F.G. v. Sweden

Application no. 43611/11

WRITTEN SUBMISSIONS ON BEHALF OF THE AIRE CENTRE (ADVICE ON INDIVIDUAL RIGHTS IN EUROPE), THE EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE) AND THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)

INTERVENERS

pursuant to the Deputy Grand Chamber Registrar's notification dated 19 September 2014 that the President of the Court had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

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10 October 2014

Introduction

1. These written observations are presented on behalf the AIRE Centre (Advice on Individual Rights in Europe), the European Council on Refugees and Exiles (ECRE) and the International Commission of Jurists (ICJ), hereinafter "the interveners".

2. They focus on:
   A. the Contracting Parties' obligation to ensure that the risk upon removal be assessed in such a way as to guarantee that the protection of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention' or ECHR) be practical and effective;
   B. whether requiring coerced, self-enforced suppression of a fundamental aspect of one's identity — such as that which enforced concealment of one's religious conversion entails — is compatible with the Convention obligations, in particular, under Article 3;
   C. the relevance and significance of the EU asylum *acquis* and relevant case-law of the Court of Justice of the European Union (CJEU), including the joined cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y and Z*, Judgment of 5 September 2012, as well as on the relevance and significance of Article 53 of the European Convention on Human Rights (ECHR or 'the Convention'); and
   D. the relevance and significance of the 1951 Convention relating to the Status of Refugees.[1]

A. Obligation to ensure that the risk upon removal be assessed in such a way as to guarantee that the Convention's protection is practical and effective: a full and *ex nunc* assessment

3. While the Convention jurisprudence has repeatedly affirmed that the right to asylum is not protected in either the Convention or its Protocols,[2] it is this Court's settled case-law that the responsibility of the Contracting Parties under the Convention is engaged under Article 3 where substantial grounds have been shown for believing that the individual concerned would—upon removal from the Contracting Parties' jurisdiction—be exposed to a real risk of treatment contrary to Article 3. In these circumstances, Article 3 entails a *non-refoulement* obligation enjoining the Contracting Parties from removing the person in question.[3] Thus, Contracting Parties are enjoined from removing individuals from their jurisdiction if there are substantial grounds for believing that a real risk exists that, following removal, the persons concerned would, *inter alia*, be exposed to Article 3 prohibited treatment, including by virtue of being sentenced to death as apostates.[4]

4. In this context — as with any others giving rise to the possibility of arbitrary *refoulement*[5] — the constant jurisprudence of this Court has held that, in order to

[1] Convention relating to the Status of Refugees, Geneva (28 July 1951), United Nations, Treaty Series, vol. 189, p. 137, hereinafter the 'Refugee Convention'.
[2] *Salah Sheekh v. the Netherlands*, App. No. 1948/04, judgment of 11 January 2007, § 135.
[3] See, among other authorities, *Hilal v. the United Kingdom*, App. No. 45276/99 (6 March 2001), § 59, and *Ahmed v. Austria,* App. No. 29564/94 (17 December 1996), §§ 38-41.
[4] As noted by the UN Special Rapporteur on freedom of religion or belief, "In various regions of the world, converts are confronted with difficulties when trying to live in conformity with their convictions. Some States have criminal law sanctions according to which acts of conversion can be punished as "apostasy", "heresy", "blasphemy" or "insult" in respect of a religion or of a country's national heritage. In extreme cases, this can include the death penalty"; interim report to the UN General Assembly, A/67/303, 13 August 2012, § 36, online at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/461/30/PDF/N1246130.pdf?OpenElement.
[5] This principle, the principle of *non-refoulement*, which is well established in the case-law of this Court, was first recognised in the context of Article 3, *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, pp. 35-36, §§ 88-91. The *non-refoulement* principle entails an obligation not to transfer (*refouler*) people where there are substantial grounds for believing that they face a real risk of serious violations of human rights in the event of their removal, in any manner whatsoever, from the State's jurisdiction. The principle dictates that, irrespective of all other considerations, Contracting Parties are not absolved from responsibility "for all and any foreseeable

prevent such an eventuality, an assessment is required to ascertain whether there are substantial grounds for believing that, upon removal from the relevant Contracting Party's jurisdiction, the individuals concerned would face a real risk of serious violations of their human rights. Further, this Court has clarified that such an assessment must necessarily be a rigorous one,[6] entailing consideration of "all the material placed before it or, if necessary, material obtained *proprio motu*".[7] In addition, this Court has also held that if, at the time of its consideration of the case, the applicant's removal from the Contracting Party's jurisdiction has yet to be enforced, the material time for the risk assessment will be that of the proceedings before the Court.[8]

