Submission by the Office of the United Nations High Commissioner for Refugees in the case of *F.G. v. Sweden* (Application No. 43611/11)

1. Introduction*

1.1 The Office of the United Nations High Commissioner for Refugees ("UNHCR") submits this written intervention as a third party in the case of *F.G. v. Sweden* (No. 43611/11) pursuant to the letter of 19 September 2014 from the European Court of Human Rights ("the Court"). In making this submission, UNHCR will address a number of legal issues relating to obligations under international refugee and human rights law regarding the assessment of an asylum claim, including in particular the State's responsibilities for ascertaining and evaluating all relevant facts in this regard. UNHCR will also deal with the issue of concealment of a religious conversion/ religious belief in asylum claims.

1.2 UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions for the problem of refugees.[1] Paragraph 8(a) of its Statute and the Preamble of the 1951 Convention relating to the Status of Refugees ("the 1951 Convention")[2] confer responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees, while Article 35(1) of the 1951 Convention obliges States Parties to cooperate with UNHCR in the exercise of its functions, including in particular to facilitate its duty of supervising the application of the provisions of the 1951 Convention.

1.3 These submissions briefly address the scope of the review of an asylum claim under Swedish law and practice, as well as how the issue of concealment of a religious conversion/ religious belief in asylum claims has been dealt with in practice (Part 2). It then sets out UNHCR's interpretation of the relevant principles of international refugee and human rights law governing these issues, including relevant case law (Part 3).

2. Relevant legal framework and practice in Sweden

2.1 Scope of the obligation to assess asylum claims

2.1.1 According to Section 8 of the Administrative Court Procedure Act, the domestic court is responsible for carrying out an assessment of all relevant facts as required by the nature of the case before it.[3] This Section thus applies to the Migration Courts and to the Migration Court of Appeal (hereafter "MCA"). The Section also applies by analogy to State authorities, such as the

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* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoys under applicable international legal instruments and recognized principles of international law.

[1] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para. 1, http://www.unhcr.org/refworld/docid/3b00f0715c.html.

[2] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, vol. 189, p. 137, http://www.unhcr.org/refworld/docid/3be01b964.html.

[3] Förvaltningsprocesslag, SFS 1971:291.

Swedish Migration Board (hereafter "SMB"), as established by general administrative law principles and confirmed by the Supreme Administrative Court of Sweden.[4]

2.1.2 The MCA has clarified in a number of cases the scope of the obligation upon Migration Courts to assess claims. Notably, in the first precedent-setting case before it in *MIG 2006:1,*[5] the MCA stated that an applicant bears the initial burden of substantiating the circumstances of his or her claim, but underlined that the unique character of asylum cases affects the scope of the Migration Courts' obligation to carry out the assessment. The MCA pointed out that asylum decisions can have a significant impact on the lives of individuals and that mistakes can lead to the individual being exposed to serious violations of their human rights. The MCA held that the Migration Courts therefore have an investigative responsibility of their own, which they can discharge, for example, by requesting the parties to submit additional evidence or remedy shortcomings in the evidence submitted. In a subsequent case, *MIG 2012:2,*[6] relying on the European Court of Human Rights judgment in *R.C. v. Sweden*,[7] the MCA elaborated on the Migration Courts' *ex officio* duty to investigate the circumstances material to an asylum claim.

2.2 Concealment to avoid persecution

2.2.1 In September 2011, UNHCR in collaboration with the SMB presented a study of the quality of the SMB's case management processes and decisions.[8] In the study, UNHCR found, inter alia, that the SMB, in some cases where religion or belief was invoked as a ground for asylum, expected the applicant to conceal his or her religious belief upon return to the country of origin.[9]

2.2.2 Following the judgment of the Court of Justice of the European Union (CJEU) in the *Y and Z* case (joined cases C-71/11 and C-99/11),[10] as well as a judgment of the MCA in which it stated that when an applicant has converted after arrival in Sweden, assessing the authenticity of the conversion is central,[11] the SMB adopted a Judicial Position in November 2012 (the Judicial Position).[12] The Judicial Position provides, *inter alia*, that an applicant can never be requested to live discretely, or conceal his/her religious belief, in order to avoid persecution. The Judicial Position further emphasizes that in cases where the conversion has been found not to be genuine, it is imperative to assess if the applicant would nonetheless be at risk if returned to the country of origin, due to an imputed religious belief/conversion. Through the Judicial Position, the SMB is seeking to reflect the jurisprudential developments that have taken place concerning religious-based claims for asylum at the European level. The Migration Courts are not bound by the SMB's Judicial Positions.

