



The Office of the United Nations High Commissioner for Refugees
Statement on the interpretation of Article 5(3) of the EU Qualification Directive regarding subsequent applications for international protection based on *sur place* religious conversion

Issued in the context of the preliminary ruling reference to the Court of Justice of the European Union in the case of J.F. v. Bundesamt für Fremdenwesen und Asyl (C-222/22)

1. Introduction

1.1. On 29 March 2022, the Supreme Administrative Court of Austria referred the following question for a preliminary ruling to the Court of Justice of the European Union ('CJEU' or 'the Court') concerning the interpretation of Article 5(3) of Directive 2011/95/EU ('Qualification Directive')¹:

*'Must Article 5(3) of Directive 2011/95/EU [...] be interpreted as precluding legislation of a Member State under which a foreign national who files a subsequent application is not normally to be granted asylum status if the risk of persecution is based on circumstances which the foreign national has created by his or her own decision since leaving his or her country of origin, unless the activities in question are permitted in Austria and it is established that those activities constitute the expression and continuation of convictions held in the country of origin?'*²

1.2. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol ('1951 Convention') do not make a distinction between persons who have fled their country of origin for fear of persecution and persons who become refugees '*sur place*' at a later date. A '*sur place*' analysis does not require an assessment of whether the applicants have created the situation giving rise to persecution by their own decision, nor does it require that the persons fled because of activities or convictions held in their country of origin. Rather, as with any asylum claim, what is required is that the elements of the refugee definition are in fact fulfilled. Any person who is objectively at risk in their country of origin is entitled to protection irrespective of their motivations, intentions, conduct or other surrounding circumstances.

1.3. In this statement, the Office of the United Nations High Commissioner for Refugees ('UNHCR') sets out its observations on subsequent applications based on '*sur place*' activities. Following this introductory section, Part II explains UNHCR's interest and expertise in this matter. The relevant legislation is outlined in Part III, while Part IV provides UNHCR's interpretation of the legal issues raised by the preliminary reference. Finally, Part V concludes summarizing UNHCR's position on this topic.

2. UNHCR's interest and expertise in the matter

2.1. The United Nations General Assembly has entrusted UNHCR with the mandate to provide international protection to refugees and, together with governments, seek solutions for them.³ UNHCR fulfils this mandate, *inter alia*, by supervising the application of international conventions for the protection of refugees, and State parties to the 1951 Convention – including all Member States of the European Union ('EU') – need to cooperate with the Office of the High Commissioner in the exercise of its mission and to facilitate its supervisory role.⁴

¹ 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)*, OJ L 337/9-337/26, 20 December 2011: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>.

² See Supreme Administrative Court of Austria, *Request for a preliminary ruling in the case of J.F. v. Bundesamt für Fremdenwesen und Asyl (C-222/22)*, 29 March 2022: <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-222/22>.

³ United Nations General Assembly (UNGA), *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V): www.refworld.org/docid/3ae6b3628.html, para. 1.

⁴ *Ibid.*, para. 8(a). Article 35, *Convention relating to the Status of Refugees*, 28 July 1951, UNTS, vol. 189: www.refworld.org/docid/3be01b964.html, p. 137; Article II, *Protocol relating to the Status of Refugees*, 31 January 1967, UNTS, vol. 606: www.refworld.org/docid/3ae6b3ae4.html, p. 267.

2.2. UNHCR's supervisory responsibility is also provided for under EU law, both in primary and secondary legislation. Article 78(1) of the Treaty on the Functioning of the European Union ('TFEU') stipulates that a common policy on asylum, subsidiary protection and temporary protection 'must be in accordance with the [1951] Convention'⁵ and Article 18 of the Charter of Fundamental Rights of the European Union ('the Charter') states that 'the right to asylum shall be guaranteed with due respect for the rules of the [1951] Convention.'⁶ Against this background, EU secondary law expressly recognises the specific role and expertise of UNHCR. The Qualification Directive affirms that consultations with UNHCR 'may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention'.⁷ Similarly, Directive 2013/32/EU ('Asylum Procedures Directive') specifically refers to UNHCR's supervisory responsibility and requires Member States to allow UNHCR to present its views regarding individual asylum applications 'at any stage of the procedure'.⁸

2.3. EU legislation and the CJEU have accordingly considered that UNHCR documents 'are particularly relevant in the light of the role conferred on the UNHCR by the Geneva Convention'.⁹ In the area of asylum claims based on religion, UNHCR refers the Court to its 'Guidelines on International Protection No. 6'¹⁰ on religion-based refugee claims, as well as its 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees'.¹¹

3. Relevant legal framework

3.1. International law: the 1951 Refugee Convention

3.1.1. The 1951 Convention is grounded in Article 14(1) of the 1948 Universal Declaration of Human Rights, which recognises as a universal principle that 'everyone has the right to seek and to enjoy in other countries asylum from persecution'.¹²

3.1.2. Article 1(A)(2) of the 1951 Convention exhaustively defines who is a refugee¹³ and provides that the term applies to any person who:

⁵ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>, Article 78(1).