5. In light of the above, the interveners submit that, in the context of a risk assessment upon removal, in keeping with the constant jurisprudence of this Court, a full and *ex nunc* evaluation is required to ensure that the protection of the rights enshrined in the Convention be practical and effective. Overlooking the fact that the circumstances may have changed over time would render these rights theoretical and illusory.[9]

B. Coerced, self-enforced suppression of a fundamental aspect of one's identity is incompatible with the Convention obligations, including under Article 3

6. In this section the interveners address the compatibility of requiring coerced, self-enforced suppression of a fundamental aspect of one's identity — such as that which enforced concealment of one's religious conversion entails — with the Contracting Parties' obligations under the Convention, in particular, under Article 3.

7. First, the interveners submit that there is no authority in the Convention case-law requiring coerced, self-enforced concealment of a fundamental aspect of one's identity such as one's religious belief.

8. Secondly, the interveners submit that, in fact, requiring coerced, self-enforced suppression of one's religious conversion, including through abstaining from any public manifestation of one's religious beliefs either alone or in community with others, is tantamount to expecting the individual concerned to abstain from exercising his or her right to freedom of thought, conscience and religion altogether.[10] Such an

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consequences" suffered by an individual following removal from their jurisdiction (See, inter alia, *Soering* §§ 85-86; *Hirsi*, §115; *Saadi v. Italy* [GC], no. 37201/06, 28 February 2008, § 126). The *non-refoulement* principle is also well established in general international human rights and refugee law. It is explicitly codified in, *inter alia*, Article 3, UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 16, International Convention for the Protection of All Persons from Enforced Disappearance; Article 19, Charter of Fundamental Rights of the European Union; Article 33, 1951 Convention relating to the Status of Refugees; and Principle 5, UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

[6] *Chahal v. the United Kingdom*, judgment of 15 November 1996, Reports 1996-V, § 96, and *Saadi v. Italy,* App. No. 372017/06, judgment (Grand Chamber 28 February 2008), § 128.

[7] See, *inter alia*, *H.L.R. v. France*, App. No. 24573/94, judgment (Grand Chamber 29 April 1997), § 37.

[8] See, inter alia, *Saadi v Italy*, cited above, § 133. "[I]t is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities", *Salah Sheekh v. the Netherlands*, cited above, § 136.

[9] In *El-Masri v. "the former Yugoslav Republic of Macedonia"*, App. No. 39630/09, judgment 13 December 2012), the Grand Chamber of this Court reiterated that "the Convention is an instrument for the protection of human rights and that it is of crucial importance that it is interpreted and applied in a manner that renders these rights practical and effective, not theoretical and illusory", § 134.

[10] On this point, for instance, the Human Rights Committee has observed that "the freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including, inter alia, the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief. Article 18(2) bars coercions that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert"; Human Rights Committee, General

expectation is not only unreasonable, but it is, in itself, incompatible with the recognition that one's religious belief is fundamental to a person's identity and humanity. With respect to this, as noted by the UN Special Rapporteur on freedom of religion or belief "[r]espect for human dignity… necessarily implies respecting the various deep convictions and commitments of all human beings by legally guaranteeing their freedom to have and adopt a religion or belief of their own "choice"".[11] Indeed, in *V.C. v Slovakia*, this Court reiterated, "that the very essence of the Convention is respect for human dignity and human freedom".[12]

9. In light of this, the interveners submit that requiring coerced, self-enforced suppression of a fundamental characteristic of one's identity, such as one's religious conversion or, *mutatis mutandis*, one's sexual orientation, is incompatible with respect for human dignity and human freedom, and thus, with the Convention's very essence.

