHR has now anchored the proposition that individuals may be able to demonstrate a risk of treatment contrary to Article 3 ECHR on return without the need to have been individually targeted or singled-out. These cases generally arise where persons are fleeing widespread violence in situations of armed conflict.

National practice requiring persons to be singled-out/individually targeted for persecution or to show a differential risk has led the ECtHR to consider whether the situation of armed conflict in the country of origin was such that a person would be at risk of treatment contrary to Article 3 ECHR due to their membership in a group defined by innate or fundamental characteristics or for reasons of severe levels of violence. The case of *Salah Sheekh v. the Netherlands* was brought before the ECtHR because the Dutch District Court applied the requirement of being singled-out and thus had upheld the Dutch Immigration and Naturalisation Service's decision to refuse international protection. The Dutch District Court had found that the Somali applicant was not at risk of serious harm due to his membership of a minority clan because there was no unfavourable interest in him personally and the situation that led him to flee was due to 'the generally unstable (security) situation in Somalia, in which intimidation and insults by criminal groups regularly and arbitrarily occurred'.<sup>656</sup> Although the ECtHR's earlier case law required evidence that applicants' personal position was worse than the generality of other members of their community,<sup>657</sup> the ECtHR changed its approach in *Salah Sheekh* to ensure that the protection offered by Article 3 ECHR was not illusory.<sup>658</sup> The ECtHR thus established that in situations of widespread violence applicants are not required to show further distinguishing

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<sup>656</sup> *Salah Sheekh v. the Netherlands* (2007) 45 EHRR 50, para. 35; see the Dutch Government's submissions at para. 131 of the judgment; see also analysis in Durieux, 'Salah Sheekh is a Refugee' (n 654) 11-12.

<sup>657</sup> *Vilvarajah and Others v. the United Kingdom* (1992) 14 EHRR 248, para. 111.

<sup>658</sup> *Salah Sheekh v. the Netherlands* (n 656), para. 148.



features over and above others affected by the general situation of insecurity.<sup>659</sup> In this case, the Court concluded that the Netherlands would breach Article 3 ECHR if it returned the applicant to Somalia because his membership of a minority clan from Somalia and the general treatment of this minority was in itself sufficient to demonstrate a real risk on return.<sup>660</sup> Significantly, Durieux has pointed out that as Salah Sheekh was at risk of serious harm for reasons of his ethnicity as a minority clan member, he was in fact a refugee.<sup>661</sup>

In later cases where the ECtHR considered situations where certain groups may be at risk of treatment contrary to Article 3 ECHR in light of the general situation in the country of origin, the Court found that where there are 'serious reasons to believe' a group is 'systematically exposed to a practice of ill-treatment' and applicants can show membership in that group<sup>662</sup> no 'further special distinguishing features are required'.<sup>663</sup> This group-based risk approach demonstrates that the ECtHR does not consider it a requirement of the protective scope of Article 3 ECHR that persons be individually singled-out for ill-treatment.

This claim is further supported by the ECtHR's consideration of cases where applicants claim to be at risk of ill-treatment due to reasons unconnected to their personal characteristics but rather because of the situation of widespread violence that often characterises armed conflicts. Thus, the ECtHR has established that return may breach Article 3 ECHR provided it can be shown that widespread violence in the country of expulsion is characterised by a sufficient level of intensity.<sup>664</sup> The reasoning for this approach is to ensure that protection under Article 3 ECHR is not illusory and to reflect the absolute nature of the right.<sup>665</sup> Thus, the issue to be determined by the ECtHR remains the same in all types of cases, namely whether 'in all the circumstances of the case before it, substantial grounds have been shown for believing that the person concerned, if returned, would face a real risk of being subjected to treatment contrary to Article 3 of the Convention'.<sup>666</sup>

The ECtHR's jurisprudence in this area supports the proposition that if a person is a member of a group and that there is evidence of systematic human rights violations of that group's members or widespread violence is sufficiently severe in the country of origin, there is no need

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<sup>659</sup> Ibid.

<sup>660</sup> Ibid.

<sup>661</sup> Durieux, 'Salah Sheekh is a Refugee' (n 654) 13.

<sup>662</sup> *N.A. v. the United Kingdom* (2009) 48 EHRR 15, para. 116.

<sup>663</sup> Ibid para. 117.

<sup>664</sup> Ibid para. 115-116.

<sup>665</sup> *Sufi and Elmi v. the United Kingdom* (8319/07) [2011] ECHR 1045, para. 217.

<sup>666</sup> Ibid para. 218.

to show any further distinguishing personal characteristics or individual circumstances in addition to those which situate the person within that group. Indeed, Vedsted-Hansen notes that the case of *Vilvarajah* was not in fact authority for the proposition that there was ever a need for showing ‘special distinguishing features’ as this would be contrary to the absolute prohibition of treatment contrary to Article 3 ECHR.<sup>667</sup> He further suggests that *Salah Sheekh* was not a change of approach by the ECtHR but merely a reiteration of the principle set out in *Vilvarajah* which had failed on the specific facts of that case. In other words, the claims brought by the applicants in *Vilvarajah* were unsuccessful not because they had not been singled-out but because there was insufficient evidence of the group to which they belonged (young male Tamil returnees) being systematically ill-treated by the authorities.<sup>668</sup> Where there is sufficient evidence of systematic ill-treatment of a group of persons, the entire group is equally entitled to protection from *refoulement* and the legal test cannot be more onerous. Alternatively, where applicants have a number of individual characteristics, which taken by themselves do not meet the required threshold of real risk but considered cumulatively in the context of widespread violence in situations of armed conflict, the standard may be met. The need to place appropriate weight to the general situation in the country of origin is derived from the obligation to take into account all relevant circumstances.<sup>669</sup> Where the general situation of violence in the country of origin is not such that anyone is at risk or members of particular groups are systematically ill-treated, it is likely that an individual will be required to show more specific proof that she is individually at risk.<sup>670</sup> However this does not entail a requirement of singling-out *per se*.

