

PART II(B): FRANCE

THE 1951 GENEVA CONVENTION AND SUBSIDIARY PROTECTION: UNCERTAIN BOUNDARIES

Laurent Dufour

1 Particular Social Group and Subsidiary Protection: The Forced Marriage Example

Whereas political opinion, religion and ethnic belonging grounds are “invariant” concepts, PSG gives space for interpretation: its existence depends on a set of social, legal, and psychological factors at a given time in a given place. Logically, PSG, more than other grounds, is liable to be “invaded” by subsidiary protection. Our recent case law shows how the same kinds of cases lead to different protections depending on the analysis we develop on the country of origin. The *Tabe* case (29 July 2005, Reunited Sections, CRR) sets the standards in that matter:

“...Considering that women willing to avoid a forced marriage—namely concluded without their free and full consent—whose attitude is perceived by part or whole of the society of their country of origin as transgressing customs and laws in force and who are facing, for such reason, persecution that the authorities are unwilling or unable to prevent, must be regarded as belonging to a particular social group as defined by article 1A(2) of the Geneva Convention.

....Considering that, when those conditions are not fulfilled, especially when their behaviour is not perceived infringing social order, such women are nevertheless likely to face inhuman or degrading treatments (as defined by article 712-1 (b) of the Admission and Residency of Aliens and Asylum Code, the text that sets out the definition of SP).”

The following case, *Dolgor* (7 October 2005, CRR) is a direct application of the *Tabe* jurisprudence. The decision starts with the preliminary analysis of the consistency of the case with Geneva provisions:

“... It does not arise from examination that the attitude of the appellant, who escaped from a forced marriage, has been perceived by part or whole of the Mongol society as transgressing customs and laws in force, such laws forbidding, moreover, the practice of forced marriage. Hence, the fear of the appellant, rooted in her behaviour, cannot be regarded as resulting from her belonging to a particular social group as defined by article 1A(2) of the Geneva Convention”.

The first stage of analysis completed, the judge still has to consider “eligibility” for SP:

“...In this particular case, it arises from both documentary evidence and declarations of the appellant that, in case of return to Mongolia, she would be victim of serious damages to her physical integrity, on behalf of her brother in law; considering that, because of the prominent position of her brother in law and of the strong reluctance of Mongol authorities to interfere in family conflicts, she is unable to avail herself of the protection of these authorities; she establishes being exposed in her country of origin to one of the

serious threats mentioned by article 712-2 (b) of Admission and Residency of Aliens and Asylum Code”.

Ratio: Mrs Dolgor, a Mongol citizen, is granted SP because in her country, women refusing forced marriage do not form a PSG and are therefore outside the scope of the Convention. A close look at the arguments supporting this solution shows their relative frailty: while admitting that appellant is at risk to be killed by her brother in law without any possibility of effective state protection (the strong reluctance of the authorities), we reject the PSG ground because her behaviour has not be perceived as transgressive by...part or whole of Mongol society. Besides the extreme difficulty of judging, through a single case, the global perception of a society, we could infer from this decision that forced marriage is a Convention matter not only when authorities are reluctant to interfere, but when society approves the punishment, generally killing or severe ill-treatment, of the “guilty” woman.

Let’s have a look at an opposite ruling in the case of *Diallo*, (27 April 2006, CRR):

“...it arises from examination that even though the Guinean civil code demands consent of the woman to marriage, and that the penal code punishes forced marriage as a criminal offence, these legal provisions are not respected in the Middle-Guinea area, where the appellant comes from and where forced marriage is a common practice among the Peuhls. Therefore, in the conditions currently prevailing in some rural areas of the Middle-Guinea region in Republic of Guinea, the attitude of Peuhl women, of Muslim belief, who intend to avoid forced marriages, is perceived by society as transgressive towards customs and Islamic law, these women being subject to persecutions inflicted with general approval of the population; ...that the women refusing forced marriages in these areas, such as the appellant, therefore form a group whose members are likely to face persecutions because of the common characteristics that define them in the eye of this fraction of Guinean society; ..those who ask for the authorities’ protection are systematically returned to their husbands.”