10. Further, in *Mamatkulov and Askarov v. Turkey*[13] this Court held that the prospective ill-treatment alleged upon removal

> *must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration and its physical or mental effects.*[14]

11. In this regard, in determining whether a person's treatment is degrading within the meaning of Article 3, in *Raninen v. Finland*,[15] this Court held that it would consider "whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3".[16] Then, in *Keenan v. the United Kingdom*,[17] this Court additionally clarified that someone's treatment is capable of raising an issue under Article 3 when it is "such as to arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance […] **or as driving the victim to act against his will or conscience**…" (**emphasis added**).[18]

12. Thus, in gauging whether the prospective alleged ill-treatment will attain the required level of severity for it to be considered inhuman or degrading, this Court considers the nature of the harm that the concerned individuals would experience, taking into account not only the actual, exogenous harm threatened — e.g. imposition of the death penalty for apostasy — but also the impact of the threatened, prospective harm on them, endogenously.

13. Therefore, in its assessment of the severity of the alleged ill-treatment upon removal, the Court considers both the prospective exogenous harm that could befall the

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Comment 22 on the right to freedom of thought, conscience and religion (Art. 18), CCPR/C/21/Rev.1/Add.4, 27 September 1993, § 5. Further, the Special Rapporteur on freedom of religion or belief has remarked that "Extraditions of converts to their countries of origin, even in the face of obvious risks of persecution, have at times been justified with the cynical recommendation that they could simply "conceal" their new faith, a recommendation that shows a flagrant disrespect for freedom of thought, conscience, religion or belief. The Special Rapporteur reiterates that extraditions or deportations that are likely to result in violations of freedom of religion or belief may themselves amount to a violation of this human right. In addition, such extraditions violate the principle of *non-refoulement*, as enshrined in article 33 of the 1951 Convention relating to the Status of Refugees." Report of the Special Raporteur, see cited above, § 40.

[11] Report of the Special Raporteur, cited above, § 61.

[12] *V.C. v. Slovakia*, App. No. 18968/07, judgment of 8 November 2011, § 105.

[13] *Mamatkulov and Askarov* v. Turkey [GC], App. Nos. 46827/99 and 46951/99, ECHR 2005-I.

[14] *Ibid*, § 70, citing in turn *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, p. 34, § 107.

[15] *Raninen v. Finland*, judgment of 16 December 1997, Reports 1997-VIII, pp. 2821-22.

[16] *Ibid*, § 55.

[17] *Keenan v. the United Kingdom*, App. No. 27229/95, judgment 3 April 2001.

[18] *Ibid*, § 110.

applicant, as well as the severity of the prospective endogenous harm. In this context, as noted above,[19] this Court has recognized that endogenous, psychological harm may attain such a severity as to fall within the scope of Article 3. Such recognition is also affirmed in general international human rights law. For example, the UN Human Rights Committee's, General Comment 20 relating to Article 7 of the International Covenant on Civil and Political Rights states that "The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim".[20] Indeed, the definition of torture provided in Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment involves the infliction of "pain or suffering, whether physical or mental".[21] The inclusion of the notion of "mental" suffering clearly indicates that torture is not restricted to the infliction of physical pain. Mental pain or suffering reaching the threshold of Article 3 may result, for example, from threatened physical ill-treatment.

14. In light of the above, the interveners contend that, *a fortiori*, ill-treatment falling short of torture under Article 3 of the Convention, namely inhuman or degrading treatment, may encompass mental, psychological harm.

15. The interveners recall that this Court has found Contracting Parties liable in cases of constructive *refoulement*. For example, in *M.S. v Belgium*,[22] this Court had to decide as a preliminary matter, whether, by "accepting" to return to Iraq, the applicant in that case could be said to have voluntarily, validly waived his right to benefit from the protection guaranteed by Article 3 of the Convention. On the basis of the facts in that case, the Court held that Belgium's reliance on the applicant's purported consent to his return to Iraq had failed to take account of the fact that by depriving him of his liberty the Belgian authorities had effectively coerced him in such a way as to dissuade him, or at the very least as to discourage him, from remaining in Belgium. By so doing, the Belgian authorities had effectively presented the applicant with a stark choice. He could either remain in Belgium without any hope of ever being granted the right to legally reside in the country and without any concrete chance of ever being released from detention; or else return to Iraq running the risk of being arrested and ill-treated in detention. In the circumstances, the Court held that the applicant could not be said to have consented to being returned to Iraq and that his return to that country by the Belgian authorities should be considered a forcible one.

