

**IN THE MATTER OF A REFERENCE FOR A PRELIMINARY RULING
OF THE COURT OF JUSTICE
B E T W E E N:**

S. and A.

Applicant

and

NETHERLANDS

Defendant

and

**THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
("UNHCR")**

Party to the proceedings

**UNHCR'S WRITTEN OBSERVATIONS
ON THE REFERENCE FOR A PRELIMINARY RULING**

I. Introduction¹

1. This preliminary reference from the Dutch Council of State to the Court of Justice of the European Union ("the Court")² concerns the interpretation of political opinion as a reason for a well-founded fear of persecution in Article 10(1)(e) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 ("Qualification Directive")³ and whether "the State Secretary should investigate and assess, as a condition for granting

¹ This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly (UNGA), *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946.

² For the exact wording of the question see [Request for a preliminary ruling from the Raad van State \(Netherlands\)](#), lodged on 2 March 2022 – S. A. v Staatssecretaris van Veiligheid en Justitie, Case C-151/22, Court of Justice of the European Union ("CJEU").

³ European Union, *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 (recast)*, (Qualification Directive), 20 December 2011, OJ L 337/9-337/26; 20.12.2011, 2011/95/EU.

international protection, whether the political opinion invoked by the foreign national is of a particular strength.”⁴

2. This submission is divided into seven parts. Following this section, the interest and expertise of UNHCR in this matter is explained in Part 2. Part 3 outlines the relevant legislation. Part 4 responds to the Court’s first question on whether political opinion as a reason for a well-founded fear of persecution may be invoked by applicants who merely claim to hold a political view, and/or to express such a view, without having attracted the negative interest of an actor of persecution during their residence in their country of origin and since their residence in the host country. Part 5 responds to the Court’s second and third questions about whether the political opinion must be ‘deeply rooted’ or ‘fundamental’. Part 6 responds to the fourth question on concealment and whether an applicant who does not have a deeply rooted political opinion can be expected to refrain from expressing that political opinion. Part 7 concludes and summarizes UNHCR’s position on these questions.

II. UNHCR’s interest and expertise in the matter

3. 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 them.⁵ UNHCR fulfils its mandate, *inter alia*, by supervising the application of international conventions for the protection of refugees.⁶ State parties to the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol* (together, “1951 Convention”),⁷ including all EU Member States, are obliged to cooperate with UNHCR in the exercise of its mandate and to facilitate its supervisory role.⁸ As part of activities pursuant to its supervisory role, UNHCR issues guidelines on the interpretation and application of the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Those guidelines include the *UNHCR Handbook on Procedures and Criteria for*

⁴ [Request for a preliminary ruling](#), Case C-151/22, para. 11.

⁵ [Statute of the Office of the United Nations High Commissioner for Refugees](#), 14 December 1950, para. 1.

⁶ *Ibid.*, para. 8(a).

⁷ [Convention Relating to the Status of Refugees](#), 28 July 1951, UNTS No. 2545, vol. 189, p. 137.

⁸ Article 35 of the *1951 Convention* and Article II of the [1967 Protocol Relating to the Status of Refugees](#).

Determining Refugee Status (“UNHCR Handbook”) which was subsequently complemented by a number of *Guidelines on International Protection*.⁹

4. UNHCR’s supervisory responsibility has been reflected in European Union law, including in Article 78 (1) of the Treaty on the Functioning of the European Union (“TFEU”) which provides that the Union’s asylum policy must be in accordance with the 1951 Convention.¹⁰ Secondary EU legislation expressly recognises the role and expertise of UNHCR. For instance, Recital 22 of the Qualification Directive, states that consultations with UNHCR “*may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention*”.¹¹ The supervisory responsibility of UNHCR is also reflected in Article 29 of Directive 2013/32/EU of 29 June 2013 (“Asylum Procedures Directive”), which obliges Member States to allow UNHCR to present its views “*in the exercise of its supervisory responsibilities*” regarding individual applications for international protection “*at any stage of the procedure*.”¹²
5. UNHCR has supervised the application of the 1951 Convention throughout the world for more than 70 years. The 1951 Convention itself is widely recognised, including by this Court, as “*the cornerstone of the international legal regime for the protection of refugees*.”¹³ The Court has also recognised that “*documents from the United Nations High Commissioner for Refugees (UNHCR) are particularly relevant in the light of the role conferred on the UNHCR by the Geneva Convention*.”¹⁴ The *UNHCR Handbook* has been found by the Supreme Courts of Canada, the United Kingdom, and the United States to be a “highly relevant authority”,¹⁵ a “highly persuasive authority”,¹⁶ a source of “significant guidance”,¹⁷ and a document that

⁹ UNHCR, [*Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*](#), 1979, reissued February 2019.

¹⁰ European Union, [*Consolidated version of the Treaty on the Functioning of the European Union*](#), 13 December 2007, OJ C 115/47 of 9.05.2008.

¹¹ Qualification Directive, note 3 above.

¹² European Union, [*Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection \(recast\)*](#), 29 June 2013, OJ L. 180/60 180/95; 29.6.2013, 2013/32/EU.

¹³ [*Salahadin Abdulla and Others v. Bundesrepublik Deutschland*](#), C-175/08; C-176/08; C-178/08 & C-179/08, CJEU, 2 March 2010, [52]; [*Bundesrepublik Deutschland v. B and D*](#), C-57/09 and C-101/09, CJEU, 9 November 2010, [77].

