

## ARTICLES

# Afghan Women Are Under Threat from the Taliban: A Great Test of the Turkish Government and the Courts

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### ABSTRACT

This article examines how Türkiye evaluates the protection requirements of Afghan women fleeing from persecution in Afghanistan. It considers whether Türkiye grants refugee status to Afghan women as members of a ‘particular social group’ or on other Refugee Convention grounds. It analyses the jurisprudence of Türkiye’s Administrative Courts and Regional Administrative Courts concerning international protection claims lodged by Afghan women between August 2021 and June 2023 to determine whether Türkiye follows a gender-sensitive interpretation of the Refugee Convention and respects the principle of *non-refoulement*.

### 1. INTRODUCTION

This article examines how Türkiye evaluates the protection requirements of Afghan women fleeing from persecution in Afghanistan. It considers whether Türkiye grants refugee status to Afghan women as members of a ‘particular social group’ or on other Refugee Convention grounds.<sup>1</sup> Through original research, including stakeholder interviews, it analyses the jurisprudence of Türkiye’s Administrative Courts (ACs) and Regional Administrative Courts (RACs) concerning international protection claims lodged by Afghan women between August 2021 and June 2023 to determine whether Türkiye follows a gender-sensitive interpretation of the Refugee Convention and respects the principle of *non-refoulement*.

Since the Taliban came to power in August 2021, the human rights situation for women in Afghanistan has deteriorated significantly. Despite the Taliban’s initial promise to uphold women’s rights, it has issued several regulations and instructions impacting women’s access to education, employment, health care, and social protection, as well as their freedom of

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1 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A(2).

movement and expression.<sup>2</sup> Taliban policies are now oppressing women in almost all aspects of their lives and completely erasing their presence from the public space. Resistance to these policies has been met with intimidation, persecution, and violence by the Taliban *de facto* authorities. Women participating in protests have been subjected to arbitrary detention, enforced disappearance, torture, and other cruel, inhuman or degrading treatment or punishment, in violation of international law.<sup>3</sup>

As a result of these rights violations, some European Union (EU) countries have granted refugee status to all female Afghan asylum claimants since December 2022, based exclusively on their gender.<sup>4</sup> The European Union Agency for Asylum (EUAA) published a country guidance document in January 2023, concluding that ‘for women and girls in Afghanistan, a well-founded fear of persecution would, in general, be substantiated’.<sup>5</sup> The United Nations High Commissioner for Refugees (UNHCR) similarly concluded that the accumulation of measures taken by the Taliban meets the threshold of persecution within the meaning of the Refugee Convention,<sup>6</sup> and as such, all Afghan women should be accepted as refugees, as a group, and should not be required to prove individual risk of serious harm.<sup>7</sup> A recent Amnesty International and International Commission of Jurists report also suggests that human rights violations against women in Afghanistan are of such a systemic nature, magnitude, and gravity that all women should be considered refugees on a *prima facie* basis.<sup>8</sup> Tan and İneli-Ciğer also argue that the use of *prima facie* recognition is an appropriate response for the protection of Afghan women, and EU law does incorporate this approach. However, Tan and İneli-Ciğer suggest that simplified, fast-track procedures ‘would allow EU Member States to maintain an individual procedure while implementing swift, simplified procedures to protect Afghan women and girls’.<sup>9</sup>

Despite certain good practices, the efforts of EU Member States and the international community have arguably been insufficient.<sup>10</sup> Even though UNHCR has provided detailed guidance on the meaning of ‘membership of a particular social group’,<sup>11</sup> many States are reluctant to

- 2 European Union Agency for Asylum (EUAA), ‘Country Guidance: Afghanistan’ (January 2023) 89–92 <<https://euaa.europa.eu/country-guidance-afghanistan-2023>> accessed 18 November 2023.
- 3 Amnesty International and International Commission of Jurists (ICJ), ‘The Taliban’s War on Women: The Crime against Humanity of Gender Persecution in Afghanistan’ (March 2023) <<https://www.amnesty.org/en/documents/asa11/6789/2023/en/>> accessed 18 November 2023.
- 4 European Parliament, ‘Refugee Status for All Female Afghan Asylum Seekers’ (2023) <[https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/747913/EPRS\\_ATA\(2023\)747913\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/747913/EPRS_ATA(2023)747913_EN.pdf)> accessed 23 May 2024; Denmark Refugee Appeals Board, ‘The Refugee Board Grants Asylum to Women and Girls from Afghanistan’ (30 January 2023) <<https://www.aa.com.tr/en/europe/denmark-to-grant-asylum-to-all-afghan-female-applicants/2802474>> accessed 18 November 2023; Finnish Immigration Service, ‘Refugee Status to Afghan Women and Girls’ (15 February 2023) <<https://migri.fi/en/-/refugee-status-to-afghan-women-and-girls>> accessed 18 November 2023.
- 5 EUAA (n 2).
- 6 UNHCR, ‘UNHCR Statement on the Concept of Persecution on Cumulative Grounds in Light of the Current Situation for Women and Girls in Afghanistan: Issued in the context of the Preliminary Ruling Reference to the Court of Justice of the European Union in the cases of AH and FN v Bundesamt für Fremdenwesen und Asyl (C-608/22 and C-609/22)’ (25 May 2023) paras 5, 6 <<https://www.refworld.org/docid/646f0e64.html>> accessed 18 November 2023.
- 7 UNHCR, ‘UNHCR Guidance Note on the International Protection Needs of People Fleeing Afghanistan’ (February 2022) <<https://www.refworld.org/docid/61d851cd4.html>> accessed 18 November 2023.
- 8 Amnesty International and ICJ (n 3).
- 9 Nikolas F Tan and Meltem İneli-Ciğer, ‘Group-Based Protection of Afghan Women and Girls under the 1951 Refugee Convention’ (2023) 72 *International & Comparative Law Quarterly* 793, 817.
- 10 European Council on Refugees and Exiles (ECRE), ‘Joint Statement: One Year after the Country’s Takeover by the Taliban: How Did Europe Welcome Afghans in Need of Protection?’ (9 September 2022) <<https://ecre.org/joint-statement-one-year-after-the-countrys-takeover-by-the-taliban-how-did-europe-welcome-afghans-in-need-of-protection/>> accessed 18 November 2023.
- 11 UNHCR, ‘Guidelines on International Protection No 2: “Membership of a Particular Social Group” within the context of Article 1 A(2) of the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees’ (7 May 2002) paras 10–13; Committee on the Elimination of Discrimination against Women (CEDAW), ‘General Recommendation No 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women’ (5 November 2014) para 15; UNHCR, ‘Guidelines on International Protection No 11: Prima Facie Recognition of Refugee Status’ (5 June 2015) para 1.

consider gender-based asylum claims on this ground.<sup>12</sup> Their reluctance is consistent with the concern that if gender-based persecution automatically leads to recognition of refugee status, then a significant wave of people seeking asylum on this basis will follow.<sup>13</sup>