16. In light of the foregoing, the interveners submit that the self-enforced suppression of a fundamental characteristic of one's identity as a human being — such as that which the concealment of one's religious conversion entails — is rarely the result of one's genuine free choice. In this context, concealment is not a course of action undertaken voluntarily, resulting from full, free, informed, genuine, non-coercive consent. In this

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[19] See, *inter alia*, *Mamatkulov*, § 70; *Raninen*, § 55; and *Keenan*, § 110, cited above.

[20] Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), § 5. See also, *María del Carmen Almeida de Quinteros et al. v. Uruguay*, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138 (1990); *Natalia Schedko v. Belarus*, Communication No. 886/1999, U.N. Doc. CCPR/C/77/D/886/1999 (1999) and *Mariya Staselovich v. Belarus*, Communication No. 887/1999, U.N. Doc. CCPR/C/77/D/887/1999 (2003).

[21] UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987. Article 1(1) reads as follows: "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[22] *M.S. v. Belgium*, App. No 50012/08, judgment, 31 January 2012, §§ 121-125.

context, the interveners further submit that, *a fortiori*, the coerced, self-enforced suppression of a fundamental aspect of one's identity — such as that which enforced concealment of one's religious conversion entails — would be a direct and foreseeable consequence of the forcible removal of an individual from the Contracting Parties' jurisdiction notwithstanding the real risk she or he would face upon return on account of being sentenced to death as an apostate.

17. Coerced, self-enforced concealment of one's religious conversion as the direct, foreseeable consequence of enforcing the removal of individuals to countries where they would face a real risk of the death penalty as apostates, therefore, entails a real risk of mental, psychological suffering falling within the scope of Article 3 of the Convention.

18. In conclusion the interveners submit that enforced removals in these circumstances would thus constitute arbitrary, constructive *refoulement* (*mutatis mutandis M.S. v Belgium*) and be incompatible with the Contracting Parties' obligations under the Convention, in particular, under Article 3.

C. The EU asylum *acquis* and relevant case-law of the CJEU, including the joined cases of *Bundesrepublik Deutschland v Y and Z*, and the relevance and significance of Article 53 of the ECHR

19. The EU asylum *acquis* is relevant to the present case in two ways.[23] First, the principle of the rule of law runs like a golden thread through the Convention.[24] As a result, the Convention requires that all measures carried out by the Contracting Parties that affect an individual's protected rights must be "in accordance with the law". In some circumstances the law will be EU law. In this context, in determining whether the Contracting Parties' obligations under the Convention are engaged in any particular case — and, if so, the scope and content of these obligations — this Court has therefore had regard to the EU asylum *acquis* materially relevant to those questions when the Respondent States are themselves legally bound by that *corpus* of law.[25]

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[23] The EU asylum *acquis* is the *corpus* of law comprising all EU law adopted in the field of international protection claims. The EU asylum *acquis* is "a body of intergovernmental agreements, regulations and directives that governs almost all asylum-related matters in the EU". '"**Under EU law**, Article 78 of the TFEU [Treaty on the Functioning of the EU] stipulates that the EU must provide a policy for asylum, subsidiary protection and temporary protection, "ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with [the 1951 Geneva Convention and its Protocol] and other relevant treaties", such as the ECHR, the UN Convention on the Rights of the Child (UNCRC), the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), ICCPR, ICESCR. The EU asylum *acquis* measures have been adopted under this policy, including the Dublin Regulation (Regulation (EU) No. 604/2013), the Qualification Directive (2011/95/EU), the Asylum Procedures Directive (2013/32/EU) and the Reception Conditions Directive (2013/33/EU). All these instruments have been amended."' See, Fundamental Rights Agency, Handbook on European law relating to asylum, borders and immigration, Edition 2014, http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded_en.pdf, pp. 64-65.

[24] The Convention's preamble recalls the rule of law.

