



**Submission by the Office of the United Nations High Commissioner for Refugees
in the case of *A.S.N and T.K.M v. The Netherlands* (Appl. no. 68377/17)
before the European Court of Human Rights**

1. Introduction*

1.1. 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 refugees.¹ UNHCR is responsible for supervising the application of international conventions for the protection of refugees.² UNHCR welcomes the opportunity to intervene in this case, as granted by the European Court of Human Rights ('the Court') in its letter of 27 February 2018.

1.2. In this submission, UNHCR addresses the domestic legislative framework and practice applicable to the determination of the need for international protection of asylum-seekers of Sikh origin from Afghanistan in the Netherlands (Part 2) and provides relevant country of origin information (Part 3) followed by UNHCR's interpretation of the relevant principles of international refugee law and human rights law (Part 4) to assist the Court.³

2. The legislative framework and practice regarding the determination of the need for international protection of asylum-seekers of Sikh origin from Afghanistan in the Netherlands

* 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, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

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

² *Ibid*, para. 8(a).

³ According to this Court, the ECHR should be interpreted 'in harmony with other rules of international law of which it forms part', particularly where such other rules are found in human rights treaties (which would include the 1951 Geneva Convention and the ICCPR); European Court of Human Rights (hereafter ECtHR), *Al-Adsani v. The United Kingdom*, 35763/97, 21 November 2001, para. 55; United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 31(3)(c), <http://www.refworld.org/docid/3ae6b3a10.html>; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 53, <http://www.refworld.org/docid/3ae6b3b04.html>. Furthermore, this Court has taken into consideration a State's international obligations, including under international refugee law, when assessing its compliance with the ECHR in a number of cases. In particular, in the case of *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012 this Court took into account a State's *non-refoulement* obligation under international law in the context of its finding that there had been a violation of Article 13 in conjunction with Article 3 ECHR (<http://www.refworld.org/docid/4f4507942.html>, para. 134).

2.1. Asylum in the Netherlands is regulated under the Aliens Act. Asylum may be granted on the following grounds:⁴

- The applicant is a Convention refugee;⁵
- Substantial grounds have been shown for believing that the applicant if expelled would face a real risk of suffering serious harm, consisting of: (1) death penalty or execution; (2) torture, and inhuman or degrading treatment or punishment or (3) serious and individual threat to the civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.⁶

2.2. Dutch asylum policy is further regulated through Aliens Circulars issued by the office of the Minister for Migration pursuant to his statutory powers. The Minister can in relation to Convention refugees (para. 2.1. above, first indent), designate a 'group at-risk' if it is apparent that persecution of persons belonging to the group occurs in the country of origin. The persecution does not have to be systematic and can be incidental in nature. The designation of a 'group at-risk' lowers the burden of proof on applicants who belong to that group.⁷ An applicant who belongs to a group which has been designated as a 'group at risk' need only, through credible and individualized statements, substantiate that his/her problems related to one of the 1951 Convention grounds lead to a well-founded fear of persecution, in order to qualify for international protection.

2.3. In the context of applicants who face a real risk of suffering serious harm (para. 2.1 above, second indent), the Minister of Migration can also designate a group as a 'vulnerable minority group', taking into account a number of elements. These include: whether the country of origin, or parts thereof, is experiencing indiscriminate violence or indiscriminate human rights violations; the extent to which an individual member of the 'vulnerable minority group' may benefit from effective protection; and the extent to which such an individual may avoid the violence or human rights violations by residing elsewhere in the country.⁸ In assessing applications of members of a 'vulnerable minority group', the Dutch Immigration and Naturalisation Service (INS) will assess the case on an individual basis with reference to the experience of other members of the group in the immediate vicinity of the individual. The INS will normally not grant protection to a person belonging to the 'vulnerable minority group' if there has been a considerable period between the human rights violations and the departure from the country of origin, or if the person has not experienced problems during a considerable period of time.⁹

2.4. In practice, despite the group designations outlined in paras. 2.2. and 2.3, a demanding burden and standard of proof are still imposed on the concerned asylum-seekers, as the requirement of an individualized fear of persecution or risk of serious harm continues to apply to persons who fall within the 'group at risk.' Additionally, as noted above, the INS will normally not grant protection to a person belonging to the 'vulnerable minority group' if there

⁴ Vreemdelingenwet 2000 (Dutch Aliens Act), article 29, <http://wetten.overheid.nl/BWBR0011823/2017-12-16>.

⁵ Article 29, first paragraph, under a, Aliens Act.

⁶ Article 29, first paragraph, under b, Aliens Act.

⁷ Vreemdelingscircularaire 2000 (Aliens Circular) C2/3.2 Refugee Status, article 29 first sub, exordium and under a Aliens Act.