There are relatively few cases which the ECtHR has decided based on the general situation of violence and insecurity in the country of origin. Even fewer cases have been decided in relation to whether a person is at risk of gender-based violence on return due to the situation of widespread violence. In 2010, the ECtHR considered the general situation of women in Afghanistan. The ECtHR referred to the objective evidence which demonstrated that 80% of women in Afghanistan were affected by domestic violence and that a recent law, although not yet implemented, requires women to comply with their husband’s sexual requests and to obtain

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<sup>667</sup> Jens Vedsted-Hansen, 'European non-Refoulement Revisited' (2010) 55 Scandinavian Studies In Law 269, 276.

<sup>668</sup> Ibid 278.

<sup>669</sup> *Sufi and Elmi v. the United Kingdom* (n 665) para. 130; See discussion in Section 2.3. in Chapter 2.

<sup>670</sup> See the typology proposed by Tsourdi as follows (i) where levels of violence are so high that *anyone* is at risk on return, (ii) where the general situation is such that particular groups are systematically exposed to ill-treatment, it is sufficient to show membership in that group and (iii) other situations may require applicants to show that they are personally at risk, Tsourdi (n 352) 280-282.

permission to leave the home except in emergencies. The ECtHR referred to the lack of state protection because seeking protection from public authorities was itself likely to lead to ill-treatment from their families.<sup>671</sup> The ECtHR thus noted:

That there are no specific circumstances in the present case substantiating that the applicant will be subjected to such treatment by X, but the Court cannot ignore the general risk indicated by statistic and international reports.<sup>672</sup>

Women are at particular risk of ill-treatment in Afghanistan if perceived as not conforming to the gender roles ascribed to them by society, tradition and even the legal system.<sup>673</sup>

Thus, this case demonstrates that under the ECHR if the risk of serious harm cannot be established by reference to the individual circumstances of the applicant alone, consideration of the general conditions in the country of origin becomes the main context of analysis. In this case, the applicant's status as a woman was sufficient to demonstrate a real risk of treatment contrary to Article 3 ECHR. This contrasts with appellate authorities' application of the Refugee Convention definition to group-based risks, including women as a group at risk which will be discussed in the next Chapter.

In 2015, the ECtHR considered for the third time whether the general situation in Mogadishu was characterised by violence of such intensity that anyone in that city would face a real risk of treatment contrary to Article 3 ECHR.<sup>674</sup> Despite finding that the general security situation in Mogadishu remained serious and fragile, the ECtHR did not consider the situation had deteriorated since September 2013 when it had last considered the general security situation and thus not everyone returned there would be at risk of treatment contrary to Article 3 ECHR.<sup>675</sup> The ECtHR recognised however that the applicant in the present case had different personal characteristics as she was a woman born in 1988 who had left Somalia aged 17 and the applicant in the earlier case was a man born in 1960.<sup>676</sup> Looking at the general treatment of women in Somalia, the ECtHR concluded 'that a single woman returning to Mogadishu without access to protection from a male network would face a real risk of living in conditions

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<sup>671</sup> *N v Sweden* [2011] Imm AR 38, para. 57.

<sup>672</sup> *Ibid* para. 58.

<sup>673</sup> *Ibid* para. 55.

<sup>674</sup> *R.H. v. Sweden* (2018) 67 EHRR 22.

<sup>675</sup> *K.A.B. v. Sweden* [2014] Imm AR 371.

<sup>676</sup> *R.H. v. Sweden* (n 674) para. 69.

constituting inhuman or degrading treatment under Article 3 of the Convention'.<sup>677</sup> Although reliance on non-state actors of protection when women fear gender-based violence has been criticised,<sup>678</sup> the ECtHR is consistent in its approach to group-based risk, in this case the group being defined by sex, in light of the general situation in the country of origin, including that society's gender norms.

The case law of the ECtHR discussed above demonstrates that *non-refoulement* under the ECHR is not dependent on the applicant being singled-out/individually targeted or demonstrating a risk over and above other similarly situated persons. Provided substantial grounds have been shown for believing that the person concerned, if returned, would face a real risk of being subjected to treatment contrary to Article 3 ECHR, *refoulement* is prohibited even if large groups of persons are ill-treated because of shared characteristics such as sex or where there is a situation of widespread violence in the context of armed conflicts placing everyone at risk. European human rights law in this respect supports the proposition that singling-out or individual targeting is not a requirement to be recognised as a refugee under the Refugee Convention. Although State practice varies regarding whether the standard of proof is the same under the Refugee Convention and international human rights instruments, no jurisdiction is adopting a stricter test under the Refugee Convention.<sup>679</sup> Moreover, there is scholarly support from authors such as Gorlick, McAdam and Mariño Menéndez for the proposition that the test is and should be the same.<sup>680</sup> Hence, there is no suggestion in State practice or academic opinion that the standard of proof in the Refugee Convention definition is more onerous than under other complementary forms of protection. Accordingly, if singling-

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<sup>677</sup> Ibid para. 70.

<sup>678</sup> Christel Querton, 'The Role of the European Court of Human Rights in the Protection of Women Fleeing Gender-Based Violence in their Home Countries' (2017) 7 *Feminists @ Law*.

<sup>679</sup> For UK practice establishing that the standard of proof is the same under both legal regimes, see *STARRED Kacaj (Article 3, Standard of Proof, Non-State Actors) Albania* [2001] UKIAT 00018, para. 10 (although the decision was successfully appealed this was on the basis of the assessment of facts rather than any issue with the legal findings, see *Kacaj v Secretary of State for the Home Department* [2002] EWCA Civ 314; the findings were also endorsed in *Dhima v Immigration Appeal Tribunal* [2002] EWHC 80). For practice in Canada and the USA where the 'well-founded fear' test under the Refugee Convention is deemed lower than the 'personal, real and foreseeable risk' test of Article 3 CAT, see discussion in Jane McAdam, 'Australian Complementary Protection: A Step-by-Step Approach' (2011) 33 *Sydney Law Review* 687, 719-720. McAdam claims that the subsidiary protection standard of proof in the Qualification Directive is higher than the 'well-founded fear' test, see McAdam, *Complementary Protection* (n 8) 62; Hathaway and Foster however claim that the standard of proof under the Refugee Convention, expressed in slightly different forms in the USA, Canada, South Africa, the UK, Germany, Australia and New Zealand, are largely interchangeable, see Hathaway and Foster, *The Law of Refugee Status* (n 20) 113.