[25] See *M.S.S. v Belgium and Greece* where the Grand Chamber analysed the scope and content of the Contracting Parties' obligations under Article 3 of the Convention in the light of relevant provisions of EU law by which the Greek authorities were bound. *M.S.S. v. Belgium and Greece,* App. No. 30696/09 (Grand Chamber 21 January 2011), *inter alia,* §§ 57-86 and § 250. Further, and of particular relevance in this context to the Court's determination of the present case, in *Sufi and Elmi v. the United Kingdom*, the Fourth Section of the Court had regard to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the 2004 Qualification Directive"), as well as to a preliminary ruling by the European Court of Justice, as the CJEU was then known, following a reference lodged by the Dutch Administrative Jurisdiction Division of the Council of State (Afdeling Bestuursrechtspraak van de Raad van State) in the case of *M. and N. Elgafaji v. Staatssecretaris van Justitie* asking, *inter alia*, whether Article 15(c) of the Qualification Directive offered supplementary

20. It is not generally the role of this Court to decide whether States have acted in accordance with EU law "unless and in so far as they may have infringed rights and freedoms protected by the Convention".[26] Further, it is clear – and undisputed – that it is for the CJEU to interpret the **content** of the applicable EU law.[27] Pursuant to the principle of *acte clair*, national courts of final instance are relieved of their obligation to refer a question of EU law to the CJEU if, in light a previous CJEU judgments, the answer is "obvious".[28] The CJEU has noted on a number of occasions the need for a uniform application of EU law and that its provisions must therefore be given an independent and uniform interpretation throughout the EU. This is the primary role of the CJEU. When the national authorities of an EU Member State apply national measures implementing a Directive in a manner that is at odds with the Directive's object and purpose, including, and *a fortiori*, as construed by CJEU's jurisprudence, Member states are bound to ensure the correct application of the relevant Directive. To this end, administrative bodies may even be required to re-open a decision based on a misapplication of EU law.[29]

21. It is for this Court therefore to consider any EU Respondent Government's obligations under the applicable provisions of EU *acquis* (as interpreted and construed by the CJEU) when assessing whether a Contracting Party's proposed actions will be "in accordance with the law" under the Convention.[30] This is a distinct but related issue from the one that arises under Article 53 of the Convention. Pursuant to Article 53, the provisions of the ECHR cannot be applied in a manner that would limit the scope of the protection of human rights and fundamental freedoms ensured under the EU asylum *acquis*.

22. Second, when this Court examines an expulsion case it will make an *ex tunc* assessment if the expulsion has already taken place, or an *ex nunc* assessment if it has not. The latter thus requires this Court to assess whether or not a proposed expulsion, were it to take place after its judgment, would be in violation of the Convention.

23. In light of the above, the interveners submit that, when this Court is called upon to carry out an *ex nunc* assessment, it must take into account, *inter alia*, the applicable EU law. For present purpose, that law will be the relevant provisions of the Recast

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or other protection to Article 3 of the Convention. *Sufi and Elmi v. the United Kingdom*, App. Nos. 8319/07 and 11449/07, 28 June 2011, *inter alia*, §§ 30-32 and §§ 219-226.

[26] See most recently *Jeunesse v. the Netherlands*, App. No. 12738/10, Grand Chamber, 3 October 2014, §§ 110-111, and *Ullens de Schooten and Rezabek v.Belgium*, App. nos. 3989/07 and 38353/07, 20 September 2011, § 54, cited therein.

[27] In *Sufi and Elmi* the Fourth Section of the Court acknowledged as much holding that "[t]he jurisdiction of this Court is limited to the interpretation of the Convention and it would not, therefore, be appropriate for it to express any views on the ambit or scope of article 15(c) of the Qualification Directive." *Sufi and Elmi*, § 226.

[28] See this Court's recognition of these principles in *Ullens de Schooten* at § 34, and § 54 and seq. See also Joined Cases 28 to 30/62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration*; Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*).

[29] *i-21 Germany GmbH and Arcor AG & Co. KG v Bundesrepublik Deutschland*, Judgment of the Grand Chamber in Joined Cases C-392/04 and C-422/04, 19 September 2006, §§ 51-52.