Türkiye's approach towards Afghan women seeking asylum differs from that of EU countries due to its close proximity to Afghanistan and the increasing number of arrivals from Afghanistan. It is not surprising that the EU–Türkiye Statement<sup>14</sup> relating to refugees has created a differentiation in access to protection, based upon nationality, that is particularly difficult for Afghans.<sup>15</sup> According to the EU–Türkiye Statement, Türkiye provides temporary protection to all Syrians entering Turkish territory, and, in return, the EU provides financial support to Türkiye. While Syrians who arrive in Türkiye are automatically granted temporary protection status through a group-based approach without undergoing any formal refugee status determination, Afghan asylum seekers have experienced increasingly restricted access to formal registration, leaving them in legal limbo and subject to inconsistent shifts in policy.<sup>16</sup> Institutional and administrative obstacles in the refugee protection system have created systemic illegalization of Afghans in Türkiye and have resulted in many unregistered and undocumented migrants residing in satellite Turkish cities.<sup>17</sup> Considering their precarious situation, Afghan nationals appear to be at the bottom of the hierarchical framework of Türkiye's international protection system.<sup>18</sup>

## 2. METHODOLOGY

This study employed a qualitative research methodology. The research design was based on semi-structured interviews conducted with 13 stakeholders between May and June 2023,<sup>19</sup> including three judges from ACs and RACs; three directors of non-governmental organizations (NGOs), themselves from Afghanistan, whose organizations assist Afghan refugees in Türkiye;<sup>20</sup> three lawyers specializing in refugee law;<sup>21</sup> three migration experts (decision makers) working in Provincial Directorates of Migration Management (PDMMs),<sup>22</sup> and one academic who has conducted extensive research on the Afghan migration route to Türkiye.<sup>23</sup> Interview questions were formulated following an extensive literature review and were largely open-ended to enable stakeholders to describe their experiences in their own words. A pilot study with two stakeholders was conducted to ensure the clarity of the questions. Interviews

12 United Nations (UN) Women, *Report on the Legal Rights of Women and Girl Asylum Seekers in the European Union* (United Nations 2017) 15–19 <<https://eca.unwomen.org/en/digital-library/publications/2017/03/report-on-the-legal-rights-of-women-and-girl-asylum-seekers-in-the-european-union>> accessed 30 April 2024.

13 Andrea Binder, 'Gender and the Membership in a Particular Social Group Category of the 1951 Refugee Convention' (2000) 10 *Columbia Journal of Gender and Law* 167, 191; Case C-621/21 *WS v Intervjuirashit organ na Darzhavna agentsia za bezhantsite pri Ministerskia savet* EU:C:2023:314, Opinion of Advocate General Richard de la Tour, para 72.

14 European Council, Press Release, 'EU–Turkey Statement' (18 March 2016) <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>> accessed 18 November 2023.

15 Shaddin Almasri, 'Why Is Syria a War but Not Afghanistan? Nationality-Based Aid and Protection in Turkey's Syrian Refugee Response' (2023) 42 *Refugee Survey Quarterly* 29.

16 *ibid* 30; Ayşen Üstübilici, 'The Impact of Externalized Migration Governance on Türkiye: Technocratic Migration Governance and the Production of Differentiated Legal Status' (2019) 7 *Comparative Migration Studies* 1.

17 Sibel Karadağ, *Ghosts of Istanbul: Afghans at the Margins of Precarity* (Association for Migration Research, 2021) 41–45; Hülya Kaya, *The EU–Turkey Statement on Refugees: Assessing Its Impact on Fundamental Rights* (Edward Elgar Publishing 2020) 159.

18 Üstübilici (n 16) 1.

19 The research was approved by the Ethics Committee of Gedik University, İstanbul, Türkiye. Interviewees provided written consent to be cited either by name or affiliation.

20 Online interviews with: Zakira Hekmat, Director, Afghan Refugee Solidarity Association (Türkiye, May 2023); Gul Muhammad Salahi, Director, Afghanistan Hazaras Culture and Solidarity Association (Türkiye, May 2023); Farzana Rahimi, Director, Erguvan Association for the Integration of Migrants (Türkiye, May 2023).

21 Interviews with: Taner Kılıç, refugee lawyer (İstanbul, Türkiye, June 2023); Abdullhalim Yılmaz, refugee lawyer (İstanbul, Türkiye, June 2023); Uğur Yıldırım, refugee lawyer (İstanbul, Türkiye, June 2023).

22 Migration experts are government employees working in PDMMs and are responsible for examining international protection claims. They decide whether or not applicants are eligible for the grant of international protection.

23 Online interview with Professor Dr Orhan Deniz, Social Sciences and Humanities, Geography, and Human Geography, Van Yüzüncü Yıl University, Türkiye (Türkiye, June 2023).

were conducted in Turkish and then translated into English. All interviews were recorded with the consent of the interviewees, transcribed verbatim, and the content analysed to create thematic categorizations.

The study also examined rulings by ACs and RACs on Afghan women's international protection applications. Türkiye has 56 ACs and nine RACs. ACs have played an important role in developing jurisprudence on refugee law at first instance, as well as in appeal courts, since the adoption of Law No 6458 on Foreigners and International Protection (LFIP),<sup>24</sup> which came into force on 11 April 2014. An asylum seeker can appeal against a decision of the Presidency of Migration Management (PMM) or governorates in the ACs, claiming that they fear imprisonment, torture, or death if forced to return to their country of origin. In this situation, ACs may approve or annul decisions of the PMM or governorates. An asylum seeker may apply to an RAC to appeal a decision by an AC. The decision of the RAC is final.

AC and RAC judgments are not publicly available so were requested by email from administrative judges, all of whom responded positively. One hundred and fifty-nine judgments relating to Afghan women's international protection claims between August 2021 and June 2023 were received. These were then analysed and categorized based on the appellants' requests, with names and personal details of the appellants anonymized.

A systematic inductive procedure<sup>25</sup> and a modified grounded theory method<sup>26</sup> were used in the study to identify a set of common themes from the interview narratives and the court rulings. The data were collected, refined, and categorized. Each transcript was analysed using line-by-line coding and the codes were grouped into themes.