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[4] See e.g. the judgment of the Supreme Administrative Court (Högsta förvaltningsdomstolen, previously known as Regeringsrätten) in RÅ 1992 not 234.
[5] Migrationsöverdomstolen, MIG 2006:1, 18 September 2006.
[6] Migrationsöverdomstolen, MIG 2012:2, 20 January 2012.
[7] ECtHR, *R.C. v. Sweden*, No. 41827/07, 9 March 2010.
[8] UNHCR, *Kvalitet i svensk asylprövning, en studie av Migrationsverkets utredning av och beslut om internationellt skydd,* September 2011.
[9] *Ibid*, page 148 – 152.
[10] See below for further details.
[11] Migrationsöverdomstolen, MIG 2011:29, 30 November 2011.
[12] The Swedish Migration Board, *Judicial Position concerning religion as grounds for asylum, including conversion*, RCI 26/2012, 12 November 2012. Judicial Positions are advisory instructions issued by the Legal Director of the SMB, which are directed to the staff of the SMB.

3. Relevant principles of international and European law

3.1 The obligation to ascertain all the relevant facts

International refugee law and Articles 3 and 13 ECHR

3.1.1 The right to seek and enjoy asylum is supported by the legal framework included in the 1951 Convention and its 1967 Protocol, to which Sweden is a State party, and derives from Article 14(1) of the Universal Declaration of Human Rights 1948.[13] Central to the realization of the right to seek asylum is the obligation of States not to expel or return (*refouler*) a person to territories where his or her life or freedom would be threatened. *Non-refoulement* is a cardinal protection principle, most prominently expressed in Article 33 of the 1951 Convention and recognized as a norm of customary international law.[14] Article 33(1) prohibits States from expelling or returning a refugee, in any manner whatsoever, to a territory where s/he would be at risk of threats to life or freedom.[15]

3.1.2 Importantly, given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature. It follows that the prohibition of *refoulement* applies to both those who have not formally been recognized as refugees, and to asylum-seekers whose status has not yet been determined.[16] Accordingly, States are obliged not to return or expel an asylum-seeker pending a final determination of his or her status.

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[13] Article 14(1) provides that "Everyone has the right to seek and to enjoy in other countries asylum from persecution".

[14] Concurring Opinion of Judge Pinto de Albuquerque in ECtHR, *Hirsi Jamaa and Others v. Italy*, No. 27765/09, 23 February 2012,http://www.unhcr.org/refworld/docid/4f4507942.html. See also, UNHCR, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: http://www.unhcr.org/refworld/docid/438c6d972.html; UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, para. 4, http://www.unhcr.org/refworld/docid/3d60f5557.html; and UNHCR, *The Scope and Content of the Principle of Non-Refoulement (Opinion)* [Global Consultations on International Protection/Second Track], 20 June 2001, paras. 193-253, http://www.unhcr.org/refworld/docid/3b3702b15.html.

[15] UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Hirsi and Others v. Italy*, No. 27765/09, 29 March 2011, para. 4(1)(1), http://www.refworld.org/docid/4d92d2c22.html.

[16] Executive Committee of the High Commissioner's Programme (ExCom), Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 79 (XLVII), 1996, para. (j); ExCom Conclusion No. 81 (XLVII), 1997, para. (i), http://www.unhcr.org/41b041534.html. See also, *Note on International Protection (submitted by the High Commissioner)*, A/AC.96/815, ExCom Reports, 31 August 1993, para. 11, http://www.unhcr.org/refworld/docid/3ae68d5d10.html; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, January 2007, paras. 26-31, http://www.unhcr.org/refworld/docid/45f17a1a4.html.

3.1.3 *Non-refoulement* obligations have also been established under international and European human rights law. More specifically, States are bound not to remove any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life,[17] or torture[18] or other cruel, inhuman or degrading treatment or punishment.[19]

3.1.4 Under the obligations of *non-refoulement*, States have a duty to establish, prior to implementing any removal measure, that the person whom they intend to remove from their territory or jurisdiction is not at risk of such harms covered by the prohibition on *refoulement*.