<sup>680</sup> Brian Gorlick, 'Human Rights and Refugees: Enhancing Protection through International Human Rights Law' (2000) 69 *Nordic Journal of International Law* 117, 154; McAdam, 'Australian Complementary Protection' (n 679); Fernando M. Mariño Menéndez, 'Recent Jurisprudence of the United Nations Committee against Torture and the International Protection of Refugees' (2015) 34 *Refugee Survey Quarterly* 61, 67-68.

out is not a requirement under the ECHR, it cannot logically be applied in the interpretation of the Refugee Convention definition which has a similar or lower standard of proof. Applying this perspective implies that evidence that members of a group sharing common characteristics are being exposed to sufficiently serious harm should serve as a satisfactory indication that a member of that group has a well-founded fear of being persecuted for a Refugee Convention reason without the need for further personal distinguishing characteristics or individual instances of direct confrontations with actors of persecution. This would demonstrate that there is a real chance<sup>681</sup> that the individual concerned has a well-founded fear of being persecuted on return to their country of origin.

#### **5.4 The Requirement of Singling-Out in the Judicial Practice of EU Member States**

This study demonstrates that the issue of the differential risk approach, namely a requirement of being at risk over and above those that are similarly situated in a situation of widespread violence, is not explicitly raised. In other words, there were no instances where appellate authorities acknowledged that all members of a particular group sharing common characteristics were at risk yet required that appellants demonstrate a risk over and above other members of the group. However, asylum appellate authorities consider it necessary that appellants demonstrate individual targeting or singling-out by actors of persecution in order to be recognised as refugees. In effect, this means that there may be cases where a group-based risk exists based on that group's actual or perceived characteristics, yet members of that group are refused refugee status if they have not been singled-out. The requirement of singling-out was confirmed in judicial practice in Belgium, Denmark, France and the United Kingdom and in a less explicit way in the Netherlands and Spain.

As noted, developments in the EU subsidiary protection regime influences the application and interpretation of the Refugee Convention definition where persons are fleeing from armed conflicts. Hence, the CJEU's jurisprudence regarding Article 15(c) will to some extent implicitly influence judicial interpretation of the refugee definition, in particular since both refugee protection and subsidiary protection are considered as part of a single determination. Although, the CJEU in *Elgafaji* used the terminology of being 'specifically targeted' when it concluded that the application of Article 15(c) is 'not subject to the condition that that applicant

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<sup>681</sup> As per the characterisation of the well-founded fear of being persecuted test adopted by Hathaway and Foster in Hathaway and Foster, *The Law of Refugee Status* (n 20) 114.

adduce evidence that he is *specifically targeted* by reason of factors particular to his personal circumstances’,<sup>682</sup> the case is not authority for the proposition that by juxtaposition, refugees must be specifically targeted. The CJEU was concerned there with explaining the apparent tension between the notions of ‘individual threat’ and ‘indiscriminate violence’ and the language used merely indicates that beneficiaries of subsidiary protection do not need to demonstrate any particular reasons for the risk of serious harm. Indeed, in later cases concerning refugee protection, the CJEU does not refer to any notion of being targeted. In a preliminary reference ruling concerning cessation of refugee status under the Qualification Directive,<sup>683</sup> the CJEU reiterated the definition of a refugee as set out in Article 2(c) Qualification Directive and noted that ‘the national concerned must therefore, on account of circumstances existing in his country of origin, have a well-founded fear of being *personally the subject of persecution* for at least one of the five reasons listed in the Directive and the Geneva Convention’.<sup>684</sup> The personal element of the well-founded fear, in other words the individual risk, is here again linked to the reasons for persecution. Thus, there is a difference between a requirement of targeting or singling-out and a requirement of persecution on discriminatory grounds as defined in the Refugee Convention reasons for persecution. The practice of appellate authorities suggests however that the CJEU’s jurisprudence may have been read as an indication of the former rather than the latter.

In France, the jurisprudence of the highest Court, the Council of State, sets out that to meet the requirements of the refugee definition a person must have a current and personal fear in relation to persecution of a certain severity.<sup>685</sup> Judicial practice in France can explicitly be traced back to the CJEU’s ruling in *Elgafaji*. Initially, the Council of State adopted word for word the CJEU’s interpretation of Article 15(c) that an applicant for subsidiary protection does not need to show that he is ‘specifically targeted by reason of factors particular to his personal circumstances’.<sup>686</sup> Thus, in the case of *Baskarathas*, the Council of State set out that ‘the existence of a serious, direct and individual threat to the life or person of an applicant for

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<sup>682</sup> *Elgafaji* (n 435) para. 43 (emphasis added).

<sup>683</sup> The CJEU set out the first preliminary reference question as ‘whether Article 11(1)(e) of the Directive is to be interpreted as meaning that refugee status ceases to exist if the circumstances which justified the refugee’s fear of persecution for one of the reasons referred to in Article 2(c) of the Directive, on the basis of which refugee status was granted, no longer exist and the refugee has no other reason to fear being ‘persecuted’ within the meaning of Article 2(c) of the Directive’, *Abdulla* (n 627) para. 55.

<sup>684</sup> *Abdulla* (n 627) para. 56-57 (emphasis added); see also Case C-472/13 *Shepherd v Germany* [2015] QB 799, para. 24.

<sup>685</sup> Conseil d’État, Les Dossiers Thématiques du Conseil d’État: Le Juge Administratif et le Droit d’Asile, January 2016 <<https://www.conseil-etat.fr/ressources/etudes-publications/dossiers-thematiques/le-juge-administratif-et-le-droit-d-asile>> accessed 12 July 2021, 13-14.

<sup>686</sup> *Elgafaji* (n 435) para. 43; see also para. 30.

subsidiary protection is not subject to the condition that the applicant demonstrates that he is specifically targeted because of factors related to his personal situation'.<sup>687</sup> In turn, the wording of *Baskarathas* is invariably repeated by the French National Asylum Court in its judgments after it dismisses appeals under the Refugee Convention because the personal account of past persecution or instances of conflict with actors of persecution is found not credible. In this construction of its written judgments and its emphasis on the absence of the need to be 'specifically targeted' under Article 15(c) Qualification Directive, the CNDA is creating a dichotomy between establishing whether appellants have been singled-out, failing which entitlement to subsidiary protection is considered.