### 3. AFGHAN WOMEN ASYLUM SEEKERS UNDER TURKISH ASYLUM LAW

Türkiye has always been a country of immigration, emigration, and transit due to its strategic geopolitical position. It hosts the world's largest refugee community, with 3.4 million Syrians under temporary protection and close to 370,000 refugees and asylum seekers of other nationalities, according to statistics from June 2023.<sup>27</sup> Turkish asylum law recognizes two distinct categories of protection: first, international protection status, which is available upon an individual assessment of asylum claims, and secondly, temporary protection status, which can be provided to a group in mass-arrival situations. The first category of protection provides three different statuses for international protection seekers, namely 'refugee', 'conditional refugee', and 'subsidiary protection'. A 'refugee' is defined in article 61 of the LFIP in conformity with article 1A(2) of the Refugee Convention,<sup>28</sup> but only applies to refugees coming from Europe.<sup>29</sup> 'Conditional refugee' status is defined in article 62 of the LFIP and it is only given to non-European refugees. Their residency continues until they are resettled in a safe third country. 'Subsidiary protection' is defined in article 63 of the LFIP and extends international protection to people who do not meet the 'refugee' or 'conditional refugee' definitions, and who are unable to return to their country of origin because they face a risk of the death penalty, torture, inhuman or degrading treatment or punishment, or a serious threat due to violence in international or nationwide armed conflicts.<sup>30</sup>

24 LFIP, Official Gazette 28615, 11 May 2013.

25 Dennis A Gioia, Kevin G Corley, and Aimee L Hamilton, 'Seeking Qualitative Rigor in Inductive Research: Notes on the Gioia Methodology' (2012) 16 *Organizational Research Methods* 15.

26 Anselm Strauss and Juliet Corbin, *Basics of Qualitative Research* (SAGE Publications 1990).

27 UNHCR, 'Operational Update' (June 2023) <[https://www.unhcr.org/tr/wp-content/uploads/sites/14/2023/07/UNHCR-Turkiye-Operational-Update-June-23F\\_TR.pdf](https://www.unhcr.org/tr/wp-content/uploads/sites/14/2023/07/UNHCR-Turkiye-Operational-Update-June-23F_TR.pdf)> accessed 18 November 2023.

28 Refugee Convention (n 1).

29 Türkiye is one of a handful of States that maintains this restriction.

30 Kaya (n 17) 111.

Temporary protection status is only available to individuals forced to leave their country of origin en masse.<sup>31</sup> Syrians are subject to a group-based, *prima facie*-type temporary protection regime in Türkiye. Article 11 of the Temporary Protection Regulation<sup>32</sup> denies beneficiaries of temporary protection access to refugee status after their temporary status ends. Syrian refugees have been beneficiaries of temporary protection for eight years, but they do not know what will happen if their status ceases.<sup>33</sup> Türkiye grants a lesser set of rights to conditional refugees and beneficiaries of temporary protection than the rights that refugees receive. Conditional refugees and temporary protection status holders are required to reside in a particular province and report to the authorities weekly due to public security and public order concerns, while refugees are not required to reside in a defined area.<sup>34</sup> Furthermore, with respect to access to the labour market, conditional refugees and temporary protection holders may apply for a work permit six months after their registration of an international protection claim, while refugees can access the labour market without waiting six months.<sup>35</sup>

The situation of Afghan refugees in Türkiye has been extremely difficult since 2021. Türkiye restricts irregular entry from Afghanistan through a large military presence located at the Iranian border and by building walls (with the support of the EU).<sup>36</sup> The Turkish media refer to ‘millions’ of Afghans waiting to cross the border into Türkiye,<sup>37</sup> but, according to stakeholders working on the ground,<sup>38</sup> the numbers are not as significant as reported. Türkiye has begun imposing restrictions on entry at its borders, and once people cross the border, they are prevented from participating in status determination processes for years, leaving them in a legal limbo.<sup>39</sup>

Afghan women asylum seekers arriving in Türkiye via such perilous routes are rarely treated well. Even though article 3(1) of the LFIP includes a ‘single mother’, a ‘pregnant woman’, or ‘a person who has been subjected to torture, rape or other serious psychological, physical or sexual violence’, in its definition of a vulnerable person, and defines special treatment for them, Afghan women find it exceedingly difficult to access PDMM offices. Interviews with stakeholders in the study identified two main types of difficulties that Afghan women asylum seekers experience in Türkiye: first, poor-quality administrative decision-making procedures, and secondly, a lack of uniform application of judicial review of international protection claims and deportation orders.

### 3.1 Poor-quality administrative decision-making procedures

Interviews with stakeholders identified four critical gaps that reduce the quality of decision making at the administrative level: difficulties in accessing refugee status determination (RSD); the absence of a gender-sensitive approach; the lack of uniform application of country of origin information and credibility assessments; and the high burden of proof placed on women.

31 Official Gazette 29153, 22 October 2014.

32 Temporary Protection Regulation (22 October 2014).

33 Kaya (n 17) 163; Meltem Ineli-Ciğer, ‘How Well Protected Are Syrians in Turkey?’ (*Open Democracy*, 17 January 2017) <<https://www.opendemocracy.net/en/mediterranean-journeys-in-hope/how-well-protected-are-syrians-in-turkey/>> accessed 18 November 2023.

34 Kaya (n 17) 161–62.

35 LFIP (n 24) art 89(4)(a–b).

36 Human Rights Watch, ‘No One Asked Me Why I Left Afghanistan: Pushbacks and Deportations of Afghans from Turkey’ (18 November 2022) <<https://www.hrw.org/report/2022/11/18/no-one-asked-me-why-i-left-afghanistan/pushbacks-and-deportations-afghans-turkey>> accessed 23 May 2024.

37 ‘Afghan Refugees Are Reaching Turkey in Greater Numbers’ (*The Economist*, 29 July 2021) <<https://www.economist.com/europe/2021/07/29/afghan-refugees-are-reaching-turkey-in-greater-numbers#>> accessed 30 April 2024.

38 Farzana Rahimi (n 20); Orhan Deniz (n 23); Zakira Hekmat (n 20).

39 Stiftung Pro ASYL, ‘Expert Opinion: The Situation of Afghan Refugees in Turkey’ (March 2021) 18 <<https://www.proasyl.de/en/material/expert-opinion-the-situation-of-afghan-refugees-in-turkey/>> accessed 18 November 2023; Asylum Information Database (AIDA), ‘Country Report: Differential Treatment of Specific Nationalities in the Procedure: Türkiye’ (14 July 2023) <<https://asylumineurope.org/reports/country/turkiye/asylum-procedure/differential-treatment-specific-nationalities-procedure/>> accessed 18 November 2023.

Following the Taliban takeover of Afghanistan, Türkiye did not change its RSD procedures to favour Afghan women. Even though UNHCR contends that Afghan women have strong *prima facie* refugee claims and, as Tan and İneli-Ciğer suggest,<sup>40</sup> States are free to examine the asylum applications of Afghan women through simplified or accelerated procedures, Türkiye does not have such procedures in place. Given the objective situation of Afghan women, Türkiye should provide Afghan women seeking asylum with either conditional refugee status on an individual basis or temporary protection status as a group. Türkiye has granted conditional refugee status to very few Afghan women, and there is not a single case in which PDMMs have assessed the protection claims of Afghan women on the basis of their membership of a ‘particular social group’. There is no gender-specific approach towards Afghan women and their refugee protection claims. Their international protection claims are evaluated on an individualized basis and the burden of proof remains on Afghan women.<sup>41</sup>

A Human Rights Watch report notes that Afghan women have been turned away from PDMM offices without having their protection claims considered. ‘[S]uch de facto barriers to registration’ hinder their access to all other essential services and put them in an irregular situation if apprehended.<sup>42</sup> As NGO interviewees in the present study pointed out, Afghan women who come to Türkiye irregularly are directed to satellite cities but face a wait of five to 10 years after their pre-registration for an interview.<sup>43</sup> Another interviewee, a migration expert from the Directorate of a PDMM,<sup>44</sup> verified this:

Afghan women asylum seekers have to wait years for an interview. Türkiye occupies [a] very strategic position in the region. If we interpret the 1951 Convention from a human rights perspective, we should grant refugee status to all those fleeing neighbouring nations that are struggling to establish democracy. We cannot handle this rising migration and refugee flows in this manner.<sup>45</sup>

This explanation points to migration management authorities’ fear that easy access to an RSD process would create a so-called ‘pull factor’ for asylum seekers.