3.1.5 Although the 1951 Convention does not govern the asylum procedure *per se*, it is accepted that, as a general rule, in order to give effect to obligations under the 1951 Convention, including the prohibition on *refoulement* in Article 33, States Parties are to grant asylum-seekers access to fair and efficient procedures without discrimination to determine whether or not a person is a refugee.[20] Derived from the legal duty of State Parties to implement their treaty obligations in good faith,[21] States parties are reasonably expected to commit themselves to do whatever is within their ability to ensure the recognition of refugees.[22] According to UNHCR, the determination of refugee status is declaratory (see para. 3.1.7 below) and is a process whereby it is necessary to ascertain the relevant facts of the case and apply the definition of a refugee in Article 1A(2) of the 1951 Convention to those facts.

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[17] The right to life is guaranteed under Article 6 of the 1966 Covenant on Civil and Political Rights (ICCPR) (999 U.N.T.S. 171, *entered into force* 23 March 1976) and, for example, Article 2 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 005, 213 U.N.T.S. 222, entered into force 3 September 1953 (ECHR); Article 4 of the American Convention on Human Rights; Article 4 of the African (Banjul) Charter on Human and People's Rights, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

[18] An explicit *non-refoulement* provision is contained in Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1465 U.N.T.S. 85, *entered into force* 26 June 1987) which prohibits the removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

[19] Obligations under the ICCPR as interpreted by the Human Rights Committee also encompass the obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 (right to life) and 7 (right to be free from torture or other cruel, inhuman or degrading treatment or punishment) of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed, thereby recognizing that the relevant provisions of the ICCPR entail the prohibition of indirect *refoulement*. With regard to the scope of the obligations under Article 7 of the ICCPR, *see* Human Rights Committee in its *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment),* 10 March 1992, U.N. Doc. HRI/ GEN/1/Rev.7, para. 9 ("States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement")*; and *General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 12. Similarly, in its *General Comment No. 6 (2005) on the Treatment of unaccompanied and separated children outside their country of origin*, U.N. Doc. CRC/GC/2005/6, 1 September 2005, the Committee on the Rights of the Child stated that States party to the Convention on the Rights of the Child "[…] shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under Articles 6 [right to life] and 37 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment and right not to be arbitrarily deprived of liberty] of the Convention." (para. 27). See also the jurisprudence of this Court, which has held that *non-refoulement* is an inherent obligation under Article 3 of the ECHR in cases where there is a real risk of exposure to torture, inhuman or degrading treatment or punishment, including, in particular, the ECtHR's judgment in *Hirsi Jamaa and Others v. Italy*, No. 27765/09, 23 February 2012, para. 114, http://www.refworld.org/docid/4f4507942.html.

[20] ExCom Conclusion No. 82 (XLVIII) 1997, para. (d) (iii).

[21] Vienna Convention on the Law of Treaties, Art. 26.

[22] James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd ed., Cambridge University Press, 2014, Cambridge, p. 119.

3.1.6 The obligations in the 1951 Convention require the State authority to ascertain all the relevant facts so as to identify and recognize refugees entitled to the benefits of the 1951 Convention.[23] Accordingly, the determination of whether an applicant has a well-founded fear of persecution or faces a risk of other serious harm is informed by the findings of fact on points that are material to the asylum claim,[24] including, for example, those presented by the applicant yet that are requested by him or her to be disregarded owing to their private nature or if the applicant considers them to be irrelevant. It is for the examiner to decide ultimately which facts are relevant and material to the overall assessment. In the same vein, with regard to an Article 3 claim, this Court has held that what matters is to establish whether "*there are substantial grounds* for believing that the applicant faces a real risk of being subjected to treatment contrary to" (emphasis added) that provision.[25] More particularly the Court emphasized that the assessment of whether the ill-treatment in question attains a minimum level of severity depends "on all the circumstances of the case".[26]

3.1.7 In respect of the burden of proof, while it generally lies on the person making the assertion,[27] in view of the particularities of a refugee's situation such that they may not be able to provide the relevant information or documentation or owing to their position of vulnerability, there is a shared duty between the applicant and the examiner to ascertain and evaluate all the relevant facts.[28] In fulfilling this shared duty, examiners may, in some cases, need to use all the means at their disposal to produce the necessary evidence in support of the application. This has been recognized by this Court in *R.C. v Sweden* with respect to gathering expert opinion.[29]

3.1.8 Finally, it is for the examiner, when investigating the facts of the case, to apply the facts to the refugee definition, by ascertaining the reason or reasons for the persecution feared and deciding whether the person concerned is a refugee within the meaning of the 1951 Convention.[30] In this respect, UNHCR recalls that the first instance determination of eligibility