The Danish Refugee Appeals Board's approach in determining asylum appeals is to enquire whether there has been a particular confrontation putting appellants personally in conflict with actors of persecution or serious harm. The focus of the Board's investigation on past facts, reveals that a risk of persecution or serious harm will arise only in cases where appellants have been in direct conflict with actors of persecution or serious harm leading to their identification and singling-out by those actors. Where appellants claim to be at risk from the authorities, an analysis of the Board's decisions shows that there is a requirement to be of particular interest to the authorities in order to demonstrate a well-founded fear of individual persecution.<sup>688</sup> For example, the Board dismissed the appeal of a Syrian woman who had received a threatening letter from Shabiha at her office where she worked as a school guidance councillor. The Board noted that irrespective of the threatening letter left at her office, the appellant had not established that the threat was directed against her personally.<sup>689</sup> In another case, the Board concluded that despite her son's work as an ambulance driver who had helped the rebels, the appellant had not personally had any problems with the authorities or non-state actors in Syria.<sup>690</sup> The Board also refused the appeal of a young Afghan orphan as it concluded that there was no risk of forced recruitment from the Taliban because he had not had any conflict with the Taliban.<sup>691</sup>

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<sup>687</sup> FR: CE, *Office Français de Protection des Réfugiés et Apatrides c/ M. Baskarathas*, N° 320295, 03.07.2009.

<sup>688</sup> In Danish the term used is '*i myndigheders søgelys*', the literal translation of which is 'in the authorities' searchlight'. In Pia Lynggaard Justesen, 'Denmark' in Jean-Yves Carlier and others (eds), *Who is a Refugee? A Comparative Case Law Study* (Kluwer Law International 1997) 306 it is described as 'the limelight of the authorities'; see for example DK: DRAB 02.10.2015 (Syria); or 'the limelight' of various non-state actors DK: DRAB 07.06.2016 (Syria): YPG; DK: DRAB 12.08.2013 (Syria): Shabiha.

<sup>689</sup> DK: DRAB 12.08.2013 (Syria).

<sup>690</sup> DK: DRAB 25.09.2013 (Syria).

<sup>691</sup> DK: DRAB 20.05.2014 (Afghanistan).

The Board's practice in relation to upgrade appeals where appellants were granted Temporary Protection Status indicates how the Board conceptualises the difference between refugee status and complementary protection. In these cases, determination by the Board entails a consideration of whether there have been specific individual instances of conflict between appellants and actors of persecution, failing which appellants retain their Temporary Protection Status. Furthermore, the practice of the Board shows that persons belonging to a group, of whose members many have been persecuted, is insufficient to be awarded international protection and individuals must demonstrate that they will 'most likely personally be subjected to persecution'.<sup>692</sup> Equally, where appellants based their asylum claim on the high level of widespread violence, the Board required them to have been singled-out by actors of persecution.<sup>693</sup> As an example, the Board dismissed the upgrade appeal brought by a Kurdish Yazidi man from Aleppo on the basis that his spouse and children lived in Aleppo where there were a lot of Kurds and where his sons could get a job because the family was not individually pursued in Aleppo.<sup>694</sup>

The UK First Tier Tribunal adopts a similar approach whereby it juxtaposes 'general' risks with 'direct' risks that arise only if there has been any singling-out.<sup>695</sup> Thus, the First Tier Tribunal concluded that an appellant from Kirkuk was not at risk on return as it was not accepted that 'he is under threat from Daesh or ISIS. He never personally encountered any difficulty with or from Daesh'.<sup>696</sup> Although accepting that a Kurdish appellant originated from Fallujah which was occupied by ISIS and characterised as a 'contested area', the First Tier Tribunal did not deem his account of ISIS approaching his family to recruit him credible and thus concluded that he 'had no direct contact with ISIS and had no problems with them directly. His fear on which he based his claim for asylum, is a general one and is based on the fear of that organisation and its barbarity in general'.<sup>697</sup> His appeal was therefore dismissed under the Refugee Convention.

The Spanish High Court also appears to require particular instances of (recent) past persecution to meet the criteria of the refugee definition. It required appellants to demonstrate a particular

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<sup>692</sup> Justesen (n 688) 305, although she continues by stating that 'on the other hand, it is not required that the asylum seekers be "singled out" for persecution'. However, it is difficult to see how a person must show that they will personally be at risk without also needing to show that they have been 'singled out'.

<sup>693</sup> See for example DK: DRAB 25.02.2016 (Syria); DK: DRAB 12.08.2013 (Syria).

<sup>694</sup> DK: DRAB February 2016 in DRAB Annual Report 2016, p. 121; see also DK: DRAB 28.06.2013 (Syria).

<sup>695</sup> UK: FTT(IAC) 08.11.2016 (Syria); UK: FTT(IAC) 14.12.2013 (Iraq); UK: FTT(IAC) 22.07.2013 (Iraq).

<sup>696</sup> UK: FTT(IAC) 06.10.2016 (Iraq).

<sup>697</sup> UK: FTT(IAC) 14.10.2016 (Iraq).



(political) profile and accordingly dismissed the appeal of a Syrian national on the basis that he had merely alleged a ‘feeling of displeasure and humiliation’ as a Kurd, in relation to poverty, racism, and the political situation but he had not been detained again and there were no other facts that could put him at risk.<sup>698</sup> In refusing appeals on safe third country grounds, the High Court noted that the general situation in Syria meant that ‘despite not having suffered persecution in the required terms by the Convention’ the grant of subsidiary protection was appropriate. The Spanish Court concluded that the appellants’ cases were to be distinguished from the jurisprudence of the Supreme Court leading to the grant of refugee status because they had left Syria before the start of the conflict to look for work and had not therefore been the ‘object of persecution’.<sup>699</sup> In summarising the principles established by the CJEU in *Shepherd*, the Spanish National High Court notes, amongst other criteria, that ‘there must be a situation of persecution regarding the applicant’.<sup>700</sup> Thus, in cases where Syrian appellants had left Syria prior to the start of the conflict and lived in a third country such as Morocco or Algeria before seeking international protection in Spain, the Court noted that ‘the allegations made are generic and imprecise and there has been no proof of a risk of persecution to the applicants so that they may fear for their lives or for the free exercise of their fundamental rights’.<sup>701</sup> In the appeal of an Afghan Hazara who expressed a fear of persecution by the Taliban, the High Court concluded that he had provided no evidence of being attacked by the Taliban when he refused to tell them who in his village was keeping weapons.<sup>702</sup>