Türkiye has no gender-specific approach in its response to women asylum seekers. The refugee lawyers interviewed noted that the PMM has not prepared any guidance on gender-based persecution, or on how to process the protection requirements of women asylum applicants.<sup>46</sup> They observed that many Afghan women do not understand how to apply for asylum in Türkiye or what documents they should show to the authorities. They are not aware of their rights or how to express themselves effectively in interviews. While they generally mention Afghanistan’s economic situation, they do not mention the gender-based persecution that they have experienced in Afghanistan.<sup>47</sup>

Migration experts often reject international protection applications without carrying out any effective research regarding the specific situation of the applicant or examining country of origin information.<sup>48</sup> This is despite UNHCR emphasizing the importance of a detailed assessment, noting, in particular, that ‘Afghans fleeing the country may refer in the first instance to their

40 Tan and İneli-Ciğer (n 9) 815–16.

41 Cavidan Soykan, Kristen Biehl, and Ceci Hazan, *Women Refugees and Gender Equality: Mapping and Monitoring Study – Extended Summary* (Association for Monitoring Gender Equality 2021) 36–37.

42 Human Rights Watch (n 36) 62–65.

43 Zakira Hekmat (n 20); Gul Muhammad Salahi (n 20); Farzana Rahimi (n 20).

44 Interview with migration expert A (PDMM) (Türkiye, June 2023).

45 *ibid.*

46 Abdulhalim Yılmaz (n 21); Uğur Yıldırım (n 21); interview with migration expert B (public defender) (Türkiye, June 2023).

47 *ibid.*

48 Stiftung Pro ASYL (n 39).

immediate needs for survival as the reason for their flight. This should not preclude a thorough assessment of the international protection needs of Afghan applicants for asylum.<sup>49</sup> As a refugee lawyer explained:

Migration experts are very young, unfamiliar with country of origin information and have far from sufficient experience in gender-based persecution. The person's story is not fully explored. When the person states that he or she comes for social and economic reasons, it is not investigated whether he or she has been subjected to any inhuman treatment or gender-based persecution. For example, once, a client said that if she was returned to her country, the Taliban would make life difficult for her, but the interviewer did not ask what it mean[t] and did not investigate the matter further.<sup>50</sup>

An NGO interviewee similarly stated that:

Afghan women's stories were not listened to in a friendly atmosphere. I know that many women were rejected because their stories were not fully listened to. Migration experts ask the same questions to everyone but every person's case is unique.<sup>51</sup>

In addition, when an Afghan woman arrives with her family, she may not be recognized as an individual, and may thus be excluded from interview processes.<sup>52</sup> UNHCR's Guidelines on Gender-Related Persecution advise that women asylum seekers should be interviewed separately, without male family members present, to ensure that they have sufficient opportunity to present their case.<sup>53</sup> The Committee on the Elimination of Discrimination against Women (CEDAW) has stated that women have the right to a female interviewer on request,<sup>54</sup> but Turkish PDMMs are unable to provide women interviewers and translators to allow refugee women to better express themselves. This has a significant effect on the quality of interviews.

Another important problem relates to credibility assessments and the high burden of proof that rests entirely on women.<sup>55</sup> Women from Afghanistan are subject to individual assessment, despite the fact that all women in Afghanistan experience repression under the Taliban takeover. Interviewees repeatedly lamented that it is extremely difficult for Afghan women to present direct evidence of persecution or threats by Taliban forces. As noted above, migration experts generally find that Afghan women's claims are not credible without making a detailed examination. For example, although women may state that they are Christian, or homosexual, or are being forced into marriage, their requests are rejected as not being credible. An Afghan woman applicant would have a better chance of gaining asylum if she were able to furnish evidence that her well-founded fear of persecution was based on her membership of the 'particular social group' of women who disagree with the Taliban, who have broken the rules of the Taliban, or who have been punished for breaking these rules.<sup>56</sup> An NGO interviewee explained that:

Migration experts do not make objective assessments. The country of origin report on Afghanistan could support the claims of women but the updated country of origin report is

49 UNHCR, 'Guidance Note' (n 7).

50 Taner Kılıç (n 21).

51 Zakira Hekmat (n 20).

52 *ibid.*

53 UNHCR, 'Guidelines on International Protection No 1: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees' (17 May 2002) para 36.

54 CEDAW (n 11) para 50(b).

55 Christel Querton, 'One Step Forward, Two Steps Back? Interpreting "Particular Social Group" in the European Union' (2022) 71 *International & Comparative Law Quarterly* 425, 430.

56 Gul Muhammad Salahi (n 20); Farzana Rahimi (n 20); Zakira Hekmat (n 20).

not read by migration experts very well. If their psychology is not good that day, if they have a problem with their spouse or child and if ten people apply for international protection, their applications are rejected before their situation is fully evaluated. Unfortunately, I have witnessed such events many times. The people who carry out immigration interviews are not aware of how deeply their decisions will affect people's lives.<sup>57</sup>

The lawyers and NGO leaders interviewed noted that administrative judges, similarly, have little experience of, or training in, international refugee law.<sup>58</sup> They generally rely on the reports of the migration experts and approve their decisions without considering country of origin information or requesting additional information from the migration experts. Furthermore, judges' attitudes vary from court to court. Some judges are more flexible, while others adhere strictly to deadlines and procedures. For example, while the İstanbul 1st RAC is flexible on annulment cases and accepts applications, even if an applicant misses a deadline, the İstanbul 16th RAC is more strict in its approach and rejects many cases due to deficiencies in procedural rules.<sup>59</sup> Judges may also be affected by negative perceptions relating to refugees and irregular migrants. For instance, one interviewee, an administrative judge, was critical of the increasing number of foreigners in the country and the effect on judges' caseloads: 'We have to stop this increasing number of foreigners coming to our country. When we established this court, we had very little caseload, but now we have had to establish ... more courts to deal with increasing cases ... It is not sustainable.'<sup>60</sup>