[30] *Aristimuño Mendizabal v France*, App. No. 51431/99, judgment 17 January 2006, § 69 and §§ 74-79. See also *Suso Musa v Malta* where the Fourth Section of the Court observed "where a State which has gone beyond its obligations in creating further rights or a more favourable position – a possibility open to it under Article 53 of the Convention – enacts legislation (of its own motion or pursuant to European Union law) explicitly authorising the entry or stay of immigrants pending an asylum application (see for example, *Kanagaratnam*, cited above, § 35 *in fine*, in relation to Belgian law), an ensuing detention for the purpose of preventing an unauthorised entry may raise an issue as to the lawfulness of detention under Article 5 § 1 (f). Indeed, in such circumstances it would be hard to consider the measure as being closely connected to the purpose of the detention and to regard the situation as being in accordance with domestic law. In fact, it would be arbitrary and thus run counter to the purpose of Article 5 § 1 (f) of the Convention to interpret clear and precise domestic law provisions in a manner contrary to their meaning (see *Longa Yonkeu v. Latvia*, no. 57229/09, § 125, 15 November 2011)." *Suso Musa v Malta*, App. No. 42337/12, 23 July 2013, § 97.

Qualification Directive (RQD),[31] viewed in the light of the authoritative interpretation by the CJEU of the corresponding provisions of the 2004 Qualification Directive (2004 QD) it replaced.[32] This Court, it is submitted, is required to consider whether the respondent Government's proposed removal would be in accordance with the applicable law in the State in question. This Court would not endorse any measure that would be in flagrant contravention of the rule of law, including the applicable EU law. The Court must additionally ensure compliance with Article 53 of the Convention by ensuring that the approach it takes guarantees at least the protection required under the applicable EU law.

24. The interveners now turn to considering the content of the EU law in question. On 9 December 2010, the cases of Y and Z were referred to the CJEU because it was unclear[33] whether the 2004 QD required Germany to recognize the asylum seekers in question as refugees. Since this is a matter governed by EU law, the provisions of the Charter of Fundamental Rights are also applicable.[34] Since 5 September 2012, the date on which the CJEU handed down its judgment in the case,[35] its interpretation of the relevant provisions of the 2004 QD has been applicable to any action taken by an EU Member State in this field.

25. In light of this, the interveners submit that this Court may therefore wish to be fully appraised of the content of the applicable EU law that governs the criteria applicable to determining the protection entitlements of those individuals who claim that removal from the Contracting Party's jurisdiction would expose them to a real risk of persecution.

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[31] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, the "recast Qualification Directive" referred to hereafter as "RQD". At the time of the domestic proceedings in the present case, the EU law applicable to the determination of entitlement to international protection in any EU Member State was the 2004 Qualification Directive, which has been subsequently superseded by the RQD. However, for present purposes, the relevant provisions, namely, Articles 5, 6, 9 and 10, remain unchanged.

[32] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (the 2004 QD).

[33] The CJEU's preliminary reference procedure is open to all national judges of all Member States. If, in the context of a case over which judges in domestic proceedings are presiding, they consider that the application of a rule of EU law raises a question the answer to which they do not know but need clarity on to be able to give judgment, they may stay the domestic case and refer the question to the CJEU, in order to clarify a point of interpretation of EU law. Such questions can concern the interpretation of Treaties, and the interpretation and validity of the acts of the institutions, bodies, offices and agencies of the EU. Judges of courts against whose decision no appeal under national law is open must refer the question to the CJEU if one of the parties requests it, except when the Court has already interpreted the provision and given its interpretation, or when the correct application of EU law is so obvious that there is no scope for any reasonable doubt. (TFEU, Article 267; Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, Official Journal of the European Union C 338 (6 November 2012); Joined Cases 28 to 30/62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration*; Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*).

[34] For example, Articles 1, 4, 18 and 19. By virtue of Article 51(1), the provisions of the EU Charter of Fundamental Rights "are addressed to the institutions, bodies, offices and agencies" of the EU "and to Member States only when they are implementing Union law". According to the official Explanations that accompany the Charter, its provisions are binding on the Member States "when they act in the scope of Union law". As the EU has developed a comprehensive set of asylum instruments, asylum decisions taken by Member States come within the scope of EU law. See, explanations relating to the Charter of Fundamental Rights, *Official Journal of the European Union* 2007/C 303/32 (14 December 2007). The Explanations set out the sources of the provisions of the Charter, and "shall be given due regard by the courts of the Union and of the Member States"; Charter of Fundamental Rights of the EU, Article 52(7).

[35] Joined cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y and Z*, Judgment of the Court (Grand Chamber) of 5 September 2012.