As discussed in the Section above, it was the Dutch practice of requiring singling-out as a condition of the Refugee Convention definition which resulted in Mr Salah Sheekh’s application before the ECtHR. According to this approach, the general situation of widespread violence in Somalia was insufficient to meet the test for refugee protection.<sup>703</sup> Although the ECtHR rejected this approach,<sup>704</sup> the Dutch Government continues to require the individual targeting of asylum claimants. For example, despite accepting that teachers in Iraq are a risk

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<sup>698</sup> ES: AN SAN 3336/2013 15.07.2013 (Syria).

<sup>699</sup> ES: AN SAN 3492/2016 19.09.2016 (Syria) - Algeria as safe third country; ES: AN SAN3235/2016 06.07.2016 (Syria) - Morocco as safe third country; see also ES: AN SAN 4350/2016 18.11.2016 (Syria); ES: AN SAN 4395/2016 17.11.2016 (Syria); ES: AN SAN 4083/2016 25.10.2016 (Syria); ES: AN SAN 3937/2016 17.10.2016 (Syria); ES: AN SAN 3839/2016 17.10.2016 (Syria) - citing at length the judgment in ES: AN SAN 3235/2016 06.07.2016 (Syria) - Morocco as safe third country.

<sup>700</sup> ES: AN SAN 4083/2016 25.10.216 (Syria); ES: AN SAN 3837/2016 17.10.2016 (Syria); ES: AN SAN 3839/2016 17.10.2016 (Syria); see discussion of *Shepherd* (n 1208) above at text accompanying footnote (1208).

<sup>701</sup> ES: AN SAN 4433/2016 29.11.2016 (Syria).

<sup>702</sup> ES: AN SAN 5686/2013 26.12.2013 (Afghanistan).

<sup>703</sup> *Salah Sheekh v. the Netherlands* (n 656), para. 131.

<sup>704</sup> *Ibid* para. 148; see also *N.A. v. the United Kingdom* (n 662) para. 116-117.

category, the Secretary of State noted this was insufficient by itself to demonstrate a well-founded fear of persecution.<sup>705</sup> Although the District Court did not explicitly state the requirement, practice showed that where appellants' account of events in their country of origin was found not credible, the Court did not consider that appellants' personal characteristics such as ethnicity, religion or being wealthy were sufficient on their own to create a well-founded fear of being persecuted.<sup>706</sup> For example, the Court found that the Secretary of State had sufficiently motivated its decision when it found that the appellant had not demonstrated he would actually be sought out by the Syrian authorities.<sup>707</sup> Hence, although the approach was not as explicit as in the judicial practice of other EU Member States as discussed in this Section, the approach of the Dutch District Court does suggest a similar expectation of individual targeting and singling-out.<sup>708</sup>

The trend identified reflects the imposition of a requirement that individual appellants have been personally singled-out by actors of persecution, which does not reflect an interpretation of the Refugee Convention in accordance with international refugee law or EU law. In effect, as appellate authorities' determination of asylum appeals under the Refugee Convention ended when accounts of individual instances of interactions with actors of persecution were found not credible, refugee protection was closely related with the assessment of credibility. However, an appropriate application and interpretation of the Refugee Convention would necessitate further examination of whether, irrespective of negative credibility findings, evidence regarding the treatment of persons sharing the same personal characteristics (as established or attributed) demonstrates a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. The following Section briefly explores the particular problems that arise from the overlap of gender norms and the assessment of credibility.

## **5.5 Credibility and Gendered Norms in Situations of Armed Conflict**

Chapter 3 highlighted how both men and women were subject to expectations of gender conformist behaviour and that this was linked to violence in situations of armed conflict.

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<sup>705</sup> NL: Rb AWB 14/12004 25.08.2014 (Iraq).

<sup>706</sup> NL: Rb AWB 15/18833 19.11.2015 (Iraq); NL: Rb AWB 14/12313, AWB 14/12311 20.06.2014 (Iraq); NL: Rb AWB 13/24160, AWB 13/24159 11.10.2013 (Iraq); NL: Rb AWB 13/21790, AWB 13/21789 13.09.2013 (Iraq).

<sup>707</sup> NL: Rb AWB 16/9070, AWB 16/9066 25.05.2016 (Syria).

<sup>708</sup> See for an explicit example see NL: Rb AWB 16/11308 21.10.2016 (Afghanistan).

Appellate authorities display some awareness of these gender dynamics. Whereas at first sight this may suggest that appellate authorities are alert to the relevance of gender in situations of armed conflict, those gendered expectations are applied rigidly such that departure from these norms will generally result in the individual account being considered not credible. Two examples of gendered expectations are explored below.

The gendered expectation that boys and young men follow the political inclinations of their fathers, uncles or other male relatives is addressed first. Provided that appellants' accounts of events are accepted, appellate authorities are prepared to find that a political opinion will be imputed on sons or male relatives resulting in a risk of persecution. Thus, 10% of appeals resulting in refugee protection were linked to the Refugee Convention reason of imputed political opinion because 'political opinion will commonly be imputed from one's father's opinion' as young men and boys are supposed to follow their fathers' decisions in respect of their political involvement.<sup>709</sup> However, where individual accounts differed from those gendered dynamics, namely where younger male generations refused to align themselves with their male relatives' political preferences, appellate authorities found their accounts not credible on the basis of those expectations. Thus, appellate authorities made negative credibility assessments on the basis that appellants' accounts were not consistent with the expectation that young boys and men usually follow their father's political alignment.<sup>710</sup>

Another illustration of gendered expectations relates to women living in countries where women's rights are limited, not having access to any form of property. Thus, where women had fled their country of origin by accessing funds or property, this was considered by appellate authorities as an indication that they had the support of their family and hence that their account of serious harm from family members was not credible.<sup>711</sup> There was nonetheless an example of good practice where the Dutch District Court allowed an appeal because it was unreasonable for the Secretary of State to conclude that an Afghan woman taking the initiative to start an extramarital relationship was implausible due to the harsh penalties.<sup>712</sup>

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<sup>709</sup> UK: FTT(IAC) 15.09.2014 (Afghanistan); see also FR: CNDA 12034053 09.04.2013 (Afghanistan); FR: CNDA 15007217/15007216 15.07.2015 (Iraq); UK: FTT(IAC) 24.11.2016 (Afghanistan); UK: FTT(IAC) 03.10.2013 (Afghanistan).