¹⁴ [*Mohammed Bilali v Bundesamt für Fremdenwesen und Asyl*](#), Case C-720/17, CJEU, 23 May 2019 [57].

¹⁵ [*Chan v. Canada \(Minister of Employment and Immigration\)*](#), [1995] 3 S.C.R. 593 at paras. 46; [*Canada \(Attorney General\) v Ward*](#), [1993] 2 S.C.R. 689, pp. 713-714.

¹⁶ *R v. Secretary of State for the Home Department, Ex parte Adan*, [2001] 1 All ER 593, [2001] 2 AC 477, p. 519.

¹⁷ *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987); 107 S. Ct. 1207.

“should be accorded considerable weight’, in the light of the obligation of Member States under Article 35 of the Convention to facilitate its duty of supervising the application of the provisions of the Convention”.¹⁸ UNHCR’s *Handbook* has also been accepted as a valid source of interpretation under Article 31(3)(b) of the 1969 *Vienna Convention on the Law of Treaties*, in reflecting “subsequent practice in the application of the treaty”.¹⁹ UNHCR’s “unique and unrivalled expertise”²⁰ on particular legal issues has also been acknowledged by the European Court of Human Rights (“ECtHR”), which has expressly interpreted the provisions of the European Convention on Human Rights in a manner consistent with UNHCR’s Guidelines.²¹

III. RELEVANT LEGAL FRAMEWORK

(i) International law: the 1951 Convention and international human rights law

6. Article 14(1) of the *Universal Declaration of Human Rights* 1948 recognises as a universal principle that “everyone has the right to seek and to enjoy in other countries asylum from persecution”.²²
7. The 1951 Convention specified, for the first time, a single and comprehensive definition of a “refugee”, who would be entitled to asylum.²³ Central to that definition was Article 1(A)(2), which provided that the term “refugee” would apply to any person who:

“...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his

¹⁸ *Al-Sirri (FC) (Appellant) v. SSHD (Respondent) and DD (Afghanistan) (FC) (Appellant) v. SSHD (Respondent)* [2012] UKSC 54, at [36] citing *R v Asfaw* [2008] AC 1061, per Lord Bingham at para 13, and *R v Uxbridge Magistrates’ Court, Ex p Adimi* [2001] QB 667, p. 678.

¹⁹ *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, Can. T.S. 1980 No. 37 as discussed in relation to the UNHCR Handbook in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, [53].

²⁰ UK Supreme Court, *EM (Eritrea) v Secretary of State for the Home Department* [2014] UKSC 12, [72].

²¹ For example, *Saadi v United Kingdom* (2008) 47 EHRR 17, [65]. On the authoritative nature of UNHCR’s reports in relation to the conditions in a third country see *Ilias and Ahmed v Hungary*, No. 47287/15, ECtHR, 21 November 2019 [141] and [163]. On the need to “give due weight” to UNHCR conclusions on the risks faced by asylum seekers on return see *Abdolkhani and Karimnia v Turkey*, No. 30471/08, ECtHR, 22 September 2009 [82]. The Court noted that its reasoning was in line with the UNHCR Guidelines in *F.G. v Sweden* No. 43611/11; ECtHR, 23 March 2016; [123].

²² *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, UN Doc A/810, (1948) 71.

²³ As updated by the Protocol, which in 1967 removed the geographic and temporal limits on the 1951 Convention.

nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality [...].”

8. The 1951 Convention affirms the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.²⁴ The right to hold opinions and the right to freedom of expression are two of the fundamental rights and freedoms in international human rights law.²⁵ Both rights go to the heart of refugee protection. The underlying rationale of the 1951 Convention is to allow persons to live their lives free from fear of persecution because of, *inter alia*, their political opinions.²⁶

(ii) European Union Law: the Qualification Directive

9. The TFEU requires the Union to develop a common policy on asylum, which is “*in accordance with the 1951 Convention*”.²⁷ The Qualification Directive lays down common criteria in the European Union for recognising applicants for asylum as refugees within the meaning of Article 1 of the 1951 Convention.²⁸ As emphasized by this Court, the Qualification Directive must be interpreted in light of its general scheme and purpose, in a manner consistent with the 1951 Convention and the rights recognised by the Charter of Fundamental Rights of the European Union (“Charter”).²⁹
10. An application for international protection made under the Qualification Directive must be assessed on an individual basis and take into account the facts relating to the country of origin, the evidence presented, and the ‘individual position and personal circumstances of the applicant.’³⁰

IV. The First Question: Political Opinions and Sur Place claims

²⁴ 1951 Convention, preambular paragraph 1.

²⁵ ICCPR, Article 19(1) and Article 19(2).

²⁶ UNHCR, *Legal considerations on the right for refugees to hold and express political opinions in their country of asylum*, 6 March 2020, www.refworld.org/docid/5e67588e4.html.

²⁷ Article 78(1).

²⁸ Qualification Directive, note 3 above, recitals (23)-(25) and (49).

²⁹ See e.g. Joined Cases C-199/12 to C-201/12 *X, Y and Z v Minister voor Immigratie en Asiel* ECLI:EU:C:2013:720, para 40. It should also be noted that Article 3 of the European Convention on Human Rights, protects against refoulement to a country where an individual would be at risk of torture or to inhuman or degrading treatment or punishment.

³⁰ Qualification Directive, note 3 above, Article 4(3).