Mrs Diallo was granted Convention refugee status. It is not in the aims of this working paper to discuss or criticize these solutions: they might address different situations with different levels of danger but they can also result from a very subjective point of view, of an ethical kind, on the degree of compliance of such society with our accepted values. It can be observed that in the *Dolgor* case, allusion to the fact that national law forbids forced marriage is not followed, like in the *Diallo* case, by an enquiry on the degree of enforcement of these provisions: the subsequent statement on the reluctance of the authorities to “interfere” is nevertheless an implicit acknowledgement of a low degree of enforcement.

A common characteristic in gender cases (excision, forced marriage, marriage related ill treatments, sexual orientation, transsexualism) is that persecution is mostly the fact of the family cell or private parties of people. Authorities are in an ambiguous position, since many countries do have a legislative arsenal allowing, in theory, to prevent or punish gender persecutors. The problem seems to be that the legal framework does not fit comfortably with the customary framework, which appears, in the field, to be the “real law”. Protection may be costly for the state, in the sense that it may break the peace among a whole community or area, especially when public authorities are fragile and rely heavily on the consent and allegiance of the tribes or communities that form the nation

(e.g. the Guinean case is a good example: what would be the price for Guinean authorities to “intervene” against the will of the whole Peuhl community who reject Mme Diallo for her behaviour?). It is interesting to remark that in such cases we are defining, perhaps unwillingly, a social group of persecutors who punish a member of the group for violating the law of the group, much more than a particular social group subject of persecution.

The non-existence of the PSG who commands the SP analysis, is linked, in the *Tabé* decision, with the absence of a negative perception by a segment of the society, generally the “group” to which the claimant belongs. Therefore, SP tends to apply to more restricted conflicts, involving fewer potential persecutors. This distinction is not purely theoretical since the PSG scheme implies that the outcast will not find protection anywhere else, which is not so in the “purely familial” SP case. We can pinpoint here a tangible difference with Canadian complementary protection, whose definition excludes the harm that can be avoided in another part of the country. It is also true that France has been until now extremely careful in applying the internal flight dispositions introduced by the 2003 law as a limitation clause for both refugee status and subsidiary protection (for the high standards set for what we call “internal asylum”: see *Boubrima*, (25 June 2004, Reunited Sections, CRR).

1. Armed Conflict: The Big Nowhere

- (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

It is reasonable to think that generalized violence calls for a specific response in the asylum perspective, because it raises the probability of harm and persecution to a very high level and lowers at the same time the degree of personal involvement or representativeness usually required in eligibility for refugee status.

It is also reasonable to think that the third case of SP envisaged by the Directive endeavours to fill a striking lack of protection.

Despite these good intentions, a close look at recent French jurisprudence reveals that, cornered in between the Convention refugee and the “en masse” war refugee, the beneficiary of SP (c) still has to be clearly identified.

The 1951 Refugee Convention, although born of the major 20th century armed conflict, was not apparently conceived to encompass the countless individual consequences of wars. As far as we can remember, the eligibility enquiry for those fleeing an armed conflict always proved to be uneasy. Mass movements and generalized violence, which characterize conflicts, alter the meaning and use of the Convention grounds. Through the years, it has been a very common ruling in CRR decisions to reject claims because the harm feared, although obviously well-founded, was not personally aimed at claimants. This “general situation” doctrine has been applied to a vast range of troubles, from mere “civil unrest” to the full “classic” war. This solution was formalized in different ways:

“...state of war is not a situation encompassed within dispositions of the Geneva Convention”, (*Miss Abbas-Akarim*, 10 February 1984, in the Iran-Iraq war context).

“...the threats alleged by the appellant result from the political and military current crisis in Lebanon. Whatever serious they may be, dangers arising from a civil war do not constitute risks of persecutions in the sense of the Geneva Convention.” (*Zein El Abiddine*, 13 June 1985, for the Lebanese civil war).

These blunt statements were somewhat tempered, by the Supreme Administrative Court, Conseil d’Etat, in a set of Yugoslavia-related cases. In *CE* (12 May 1997), *Miss Strbo*, the High Court took the first step:

“...considering that, in her claim for refugee status, Miss Strbo, limited herself in stating that, being of Bosnian nationality, she could not envisage returning to the city of Sarajevo, because of the events who were then taking place, namely the siege of the city and the bombings of Serbian forces; that if the situation prevailing at that time in Sarajevo could possibly reveal fears of persecution in the sense of article 1A(2) of the Geneva Convention, Miss Strbo did not allege any fear of persecution of a personal character but based her fear merely on the general situation in that city.”