⁶ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>, Article 18.

⁷ Recital 22 Directive 2011/95/EU, note 1 above.

⁸ 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)*, 2013/32/EU, 26 June 2013: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32013L0032>, Article 29.

⁹ CJEU, Fifth Chamber, *Mohammed Bilali v. Bundesamt für Fremdenwesen und Asyl*, C-720/17, 23 May 2019: <https://curia.europa.eu/juris/liste.jsf?num=C-720/17>, para. 57. This was restated in CJEU, Grand Chamber, *L.W. v. Bundesrepublik Deutschland*, C-91/20, 9 November 2021: <https://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-91/20>, para. 56. See also, CJEU, Grand Chamber, *Commission v. Hungary*, C-808/18, 17 December 2020: <https://curia.europa.eu/juris/liste.jsf?num=C-808/18>, para. 115 and CJEU, Fourth Chamber, *Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet*, C-528/11, 30 May 2013: <https://curia.europa.eu/juris/liste.jsf?num=C-528/11&language=EN>, para. 44.

¹⁰ UNHCR, *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*, 28 April 2004, HCR/GIP/04/06: www.refworld.org/docid/4090f9794.html.

¹¹ UNHCR, *Handbook on procedures and criteria for determining refugee status and guidelines on international protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 4, April 2019: www.refworld.org/docid/5cb474b27.html. UNHCR's Handbook and Guidelines have been found to be a relevant and persuasive authority that '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' (see United Kingdom Supreme Court, *Al-Sirri (FC) v. Secretary of State for the Home Department*, 21 November 2012: www.refworld.org/cases_UK_SC_50b89fd62.html, citing *R v Asfaw* [2008] AC 1061, per Lord Bingham at para. 13); United Kingdom High Court, *R. v. Uxbridge Magistrates' Court, Ex p. Adimi*, 29 July 1999: www.refworld.org/cases_GBR_HC_QB_3ae6b6b41c.html, para. 20. See also, Court of Cassation of Italy, Third Civil Section, *Judgment no. 25751/2021*, 22 September 2021, para. 1.2.1., where it was held that 'even though UNHCR Guidelines are not binding norms, they provide essential indications in the field of refugee law and every asylum judge should be acquainted with them and apply them, if appropriate' (the original version of the decision is available at www.italgiure.giustizia.it/sncass/).

¹² UNGA, *Universal Declaration of Human Rights*, 10 December 1948: www.refworld.org/docid/3ae6b3712c.html, Article 14(1).

¹³ As updated by the 1967 Protocol relating to the Status of Refugees, which removed the geographic and temporal limits on the 1951 Convention.

‘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 nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country’¹⁴

3.1.3. Individuals become refugees within the meaning of the 1951 Convention as soon as they fulfil the criteria enshrined in Article 1(A)(2). Since this would necessarily occur prior to the time at which the refugee status is formally determined, the recognition of the refugee status does not make those individuals refugees but declares them to be refugees. In other words, asylum applicants do not become refugees because of recognition but are recognized because they are refugees.¹⁵

3.2. European Union law: the Qualification Directive

3.2.1. The Qualification Directive lays down common minimum standards for recognising applicants for asylum as refugees within the meaning of Article 1(A)(2) of the 1951 Convention,¹⁶ a definition which is essentially replicated in Article 2(d) of the Qualification Directive.¹⁷ As mentioned above, the TFEU contains an explicit obligation for EU secondary legislation on asylum to conform to the 1951 Convention.¹⁸ Moreover, both the Qualification Directive and the jurisprudence of this Court have confirmed that the 1951 Convention is *‘the cornerstone of the international legal regime for the protection of refugees.’* Not only does the Qualification Directive ensure compliance with the 1951 Convention, but it also aims at ensuring its full implementation.¹⁹

3.2.2. Under EU law, an application for international protection 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’*.²⁰ Among the elements that should be taken into account in the evaluation of asylum applications, Article 4(3)(d) of the Qualification Directive includes also:

‘whether the applicant’s activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country.’

3.2.3. In light of this provision and of Recital 25,²¹ Article 5 of the Qualification Directive introduces a common norm defining the notion of applications based on international protection needs arising *sur place* and regulating their assessment:

Article 5(1): *‘A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.’*

¹⁴ It must be recalled that the refugee definition contained in Article 1(A)(2) of the 1951 Convention also includes those individuals who, not having a nationality and being outside the country of their former habitual residence as a result of such events, are unable or, owing to such fear, are unwilling to return to it.