11. It is important to recall that all the reference questions are related to a very specific and limited sub-group of applicants who claim to be in need of international protection for reasons of political opinion, but who have not yet attracted the ‘negative interest of an actor of persecution.’³¹

12. The first question referred is as follows:

Must Article 10(1)(e) of the Qualification Directive be interpreted as meaning that political opinion as a reason for persecution may also be invoked by applicants who merely claim to hold a political view, and/or to express such a view, without having attracted the negative interest of an actor of persecution during their residence in their country of origin and since their residence in the host country?

13. UNHCR makes two submissions in relation to this question. First, political opinion as a protected ground under the 1951 Convention does not require a particular level of conviction. Second, the applicant must not necessarily have left their country of origin because they had attracted the negative interest of an agent of persecution, or because they hold and/or expressed a political opinion.

i) Political opinion as a protected ground under the 1951 Convention

14. The first submission concerns the meaning of the term ‘political opinion’. UNHCR notes that the term ‘political opinion’ as stated in Article 10(1)(e) of the Qualification Directive in the Dutch version reads ‘politieke overtuiging’, which could incorrectly be understood as meaning ‘political conviction’ rather than ‘political opinion’ as found in the original English (‘political opinion’ - singular) and French texts (‘opinions politiques’ - plural) of the 1951 Convention. Opinion or opinions is more accurately translated in Dutch by ‘opinie’ or ‘mening’; the latter word being the translation used for Article 19 of the *International Covenant on Civil and Political Rights* (‘ICCPR’), namely, the right to hold an opinion and freedom of expression.³² The Dutch word ‘overtuiging’ [conviction] may wrongly invite adding an element of ‘fundamentality’ to the right to hold and express opinions. Translating political opinion into political conviction mistakenly suggests that it relates to something fundamental for the identity, belief or way of life of the person. Further, the use of different

³¹ Dutch Council of State (Rand van State), [Statement 202003129/1/V2 and 202004875/1/V2](#), paras 18-19.

³² [International Covenant on Civil and Political Rights](#), 16 December 1966, UNTS, vol. 999, p. 171.

terms in various languages might lead to a different understanding of the protected ground in the national jurisdictions of the EU Member States.

15. Translating political opinion into political conviction mistakenly suggests this Convention ground to be similar to the Convention ground “religion”, officially translated in the Netherlands as ‘religieuze overtuiging’ [religious conviction], and that it relates to a fundamental identity, belief or way of life for the applicant. While there may be overlap between the Convention ground “political opinion” and “religion”, as between other Convention grounds, and more than one ground may be applicable in an individual case,³³ each of the Convention grounds is nonetheless a stand-alone protected ground. Where, for example, the Convention ground ‘political opinion’ aims to protect, *inter alia*, the right to hold opinions and freedom of expression, the ground ‘religion’ relates to the right to freedom of thought, conscience and religion.³⁴

16. Although political opinion is not defined in the 1951 Convention or elsewhere in international human rights treaties, protection of and freedom from discrimination for holding and expressing an opinion, including a political opinion, is enumerated in the *Universal Declaration of Human Rights*³⁵ and is specifically protected in the ICCPR which states that “everyone has the right to hold opinions and is free to express them”.³⁶ The right to hold opinions and the right to freedom of expression are related but distinct human rights under Article 19(1) and 19(2) of the ICCPR respectively. All forms of opinions are protected, including political opinions expressed and disseminated in any shape or form, and irrespective of their importance, tenacity or strength of the individual holding and/or expressing them.

³³ UNHCR, *Handbook*, para. 67. UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, www.refworld.org/docid/3b20a3914.html, para. 24.

³⁴ UNHCR, *Handbook*, para. 71.

³⁵ *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71. Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

³⁶ ICCPR, Article 19(1) and 19(2), note 33 above. See also regional human rights law instruments, including: Article 13 of the *American Convention on Human Rights*, (Organization of American States), 22 November 1969; Article 10 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950.

Opinions can be “actual, perceived or supposed”.³⁷ The right to hold an opinion also extends to the right to form an opinion, or change it whenever and for whatever reason a person so freely chooses.³⁸ As the UN Human Rights Committee has affirmed: “any form of effort to coerce the holding or not holding of any opinion is prohibited”.³⁹ As such, for an opinion to be protected, it need not be deeply rooted or fundamental to the individual holding it.

17. The concept of political opinion as a protected ground under the 1951 Convention should be understood in a broad sense, to incorporate “any opinion on any matter in which the machinery of State, government, society, or policy may be engaged”.⁴⁰ This presupposes that the applicant holds (or is attributed) an opinion not tolerated by, different from, or critical of, the policies, goals, traditions or methods of the authorities, or parts of, or groups in, society.⁴¹ There is no need for the applicant to describe or qualify their opinion as political,⁴² or for the opinion to conform to the applicant’s true beliefs.⁴³ Further, just as expressions (and non-expressions)⁴⁴ of political opinions are protected, so too is political neutrality.⁴⁵

³⁷ Human Rights Committee, General Comment No. 34, para. 9, considering that “[n]o person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions”.

³⁸ *Ibid.* The rapporteur leading the work on the General Comment summarized the Committee’s broad approach to freedom of expression by stating that ‘...freedom of expression embraces every form of idea and opinion capable of transmission to others, including views that may be deeply offensive.’ Michael O’Flaherty: “Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No 34” (2012) 12:4 HRLR 627 at 644-45.

³⁹ Human Rights Committee, General Comment No. 34.