26. The current position in EU law is set out in the CJEU judgment in *Y and Z*,[36] which concerned two asylum claims based on persecution for reasons of religious belief. The CJEU in its analysis observed that none of the relevant rules required consideration "of the possibility open to the applicant of avoiding the risk of persecution by abstaining from the religious practice in question and, consequently, renouncing the protection which the Directive is intended to afford the applicant by conferring refugee status."[37] In light of this, the CJEU went on to hold that "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…. The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant".[38]

27. The CJEU first identified freedom of religion as one of the foundations of a democratic society and a basic human right, holding that an interference with it may be so serious as to be "treated" in the same way as violations of non-derogable rights (such as are found in Article 3 of the Convention by virtue of Article 15(2)). It then nonetheless emphasized that this consequence "cannot be taken to mean that any interference with the right to religious freedom… constitutes an act of persecution".[39] The CJEU held that the QD must be applied "in such a manner as to enable the competent authorities to assess all kinds of acts which interfere with the basic right of freedom of religion in order to determine whether, by their nature or repetition, they are sufficiently severe to be regarded as amounting to persecution".[40] Such acts must be identified "not on the basis of the particular aspect of religious freedom that is being interfered with but on the basis of the nature of the repression inflicted on the individual and its consequences".[41] Accordingly, the Court continued, "a violation of the right to freedom of religion may constitute persecution within the meaning of… the Directive [i.e. 2004 QD] where an applicant for asylum, as a result of exercising that freedom in his country of origin, runs a genuine risk of, inter alia, being prosecuted or subject to inhuman or degrading treatment or punishment by one of the actors referred to in Article 6 of the Directive [i.e. 2004 QD]".[42] This latter group includes the State as well as non-State actors, where the State (or parties controlling it or a part of its territory) is unable or unwilling to provide protection.

28. The CJEU determined, in a manner consistent with the Refugee Convention, whether the feared human rights violations for reasons of religious belief on return to the country of origin would be so serious, by their nature or repetition, as to give rise to a well-founded fear of persecution. In conducting the analysis, the Court took into account the whole spectrum of the experience of freedom of religion, and acts and measures that interfere with it and the way in which they would affect the applicants in turn. The CJEU held that for the purpose of determining whether interference constitutes persecution, the "authorities must ascertain, in light of the personal circumstances of the person concerned, whether that person… runs a genuine risk of, inter alia, being prosecuted". The "genuine risk of… being prosecuted", in the context of religious freedom, appeared to be sufficient to give rise to a well-founded fear of persecution.[43]

29. The interveners therefore invite the Court to hold that, in the light of the CJEU's judgment in *Y and Z*, it would not be "in accordance with the law" for any Contracting

[36] In 2004 and 2003 Y and Z, respectively, entered Germany and applied for asylum. They claimed that their membership of the Muslim Ahmadi community forced them to leave their country of origin, Pakistan. They had both experienced past incidents of persecution and the Pakistani Criminal Code provides that members of the Ahmadi religious community may face imprisonment of up to three years or may be punished by death or life imprisonment or a fine.
[37] *Bundesrepublik Deutschland v Y and Z*, § 78.
[38] *Ibid*, § 79.
[39] *Y and Z*, §§ 57-58.
[40] *Ibid*, § 64.
[41] *Ibid*, § 65.
[42] *Ibid*, § 67.
[43] *Ibid*, § 72.

Party to the Convention that is also an EU Member State to expel any individuals who have converted to a different religion in circumstances where, in the country of proposed destination, apostasy gives rise to a real risk of persecution amounting to treatment impermissible under Article 3 of the Convention. This prohibition applies equally in circumstances where they could only avoid violations of the Convention amounting to persecution by concealing their religion. Nor would such an expulsion comply with the requirements of Article 53 of the Convention.

D. The relevance and significance of the Refugee Convention

30. This Court's jurisprudence recognizes that Convention rights are not applied in a vacuum,[44] but fall to be interpreted in the light of and in harmony with other international law standards and obligations,[45] including under treaty and customary international law.[46] In the light of this, in the following section the interveners address the relevance of the Refugee Convention to the Court's determination of the present case.