⁸ Vreemdelingscircularaire 2000 (Aliens Circular) C2/3.3 Serious Harm as defined in article 29 first sub, exordium and under b Aliens Act.

⁹ *Ibid.*

has been a considerable period between the human rights violations and the departure from the country of origin, or if the person has not experienced problems during a considerable period of time. The above concerns are exemplified in the context of the determination of the need for international protection of asylum-seekers of Sikh origin from Afghanistan in the Netherlands, which has resulted in the rejection of a number of cases and the issuance of deportation orders.

3. The situation of Sikhs in Afghanistan

3.1. In a letter to the House of Representatives dated 23 February 2017,¹⁰ the Minister for Migration announced that Sikhs in Afghanistan are to be considered a ‘group at-risk’ as well as a ‘vulnerable minority group’ on account of the fact that they face societal discrimination, limitations in education and economic opportunities and are exposed to violence. It was further noted in the letter that national Afghan law provides little protection on account of their religion.¹¹

3.2. However, the determination of the need for international protection of asylum-seekers of Sikh origin from Afghanistan remains problematic. UNHCR has drawn the attention of the Dutch authorities to the vulnerable situation of Sikhs in Afghanistan on several occasions, including in two letters of 13 April and 29 June 2017, underlining the continued validity of the 2016 UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*,¹² which emphasised the following:

“Although reliable data about the current size of the Sikh and Hindu communities in Afghanistan are not available, large numbers of Sikhs and Hindus are believed to have left Afghanistan as a result of the severe difficulties they faced. The small number of Sikhs and Hindus who are reported to remain in Afghanistan have reportedly been left even more vulnerable to abuse, particularly by the police and by extremist elements of the Muslim community. Although the Sikh and Hindu communities are allowed to practise their religion publicly, they reportedly continue to face discrimination at the hands of the State, including when seeking political participation and government jobs, despite public statements by President Ghani to promote tolerance and increase their political representation. They reportedly also continue to face societal discrimination and intimidation. Both communities report difficulties in carrying out funerals in accordance with their customs, due to harassment and discrimination. While the police are reported to provide protection to Hindu and Sikh communities during burial rituals, members of the two communities report feeling unprotected by State authorities in other contexts, including in relation to land disputes. Sikhs and Hindus have reportedly been victims of illegal occupation and seizure of their land, and have been unable to regain access to property that was seized during

¹⁰ Letter to the House of Representatives concerning Country Specific Asylum Policy in relation to Afghanistan. https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2017Z03185&did=2017D06571.

¹¹ The substance of the letter was based on a country of origin report on Afghanistan issued by the Netherlands: Ministry of Foreign Affairs, *Country of Origin Information Report Afghanistan, November 2016*, 1 November 2016, <http://www.refworld.org/docid/58c2855c4.html>.

¹² UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* (hereafter referred to as the 2016 Guidelines), 19 April 2016, HCR/EG/AFG/16/02, <http://www.refworld.org/docid/570f96564.html>. See also, Annual reports on Afghanistan of the Office of the High Commissioner for Human Rights: <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/HRReports.aspx>.

the Mujahideen era. Members of the Sikh and Hindu communities reportedly refrain from pursuing restitution through the courts, for fear of retaliation. A small number of schools for Hindu and Sikh children have reportedly been established, but Hindu and Sikh children attending government schools in Kabul are reported to be subjected to harassment and bullying by other students."¹³

3.3. It is further noted in the 2016 Guidelines that persons perceived as contravening Sharia law, including persons accused of blasphemy and converts from Islam, as well as members of minority religious groups, may be in need of international refugee protection on the ground of religion or other relevant grounds, depending on the individual circumstances of the case.¹⁴ UNHCR further reiterated in its letter of 29 June 2017 that the Sikh community continued to flee Afghanistan on account of the threats and discrimination.¹⁵

3.4. In UNHCR's view, there is no internal relocation alternative (IRA)/internal flight alternative (IFA) for members of the Sikh community in Afghanistan. An assessment of the possibility of relocation requires an assessment of the relevance as well as the reasonableness of the proposed IFA/IRA.¹⁶ In assessing the relevance of an IFA/IRA for Afghan applicants, it is of particular importance to consider: (i) the requirement that the proposed area of relocation must be durably safe, and (ii) the fact that the area of prospective IFA/IRA must be practically, safely and legally accessible to the individual.¹⁷ As further noted in the 2016 Guidelines:

"Whether an IFA/IRA is "reasonable" must be determined on a case-by-case basis, taking into account the personal circumstances of the applicant, including the impact of any past persecution on the applicant. Other factors that must be taken into account include the safety and security situation in the proposed area of relocation; respect for human rights in that area, and the possibilities for economic survival in dignified conditions."¹⁸

3.5. UNHCR considers an internal relocation alternative (IRA)/internal flight alternative (IFA) to be reasonable only where the individual has access to a support network of members of his or her (extended) family or members of his or her larger ethnic community in the area of prospective relocation, who have been assessed to be willing and able to provide genuine support to the applicant in practice.¹⁹ UNHCR has also noted the following:

¹³ *Ibid.*, pp. 52-53.