⁴⁰ UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, (‘UNHCR GIP No. 1: Gender’), 7 May 2002, www.refworld.org/docid/4f33c8d92.html, para. 32. UNHCR, *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, (‘UNHCR GIP No. 12: Conflict and Violence’), 2 December 2016, www.refworld.org/docid/583595ff4.html, para 38. G S Goodwin-Gill and J McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), p. 87. This definition of political opinion was adopted and affirmed by the Supreme Court in Canada in *Ward*, note 7 above.

⁴¹ UNHCR GIP No. 1: Gender, note 40 above, para. 32. UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Article 1A(2) and 1(F) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, (‘UNHCR GIP No. 8: Children’), 22 September 2009, <http://www.refworld.org/docid/4f33c8d92.html>, para. 45; UNHCR GIP No. 12: Conflict and Violence, note 40 above, para. 37.

⁴² UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in 201701423/1/V2, 201704575/1/V2 and 201700575/1/V2 before the Council of State*, 28 February 2018: www.refworld.org/docid/5c001b0a4.html, para. 25.

⁴³ As the Supreme Court of Canada held in *Ward*, “[t]he political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant’s true beliefs.” Note 7 above, at p. 746-747.

⁴⁴ UNHCR Handbook, para. 82.

⁴⁵ UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, www.refworld.org/docid/4bb21fa02.html, para. 50; *UNHCR intervention before the Supreme Court of the United Kingdom in the case of RT (Zimbabwe) and others (Respondents) v Secretary of State for the Home Department*, 25

18. Further, the protected ground ‘political opinion’ includes an opinion the applicant actually holds, or where they are perceived to hold it and have a political opinion imputed on them by the persecutor, even if they do not hold it.⁴⁶ A political opinion may be imputed on the applicant by the persecutor, for example, because of non-conformist behaviour by the applicant,⁴⁷ the projection on the applicant of activities and opinions of family members, such as the views or opinions of parents on their children,⁴⁸ or where the role or status within society that follows from, or is associated with, the applicant’s trade, profession or occupation, may be regarded as a perceived political opinion.⁴⁹ The perception of the persecutor is a determinative aspect.⁵⁰

19. This broad understanding and scope of the concept of political opinion as a protected ground is included and affirmed in the wording of Article 10 of the Qualification Directive, which states that ‘*the concept of political opinion, shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution*’.⁵¹ The concept of political opinion also includes both real and perceived (or imputed) political opinions.⁵²

May 2012: www.refworld.org/docid/4fc369022.html, paras. 8(5); *RT (Zimbabwe) and others v Secretary of State for the Home Department*, [2012] UKSC 38, United Kingdom: Supreme Court, 25 July 2012: www.refworld.org/cases/UK_SC.500fdacb2.html.

⁴⁶ UNHCR, *Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, (‘UNHCR GIP No. 10: Military Service’), 3 December 2013, www.refworld.org/docid/529ee33b4.html, para. 51. See also, *UNHCR intervention before the Supreme Court of the United Kingdom in the case of RT (Zimbabwe) v SSHD*, note 25 above, para. 8(6); and UNHCR, *MSM (Somalia) v. Secretary of State for the Home Department: UNHCR Submissions*, 18 January 2016, para. 39.

⁴⁷ UNHCR GIP No. 1: Gender, note 40 above, para. 32. *UNHCR intervention before the Supreme Court of the United Kingdom in the case of RT (Zimbabwe) v SSHD*, note 25 above, para. 8.

⁴⁸ UNHCR GIP No. 8: Children, note 41 above, para. 46; UNHCR GIP No. 10: Military Service, note 46 above, para 54.

⁴⁹ UNHCR GIP No. 12: Conflict and Violence, note 40 above, para. 38.

⁵⁰ See *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, note 7 above at p. 746-747.

⁵¹ Article 10 (1) QD: ‘Member States shall take the following elements into account when assessing the reasons for persecution: (e) the concept of political opinion shall, in particular, include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.’

⁵² Article 10 (2) QD: ‘When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.’

20. In sum, the concept of political opinion must be interpreted broadly and in context. In determining the applicability of the Convention ground ‘political opinion’, whether the political opinion is deeply rooted or fundamental to the applicant is not relevant as it can change or be imputed to the applicant, irrespective of whether they hold that opinion.⁵³ The perception of the persecutor is a key factor; an applicant can have a well-founded fear of persecution for reasons of political opinion even if the opinion held (or imputed) is not ‘fundamental’.⁵⁴ A political opinion can be imputed to a person, for example, simply because of a profession, trade or even place of residence.⁵⁵

ii) Assessing “sur place” claims for international protection

21. UNHCR’s second submission is that a person must not necessarily have left their country of origin on account of having attracted the negative interest of the persecutor. They may develop a well-founded fear of persecution and may become a refugee *sur place* either as a result of circumstances arising in their country of origin during their absence, or because of their own activities, acts, or behaviour, such as associating with refugees already recognized, or expressing political opinions in their country of asylum.⁵⁶ As outlined above, political opinions may develop or change over time. It is not determinative that the person expressing political opinions outside their country of origin already held or expressed such opinions (or any opinions) while in their country of origin. In fact, they may have concealed their political opinions and refrained from expressing them, *precisely so as to avoid* persecution while still in the country of origin.⁵⁷

⁵³ Goodwin-Gill and McAdam, *The Refugee in International Law* (OUP 2007), p. 87; [Canada \(Attorney General\) v. Ward](#), [1993] 2 S.C.R. 689, Canada: Supreme Court, note 7 above; UNHCR, Handbook, para. 82. See also, [Submission by UNHCR in case numbers 201701423/1/V2, 201704575/1/V2 and 201700575/1/V2 before the Council of State](#), 28 February 2018, paras 19 to 28 on the overlap between the Convention grounds religion, membership of a particular group and political opinion.