¹⁵ UNHCR, *Handbook on procedures and criteria for determining refugee status*, note 11 above, para. 28. See also Recital 21 Directive 2011/95/EU, note 1 above, as well as CJEU, Second Chamber, *A. and S. v. Staatssecretaris van Veiligheid en Justitie*, C-550/16, 12 April 2018: <https://curia.europa.eu/juris/liste.jsf?language=en&jur=C.T.F&num=c-550/16>, paras 53-54, and CJEU, Grand Chamber, *M. and X., X.*, Joined Cases C-391/16, C-77/17 and C-78/17, 14 May 2019: <https://curia.europa.eu/juris/liste.jsf?num=C-391/16>, para. 85.

¹⁶ See Recitals 23-25 and 49 Directive 2011/95/EU, note 1 above.

¹⁷ See Article 2(d) Directive 2011/95/EU, note 1 above.

¹⁸ Article 78(1) TFEU, note 5 above.

¹⁹ Recitals 3-4, 22-23, and 24 Directive 2011/95/EU, note 1 above, as well as Recital 3 Directive 2013/32/EU, note 8 above. See also CJEU, Grand Chamber, *Kreis Warendorf v. Ibrahim Alo and Amira Osso v. and Region Hannover*, Joined Cases C-443/14 and C-444/14, 1 March 2016: <https://curia.europa.eu/juris/liste.jsf?num=C-443/14>, paras 28-30; restated in CJEU, Fifth Chamber, *Mohammed Bilali v. Bundesamt für Fremdenwesen und Asyl*, C-720/17, 23 May 2019: <https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-720/17>, para. 54. See also CJEU, Grand Chamber, *M. v. Ministerstvo vnitra and X., X. v. Commissaire général aux réfugiés et aux apatrides*, Joined Cases C-391/16, C-77/17 and C-78/17, 14 May 2019: <https://curia.europa.eu/juris/liste.jsf?num=C-391/16>, paras 80-83, and CJEU, Second Chamber, *Shajin Ahmed v. Bevándorlási és Menekültügyi Hivatal*, C-369/17, 13 September 2018: <https://curia.europa.eu/juris/liste.jsf?num=C-369/17>, para. 37.

²⁰ Article 4(3)(c) Directive 2011/95/EU, note 1 above.

²¹ Recital 25 Directive 2011/95/EU, note 1 above: *‘In particular, it is necessary to introduce common concepts of protection needs arising sur place, sources of harm and protection, internal protection and persecution, including the reasons for persecution’.*

Article 5(2): ‘A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which the applicant has engaged in since he or she left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.’

Article 5(3): ‘Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin.’

3.2.4. The definition of a subsequent application mentioned in Article 5(3) of the Qualification Directive is found in Article 2(q) of the Asylum Procedures Directive.²²

3.3. Austrian law: the Austrian Asylum Act

3.3.1. The norms contained in the Qualification Directive were implemented in the Austrian legal system through the Austrian Asylum Act 2005 (AsylG 2005). The legal rule transposing Article 5(3) of the Qualification Directive at the national level is Article 3, paragraph 2, second sentence of the AsylG 2005:²³

‘An alien who files a subsequent application (§ 2 para 1 sub-para 23) shall normally not be granted asylum status if the risk of persecution is based on circumstances which the alien has created himself since leaving his country of origin, unless the case concerns activities permitted in Austria which are established as constituting the expression and continuation of convictions already held in the country of origin [emphasis added].’

3.3.2. In transposing the Qualification Directive into their national legislation, Austria has taken a discretionary provision of the Directive (Article 5(3) uses ‘may’) and merged elements of Article 5(2) requiring that, for the granting of asylum, the activities constitute the continuation of previously held convictions with Article 5(3). This results in a restrictive application and interpretation of subsequent *sur place* claims which in UNHCR’s view is at variance with the 1951 Convention. It must be recalled that the transposition of the Directive into national legislation of the Member States must be in line with the 1951 Convention and Article 74 AsylG 2005 explicitly states that ‘the provisions of the Geneva Convention on Refugees shall be unaffected’. Therefore, all provisions of the Asylum Act, including Article 3, paragraph 2, must be read without prejudice to the 1951 Convention.

4. Preliminary question: subsequent applications based on *sur place* activities

4.1. International protection needs arising *sur place*

4.1.1. The question referred to the Court in the present case concerns the interpretation of Article 5(3) of the Qualification Directive. This is an optional provision, which allows Member States to not ‘normally’ grant refugee status to applicants who have filed a subsequent application and whose fear of persecution is based on circumstances created by their own decisions (or actions) after their departure from their country of origin.

4.1.2. UNHCR highlights that nowhere in the 1951 Convention is it limited to having a well-founded fear of persecution prior to leaving the country of origin. There is no requirement that refugees must have left their country of origin on account of well-founded fear. In fact, the wording of the Convention explicitly suggests that the refugee definition can and does apply to all persons at risk of persecution who are outside their country of nationality.²⁴

²² See Article 2(q) Directive 2013/32/EU, note 8 above, according to which ‘subsequent application’ means ‘a further application for international protection made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28(1).’