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[23] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, December 2011, para. 29, http://www.refworld.org/docid/4f33c8d92.html. See also UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001,http://www.refworld.org/docid/3b20a3914.html, para. 8 states: "When attempting to apply the Article 1 criteria in the course of individual asylum procedures, decision-makers should have regard to all the relevant circumstances of the case." Lord Clyde in the case of Horvath v. Secretary of State for the Home Department (6 July 2000, (2000) 3 W.L.R. 379) also cites with approval the words of Simon Brown L.J. in Ravichandran v. Secretary of State for the Home Department [1996] Imm.A.R. 97, 109, where he says "the question whether someone is at risk of persecution for a Convention reason should be looked at in the round and all the relevant circumstances brought into account" (p. 399).

[24] UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, p. 28, http://www.refworld.org/docid/519b1fb54.html.

[25] ECtHR, *Mamatkulov and Askarov v. Turkey*, Nos. 46827/99 and 46951/99, 4 February 2005, para. 67.

[26] ECtHR *Hilal v. The United Kingdom*, No. 45276/99, 6 June 2001, para 60.

[27] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status,* cited in footnote 23 para. 196 ; Beyond Proof, cited in footnote 24,, p. 86; ECtHR, *R.C. v. Sweden*, No. 41827/07 , 9 March 2010, para. 53.

[28] UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, para 6, http://www.refworld.org/docid/3ae6b3338.html.

[29] ECtHR, *R.C. v. Sweden*, No. 41827/07, 9 March 2010, para. 53: "In the Court's view, the Migration Board ought to have directed that an expert opinion be obtained as to the probable cause of the applicant's scars in circumstances where he had made out a prima facie case as to their origin. It did not do so and neither did the appellate courts. While the burden of proof, in principle, rests on the applicant, the Court disagrees with the Government's view that it was incumbent upon him to produce such expert opinion. In cases such as the present one, the State has a duty to ascertain all relevant facts, particularly in circumstances where there is a strong indication that an applicant's injuries may have been caused by torture."

[30] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status,* cited in footnote 23, paras. 29 and 67.

for international protection is not an adversarial process, and there is no subject of dispute between the applicant and the examiner.[31]

3.1.9 The principles outlined above are reflected in the case law of this Court regarding the procedural limb of Art. 3 ECHR as well as the right to an effective remedy under Art. 13 ECHR in conjunction with Art. 3 ECHR.

3.1.10 The ECtHR has continuously reiterated that, given the importance of Article 3 ECHR and the irreversible nature of the harm likely to be caused in the event of ill-treatment, it is the duty of national authorities to conduct a thorough and rigorous assessment to dispel any doubt regarding the ill-foundedness of the claim.[32]

3.1.11 The Court also held that Article 13 ECHR requires careful control, independent and rigorous review of any grievance under which there is a reason to believe a risk of treatment contrary to Article 3 ECHR exists. In this connection, the Court found that the rejection by the State authorities of relevant documentary evidence submitted by the applicant without sufficient investigation was at odds with that close and rigorous scrutiny requirement.[33]

3.1.12 In light of the above, the examiner is expected to assess all the relevant elements that are material to a determination of their refugee status, even if, for example, the applicant requests elements to be disregarded.

EU law

3.1.13 UNHCR's above submissions are supported by EU law. The CJEU held that:

> "th[e] right [to be heard] also requires the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case".[34]

3.1.14 The CJEU further indicated that the right to be heard "must apply fully to the procedure in which the competent national authority examines an application for international protection".[35]

3.1.15 More particularly, the EU asylum *acquis* contains a number of important provisions directed at ensuring the State's obligation to conduct a proper assessment of the asylum claim. Article 4(1) of the Qualification Directive provides that "in cooperation with the applicant it is the duty of the member State to assess the relevant elements of the application". Furthermore Art. 4(3) QD specifies that the assessment of an asylum application "includes taking into

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[31] CJEU, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-277/11, 22 November 2012, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0277&from=EN, para. 66.

[32] ECtHR, *Singh and Others v. Belgium*, No. 33210/11, 2 October 2012, para. 103; *M.S.S. v. Belgium and Greece*, No. 30696/09 , 21 January 2011, para. 387: "the Court reiterates that it is also established in its case-law […] that any complaint that expulsion to another country will expose an individual to treatment prohibited by Article 3 of the Convention requires close and rigorous scrutiny."; *NA v. The United Kingdom*, No. 25904/07 , 17 July 2008, para. 111; *Jabari v. Turkey*, No. 40035/98,,11 July 2000, para. 50; ; *Hirsi Jamaa and Others v. Italy*, No. 27765/09 , 23 February 2012, para. 200.