Afghans coming to Türkiye have not previously faced such hostile treatment. Increasingly, far-right sentiments in Türkiye have fuelled hostility, and during the presidential election in 2023, Opposition parties harshly criticized the government's immigration policy. Recep Tayyip Erdoğan, President of Türkiye, had to take into account growing public hostility towards migrants and declared that Türkiye would progressively limit the number of refugees and encourage people to return voluntarily to their countries of origin.<sup>61</sup> While most countries stopped returning applicants to Afghanistan after the Taliban took over, Iran and Türkiye have continued to return Afghans to their country of origin,<sup>62</sup> with Türkiye's deportations of Afghans dramatically increasing between 2021 and 2022.<sup>63</sup> As a refugee lawyer observed, these unlawful deportations were carried out using pro forma voluntary return documents:

Afghans in the removal centre were deported to Afghanistan by plane without being given any opportunity to make an asylum claim or challenge their deportation. This happened for the first time in history. It is a very worrying scenario that Türkiye deported Afghans to their countries by chartered planes when they needed Türkiye's protection more than ever. This is a

57 Gul Muhammad Salahi (n 20).

58 Taner Kılıç (n 21); Abdulhalim Yılmaz (n 21); interview with migration expert C (public defender) (Türkiye, June 2023); Gul Muhammad Salahi (n 20).

59 Gul Muhammad Salahi (n 20); Farzana Rahimi (n 20); Zakira Hekmat (n 20); Abdulhalim Yılmaz (n 21).

60 Interview with administrative judge A (Türkiye, June 2023).

61 Diyar Guldogan, 'Türkiye Creating Infrastructure for Voluntary Return of Syrian Refugees: President Erdoğan' (*Anadolu News Agency*, 25 May 2023) <<https://www.usmuslims.com/turkiye-creating-infrastructure-for-voluntary-return-of-syrian-refugees-president-er-209280h.htm>> accessed 13 May 2024; Kerem Morgül, 'Sending "Our Brothers" Back "Home": Continuity and Change in President Erdoğan's Discourse on Syrian Refugees' (2023) 69 *New Perspectives on Turkey* 30, 47.

62 UNHCR, 'Afghanistan Situation: Regional Refugee Response Plan 2021 Final Report' (31 March 2022) 6; EUAA, *Iran: Situation of Afghan Refugees* (November 2022) 53–54 <<https://euaa.europa.eu/publications/iran-situation-afghan-refugees>> accessed 20 April 2024; Human Rights Watch (n 36).

63 Amnesty International, 'They Don't Treat Us Like Humans': *Unlawful Returns of Afghans from Turkey and Iran* (2022) 31 <<https://reliefweb.int/report/afghanistan/they-dont-treat-us-humans-unlawful-returns-afghans-turkey-and-iran-enftr>> accessed 18 November 2023.

very tragic situation. Even those who filed a lawsuit against the deportation process were sent back to their countries in this context.<sup>64</sup>

#### 4. LACK OF UNIFORM APPLICATION OF JUDICIAL REVIEW OF INTERNATIONAL PROTECTION CLAIMS AND DEPORTATION DECISIONS

This part analyses selected judgments of the ACs and RACs between August 2021 and June 2023 to determine whether ACs conduct a gender-sensitive interpretation of the Refugee Convention and assess the specific situation of Afghan women as members of a ‘particular social group’ or on other Convention grounds.

##### 4.1 Cases rejected by PDMMs

The first series of cases relates to Afghan women whose asylum applications were rejected by PDMMs, without taking into account their special situation in Afghanistan. In one case, an Afghan woman applied for international protection on the basis that she was threatened and kidnapped by the Taliban due to her work as a translator and nurse at an international aid organization and for being an activist for women’s rights and a member of the Shiite sect. The Ağrı PDMM rejected her international protection claim, stating that it was not credible. The Erzurum 1st AC annulled the PDMM decision on the basis that insufficient research into and examination of her claims had been undertaken.<sup>65</sup> The court underlined that the administrative authority did not consider the country of origin report prepared by international organizations and documents submitted by the applicant. The Ağrı PDMM challenged the annulment of its decision before the Erzurum RAC, but the court dismissed the claim and approved the decision of the first instance court.<sup>66</sup>

There were 14 similar cases,<sup>67</sup> in which the international protection claims of Afghan women were rejected on the basis that PDMMs did not conduct an effective and sufficient examination as to the applicants’ risk of persecution or other ill-treatment upon their return to Afghanistan. In these cases, both the ACs and the RACs approached the international protection claims of Afghan women from a human rights perspective and annulled the negative decisions of the migration management authorities. That there was complete consistency between the ACs and the RACs is a promising sign.

##### 4.2 Cases rejected by PDMMs and ACs

The second category of cases relates to Afghan women whose asylum applications were rejected by PDMMs and then upheld by ACs, without consideration of the most recent country of origin information or evaluation of the specific situations of Afghan women. The RACs annulled the AC decisions due to the risk of persecution of Afghan women and inadequate examination by the ACs. These cases provide valuable information as to whether Turkish ACs and RACs are consistent in their judgments and the principle of legal certainty.

64 Taner Kılıç (n 21).

65 Erzurum 1stAC, R:2021/1820, J:2022/758.

66 Erzurum RAC 5thALD, R:2022/2178, J:2022/521.

67 Ankara RAC 10thALD, R:2022/4439, J:2022/5897; Ankara RAC 10thALD R:2022/4438, J:2022/5825; Ankara RAC 10thALD, R:2022/4157, J:2022/4967; Ankara RAC 10thALD, R:2022/3683, J:2022/4956; Ankara RAC 10thALD, R:2022/4157, J:2022/4967; Ankara RAC 10thALD, R:2022/4411, J:2022/6070; Ankara RAC 10thALD, R:2022/3683, J:2022/4956; Ankara RAC 10thALD, R:2022/2164, J:2022/4360; Ankara RAC 10thALD, R:2022/4071, J:2022/4990; Ankara RAC 10thALD, R:2022/4071, J:2022/4990; Ankara RAC 10thALD, R:2022/3720, J:2022/4994; Ankara RAC 10thALD, R:2022/2161, J:2022/4361; Ankara RAC 10thALD, R:2022/2211, J:2022/2145.

In one case, an Afghan woman applied to the Yalova PDMM for international protection, claiming that her husband had died while working as a police officer in Afghanistan. She had lost all her family in the conflict and found herself alone in her country. She stated in her interview that it was very difficult to live alone as a woman in Afghanistan since the Taliban takeover. In its assessment, the Yalova PDMM found her claim unconvincing and rejected it on the basis that she did not have a well-founded fear of persecution in her country.