²³ Article 3(2) AsylG 2005, official English translation and original German at: https://www.ris.bka.gv.at/Dokumente/Erw/ERV_2005_1_100/ERV_2005_1_100.html.

²⁴ UNHCR, *Handbook on procedures and criteria for determining refugee status*, note 11 above, para. 94.

4.1.3. This interpretation is further confirmed by the wording and content of Article 1(C)(4) of the 1951 Convention, which provides that the Convention ceases to apply to a person who ‘has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution’. By explicitly referring to a country where the person has remained, it is clear that one’s fear of persecution is not dependent on, and need not have arisen prior to, leaving or fleeing their country.²⁵

4.1.4. Such considerations stem from the fact that the 1951 Convention protects those who are at risk of persecution at the time of the assessment, regardless of whether they had a well-founded fear of persecution in the past.²⁶ In fact, as highlighted by the CJEU in the case of *Y and Z*, a decision on whether a person has a well-founded fear of being persecuted requires a forward-looking assessment of all relevant facts of the case.²⁷ Individuals who were not refugees when they left their country of origin but who become refugees at a later date are called refugees *sur place*.²⁸ Well-founded fear of persecution may arise *sur place* due to new circumstances developing in the country of origin during an individual’s absence abroad. For instance, people who have left their country of origin for economic reasons may become refugees following the outbreak of an armed conflict, the onset of a violent change of regime, or when the community to which they belong starts being subjected to serious human rights violations.²⁹ Similar situations may affect students, diplomats and other government officials serving abroad, as well as prisoners of war or tourists.³⁰

4.1.5. Individuals may also become refugees *sur place* as a result of activities carried out by them in the country of asylum, for example when expressing their political views or changing their religious beliefs. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful evaluation of all the elements of the case.³¹

4.1.6. Under the Common European Asylum System (‘CEAS’), Article 5(1) of the Qualification Directive regulates asylum cases based on significant changes and events, which have taken place since the applicants left the country of origin. By contrast, Article 5(2) of the Directive focuses on applications based on activities undertaken by the applicants outside of their country of origin and distinguishes between two types of activities: those constituting ‘the expression and continuation of convictions or orientations held in the country of origin’ and new activities that the applicants engaged in only after their departure.

4.1.7. By using the words ‘in particular’, Article 5(2) clearly acknowledges the possibility that a well-founded fear of persecution may arise in relation to both types of activities outside the country of origin and not only in cases where such actions constitute a continuation of previous conviction or orientations.

4.1.8. This interpretation was confirmed by the Italian Court of Cassation in a recent judgment concerning *sur place* religious activities. The Court underlined that while individual actions constituting the expression and continuation of previous convictions represent a favorable element in the assessment of *sur place* asylum claims, in principle, international protection may also be recognized in the absence of such requirement.³²

4.1.9. UNHCR emphasizes that, even where it cannot be established that the applicants have previously held the relevant convictions or orientations in their country of origin, they are entitled to freedom of expression, religion

²⁵ Andreas Zimmermann, Claudia Mahler, *Article 1 A, para. 2, Definition of the term ‘Refugee’*, in Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: a commentary* (2011 OUP) p. 325.

²⁶ UNHCR, *Handbook on procedures and criteria for determining refugee status*, note 11 above, paras 42 and 45.

²⁷ CJEU, Grand Chamber, *Bundesrepublik Deutschland v. Y. and Z.*, Joined Cases C-71/11 and C-99/11, 5 September 2012: <https://curia.europa.eu/juris/liste.jsf?num=C-71/11>, para. 76: ‘[W]hen assessing whether, in accordance with Article 2(c) thereof, an applicant has a well-founded fear of being persecuted, the competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subject to acts of persecution’.

²⁸ UNHCR, *Handbook on procedures and criteria for determining refugee status*, note 11 above, para. 94: ‘The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear’.

²⁹ UNHCR, *Refugee protection and international migration*, 17 January 2007: www.unhcr.org/4a24ef0ca2.pdf, para. 20.

³⁰ UNHCR, *Handbook on procedures and criteria for determining refugee status*, note 11 above, para. 95.

³¹ *Ibid.*, para. 96.

³² See Court of Cassation of Italy, First Civil Section, *Judgment no. 22097*, 13 October 2020: www.italgiure.giustizia.it/sncass/. But see also Court of Cassation of Italy, First Civil Section, *Judgment no. 2954*, 7 February 2020: www.italgiure.giustizia.it/sncass/.

and association, among others, within the limits defined in Article 2 of the 1951 Convention and other human rights instruments.³³ UNHCR also recalls that such freedoms include the right to change one's religion, which could occur subsequent to departure, for example, due to disaffection with the religion practiced in the country of origin, or greater awareness of the impact of certain religious policies.³⁴

4.2 *Sur place* refugee claims based on circumstances created by own decision

4.2.1. Taking into account the legal framework described above, the question raised by the preliminary reference focuses on the assessment of persecution risks deriving from circumstances created by the applicants' own decisions after their departure from the country of origin. This issue has been discussed by various courts and tribunals at the national level and the existing case-law might provide relevant insights related to this preliminary reference.