⁵⁴ By ‘fundamental’, the State Secretary “means that a belief and resulting activities are only protected if they are so fundamental to the identity or moral integrity of a foreigner that he should not be asked to give up or hide this belief.” Dutch Council of State (Rand van State), [Statement 202003129/1/V2 and 202004875/1/V2](#), para. 16.

⁵⁵ UNHCR GIP No. 12: Conflict and Violence, note 40 above, para. 33; UNHCR, [International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update VI](#), March 2021: p. 94.

⁵⁶ UNHCR, Handbook, paras 95 and 96.

⁵⁷ 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](#), (‘UNHCR GIP No. 9: SOGI’), 23 October 2012, paras. 30 and 57.

22. As UNHCR acknowledges in its Handbook:

*An applicant claiming fear of persecution because of political opinion need not show that the authorities of his/her country of origin knew of his opinions before he left the country. He may have concealed his political opinion and never have suffered any discrimination or persecution. However, the mere fact of refusing to avail himself of the protection of his Government, or a refusal to return, may disclose the applicant's true state of mind and give rise to fear of persecution.*⁵⁸

23. Thus, in response to the first question, UNHCR submits that it be answered in the affirmative.

The applicant's political opinion need not be deeply rooted, fundamental, or 'important to maintain their identity or moral integrity'. The importance, tenacity or strength of the opinion is *not relevant* for invoking the Convention ground 'political opinion'. Moreover, political opinion may be invoked and be relevant regardless of whether the applicant has 'attracted the negative interest of an actor of persecution during their residence in their country of origin and since their residence in the host country.'

V. The Second and Third Questions: "Deeply rooted"

24. The second and third questions referred are as follows:

2. If the answer to Question 1 is in the affirmative, and a political view is thus sufficient to qualify as a political opinion, what weight must be given to the strength of that political view, thought or belief and to the importance to the foreign national of the activities stemming from it in the examination and assessment of an asylum application, that is to say, the examination of the reality of that applicant's alleged fear of persecution?
3. If the answer to Question 1 is in the negative, is the criterion then that such a political opinion must be deeply rooted, and if not, what is the relevant criterion and how is it to be applied?

25. UNHCR makes one submission with regard to questions 2 and 3. While the importance, tenacity or strength of the opinion for its holder is *not relevant* for invoking the Convention ground 'political opinion', it *may be relevant* in assessing the applicant's well-founded fear of persecution.

i) The importance or tenacity of an opinion to assess a well-founded fear of persecution

⁵⁸ UNHCR, *Handbook*, para. 83. See also, UNHCR GIP No. 1: Gender, note 40 above, para. 32.

26. Whether holding political opinions and/or expressing them outside the country of origin are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances, taking into account up-to-date and relevant country of origin information.⁵⁹ Regard should also be had in particular to whether such opinion or expression, for example through particular activities, could lead to the applicant having a political opinion imputed to them, or may have come, or could come, to the attention of the persecutor and how they are likely to be viewed by the persecutor.⁶⁰
27. While the strength of the opinion has no bearing on the assessment of the applicability of political opinion as the ground for persecution per se, as mentioned above under section IV, the “relative importance or tenacity of the applicant’s opinion – in so far as this can be established from all the circumstances of the case – [... is] relevant” in assessing the applicant’s well-founded fear (of persecution).⁶¹ Particularly where the applicant has not given expression to their political opinion, “due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have a well-founded fear of persecution for reasons of political opinion.”⁶²
28. Accordingly, where an applicant participates in activities in which the persecutor perceives them to be holding a particular political opinion, or in any other way attracts the negative interest of the persecutor, that gives rise to a well-founded fear of persecution, it would be contrary to the 1951 Convention to deprive them of international protection and return them to their country of origin even when such activities are not based on a fundamental or deeply rooted conviction.
29. UNHCR further underlines the importance of an in-depth examination of *sur place* claims. Where the fear of persecution arises as a result of the person’s own behaviour while in the country of asylum, the issue of credibility arises, as it may be thought that the activities are

⁵⁹ UNHCR, *Handbook*, para. 42.

⁶⁰ UNHCR, *Handbook*, paras. 95-96

⁶¹ UNHCR, *Handbook*, para. 80.

⁶² UNHCR, *Handbook*, para. 82.

self-serving especially when these activities are carried out at a time when an earlier asylum application has been rejected on a final basis and the concerned applicant is required to leave the country. However, it remains important in such cases that the full details are examined and analyzed carefully in light of the likelihood of a risk of persecution actually arising in consequence of the applicant's behaviour, whether self-serving or not.⁶³

30. As outlined in UNHCR guidelines, "in the event that the claim is found to be self-serving but the claimant nonetheless has a well-founded fear of persecution on return, international protection is required."⁶⁴ The UK Court of Appeal has similarly held:

For all these reasons I do not accept the Tribunal's conclusion that a refugee sur place who has acted in bad faith falls out with the Geneva Convention and can be deported to his home country notwithstanding that he has a genuine and well-founded fear of persecution for a Convention reason and there is a real risk that such persecution may take place. Although his credibility is likely to be low and his claim must be rigorously scrutinised, he is still entitled to the protection of the Convention, and this country is not entitled to disregard the provisions of the Convention by which it is bound, if it should turn out that he does indeed qualify for protection against refoulement at the time his application is considered.⁶⁵

31. It should be recalled that the burden of proof is discharged by the applicant rendering a truthful account of facts relevant to the claim so that, based on the facts, a proper decision may be reached. It is on the applicant to present a coherent, plausible account of why they fear persecution that does not contradict generally known facts. As UNHCR has stated:

"In view of the particularities of the refugee's situation, the adjudicator shares the duty to ascertain and evaluate all the relevant facts. This is achieved, to a large extent, by the adjudicator being familiar with the objective situation in the country of origin concerned, being aware of relevant matters of common knowledge, guiding the applicant in providing the relevant information and adequately verifying facts alleged which can be substantiated."⁶⁶

⁶³ UNHCR, *Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees*, April 2001, para. 34. See also, *Danian v. Secretary of State for the Home Department (Appeal)*, [2000] Imm AR 96, United Kingdom: Court of Appeal (England and Wales), 28 October 1999, www.refworld.org/cases/GBR_CA_CIV.3e71dd564.html.

⁶⁴ UNHCR GIP No. 6: Religion, para 36.

⁶⁵ *Danian v. Secretary of State for the Home Department (Appeal)*, note 63 above, p. 22.

⁶⁶ UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, para. 6. Article 4 (1) QD explicitly states that it is the Member State's duty to assess the relevant elements of the application "in cooperation with the applicant." See also, UNHCR, *Handbook*, para. 196. The Handbook underlines that an "examiner's conclusion on the facts of the case and personal impression of the applicant should not lead to a judgment being influenced by personal considerations that the applicant may be an 'undeserving case'". UNHCR, *Handbook*, para. 202. "[W]hat

32. While an “evaluation of risk of persecution is forward-looking and therefore inherently somewhat speculative, such an evaluation should be made based on factual considerations which take into account the personal circumstances of the applicant as well as the elements relating to the situation in the country of origin.”⁶⁷ The applicant’s activities, in the country of origin and/or the country of asylum, and profile assessed in light of country of origin information, will determine whether the applicant may have attracted, or may attract, the negative attention of the persecutor.
33. The ground of political opinion needs to reflect the reality of the specific geographical, historical, political, legal, judicial, and socio-cultural context of the country of origin.⁶⁸ Context is vital to understanding the substance of ‘political’, indeed “political opinion is not a matter of definition but depends on the context of the case”.⁶⁹ There is “not as such an inherently political or an inherently non-political activity.”⁷⁰ Thus, decision-makers need to ensure that the social and political context of the country of origin is meaningfully taken into account in assessing the existence of a political opinion.
34. While acknowledging that the Qualification Directive permits EU Member States to reject a subsequent application for international protection if it is based on “circumstances which the applicant has created by [their] own decision since leaving the country of origin”,⁷¹ UNHCR cautions that this provision does not derive from the 1951 Convention. In UNHCR’s view, the *sur place* analysis does not require an assessment of whether the applicant has created the situation giving rise to persecution or serious harm by their own decision. Rather, as in every case, what is required is that the elements of the refugee definition are in fact fulfilled. The person who is objectively at risk in their country of origin is entitled to protection notwithstanding their motivations, intentions, conduct or other surrounding circumstances. “The 1951 Convention does not, either explicitly or implicitly, contain a provision according

needs to be assessed is the credibility of the applicant’s statements rather than the credibility of the applicant as a person.” UNHCR, [Summary of Deliberations on Credibility Assessment in Asylum Procedures, Expert Roundtable, 14-15 January 2015, Budapest, Hungary, 5 May 2015](#), para. 19.

⁶⁷ UNHCR, [Note on Burden and Standard of Proof in Refugee Claims](#), 16 December 1998, para. 18.

⁶⁸ [Refugee Appeal No. 76044](#), New Zealand: Refugee Status Appeals Authority, 11 September 2008.

⁶⁹ *Ibid*, para 83; See also UNHCR GIP No. 1: Gender, note 40 above, para. 32.

⁷⁰ UNHCR GIP No. 1: Gender, note 40 above, para. 32; UNHCR GIP No. 10: Military Service, note 46 above, para. 51; and UNHCR GIP No. 12: Conflict and Violence, note 40 above, para. 38.

⁷¹ Qualification Directive 2011/95/EU, art. 5(3), note 12 above.

to which its protection is unavailable to persons whose claims for asylum are the result of actions abroad.”⁷²

35. Furthermore, the phrase “without prejudice to the Geneva Convention” in Article 5(3) of the Qualification Directive requires *sur place* claims to be assessed consistent with the 1951 Convention.⁷³ Noting also that the TFEU expressly requires EU secondary legislation on asylum to conform to the 1951 Convention,⁷⁴ and that this Court has repeatedly reiterated that this instrument must be interpreted “in a manner consistent with the 1951 Convention and the other relevant treaties”.⁷⁵

36. UNHCR emphasises that the decision-maker’s critical focus in the context of *sur place* refugee claims – as for all claims – must be on the risk of persecution faced by the applicant because of their profile and activities, in the country of origin and/or the country of asylum, in light of country of origin information, and not on whether the activities of the applicant were self-serving. In cases where the applicant has not attracted the negative attention of the persecutor while in the country of origin or in the country of asylum, the importance or tenacity of the applicant’s opinions will be relevant to determine whether the applicant is at risk of persecution upon return to the country of origin. This may however be difficult to establish from all the circumstances of the case. The determination to be made under the 1951 Convention is whether there is a fear of persecution for one or more Convention grounds and whether that fear is well-founded.