[33] ECtHR, *Singh and others v. Belgium*, No. 33210/11, 2 October 2012, paras. 103-104.

[34] CJEU, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-277/11, 22 November 2012, para. 88, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0277&from=EN.

[35] *Ibid*, para. 89.

account (a) all relevant facts as they relate to the country of origin (…)" and "(b) the relevant statements and documentation presented by the applicant (…)". The Asylum Procedures Directive also provides that the right to an effective remedy includes "a full and *ex nunc* examination of both facts and points of law (…)".[36]

3.1.16 The CJEU held in *Abdulla and Others v. Bundesrepublik Deutschland*:

> "That assessment of the extent of the risk must, in all cases, be carried out with vigilance and care, since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union".[37]

3.1.17 The CJEU further explained in *M.M. v. Minister for Justice, Equality and Law Reform* that:

> "Th[e] requirement that the Member State cooperate therefore means, in practical terms, that if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled."[38]

3.2 Concealment of conversion/religious belief to avoid persecution

<u>The right to freedom of religion in international refugee and human rights law</u>

3.2.1 Under international and European human rights law everyone has the right to freedom of religion.[39] This basic human right includes the right to have or not to have a religion or belief of one's choice – or to change religion or belief -, to practice one's religion or belief either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance, practice and teachings.

3.2.2 With this general understanding of the right to freedom of religion, the question to be considered in a claim to international protection – whether under the 1951 Convention or under the European Convention on Human Rights – is what predicament the applicant would face if he or she were returned to the country of origin and exercised his or her freedom of religion. The question is not whether the applicant, by being discreet, could live in that country without attracting adverse consequences.[40] In UNHCR's view, this requires an objective and fact-specific examination of the nature of the applicant's predicament upon return and whether this amounts to persecution. The role of the examiner is to assess risk (whether the fear of

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[36] Art. 46(3) Asylum Procedures Directive.

[37] CJEU, *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, 2 March 2010, para. 90, http://www.refworld.org/docid/4b8e6ea22.html.

[38] CJEU, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-277/11, 22 November 2012, para. 66.

[39] The right to freedom of religion is protected in several international human rights instruments, including in Article 18 of the International Covenant on Civil and Political Rights (ICCPR) and Article 9 of the ECHR.

[40] CJEU, Germany v. Y and Z, C-71/11 and C-99/11, 5 September 2012, paras. 76-78 ; by analogy see UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, para. 32, http://www.refworld.org/docid/50348afc2.html.

persecution is well-founded) and not to demand conduct (pronounce upon what that applicant should and should not do).[41]

The irrelevance of the concealment issue in the risk assessment

3.2.3 As UNHCR highlights in its Statement on religious persecution and the interpretation of Article 9(1) of the EU Qualification Directive[42] and in its Guidelines on International Protection No.6 on religion-based refugee claims, one's religious belief, identity or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution, in particular where the risk of being persecuted hinges on the future behaviour of an applicant.[43] In fact, being compelled to forsake or conceal one's religious belief, identity or way of life where this is instigated or condoned by the State may itself constitute persecution, or be part of a pattern of measures that cumulatively amount to persecution in an individual case. "Persecution does not cease to be persecution because those persecuted eliminate the harm by taking avoiding action."[44] Adopting such an approach would undermine the fundamental protection foundations of the 1951 Convention, such that persons are entitled to protection precisely because they are at risk of persecution on account of their race, religion, nationality, membership of a particular social group or political opinion.

3.2.4 Manifestations of religious belief likewise cannot be expected to be suppressed in order to avoid a danger of persecution as long as the manifestations constitute an exercise of human rights. Although a State may impose certain restrictions on the exercise of one's religion under international human rights law, any such restrictions need to be assessed as to their compatibility with human rights. Where they are persecutory, they would not be in conformity with human rights law and would ground a claim to refugee status.[45] In the same vein, a statement by an applicant expressing the intention to abstain from certain religious practices in order to avoid persecution does not render refugee protection unnecessary; to the contrary, this avoidance could constitute evidence of the individual's fear of persecution.[46]

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[41] UNHCR *statement on religious persecution and the interpretation of Article 9(1) of the EU Qualification Directive - Issued in the context of two references for a preliminary ruling to the Court of Justice of the European Union (CJEU) from the Bundesverwaltungsgericht (Germany) lodged on 18 February and 2 March 2011 – Federal Republic of Germany v Y (Case C-71/11) and Federal Republic of Germany v Z (Case C-99/11)*, 17 June 2011, para. 5.2.3, http://www.refworld.org/docid/4dfb7a082.html.