4.2.2. In the case of *Danian v. Secretary of State for the Home Department*, the United Kingdom Court of Appeal focused on the question of whether individuals who had engaged in activities in the country of refuge with a view to building a refugee case can nonetheless come within the terms of the 1951 Convention, or whether their claims should be rejected due to lack of good faith.³⁵

4.2.3. The UK Court of Appeal held that, under the 1951 Convention, there is no legal basis for requiring the applicants to prove that their *sur place* asylum request was submitted in good faith. In addition, it clarified that asylum-seekers, who took part in *sur place* activities in bad faith solely to support their asylum claim, should not have their application rejected on that basis.³⁶ Lord Justice Brooke concluded as follows:

*'[I] do not accept the Tribunal's conclusion that a refugee sur place who had 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 that 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.'*³⁷

4.2.4. A similar approach was adopted by the High Court of Ireland in the case of *F.V. v. Refugee Appeals Tribunal*, where it was held that:

'the court is conscious that there is scope for asylum seekers to abuse the statutory asylum process by making an initial unfounded application for asylum and subsequently claiming a fear of persecution as a failed asylum seeker. The making of a self-serving, unfounded initial claim must,

³³ See 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.

³⁴ 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 (COM(2009)551, 21 October 2009)*, 29 July 2010: www.refworld.org/docid/4c503db52.html, p. 16. See also *Submission by the Office of the United Nations High Commissioner for Refugees in case numbers 202005668/1/V2 and 202102293/1/V2 before the Council of State*, September 2021: www.refworld.org/docid/61925b574.html, section 2.

³⁵ United Kingdom, Court of Appeal (England and Wales), *Danian v. Secretary of State for the Home Department*, [2000] Imm AR 96, 28 October 1999: www.refworld.org/docid/3e71dd564.html. The relevance of this landmark judgment was recently confirmed by the United Kingdom Upper Tribunal (Immigration and Asylum Chamber), *X.X. v. Secretary of State for the Home Department*, CG [2022] UKUT 23 (IAC), 20 January 2022: www.bailii.org/uk/cases/UKUT/IAC/2022/23.html, para. 118.

³⁶ See, in particular, Buxton LJ's judgment in *Danian*, note 35 above, which states: '*I am of opinion that the Secretary of State is wrong to contend for any 'bad faith' term or limitation in the application of the Convention*'. In a comment to this judgment, Guy S. Goodwin-Gill stated that '*there is no rational basis for distinguishing in the matter of refugee status between the innocent bystander to whom political opinions are imputed by the persecutor, and the less than innocent bystander whose self-interested actions lead the persecutor also to impute political opinions to the person concerned. The so-called good faith requirement seems to offer an attractive and self-justifying response to the asylum seeker who is trying to manipulate the process. However, it has no legal authority. It cannot be read into the ordinary meaning of article 1A(2)*'. See Guy S. Goodwin-Gill, *Danian v. Secretary of State for the Home Department, Comment: Refugee Status and "Good Faith"*, 12 *International Journal of Refugee Law*, 2000, pp. 663-670.

³⁷ See Brooke LJ's judgment in *Danian*, note 35 above, p. 21.

of course, not exclude any person from the protection of the Refugee Act 1996, but it seems reasonable that it be taken into account and accorded some weight by the decision-makers when credibility is being assessed. Indeed, such a person might properly be called upon to explain why they deliberately exposed themselves to a risk of persecution by creating the conditions that would make them a failed asylum seeker.’³⁸

4.2.5. In a case based on political activities carried out *sur place*, the Belgian *Conseil du Contentieux des Etrangers* found that national authorities were obliged to assess whether elements of the applicant’s account were sufficiently well-founded to establish a real risk of serious harm. The Court stated that, since the fear of persecution expressed by the applicant was credible, his claim fell within the refugee definition, irrespective of the fact that the applicant had previously submitted a fraudulent claim, which called into question his good faith.³⁹

4.2.6. In UNHCR’s view, *sur place* asylum applicants may be granted refugee status, irrespective of whether they have created the situation giving rise to a well-founded fear of persecution by their own decision or actions and regardless of whether their claim constitutes the continuation of convictions or orientations held in the country of origin. Individuals who are objectively at risk are entitled to international protection notwithstanding their motivations, intentions, conduct or other surrounding circumstances.⁴⁰

4.2.7. In relation to an application for international protection based on the religious conversion of an Afghan national, the High Court of Ireland adopted a similar interpretation, clarifying that:

‘while an applicant may have contrived to stage his ‘conversion’ and be the architect of his own misfortune, it does not necessarily detract from the fact that he may indeed be unfortunate. The essential question remains - whether the applicant had a well-founded fear of persecution, even if he had acted in bad faith.’⁴¹

4.2.8. UNHCR acknowledges that there may be instances where individual applicants, who would otherwise not have a well-founded fear of persecution, act for the sole purpose of manufacturing an asylum claim and that, in such cases, national authorities face difficult evidentiary and credibility questions that require a rigorous assessment.⁴²

4.2.9. The jurisprudence of the European Court of Human Rights (‘ECtHR’),⁴³ has also emphasized that in cases where the real risk of serious harm derives from the applicant’s own behaviour, the issue of credibility inevitably arises, and it is crucial that all details of the claim are carefully analysed. For instance, credibility is a central issue in *sur place* claims based on the conversion of the applicant, especially if the application has been submitted after the adoption of a final decision on a previous asylum request.⁴⁴

4.2.10. However, once the credibility of the applicant has been established following a rigorous assessment, the recognition of the refugee status depends on the existence of a well-founded fear of persecution, regardless of whether the risk of ill-treatment was created by the applicant’s own activities.⁴⁵ Particular attention should be

³⁸ High Court of Ireland, *F.V. v. Refugee Appeals Tribunal (Ricardo Dourado) and Minister for Justice, Equality and Law Reform*, [2009] IEHC 268, 28 May 2009: www.bailii.org/ie/cases/IEHC/2009/H268.html, para. 37.

³⁹ See Council for Alien Law Litigation of Belgium, *Arrêt no. 150 548*, 10 August 2015: www.refworld.org/docid/55cdf11a4.html.

⁴⁰ UNHCR, *Comments on the European Commission proposal for a Qualification Regulation - COM (2016) 466*, February 2018: www.refworld.org/docid/5a7835f24.html, p. 12.

⁴¹ High Court of Ireland, *H.M. v. Minister for Justice and Law Reform*, [2012] IEHC 176, 27 April 2012: www.bailii.org/ie/cases/IEHC/2012/H176.html, para. 35.

⁴² UNHCR, *Comments on the European Commission’s proposal for a Qualification Directive*, note 34 above, p. 17. On this point, see also Opinion of AG Mengozzi in the *Bahtiyar Fathi* case (C-56/17), 25 July 2018: <https://curia.europa.eu/juris/liste.jsf?num=C-56/17>, para. 63.

⁴³ In respect of *sur place* activities, the Court has acknowledged that it is generally very difficult to assess whether a person is genuinely interested in the activity in question, be it a political cause or a religion, or whether the person has only become involved in it in order to create post-flight grounds. For reference, see ECtHR, Grand Chamber, *F.G. v. Sweden*, 23 March 2016: <https://hudoc.echr.coe.int/fre?i=001-161829>, para. 123 and ECtHR, Third Section, *A.A. v. Switzerland*, App. no. 32218/17, 5 November 2019: <https://hudoc.echr.coe.int/eng?i=001-197217>, para. 41.

⁴⁴ UNHCR, *Guidelines on international protection no. 6: religion-based refugee claims*, note 10 above, para. 34. For a general overview and analysis on credibility issues concerning applications for international protection in the context of the CEAS, see UNHCR, *Beyond proof, credibility assessment in EU asylum systems: full report*, May 2013: www.refworld.org/docid/519b1fb54.html.

⁴⁵ UNHCR, *Comments on the proposal for a Qualification Regulation*, note 40 above, p. 12.

drawn to whether such actions are sufficient to justify a well-founded fear of persecution, whether the actions carried out abroad may come to the notice of the actors of persecution and how this is likely to be perceived in the country of origin.⁴⁶ Detailed country of origin information is required to determine whether a fear of persecution is objectively well-founded.⁴⁷

4.2.11. The European Court of Human Rights has adopted a comparable approach in Article 3 ECHR cases based on *sur place* conversion and requires national authorities to carry out an *ex nunc* assessment of the consequences of the conversion, which focuses on the resulting risk of ill-treatment upon return. While the human rights protected under the European Convention on Human Rights (ECHR) and its Protocols do not include the right to asylum and the ECtHR ‘does not itself examine the actual asylum applications or verify how the States honour their obligations under the Refugee Convention’, the legal reasoning adopted by the ECtHR in expulsion cases may operate as a persuasive argument and an important contribution to the assessment of international protection claims.⁴⁸

4.2.12. UNHCR highlights that the determination of refugee status does not necessitate the assessment of whether asylum-seekers acted in good or bad faith but rather, as in every asylum case, of whether the requirements of the refugee definition are fulfilled, taking into account all the relevant facts surrounding the claim. There is no logical or empirical connection between the well-foundedness of the fear, and the fact that the person may have acted in a manner designed to create a refugee claim.⁴⁹ In other words, even in the event that the actions which serve as the basis of an asylum claim are found to be self-serving, if the claimant nonetheless has a well-founded fear of persecution, the grant of international protection is required.⁵⁰

4.2.13. In practice, the evaluation of international protection needs, including those deriving from post-flight activities, consists of a credibility assessment aimed at establishing the relevant material facts of the case, as a first step, and an assessment of whether these facts fall under the refugee definition, as a second step.⁵¹ Therefore, once this first step has been completed and the credibility of the applicant has been verified, the motives of those *sur place* activities do not influence the objective application of the refugee criteria, which are exhaustively specified in the 1951 Convention.