⁷² UNHCR, *Amicus curiae of the United Nations High Commissioner for Refugees on the interpretation and application of 'sur place' claims within the meaning of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees*, 14 February 2017: www.refworld.org/docid/58ee206a4.html, para. 29; ‘There is no logical or empirical connection between the well-foundedness of the fear of being persecuted or of suffering serious harm, and the fact that the person may have acted in a manner designed to create a refugee claim.’

⁷³ UNHCR, *Comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted*, 21 October 2009, p. 16.

⁷⁴ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, www.refworld.org/docid/4b17a07e2.html, Article 78(1).

⁷⁵ Referring to Article 63(1) of the Treaty Establishing the European Community (Consolidated Version) (Rome Treaty), now Article 78(1) TFEU, see *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08, C176/08, C-178/08 and C-179/08, CJEU, 2 March 2010, at paras. 53–54; *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, CJEU, 17 June 2010, at para. 38; *Bundesrepublik Deutschland v. B. and D.*, C-57/09 and C-101/09, CJEU, 9 November 2010, at para. 78.

Should a claim on the basis of political opinion be assessed in the same manner as a claim based on religion?

37. “According to the State Secretary, political opinion as a reason for persecution has to be examined and assessed in the same way as religious belief as a reason for persecution, with the result that it has to be shown that the opinion held by a foreign national is so determinative of his/her identity or moral integrity that he/she may not be asked to give it up or to conceal it after returning to his/her country of origin.”⁷⁶

38. In UNHCR’s view, the question whether a person’s political opinion is ‘so determinative of his/her identity or moral integrity’ or ‘deeply rooted’ is not a relevant question for determining whether the ground is applicable in an individual case, as elaborated in this submission in response to question 1. Further, applicability of the political opinion ground as such does not require political activities, nor does it require an applicant to have expressed their opinion.

39. While the grounds of religion and of political opinion are distinct and stand-alone as they protect different rights (as outlined in para. 15 above), UNHCR notes the similarities between the grounds of religion and of political opinion. For example, applications based on religion may be based on the public manifestation of that religion, or not having or manifesting a religion, as applications on the grounds of political opinion may be based on expressions of the opinion. Further, an applicant may be perceived to have a religion, that may not align with the applicant’s actual beliefs, similar to a political opinion being imputed on an applicant. Finally, a religion may be changed, as may a political opinion. Indeed, there is often some overlap between the grounds of religion and political opinion, for example, in gender-related claims, especially with regards to imputed political opinion.⁷⁷ Both grounds should be assessed as part of a holistic, integrated analysis that assesses the overall credibility of the applicant’s claim, while taking into account such factors as “the reasonableness of the facts alleged, the overall consistency and coherence of the applicant’s story, corroborative evidence

⁷⁶ [Request for a preliminary ruling from the Raad van State \(Netherlands\)](#), S. A. v Staatssecretaris van Veiligheid en Justitie, Case C-151/22, CJEU, note 2 above, para. 6.

⁷⁷ “While religious tenets require certain kinds of behaviour from a woman, contrary behaviour may be perceived as evidence of an unacceptable political opinion.” UNHCR, [Submission by UNHCR in case numbers 201701423/1/V2, 201704575/1/V2 and 201700575/1/V2](#) before the Council of State, 28 February 2018, para. 24.

adduced by the applicant in support of his/her statements, consistency with common knowledge or generally known facts, and the known situation in the country of origin.”⁷⁸

VI. The Fourth Question: Concealment or Discretion

40. The fourth question referred is as follows:

4. If the criterion is that the political opinion must be deeply rooted, can an applicant who fails to demonstrate that he or she holds a deeply rooted political opinion be expected to refrain from expressing that political opinion upon return to the country of origin, so as not to arouse the negative interest of an actor of persecution?

41. UNHCR submits that an applicant may not be denied refugee status on the basis that they could conceal (or exercise discretion in relation to, or refrain from expressing) one of the grounds protected by the 1951 Convention.⁷⁹ Even when the political opinion is not fundamental, in UNHCR’s view, the applicant cannot be required to exercise restraint or to conceal their opinions. What matters is whether a protected ground can be exercised or not.

42. A person holding a political opinion should not be expected to modify their opinion, and a person wanting to express an opinion should not be expected to show restraint in order to avoid persecution.⁸⁰ The underlying rationale of the 1951 Convention is to allow persons to live their lives free from fear of persecution because of their race, religion, nationality, membership of a particular social group, or political opinion. Expecting an applicant to modify or conceal their opinion or the expression thereof would be contrary to the whole purpose of the 1951 Convention and the fundamental rights and freedoms on which it is

⁷⁸ UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, para. 11.