The applicant challenged the negative decision before the Bursa 1st AC, which dismissed her claim.<sup>68</sup> The court stated that, while the applicant may have experienced difficult living conditions in Afghanistan without her family, that was not sufficient to qualify for refugee status under the Refugee Convention. The applicant challenged the negative decision before the RAC.<sup>69</sup> The RAC considered the most recent reports of international organizations and incident reports from the United Nations Assistance Mission in Afghanistan. These reports showed that the Taliban not only kills pro-government militants and women who worked for the previous government, but also harms women who do not follow the Taliban's moral code. The court stated that the migration expert's assessment report was not sufficient because it did not take into account the serious threat posed by the Taliban to women; nor did it evaluate the issues raised by the applicant. The court held that the security situation in Afghanistan had deteriorated for women and that poor living conditions would expose the applicant to inhuman and degrading treatment upon return.<sup>70</sup> It therefore annulled the decision of the AC.

In another case, an Afghan woman claimed that the Taliban took her house, killed her father, and wanted to marry her daughter. The family fled to Türkiye, fearing that if the daughter was not given to the Taliban, they would not be safe in their country. The woman's asylum request was denied by the Adıyaman PDMM for her failure to prove that she and her family would face a real risk of persecution or other ill-treatment by the Taliban. She challenged the negative decision before the Adıyaman AC, but it rejected her request, upholding the PDMM decision.<sup>71</sup> The Gaziantep RAC referred to the most recent country of origin information and security situation in Afghanistan and annulled the ruling of the AC.<sup>72</sup> It ruled that the PDMM report did not reflect the real situation of the applicant. There was no evidence that the family had only come to Türkiye for economic reasons.

A third similar case concerned an Afghan woman who was subjected to forced marriage after her husband's death and fled to Türkiye. She converted to Christianity during her stay in Türkiye. She applied for asylum in Türkiye with her children, claiming that the Taliban discriminate against women and children in all aspects of their lives and there would be a serious risk of ill-treatment if she were to return to Afghanistan. Even though she applied for asylum in Türkiye immediately after entering the country, it took two years before the PDMM called her for interview, and then processed her application in an accelerated procedure, without giving any reason for doing so. The PDMM rejected her asylum request on the basis that she should have sought to relocate internally in Afghanistan, and held that there was no well-founded fear of persecution. The applicant requested annulment of the decision from the Bursa 1st AC, claiming that Afghanistan under the Taliban is not a safe place for women and children. The AC rejected her request and approved the PDMM's decision, without inquiring why it had been subject to an accelerated procedure.<sup>73</sup> The Bursa RAC subsequently annulled the AC decision, ruling that the PDMM had violated the principle of legal certainty because it had assessed the applicant's

68 Bursa 1stAC, R:2020/969, J:2021/207.

69 Bursa RAC 3rdALD, R:2021/235, J:2021/540.

70 *ibid.*

71 Adıyaman AC, R:2020/100, J:2020/665.

72 Gaziantep RAC 3rdALD, R:2020/5299, J:2021/3516.

73 Bursa 1stAC, R:2021/164, J:2021/846.

asylum application using an accelerated procedure two years after it had been lodged, and had rejected her claim without considering the current situation in Afghanistan.<sup>74</sup>

There were eight similar cases revealing inconsistencies between AC and RAC judgments. In these cases, the ACs had rejected the annulment requests of the applicants without considering recent country of origin information or conducting a detailed examination of the claims. The RACs annulled these decisions due to the increasing risk of ill-treatment of women in Afghanistan and the deficient examinations by the PDMMs.<sup>75</sup> The RACs also drew attention to the quality of the interviews conducted by PDMMs: the PDMMs claimed that the applicants had come to Türkiye purely for economic reasons, yet there was no evidence to substantiate this.

These sample cases reveal significant inconsistencies in the practice of administrative judges. This undermines faith in the fairness of legal processes and can lead to erroneous decision making, with the grave consequence that asylum seekers may be forcibly returned, in violation of the principle of *non-refoulement*.

### 4.3 Cases rejected by PDMMs, ACs, and RACs

Recalling that the Taliban takeover of Afghanistan took place in August 2021, 159 AC and RAC cases<sup>76</sup> lodged by Afghan women between August 2021 and June 2023 were analysed. In these cases, the courts annulled only a few negative decisions of the PDMMs on the basis that the applicant did have a well-founded fear of persecution, or that the PDMM had not carried out sufficient research.<sup>77</sup> In the many other cases, the courts approved the negative decisions of the PDMMs based on grounds including the applicants' 'failure to prove persecution';<sup>78</sup> 'no application to the official authorities regarding alleged threats by non-State actors';<sup>79</sup> 'failure to present any concrete information and documents to prove their claims';<sup>80</sup> 'inadmissible application';<sup>81</sup>

74 Bursa RAC 3rdALD, R:2021/1126, J:2021/588.

75 Bursa RAC 3rdALD, R:2021/133, J:2021/597; Bursa RAC 3rdALD, R:2021/134, J:2021/596; Bursa RAC 3rdALD, R:2021/142, J:2021/245; Bursa RAC 3rdALD, R:2021/1126, J:2021/588; Gaziantep RAC 4thALD, R:2021/1959, J:2021/3663; Gaziantep RAC 4thALD, R:2021/882, J:2021/2868; Gaziantep RAC 4thALD, R:2021/611, J:2021/2133; Gaziantep RAC 4thALD, R:2021/1959, J:2021/3663.

76 Ankara RAC 10thALD, R:2022/6333, J:2022/5726; Ankara RAC 10thALD, R:2022/6266, J:2022/6406; Ankara RAC 10thALD, R:2022/4343, J:2022/3762; RAC 10thALD, R:2022/4343, J:2022/3762; RAC 10thALD, R:2022/6191, J:2022/5494; RAC 10thALD, R:2022/6240, J:2022/5431; RAC 10thALD, R:2022/6266, J:2022/6406; RAC 10thALD, R:2022/6270, J:2022/6398.

77 Of the cases analysed in this study, in 2021, ACs or RACs annulled the decisions of PDMMs in only eight of 98 cases, owing to an increased risk of persecution of Afghan women in their country of origin and insufficient examination by the PDMMs. In 2022, there were 17 annulments out of 37 cases. In 2023, there were no annulment decisions in 14 cases. This means that the PDMMs rejected applications for international protection by Afghan women in these 14 cases and these negative decisions were approved by both ACs and RACs. See annulment decisions of ACs and RACs: Bursa IstAC, R:2020/969, J:2021/207; Bursa RAC 3rdALD, R:2021/133 J:2021/597; Bursa RAC 3rdALD, R:2021/134 J:2021/596; Bursa RAC 3rdALD, R:2021/142 J:2021/245; Bursa RAC 3rdALD, R:2021/1126 J:2021/588; Gaziantep RAC 4thALD, R:2021/1959 J:2021/3663; Gaziantep RAC 4thALD, R:2021/882 J:2021/2868; Gaziantep RAC 4thALD, R:2021/611 J:2021/2133; Gaziantep RAC 4thALD, R:2021/1959 J:2021/3663; Erzurum RAC 5thALD, R:2022/2178, J:2022/521; Gaziantep RAC 3rdALD, R:2020/5299 J:2021/3516.