War is no more “excluded” from the Conventional provisions, as it could be inferred from the Lebanese and Middle East case law of the eighties. But what would be such a “personal” fear of persecution in this context? In *CE* (12 May 1997), *Mrs Adamovic*, quashed the negative decision of the CRR for not having considered the allegation of the appellant that she had just scraped out from an attempt that killed one of her colleagues and having based its decision on the fact that “...the argument of the general situation in her country, whatever tragic it might be, cannot found her claim since the Geneva Convention demands personal fears...”.

This recall of past case law is not without motive: the personalized fear in midst of a besieged city seems a prefiguration of the requirement in SP (c), that the threat has to be individual. The 2003 French legislator made the requirement even harder in order not “to leave the gates open”: the threat has to be “direct, serious and individual”. What an individual but not direct threat could be remains to be explained. In any case, besides this minor point, the real difficulty for a coherent application of SP (c) derives directly from the hierarchical order of protections set out by the Directive, and the order in examining the claim it implies. SP (c) may be granted only if the claim has been rejected on the Convention basis. As we just said, the Conseil d’Etat holds that a situation of armed conflict can “possibly reveal fears of persecution according to article 1A(2) of the Geneva Convention”. This means that the existence of an armed conflict is not an obstacle to refugee status recognition and that SP (c) is not necessarily the standard for those fleeing from a war. It is not therefore possible to motivate on the mere consideration that a war or a civil war is outside, whatever personal reasons, the scope of the Convention.

The matter becomes even more awkward when Convention reasons are put forward by the appellant to justify his or her fears. If, by one way or another, we manage to put them apart at the first stage, we will necessarily find them at the second stage, as individualizing factors: the great divide between Convention status and SP, namely the absence of grounds for SP, seems to be completely blurred (see the Iraqi cases mentioned above in “the French reading of Subsidiary Protection”, *Miss Kona and M. Alazawi*, 17 April 2006, Reunited Sections, CRR).

Such a double-bind system can only work for someone having non-Convention individualizing reasons to be threatened in a situation of generalized violence. In the case of a Darfur Sudanese claimant, *Azzine Ahmed* (22 November 2005, CRR) the decision-maker did not believe that the claimant's political involvement with Equity and Justice Movement rebels justified the claim, nor that his problems may have been caused by one of the other reasons of article 1A(2). When dealing afterwards with SP, the judge stated that "...because he was facing, once again, a serious direct and individual threat against his life (from Janjawid "Arab" militias acting on behalf of the Khartoum government) by reason of his noteworthy and well-off position, he fled the situation of generalized violence resulting from the armed conflict currently taking place in Darfur..."

After remarking on the consistency of that conflict with the criteria set by article 3 of the 1949 Geneva Conventions, the judge granted SP on the basis of article (c) of the Qualification Directive. There is something laborious and uneasy in this qualification, simply because we have to present the individualizing factor as clearly non-Conventional, which is not so obvious in this particular case.

In a more recent ruling (*Miss Rincon Perez*, 29 September 2006, CRR) the applicant, a young Colombian woman was granted SP (c) because she was seriously threatened by the FARC rebels due to her being an accountant and a member of a landowning, cattle-breeding family.

It is remarkable that in both cases the SP individualizing factor could have been easily considered as a Convention ground: ethnic rivalries encouraged for political intentions in the Sudanese case, membership of the social group of landowners, politically targeted by Marxist FARC as "class enemy" in the Colombian ruling.

It is obviously too early to predict the fortune of SP (c). French judges seem reluctant to use it when they are convinced that a claim is well-founded: Colombian, Afghan, Iraqi or Sudanese claimants are commonly granted refugee status, which makes, in return, the difference between the two protections even less understandable. If the present trend continues, it will remain a marginal instrument.

It falls within the traditional purposes of jurisprudence to provide a "constructive" interpretation of uneasy or unclear legal provisions: a smoothing of the individualizing factor could perhaps reduce the inherent contradiction of the concept and increase its legitimacy as a protection instrument.