4.3. Article 5(3) of the Qualification Directive in light of the 1951 Convention

4.3.1. The above-mentioned considerations apply to both first-time and subsequent asylum applications. As acknowledged by the case-law of the European Court of Human Rights,⁵² *sur place* claims may legitimately be based also on activities conducted between the first and subsequent asylum applications.

4.3.2. However, as far as the preliminary reference at hand is concerned, Article 3, paragraph 2 AsylG 2005 provides that in case of subsequent applications based on post-flight activities created by the applicant’s own decision, national authorities shall normally not grant asylum, ‘*unless the case concerns activities permitted in Austria which are established as constituting the expression and continuation of convictions already held in the country of origin*’.⁵³

⁴⁶ UNHCR, *Handbook on procedures and criteria for determining refugee status*, note 11 above, para. 96 and UNHCR, *Guidelines on international protection no. 6*, note 10 above, para. 35. See also Opinion of AG Mengozzi in *Bahtiyar Fathi*, note 42 above, para. 63.

⁴⁷ UNHCR, *Guidelines on international protection no. 6*, note 10 above, paras 34-36.

⁴⁸ In this respect, it must be recalled that in *F.G. v. Sweden*, the ECtHR stated that in assessing *sur place* conversions, authorities should firstly examine the genuineness of the conversion, and whether such conversion had attained a certain level of cogency and importance, before assessing the risk of treatment contrary to Articles 2 and 3 ECHR the applicant would consequently face upon return. See also ECtHR, Third Section, *A. v. Switzerland*, App. No. 60342/60, 19 December 2017: <https://hudoc.echr.coe.int/fre?i=001-179573>, ECtHR, Third Section, *M.A.M. v. Switzerland*, App. no. 29836/20, 26 April 2022: <https://hudoc.echr.coe.int/eng?i=001-216976>, and ECtHR, Second Section, *M.N. and Others v. Turkey*, App. no. 40462/16, 21 June 2022: <https://hudoc.echr.coe.int/eng?i=001-217813>.

⁴⁹ UNHCR, *Annotated Comments on the EC 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*, January 2005: www.refworld.org/docid/4200d8354.html, p. 17.

⁵⁰ UNHCR, *Guidelines on international protection no. 6*, note 10 above, paras 34-36.

⁵¹ UNHCR, *Beyond proof*, note 44 above, pp. 34-52.

⁵² The recent ECtHR judgments in the cases of *A.A. v. Switzerland*, note 43 above, and *F.G. v. Sweden*, note 43 above, are examples of acceptance of *sur place* claims based exclusively on activities conducted between the first and subsequent asylum applications.

⁵³ Article 3, para. 2 AsylG 2005, note 23 above.

4.3.3. It must be recalled that Article 5(3) of the Qualification Directive, which was transposed in the Austrian legal system by this provision, stipulates that its content should be interpreted ‘[w]ithout prejudice to the Geneva Convention’.

4.3.4. In light of these provisions, it should be underlined that the 1951 Convention does not contain any provision rendering its protection unavailable to persons whose subsequent claims for asylum are the result of actions carried out abroad, even when such actions are not a continuation of existing convictions or orientations or appear to be self-serving. The Convention clearly outlines under what circumstances a person, who would otherwise qualify as a refugee, can be excluded from asylum, being not in need of or not deserving of international protection. These exclusion clauses are exhaustively enumerated, and no additional grounds would justify a conclusion that international protection is not required. Moreover, given the serious consequences that flow from exclusion, UNHCR recalls that the exclusion clauses should be interpreted restrictively.⁵⁴

4.3.5. Since the 1951 Convention does not provide any basis for excluding applicants at risk of persecution because they have engaged in new or self-serving activities, national authorities must, if the refugee criteria are fulfilled, grant international protection regardless of the reasons that motivated such actions and irrespective of whether the asylum claim was lodged for a first or a second time.