78 See eg Bursa RAC 3rdALD, R:2021/1126, J:2021/588; İstanbul RAC 10th ALD, R:2021/311, J:2021/1475; Ankara RAC 10thALD, R:2020/2402, J:2021/132; Bursa RAC 3rdALD, R:2021/164, J:2021/104; İzmir RAC 6thALD, R:2021/165, J:2021/142; Bursa RAC 3rdALD, R:2021/293, J:2021/411; İzmir RAC 6thALD, R:2021/938, J:2021/885.

79 İzmir RAC 6thALD, R:2021/1909, J:2021/1949; İstanbul RAC 9thALD, R:2020/1569, J:2021/110; Samsun RAC 3rdALD, R:2021/749, J:2021/708.

80 Erzurum RAC 5thALD, R:2022/1247, J:2023/66; Erzurum RAC 5thALD, R:2022/2740, J:2023/33; Ankara RAC 10thALD, R:2022/6406, J:2023/446; Ankara RAC 10thALD, R:2022/6635, J:2023/641; Ankara RAC 10thALD, R:2022/6685, J:2023/443; Ankara RAC 10thALD, R:2023/26, J:2023/1337; Ankara RAC 10thALD, R:2023/457, J:2023/672; Ankara RAC 10thALD, R:2023/1207, J:2023/198; Bursa RAC 3rdALD, R:2021/124, J:2021/129; Samsun RAC 3rdALD, R:2021/870, J:2021/857; İzmir RAC 6thALD, R:2023/11, J:2023/303.

81 Erzurum RAC 5thALD, R:2022/2463, J:2022/569; Konya RAC 5thALD, R:2021/1415, J:2021/1352; Samsun RAC 3rdALD, R:2021/1176, J:2021/1064; İstanbul RAC 9thALD, R:2021/787, J:2021/809; İstanbul RAC 9thALD, R:2021/1575, J:2021/1459; İstanbul RAC 9thALD, R:2021/698, J:2021/789.

‘internal flight alternatives within the country’;<sup>82</sup> and ‘coming to Türkiye for economic reasons’.<sup>83</sup>

These cases show that decision making at both the administrative and judicial levels lacks a human rights-based approach and there is an absence of consistency in AC decision making. The quality of interviews in PDMMs remains poor. As the study’s interviewees reported, RSD interviews are conducted in unsuitable conditions, applicants’ vulnerabilities are frequently overlooked, and PDMMs do not always assess the evidence that women present, or examine the most recent country of origin information.<sup>84</sup> There seems to be a general tendency among migration experts to find ways to reject Afghan women’s asylum applications.<sup>85</sup> There are similar concerns about the approaches taken by ACs.<sup>86</sup> Overall, in the majority of cases, PDMMs and ACs ignore women’s claims. Arguably, migration experts’ lack of training negatively affects the fairness of their decisions. It is therefore not surprising to see human rights infringements at both administrative and judicial levels.

#### 4.4 Individual applications to the Turkish Constitutional Court on deportations

Despite the risk of gender-based persecution of Afghan women, many Afghan women asylum seekers have been subject to deportation orders after the rejection of their asylum claims by PDMMs (with these rejection decisions upheld by RACs) in Türkiye. This section analyses two pilot judgments of the Turkish Constitutional Court (TCC) related to deportation orders involving Afghan women asylum seekers.<sup>87</sup> According to article 53(3) of the LFIP, when a person is subject to a deportation order, they may apply to an AC within seven days of the date of notification. The AC must then make a decision on this appeal within 15 days and that decision is final. Foreigners may apply to the TCC with requests for interim measures against deportation. The TCC may grant interim measures to prevent the applicant’s deportation if there is an imminent risk of irreparable harm. The TCC may also remit a case to the relevant court; in cases where there is no legal benefit in a retrial, compensation may be awarded in favour of the applicant or a lawsuit may be filed in the general courts.<sup>88</sup>

- 82 Ankara RAC 10thALD, R:2021/81, J:2021/118; Samsun RAC 3rdALD, R:2021/1009, J:2021/866; Ankara RAC 10thALD, R:2021/64, J:2021/372; İstanbul RAC 9thALD, R:2021/102, J:2021/260; Ankara RAC 10thALD, R:2021/150, J:2021/65; Ankara RAC 10thALD, R:2021/1702, J:2021/2185; Ankara RAC 10thALD, R:2021/2732, J:2021/2435; Ankara RAC 10thALD, R:2021/2752, J:2021/2372; Ankara RAC 10thALD, R:2021/3763, J:2021/3992; Ankara RAC 10thALD, R:2021/4295, J:2021/4338; Ankara RAC 10thALD, R:2021/767, J:2021/660; İstanbul RAC 9thALD, R:2021/284, J:2021/636; İzmir RAC 6thALD, R:2021/936, J:2021/884; İzmir RAC 6thALD, R:2021/930, J:2021/1127; İzmir RAC 6thALD, R:2021/928, J:2021/1128.
- 83 İzmir RAC 6thALD, R:2022/2154, J:2022/2048; İzmir RAC 6thALD, R:2022/2287, J:2023/50; Samsun RAC 3rdALD, R:2021/895, J:2021/856; Samsun RAC 3rdALD, R:2021/73, J:2021/51; Bursa RAC 3rdALD, R:2021/75, J:2021/13; İzmir RAC 6thALD, R:2021/1955, J:2021/1961; Gaziantep RAC 4th ALD, R:2020/4940, J:2021/3160; Ankara RAC 10thALD, R:2021/1748, J:2021/2438.
- 84 Gul Muhammad Salahi (n 20); Farzana Rahimi (n 20); Zakira Hekmat (n 20); Abdulhalim Yılmaz (n 21); Uğur Yıldırım (n 21); Taner Kılıç (n 21).
- 85 AIDA, ‘Country Report: Türkiye’ (2021 Update) (31 December 2021) 43–48 <[https://asylumineurope.org/wp-content/uploads/2022/07/AIDA-TR\\_2021update.pdf](https://asylumineurope.org/wp-content/uploads/2022/07/AIDA-TR_2021update.pdf)> accessed 3 May 2024. See also AIDA, ‘Country Report: Turkey’ (2020 Update) (31 December 2020) 45 <[https://asylumineurope.org/wp-content/uploads/2021/05/AIDA-TR\\_2020update.pdf](https://asylumineurope.org/wp-content/uploads/2021/05/AIDA-TR_2020update.pdf)> accessed 18 November 2023.
- 86 See Ankara RAC 10thALD, R:2021/3931, J:2021/4000 Although the applicant’s language was Uzbek, the interview was conducted with a Persian translator. The decision was overturned because the applicant did not have the opportunity to express herself in her own language. See also Gaziantep RAC 4thALD, R:2019/5599, J:2021/2149. The applicant applied for asylum with her sister and their RSD was determined six years later. The PDMM rejected their asylum application, but the RAC found the examination and evaluation of the migration expert incomplete and annulled the PDMM decision.
- 87 Internal Regulations of the Constitutional Court, Official Gazette 28351, 12 July 2012, art 75(1) provides that: ‘In the event that the Sections determine that an application stems from a structural problem and that this problem has led to other applications or they envisage that this situation will lead to new applications, they can implement the pilot decision procedure. In this procedure, a pilot decision shall be made by the Section in relation to the matter. Applications of similar nature shall be resolved by administrative offices within the framework of these principles; in the event that they are not resolved, they shall be reviewed and concluded collectively by the Court.’
- 88 Law No 6216 on the Establishment of the Constitutional Court and Trial Procedures (30 March 2011) art 50/2.