<sup>710</sup> UK: FTT(IAC) 21.04.2016 (Afghanistan); UK: FTT(IAC) 14.12.2013 (Iraq).

<sup>711</sup> UK: FTT(IAC) 12.09.2016 (Iraq): appellant able to save her wages; UK: FTT(IAC) 19.02.2015 (Iraq): appellant had access to money and gold from her dowry (first marriage); see also DK: DRAB 13.05.2016 (Afghanistan).

<sup>712</sup> NL: Rb AWB 16/7907, AWB 16/7908 30.05.2016 (Afghanistan).

Although both these types of cases demonstrate that appellate authorities may be aware of the existence of gendered norms in societies where appellants come from, these norms are considered fixed. Considering gender-related norms as inflexible means that any gender diverging behaviour (for example boys and young men adopting different political views to their male family members or women having access to funds) is considered by appellate authorities as constituting evidence that the account is not credible and results in the Refugee Convention appeal being dismissed. The approach of appellate authorities in these cases illustrate the interplay between their reliance on fixed expectations of male or female behaviour in situations of armed conflict and the requirement of having been personally singled-out by actors of persecution.

Practice across EU Member States has thus erroneously elevated evidence of being singled-out into a legal criterion for the existence of a well-founded fear of being persecuted. Although previous work has shown this was an issue, the methodological approach to this study demonstrates that the practice continues to prevail in the EU. As a result, unless persons seeking international protection have previously experienced personal instances of conflict with actors of persecution in their country of origin, they are unlikely to be awarded refugee status, particularly if they have fled from situations of armed conflict characterised by widespread violence. The ‘well-founded fear of being persecuted’ test has become conflated with the assessment of credibility, which itself can be highly gendered. Accordingly, the standard of proof under the Refugee Convention is heightened contrary to international refugee law.

### **5.6 A Heightened Standard of Proof: The Requirement of Concrete Risk in the Judicial Practice of EU Member States**

The analysis of judicial approaches to the ‘well-founded fear of being persecuted’ indicates that appellate authorities apply a higher standard of proof than is warranted under the Refugee Convention when determining the asylum appeals of persons fleeing armed conflicts. As noted earlier, the ‘well-founded fear’ element of the refugee definition denotes an objective test understood as a forward-looking expectation of risk and past persecution is not a requirement of meeting the test although it is an indicator of future risk.

The study reveals that appellate authorities consistently use the term ‘concrete’ in assessing the risk and fear of persecution on return<sup>713</sup> suggesting a standard of proof higher than the low standard warranted in international refugee law. When determining the appeals of persons fleeing armed conflicts, appellate authorities invariably connect the term ‘concrete’ to past instances of persecution or threats of persecution and evidence but also more generally the future risk and fear of persecution on return. In this way, the ‘well-founded fear of being persecuted’ criterion in the Refugee Convention definition is equated to a concrete risk of persecution. The Cambridge English Dictionary defines the adjective ‘concrete’ as ‘clear and certain, or real and existing in a form that can be seen or felt’ and the Thesaurus gives the term ‘certainty’ as a synonym.<sup>714</sup> There is a clear difference between a requirement of a concrete risk of persecution and the need to show that persecution is ‘reasonably possible’.<sup>715</sup> Thus, the practice of appellate authorities in the EU in appeals brought by persons fleeing armed conflicts demonstrates the application of a higher standard of proof than warranted under international refugee law. Yet rather than making a claim under the Refugee Convention less likely, the impact of widespread violence in situations of armed conflict may increase the risk of persecution and serious harm and the lack of state protection.<sup>716</sup>

In the jurisprudence of the Belgian Court, regular references are made to the appellant not having had ‘concrete problems’ in the country of origin,<sup>717</sup> to the conclusion that the appellant did not have a ‘concrete and individual fear’ on return,<sup>718</sup> there were no ‘concrete indications’ that the appellant would be personally targeted,<sup>719</sup> the appellant must show ‘in concrete terms’ that he personally runs a risk of forced recruitment,<sup>720</sup> the fear of persecution must be demonstrated in ‘concrete terms’,<sup>721</sup> the risk must be demonstrated ‘in concrete’,<sup>722</sup> the fear of persecution or real risk of serious harm must be demonstrated ‘in concrete’,<sup>723</sup> and the fear of

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<sup>713</sup> FR: CNDA 16024450/16024449 15.12.2016 (Iraq); FR: CNDA 15027724 11.04.2016 (Iraq); BE: RvV 165 409 08.04.2016 (Afghanistan); BE: RvV 154 649 15.10.2015 (Afghanistan); BE: RvV 147 398 08.06.2015 (Afghanistan); BE: RvV 142 056 27.03.2015 (Syria); BE: RvV 131 607 17.10.2014 (Afghanistan); BE: RvV 122 391 11.04.2014 (Afghanistan); BE: RvV 116 849 14.01.2014 (Afghanistan); BE: RvV 114 377 25.11.2013 (Afghanistan); ES: AN SAN 5539/2013 12.12.2013 (Syria); ES: AN SAN 2221/2013 22.05.2013 (Syria).

<sup>714</sup> Cambridge Advanced Learner’s Dictionary & Thesaurus, CUP, <<https://dictionary.cambridge.org/dictionary/english/concrete>> accessed 12 July 2021.

<sup>715</sup> UNHCR, Note on Burden and Standard of Proof (n 624) para. 17.

<sup>716</sup> Türk, Edwards and Wouters, ‘Introduction’ (n 2) 9; UNHCR, *Summary Conclusions* (n 26) para. 8.

<sup>717</sup> BE: RvV 163 585 08.03.2016 (Syria).