31. The fact that, under international human rights law, in certain circumstances, psychological harm resulting from fear of exogenous harm has been found to constitute cruel, inhuman and degrading treatment is consistent with refugee law holding that in some cases endogenous, psychological harm is persecutory.[47]

32. Further, under refugee law, requiring self-enforced, coerced suppression of a fundamental aspect of one's identity, such as one's religious belief,[48] one's sexual orientation[49] or one's political opinion[50] has been held inconsistent with the fundamental tenets of the Refugee Convention.[51] For instance, the UK's Supreme

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[44] *Öcalan v. Turkey* [GC], no. 46221/99, 12 May 2005, § 163.

[45] *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, § 67; *Al-Adsani v. UK* [GC], no. 35763/97, 21 November 2001, § 55.

[46] Al-*Adsani*, op cit; *Waite and Kennedy v Germany*, [GC] no. 26083/94, 18 February 1999; *Taskin v Turkey*, no. 46117/99, 10 November 2004.

[47] UNHCR's guidance in refugee claims relating to sexual and gender identity indicates that psychological harm can amount to persecution. See UNHCR, *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, Geneva, 21 December 2008, § 14. In *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004), a mother's psychological trauma due to the risk of her child undergoing female genital mutilation was found to constitute persecutory harm and thus enough to entitle her to protection as a refugee. Endogenous psychological harm is capable of constituting persecution for the purposes of the Refugee Convention when it results from coercion. US case law also confirms this clearly: *Fisher v I.N.S.*, 37 F.3d 1371 (9th Cir. 1994) "being forced to conform to, or being sanctioned for failing to comply with, a conception of Islam that is fundamentally at odds with one's own…can rise to the level of persecution", § 45.

[48] "[R]eligious 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[….] Indeed, the Convention would give no protection from persecution for reasons of religion if it was a condition that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. Bearing witness in words and deeds is often bound up with the existence of religious convictions", footnote in the original omitted, UNHCR's Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06, 28 April 2004, § 13.

[49] UNHCR's 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, HCR/GIP/12/09, 23 October 2012, §§ 30-33.

[50] *RT (Zimbabwe) and others (Respondents) v Secretary for State for the Home Department (Appellant); KM (Zimbabwe) (FC) (Appellant) v Secretary of State for the Home Department* [2012] UKSC 38, § 26.

[51] There is no hierarchy within the grounds for persecution identified in the Refugee Convention. Indeed, the treaty lists the five grounds on an equal basis. See also for instance, UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, "In order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons stated above. It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them", Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,

Court ruled that to hold otherwise it would have countenanced the return of Anne Frank to Nazi-occupied Netherlands, had she ever managed to escape it, on the basis that she could have hidden in the attic and therefore successfully avoided the possibility of Nazi detection.[52] Further, Anne Frank's well-founded fear of Nazi persecution was not eliminated by her self-enforced confinement in the attic to conceal her identity as a Jew. To put the same point in Convention terms, the risk of Article 3 prohibited ill-treatment to which removal would have exposed Anne Frank would not have been any less real purportedly on account of the fact that she could have remained hidden in the attic. The same could equally be said about the risk of Article 3 prohibited treatment befalling apostates upon Contracting Parties' removing them to certain countries. Such a risk is no less real because the people concerned would most likely seek to reduce that risk materializing by self-enforced, coerced suppression of their religious conversion.

33. The interveners submit that it is inconceivable that either the drafters of the Convention — a treaty that came about, *inter alia*, to ensure that the horrors of the Nazis and of the second World War could never be repeated — or nowadays Contracting Parties, let alone this Court, ever did have, or should be imputed to have had, contemplated any other result.

34. Moreover, under refugee law, it is not necessary that an individual declares that she or he belongs to a particular religious "faith", or adheres to certain religious "practices". A religious affiliation may be imputed or attributed to people, for example, if they participate in such activities as the observance of religious holidays or comply with distinct dietary requirements that are ordinarily associated with a particular religious belief. Individuals may be persecuted for reasons of a certain religious belief, even if they adamantly deny that that belief, identity and/or way of life constitute a "religion".

Reissued Geneva, December 2011, § 66. Therefore the Refugee Convention affords refugees the same protection, whether it be to safeguard the right to express one's political opinion or one's religious belief, or to live openly as a homosexual.

[52] As held by Lord Collins in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, "It is plain that it remains the threat to Jews of the concentration camp and the gas chamber which constitutes the persecution." Concurring judgment of Lord Collins of Mapesbury, United Kingdom Supreme Court judgment, 7 July 2010, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596, § 107.