⁷⁹ UNHCR, *MSM (Somalia) v. SSHD*, note 29 above, para. 31. See also, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, where the Court held with reference to the rationale of the 1951 Convention that ‘people should be allowed to live their lives free from the fear of serious harm coming to them because of their race, religion, nationality, membership of a particular social group or political opinion.’; [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010, www.refworld.org/cases,UK_SC,4c3456752.html, para. 52. The CJEU has also stated that it is not relevant whether the conduct which would place the asylum applicant at risk on return is at the ‘core’ or margin of the protected rights: *Germany v Y and Z (joined Cases C-71/11 and C-99/11)* and in *Minister voor Immigratie en Asiel v X, Y and Z (joined Cases C-199/12 to C-201/12)*. Thus, the Fourth Chamber affirmed in *X, Y and Z*, that ‘[t]he fact that [the asylum applicant] could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account.’, para. 75 and ‘it is unnecessary to distinguish acts that interfere with the core areas of the expression of sexual orientation even assuming it were possible to identify them, from acts which do not affect those purported core areas.’, para. 78.

⁸⁰ *UNHCR intervention before the Supreme Court of the United Kingdom in the case of RT (Zimbabwe) v SSHD*, note 25 above, para. 9.

based.⁸¹ This would deny the applicant the right to hold opinions and the right to freedom of expression.⁸² Further, persecution does not cease to be regarded as such because those at risk of being persecuted can eliminate the harm (or threat thereof) by taking avoiding action.⁸³

43. The question to be considered in assessing whether an applicant's fear of persecution is well-founded is what may happen if the applicant returns to their country of origin and exercises their human rights. The question is not, can the applicant conceal or modify their behaviour in order to avoid attracting adverse consequences and risk, for example in the context of political opinion, that their opinions come to the attention of the persecutor or that they will be unable to express opinions.⁸⁴ Moreover, the well-founded fear of persecution is always to be assessed in terms of future risk, as the test is a forward-looking assessment and is the same regardless of the Convention ground on which it is based.⁸⁵ If the price that a person must pay in order to avoid persecution is that they must conceal, for example, their political opinion, or be discreet in their expressions, then they are "being required to surrender the very protection that the 1951 Convention is intended to secure for them."⁸⁶

VII. Conclusion

44. UNHCR proposes the following specific responses to the questions referred to the Court by the Dutch Council of State.

Question 1:

⁸¹ 1951 Convention, preambular paragraph 1.

⁸² ICCPR, Article 19. UNHCR, UNHCR intervention before the Supreme Court of the United Kingdom in the case of *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, 19 April 2010: <https://www.refworld.org/docid/4bd1abbc2.html>, para. 32.

⁸³ UNHCR, GIP No. 9: SOGI, note 57 above, paras 30-32.

⁸⁴ UNHCR, *MSM (Somalia) v. Secretary of State for the Home Department: Submissions on behalf of UNHCR*, 5 November 2014, AA/00387/2014: <https://www.refworld.org/docid/545cc43f4.html>, para. 37.

⁸⁵ In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, *or would for the same reasons be intolerable if he returned there*. [emphasis added] UNHCR Handbook, para 42. See also para. 45. See also, UNHCR GIP No. 12: Conflict and Violence, note 40 above, para. 24.

⁸⁶ *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom: Supreme Court, note 45 above, para. 11.

45. In accordance with international refugee law, the ordinary meaning of Article 1A(2) of the 1951 Convention in its context, object and purpose, as well as the plain language of Article 10(1)(e) of the Qualification Directive, the refugee definition does not require a political opinion to be deeply rooted or fundamental to an applicant for it to be a relevant Convention ground in a case. The political opinion ground covers both holding a political opinion and having a political opinion imputed, whether or not an applicant actually holds and/or expresses that or any political opinion, and irrespective of the importance of the opinion for the applicant. The concept of political opinion must be interpreted broadly and in context.
46. Applicability of the political opinion ground as such does not require political activities, nor does it require an applicant to have expressed their opinion or for the persecutor to already be aware of the opinion when the applicant is still in the country of origin or in the country of asylum. Where it can be established, the importance of the opinion for the applicant is relevant in assessing a well-founded fear of persecution for reasons of political opinion, particularly when the political opinion, real or imputed, has not yet attracted negative attention from the persecutor. Such assessment will involve looking at the opinions, expressions, activities and other personal facts, circumstances or characteristics of the applicant in light of up-to-date and relevant country of origin information.
47. The 1951 Convention does not make a distinction between persons who have fled their country for fear of persecution and persons who become refugees at a later date. With *sur place* claims for international protection, as with any asylum claims, the determination to be made is whether there is a well-founded fear of persecution; a determination that is forward looking, irrespective of the applicant's motivations, intentions, conduct or other surrounding circumstances.

Questions 2 and 3:

48. While the importance, tenacity or strength of the opinion for its holder is *not* relevant for invoking the Convention ground 'political opinion', it *may be* relevant in assessing the applicant's well-founded fear of persecution. The strength of the opinion, in so far as this can be established from all the circumstances of the case, will be of relative importance to assessing whether the applicant may attract the negative interest of the persecutor, particularly

when it has not yet attracted a negative interest. Assessing the credibility of an applicant seeking international protection on the grounds of political opinion should be assessed as part of a holistic integrated analysis of the refugee definition.

Question 4:

49. Whether one's political opinion is deeply rooted or not, it is impermissible to deny asylum applicants refugee status on the basis that they could be expected to conceal (or exercise discretion or restraint in relation to) a ground protected under the 1951 Convention. Irrespective of the strength, or how fundamental or deeply-rooted one's political opinion, expecting an applicant to modify or conceal their opinion or the expression thereof in order to avoid persecution would deny the applicant the right to freedom of expressing an opinion and would be at variance with the 1951 Convention.

All of which is respectfully submitted,

UNHCR

June 2022