<sup>718</sup> BE: RvV 142 056 27.03.2015 (Syria).

<sup>719</sup> BE: RvV 165 409 08.04.2016 (Afghanistan).

<sup>720</sup> BE: RvV 147 398 08.06.2015 (Afghanistan).

<sup>721</sup> BE: RvV 116 849 14.01.2014 (Afghanistan).

<sup>722</sup> BE: RvV 154 640 15.10.2015 (Afghanistan).

<sup>723</sup> BE: RvV 131 607 17.10.2014 (Afghanistan).

persecution must be shown ‘in concrete terms’.<sup>724</sup> The French Court also referred regularly to the test amounting to a concrete risk of persecution when it noted that the appellant did not ‘concretely present the threats’ directed at him<sup>725</sup> and that the appellant’s account lacked any ‘concrete element’.<sup>726</sup> In Denmark, the Refugee Appeals Board found that there was no ‘concrete risk’ of being exposed to serious harm because the appellant had not received any further threats since leaving Iraq,<sup>727</sup> the appellants had not established that on return there would be a concrete and individual risk of persecution,<sup>728</sup> there was a ‘concrete and individual risk of persecution’ as the appellant had been issued a military book,<sup>729</sup> and the appellant had not established that he would be at risk of persecution due to ‘individual and concrete conditions’.<sup>730</sup> In Denmark, the requirement of demonstrating a ‘concrete and individual risk’ has long been part of the Refugee Appeals Board’s practice<sup>731</sup> and is applied whether the claim concerns gender-based violence or not.<sup>732</sup>

In Spain, judicial practice disclosed evidence of the term ‘concrete’ also being used and similar expectations of concrete evidence to establish a personal risk. Accordingly, the High Court regularly refers to the Supreme Court jurisprudence from 1998 regarding the standard of proof in asylum cases stating,

it is necessary that, at least, circumstantial evidence exists, otherwise every citizen of a country experiencing serious social disruption, with the death of civilians and the absence of protection of basic human rights, would automatically be entitled to the granting of asylum, which is not the purpose of asylum protection.<sup>733</sup>

The High Court also cited the established jurisprudence of the Supreme Court that,

the situation of generalised internal conflict in a country, even with the weakening of state powers and the emergence of uncontrolled groups that may put people’s most

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<sup>724</sup> BE: RvV 114 377 25.11.2013 (Afghanistan).

<sup>725</sup> FR: CNDA 15027724 11.04.2016 (Iraq).

<sup>726</sup> FR: CNDA 14037272 26.06.2015 (Syria).

<sup>727</sup> DK: DRAB 13.03.2013 (Iraq).

<sup>728</sup> DK: DRAB 09.11.2016 (Afghanistan); DK: DRAB 07.06.2016 (Syria); DK: DRAB 02.10.2015 (Syria); DK: DRAB 12.08.2013 (Iraq); DK: DRAB 06.02.2013 (Afghanistan).

<sup>729</sup> DK: DRAB 09.11.2015 (Syria).

<sup>730</sup> DK: DRAB 05.04.2016 (Syria).

<sup>731</sup> Jens Vedsted-Hansen, "Konkret og individuelt": Et Kriteriums forvandling fra Kvalifikation til Eksklusion' in Annette Møller-Sørensen and Anette Storgaard (eds), *Jurist uden Omsvøb: Festskrift til Gorm Toftegaard Nielsen* (Christian Ejlers 2007) 599-616.

<sup>732</sup> Jesper Lindholm, *Danske Asylafgørelser: Baggrund, Kontekst, Analyse* (Jurist- og Økonomforbundets Forlag 2014) 342.

<sup>733</sup> ES: AN SAN 4854/2016 24.11.2016 (Iraq); ES: AN SAN 1202/2015 01.04.2015 (Syria); ES: AN SAN 5686/2013 26.12.2013 (Afghanistan).

basic human rights at risk, is not by itself a ground giving rise to the recognition of refugee status, which requires, not only the general risk, common for all, inherent to such a situation but also that this risk has been translated and become a concrete instance of persecution, or in a well-founded fear of persecution, towards the asylum seeker, either individually or because of their belonging to a group and for reasons of race, religion, nationality, belonging to a particular social group or political opinion.<sup>734</sup>

The High Court also required that the account of the appellant,

must have a level of specificity that allows identifying a true persecution, not being sufficient for that purpose a vague and generic account that could be applicable to practically anyone from the same country as the appellant, or who lacks elements of contrast and verification that allow to appreciate its verisimilitude.<sup>735</sup>

The High Court noted that an appellant had ‘not alleged any concrete reasons for persecution’<sup>736</sup> or that ‘the situation of civil conflict in the country of origin is not sufficient to meet the criteria of an asylum application if it is not accompanied by evidence that the applicant will suffer personal and concrete persecution’ for a Convention reason.<sup>737</sup> Significantly, the High Court applied a decision of the Supreme Court noting that a situation of civil confrontation cannot on its own lead to asylum if it is not accompanied by an account or exposure to concrete repercussions from this general climate of confrontation for the person and this account must also be concrete and coherent to a minimum degree.<sup>738</sup>

Although there were no explicit statements of the risk of persecution test in judicial practice in the Netherlands due to the limited judicial review grounds in asylum appeals, a high standard of proof is nonetheless applied, requiring extensive documentary evidence.<sup>739</sup> For example, in an appeal remitted by the Court to review the security situation in Iraq, the Secretary of State had argued that a teacher finding a bullet in his home was insufficient evidence of risk because the appellant had not established that it was intended for him.<sup>740</sup> Finally, although the UK First

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<sup>734</sup> ES: AN SAN 2156/2015 11.06.2015 (Syria) - successfully appealed to ES: TS STS 1182/2016 16.03.2016 (Syria), citing ES: TS RC 3933/2009 10.10.2011.

<sup>735</sup> ES: AN SAN 4433/2016 29.11.2016 (Syria); ES: AN SAN 4395/2016 17.11.2016 (Syria), citing ES: TS RC 678/2008 17.05.2011.

<sup>736</sup> ES: AN SAN 3336/2013 15.07.2013 (Syria).

<sup>737</sup> ES: AN SAN 5539/2013 12.12.2013 (Syria).