[42] *Ibid.*

[43] UNHCR, *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees,* 28 April 2004, para. 13, http://www.refworld.org/pdfid/4090f9794.pdf .

[44] See decisions in HJ (Iran) v. Secretary of State for the Home Department; HT (Cameroon) v. Secretary of State of the Home Department [2010] UKSC 31, per Lord Hope, at para. 26 (United Kingdom Supreme Court); following Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs [2003] 216 CLR 473, para. 39, per McHugh and Kirby JJ. (Australian High Court).

[45] *CJEU, Germany v. Y and Z, C-71/11 and C-99/11,* 5 September 2012, para.72.

[46] Golesorkhi v. Canada (Citizenship and Immigration), 2008 FC 511 (CanLII), paras. 3, 17, and 18; See e.g. Farajvand v MIMA [2001] FCA 795 (Australia), "the applicant's faith, recognised by the Tribunal by his membership of an evangelical congregation on a genuine basis, carried with it necessarily, unless there were evidence or, perhaps more accurately, findings, to the contrary, the elements of manifestation and practice in community with others. To say that if he keeps a "low profile" and worships "quietly" or "cautiously" or "circumspectly", is, I think, with respect, to deny the applicant a dimension to his faith, even accepting that he is not an enthusiastic proselytiser or derider of Islam" para. 25.

3.2.5 When assessing the dangers arising from future behaviour of an applicant, it is important to assess whether the said behaviour is part of the applicant's individual religious belief or identity, or fundamental to his or her way of life. If the behaviour cannot be interfered with in a justified manner as a matter of international human rights law, it cannot be expected that the applicant abstains from such behaviour. Denying refugee status by requiring the individual to refrain from such protected practices or behaviour would not be compatible with protection principles underlying the 1951 Convention.[47] These same considerations are equally valid if the asylum claim is based on one of the other grounds enshrined in the refugee definition of the 1951 Convention.

3.2.6 Even if applicants may so far have managed to avoid harm through concealment, their circumstances may change over time and secrecy may not be an option for the entirety of their lifetime. Clearly persons will take steps to conceal their religion or religious practices when they are at risk of persecution: during the Second World War many Jews went into hiding or took steps to hide their ethnicity and religion, for example, by pretending to be non-Jewish. This did not make their fear of persecution any less real, but rather was evidence of the very extreme dangers they faced. The risk of discovery is also not necessarily confined to one's own conduct. There is almost always the possibility of discovery against the person's will, for example, by accident, rumours or growing suspicion.

3.2.7 The above position is supported by the relevant CJEU's case law. As pointed out in *Y. and Z.*:

> "where it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status, in accordance with Article 13 of the Directive. *The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant*" (emphasis added).[48]

3.2.8 Importantly, the Court repeatedly emphasized that "account must (…) be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part".[49] Furthermore, while the ECtHR traditionally pays attention to the extent to which the applicant is known to the authorities of the country of origin as a criterion to determine the reality of the risk of ill-treatment upon return,[50] it has rightly never recognized that concealment could constitute a sufficient guarantee for the applicant to be protected against the risk of ill-treatment. There is consistency between international refugee law and the jurisprudence of this Court and the CJEU on the point of concealment, and this reflects the correct position.

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[47] UNHCR, *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees,* cited in footnote 43, para. 16

[48] CJEU, *Bundesrepublik Deutschland v. Y (C-71/11), Z (C-99/11), C-71/11 and C-99/11*, 5 September 2012, para. 79, http://www.refworld.org/docid/505ace862.html.

[49] ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, para. 274.

[50] ECtHR, *N.S. v. Denmark*, No. 58359/08, 20 January 2011, paras. 93 and 94.

4. Conclusion

4.1 In light of the above and in keeping with the relevant standards of international and European refugee and human rights law and the Court's own jurisprudence, UNHCR considers that:

- The State is required to assess all the relevant elements that are material to a determination of a claim for protection, even if, for example, the applicant requests elements to be disregarded;

- The applicant cannot be expected to conceal his or her religion to avoid persecution, serious human rights violations or other serious harm, including ill-treatment as proscribed by Article 3 ECHR.

UNHCR
14 October 2014