The first case relates to the deportation of an Afghan woman who was apprehended by Turkish security forces while trying to cross the Aegean Sea. The applicant applied to the İzmir 1st AC for annulment of the PDMM's deportation decision. The court rejected her request and approved the deportation decision. The applicant applied to the TCC for an individual application, together with a request for interim measures against deportation. The TCC delivered a pilot judgment, granting interim measures to prevent the applicant's deportation to Afghanistan.<sup>89</sup> The court emphasized the deficiencies of the PDMM and AC decisions, stating that, even though the reports of human rights and international organizations supported the claims of the applicant, the AC had not investigated the allegations adequately or explained why these reports had not been considered in its decision. Furthermore, the AC did not ask for an explanation from the administrative authorities about whether they had undertaken an assessment of the risk of ill-treatment if the applicant were to be sent back to her country. The TCC underlined that the AC's decision had been made without investigating or evaluating the applicant's risk of ill-treatment, or whether she was in a special situation. For these reasons, the TCC concluded that the prohibition of ill-treatment guaranteed in article 17 of the Turkish Constitution<sup>90</sup> had been violated by the AC. To eliminate the consequences of such a violation, there would be a legal benefit in conducting a retrial to investigate and evaluate whether there would be a risk of ill-treatment if a person were to be sent back to the home country.<sup>91</sup> The matter was reconsidered by the İzmir 1st AC, and the deportation decision of the İzmir PDMM was annulled after the retrial. The İzmir 1st AC cancelled the deportation order.<sup>92</sup>

The second case relates to an Afghan woman and her daughter, who, fearing persecution by the Taliban, came to Türkiye and applied for international protection in Van. The PDMM rejected the woman's application for international protection; the applicant was also unsuccessful before the Van 1st AC<sup>93</sup> and the Erzurum RAC. The Van governorship then decided to deport the applicant and her daughter to Afghanistan. The applicant challenged the deportation decision before the TCC, claiming a well-founded fear of persecution on return. In this case, the TCC referred to its most important judgment, *MD*,<sup>94</sup> and highlighted that the AC had not requested an explanation from the PDMM as to whether the applicant faced a real risk of ill-treatment upon return to Afghanistan. The TCC remitted the case to the Van 1st AC for a retrial, and requested that it investigate the allegations adequately and explain why human rights reports had not been considered or taken into account in its decisions. The Van 1st AC then ruled that, considering the most recent country of origin information and the practices of the Taliban, there was, in fact, a high risk of persecution and a real risk of ill-treatment. The AC annulled the deportation decision, stating that the PDMM had made it without considering the recent situation in Afghanistan and without assessing the risk of the applicant's ill-treatment there.

It is promising to see that following these pilot judgments of the TCC on individual applications relating to deportation decisions of foreigners, especially Afghan nationals, ACs have begun to refer to recent country of origin information in their judgments and to request that PDMMs investigate whether applicants' claims are based on concrete data and whether there is a real risk of ill-treatment.<sup>95</sup> ACs are gradually incorporating the guidance of the TCC into their rulings and adopting a more human rights-based approach.

89 *AE*, TCC 2016/22584 and J:21/04/2021.

90 Constitution of the Republic of Türkiye (7 November 1982, revised 2017).

91 *AE* (n 89).

92 İzmir 1stAC, R:2021/1430, J:2021/1561.

93 Van 1stAC, R:2019/2349, J:2020/75.

94 *MD*, TCC 2016/24613 and J:02/06/2020.

95 Edirne 1stAC, R:2021/1477, J:2021/1694; Kayseri 1stAC, R:2022/1448, J:2023/97; İstanbul 1stAC, R:2021/1166, J:2021/3010; İzmir 1stAC, R:2021/1171, J:2021/1669; Malatya 1stAC, R:2022/1302, J:2022/1072; Van 1stAC, R:2021/1817, J:2021/1581; Van 1stAC, R:2022/1285, J:2022/1898; Van 1stAC, R:2021/1316, J:2022/1899; Van 1stAC, R:2022/1551, J:2022/1983.

## 5. CONCLUSION

While some European countries have accepted Afghan women as refugees, based solely on their gender, Türkiye has been far more restrictive in its approach. Not only has it blocked access physically, through a large military presence and the construction of walls at its borders, but its RSD procedures mean that Afghan women have limited access to protection. This article contends that Türkiye is afraid of becoming a target country for Afghan women asylum seekers, given its close proximity to Afghanistan.

Through an analysis of the jurisprudence of ACs, RACs, and the TCC, this article has identified two main challenges that have a significant impact on the outcomes of Afghan women's asylum claims: the poor quality of administrative decision-making procedures and a lack of consistency in the jurisprudence of ACs on international protection claims and deportation orders.

Interviews with stakeholders revealed four critical gaps that reduce the quality of administrative decision making in Türkiye: difficulties in accessing RSD; the lack of a gender-sensitive approach; the non-uniform application of country of origin information and credibility assessments; and a high burden of proof for women asylum applicants. Further, there are significant inconsistencies between ACs and RACs that result in erroneous decision making and undermine faith in the fairness of legal processes. The TCC has drawn attention to deficiencies in the ACs, ruling that they do not adequately research applicants' claims, or explain why the reports of human rights and international organizations (supporting the claims of applicants) are not taken into account in their decisions. In a positive development, there are signs that ACs are beginning to consider the guidance of the TCC in their rulings and to adopt a more human rights-based approach. ACs have also begun to refer to the most recent country of origin information in their judgments and are requesting PDMs to investigate applicants' claims in a more detailed way.

Türkiye's approach towards Afghan women asylum seekers risks violating the principles of non-discrimination and *non-refoulement* in international law and human rights law. In contrast to the group-based temporary protection provided to Syrian asylum seekers since 2014, Afghan women asylum seekers face great barriers in accessing protection. This differential system of refugee protection based on nationality can be explained by the EU's externalization policies involving non-legally binding agreements. Arguably, the EU–Türkiye Statement is the true architect of Türkiye's current insufficient policy and procedures for Afghan asylum seekers. This article has shown why it is important to see how the externalization of responsibility for refugee protection affects the approaches of developing countries. Türkiye and the EU need to find ways to share refugee protection responsibility fairly, without violating the right to seek asylum and the principle of *non-refoulement*.