<sup>738</sup> ES: AN SAN 2221/2013 22.05.2013 (Syria), citing ES: TS STS 6252/2004 15.02.2008.

<sup>739</sup> See for example NL: Rb AWB 16/9070, AWB 16/9066 25.05.2016 (Syria); NL: Rb AWB 14/12313, AWB 14/12311 20.06.2014 (Iraq); NL: Rb AWB 13/23795, AWB 13/23792 03.10.2013 (Afghanistan).

<sup>740</sup> NL: Rb AWB 14/12004 25.08.2014 (Iraq).

Tier Tribunal did not make references to a ‘concrete’ risk of persecution, instead generally referring to a ‘risk of persecution’ or ‘real risk of persecution’,<sup>741</sup> the requirement of singling-out and individual targeting as discussed above nonetheless demonstrates that in practice a higher standard of proof is applied by the Tribunal.

Overall, judicial practice in EU Member States is to consistently require ‘concrete’ evidence of a well-founded fear of being persecuted, a standard of proof which appellate authorities are satisfied is met only when personal instances of conflict or persecution with actors of persecution has been accepted as credible. The additional requirement that appellants be specifically targeted or individually singled-out for persecution illustrates this heightened standard of proof. The trend across EU Member States has erroneously elevated this element into a legal requirement for the existence of a well-founded fear of being persecuted. As a result, unless persons seeking international protection have previously experienced personal instances of conflict with actors of persecution in their country of origin, they are generally refused refugee protection, particularly if they have fled from situations of armed conflict characterised by widespread violence.

## **5.7 Conclusion**

This Chapter set out how appellate authorities in Belgium, Denmark, France, the Netherlands, Spain and the United Kingdom require that persons fleeing armed conflicts be singled-out by actors of persecution in order to be recognised as refugees under the Refugee Convention in practice. In other words, the concept of ‘well-founded fear of being persecuted’ is being interpreted as requiring ‘individual’ persecution in the sense of being personally targeted. Although the condition was not stated explicitly, the existence of this added legal requirement is apparent as most appellants were refused refugee status when appellate authorities did not find their account of past persecution or having experienced personal instances of conflict with actors of persecution credible. Furthermore, this Chapter briefly set out how the assessment of credibility of appellants’ accounts could be influenced by appellate authorities’ rejection of any deviation from gender norms.<sup>742</sup> In their legal reasoning, appellate authorities translate the absence of singling-out or individual targeting into the failure to meet a standard of ‘concrete’

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<sup>741</sup> See for example UK: FTT(IAC) 14.11.2016 (Iraq); UK: FTT(IAC) 01.11.2016 (Iraq); UK: FTT(IAC) 15.09.2014 (Afghanistan); UK: FTT(IAC) 31.01.2014 (Afghanistan).

<sup>742</sup> Although full exploration of this issue is beyond the scope of this study, it is highlighted as creating a need for further research.



risk thereby elevating the standard of proof under the Refugee Convention. Although it is clear that past persecution or past instances of conflict with actors of persecution may act as an indicator of a future risk and well-founded fear, it nonetheless does not constitute a legal requirement of the Refugee Convention definition. In this sense, the standard of proof is being conflated with the assessment of credibility of appellants' account of events in their country of origin. This is not in accordance with the generally agreed interpretation of the standard of proof in international refugee law.

Consequently, the general conditions of violence in the country of origin are rarely, if ever, assessed from an interdisciplinary perspective contrary to States' obligations in international refugee law. Appellate authorities' perspective of armed conflicts through a conventional warfare lens and consequent perception that violence against civilians is random and indiscriminate explains the focus of judicial determination on past events and subsequently on the assessment of credibility. Overall, the failure of appellate authorities in EU Member States to engage with the Refugee Convention unless appellants' account of having been singled-out for persecution is considered credible acts as a barrier to the protection of persons fleeing armed conflicts in breach of States' duties under international refugee law. Although temporary protection in the EU for persons fleeing 'areas of armed conflict or endemic violence'<sup>743</sup> is not hampered by the same obstacles to interpretation discussed in this Chapter, it still does not entitle its beneficiaries to the same length of residence as refugee status. Temporary Protection may be administratively convenient for EU Member States due to the grant of group protection, yet its use contributes to the displacement of the Refugee Convention as the cornerstone of international protection.

The implication for international refugee law is that the application of the Refugee Convention and development of jurisprudence regarding the interpretation of the Refugee Convention definition in the cases of persons fleeing armed conflicts in the EU is constrained. The general conditions in the country of origin are rarely examined by appellate authorities with a view to understand and evaluate the nature of violence and strategic actions of parties to the conflicts. Large numbers of persons fleeing armed conflicts and seeking international protection in the EU are thus being denied a full examination of their claim under the Refugee Convention, in particular where persons are at risk of persecution for reasons of their membership of a group

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<sup>743</sup> Article 2(c) Temporary Protection Directive.

or where fighting parties impute certain characteristics to groups defined as opponents in armed conflicts through identity politics.

The effective protection in international law of persons fleeing widespread violence in situations of armed conflict requires asylum decision-makers to interpret the Refugee Convention definition in light of the social reality of contemporary armed conflicts. Applying the knowledge acquired in feminist and security studies scholarship when interpreting the Refugee Convention definition highlights that violence in situations of armed conflict is rarely targeted against single individuals but rather that it is directed against similarly situated individuals on the basis of identity politics. More specifically, parties to the conflict exercise violence strategically by targeting entire groups of persons sharing actual or imputed characteristics in order to terrorise the population and thereby control large parts of the territory. As demonstrated in the previous Chapter, appellate authorities perceive the dynamics of violence against civilians as an unfortunate effect of conventional warfare rather than the product of gendered fighting strategies aimed at terrorising groups of persons distinguished by real or perceived characteristics. Instead, it is suggested that enquiring into the means and tactics of parties to conflict locates a logic in the choice of violence leading to highly visible forms of human rights violations. This allows the conceptualisation of particular incidents, such as kidnappings or sexual violence at checkpoints to control freedom of movement, as strategic choices of violence rather than criminal by-products of conflict. This perspective supports an interpretation of the Refugee Convention reasons for persecution in a manner that better responds to the realities of contemporary armed conflicts and is discussed in the next Chapter.