4.3.6. This interpretation is supported by the judgment of the United Kingdom Court of Appeal in the case *Y.B. (Eritrea) v. Secretary of State for the Home Department*,⁵⁵ where the Court confirmed that it could not find any legal rule establishing that those applicants, who engaged in self-serving activities, were not entitled to asylum. In particular, the Court held that Article 5(3) of the Qualification Directive ‘recognise[s] that opportunistic activity *sur place* is not an automatic bar to asylum’, because the applicant, whose conduct has been entirely opportunistic, has:

*‘already been believed about his activity and (probably) disbelieved about his motive. Whether his consequent fear of persecution or ill-treatment is well-founded is then an objective question. And if it is well-founded, then to disbelieve him when he says it is a fear he now entertains may verge on the perverse.’*⁵⁶

4.3.7. In addition, Article 5 of the Qualification Directive should be read in conjunction with Article 4(3)(d) of the Directive. Therefore, even in case of subsequent applications for international protection based on *sur place* activities undertaken with the objective of creating the conditions for being recognized as a refugee, national authorities should evaluate ‘whether those activities would expose the applicant to persecution or serious harm if returned to that country’.⁵⁷

4.3.8. This provision reflects UNHCR’s position that in the assessment of *sur place* claims particular attention should be paid as to whether the activities engaged in after the applicant left their country of origin may have come to the notice of the actors of persecution in the country of origin and how they are likely to be viewed by those actors, rather than to whether the applicant has created the circumstances substantiating the subsequent asylum claim by their own decision.⁵⁸

4.3.9. Such interpretation is further corroborated by the case-law of national courts and tribunals. For instance, the Spanish *Tribunal Supremo* underlined that, as far as *sur place* asylum claims are concerned, the persecutor’s perception of post-flight actions is a decisive element for the determination of the refugee status.⁵⁹

⁵⁴ See UNHCR, *Guidelines on international protection no. 5: application of the exclusion clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05: www.refworld.org/docid/3f5857684.html.

⁵⁵ United Kingdom Court of Appeal (England and Wales), *Y.B. (Eritrea) v. Secretary of State for the Home Department*, [2008] EWCA Civ 360, 15 April 2008: www.refworld.org/docid/4805f3312.html.

⁵⁶ *Ibid.*, para. 13.

⁵⁷ Article 4(3)(d) Directive 2011/95/EU, note 1 above.

⁵⁸ See UNHCR, *Handbook on procedures and criteria for determining refugee status*, note 11 above, para. 96.

⁵⁹ Supreme Court of Spain, *Applicant (Moroccan national) v. Ministry of Interior*, 24 February 2010: <https://www.poderjudicial.es/search/AN/openDocument/8ac5732f0fdcf01d/20100506>.

4.3.10. Similarly, in a case concerning the online activities carried out by a Mauritanian applicant after his departure from his country of origin, the French *Cour Nationale du Droit d'Asile* recognized refugee status considering that Mauritanian authorities would have acquired knowledge of the applicant's activities abroad and that this would have put him at risk of persecution.⁶⁰

4.3.11. In light of these considerations, a norm and/or practice that would allow national authorities to establish that asylum may be granted only when subsequent applications are based on post-flight activities, which are permitted by national law and constitute the continuation of previous convictions, is at variance both with Article 5(3) of the Qualification Directive and the 1951 Convention. Such a restrictive interpretation of this provision would hinder the recognition of refugee status for virtually all applicants expressing a well-founded fear of persecution based on a genuine religious conversion matured after their first asylum application. UNHCR underlines that both, Article 5(3) of the Directive and Article 3(2) of the AsylG 2005 must be interpreted and applied '[w]ithout prejudice to the Geneva Convention'.

5. Conclusion

5.1. In conclusion, UNHCR reiterates that individuals who are objectively at risk of persecution in their country of origin are entitled to protection notwithstanding their motivations, intentions, conduct or other surrounding circumstances and irrespective of whether these constitute a continuation of previously held convictions or orientations. This conclusion is drawn on the basis that the 1951 Convention does not, either explicitly or implicitly, contain any provision according to which international protection is unavailable to individuals whose claims for asylum are based on circumstances created *sur place* by their own decision. To the contrary, the recognition of refugee status depends on whether the asylum applicants have a well-founded fear of persecution based on a Convention ground.

5.2. Therefore, in UNHCR's view, in cases of subsequent applications based on activities undertaken after having left their country of origin, the recognition of refugee status should not be limited to claims that are permitted by law and constitute the expression and continuation of convictions or orientations held in the country of origin. To refrain from recognizing refugee status in such cases is at variance with the Qualification Directive and the 1951 Convention.

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⁶⁰ National Court of Asylum of France, *Ms N.G.*, App. no. 13005020, 19 December 2013. See also Administrative Court Saarland, *Judgment no. 5 K 170/20*, 2 February 2022: www.asyl.net/rsdb/m30837, according to which, in relation to the refugee status determination of Afghan nationals converted to Christianity, it makes no difference whether the conversion was made out of conviction or for self-serving reasons, as in Afghanistan all those who converted from Islam to Christianity are at serious risk of persecution by the Taliban.