¹⁴ UNHCR 2016 guidelines, p. 54.

¹⁵ Reuters, *Afghanistan's dwindling Sikh, Hindu communities flee new abuses*, 23 June 2016, <https://www.reuters.com/article/us-afghanistan-minority/afghanistans-dwindling-sikh-hindu-communities-flee-new-abuses-idUSKCN0Z82SL> and Hindustan Times, *Afghanistan: Head of Sikh community in Kunduz shot dead by unknown gunmen*, 30 December 2016, <https://www.hindustantimes.com/world-news/afghanistan-sikh-community-head-of-kunduz-shot-dead-by-unknown-gunmen/story-bqmG9cC441LUB2Lj6K1JeO.html>.

¹⁶ The relevance and reasonable test is also found in Article 8 of the EU Qualification Directive (recast): Council of the 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)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, <http://www.refworld.org/docid/4f197df02.html>.

¹⁷ UNHCR, 2016 Guidelines, p. 82. See also, UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, <http://www.refworld.org/docid/3f2791a44.html>, para. 7.

¹⁸ UNHCR, 2016 Guidelines, p. 83.

¹⁹ *Ibid.*, p. 86.

“For individuals who fear harm as a result of harmful traditional practices and religious norms of a persecutory nature, such as women and children and persons of diverse sexual orientations and/or gender identities, the endorsement of such norms and practices by large segments of society and powerful conservative elements at all levels of government needs to be taken into account as a factor that weighs against the relevance of an IFA/IRA.”²⁰

3.6. The 2016 guidelines state further:

“The particular circumstances of children as well as the legal obligations of States under the Convention on the Rights of the Child – in particular the obligations to ensure that the best interests of the child are a primary consideration in all decision-making affecting children and to give due weight to the views of the child in light of his or her age and maturity - need to be taken into account in assessing the reasonableness of an IFA/IRA involving children. Adjudicators need to give due consideration to the fact that what is considered merely inconvenient for adults may constitute undue hardship for a child.”²¹

3.7. Based on the above, in its letter of 29 June 2017, UNHCR indicated that members of the Sikh community may be in need of international protection because of their profile as Sikhs and urged the Dutch authorities to re-assess their policy relating to past persecution and recent residence and to consider halting deportations of Sikhs to Afghanistan.

4. Principles of international refugee and human rights law regarding the determination of the need for international protection

4.1. The principle of non-refoulement

4.1.1. The right to seek and enjoy asylum is a basic human right under Article 14(1) of the *Universal Declaration of Human Rights*,²² and is supported by the legal framework of the 1951 Refugee Convention and its 1967 Protocol (‘1951 Convention’),²³ to which the Netherlands is a State party.

4.1.2. Central to the realization of the right to seek asylum is the obligation of States not to expel or return (*refouler*) a person to a territory where his or her life or freedom would be threatened. *Non-refoulement* is a cardinal protection principle, most prominently expressed in Article 33 of the 1951 Convention and recognized as a norm of customary international law.²⁴

²⁰ *Ibid.*, p. 83.

²¹ *Ibid.*, p. 85.

²² UNGA, *Universal Declaration of Human Rights*, 1948, 217 A (III), <http://www.refworld.org/docid/3ae6b3712c.html>.

²³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, <http://www.refworld.org/docid/3be01b964.html>.

²⁴ UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994, <http://www.refworld.org/docid/437b6db64.html>; UNHCR Note on the Principle of Non-Refoulement, November 1997, <http://www.unhcr.org/refworld/docid/438c6d972.html>; UNHCR, *Declaration of States Parties to the 1951*

Article 33(1) prohibits states from expelling or returning a refugee in any manner whatsoever, to a territory where s/he would be at risk of threats to life or freedom.

4.1.3. Importantly, given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is merely declaratory in nature.²⁵ It follows that the prohibition of *refoulement* applies to all refugees, including those who have not formally been recognized as such, and to asylum-seekers whose status has not yet been determined.²⁶

4.1.4. The principle of *non-refoulement* has also been established in international and European human rights law. More specifically, States are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life,²⁷ or torture²⁸ or other cruel, inhuman or degrading treatment or punishment.²⁹

Convention and or Its 1967 Protocol relating to the Status of Refugees, 16 January 2002, HCR/MMSP/2001/09, at para. 4, <http://www.unhcr.org/refworld/docid/3d60f5557.html> and UNHCR, *The Scope and Content of the Principle of Non-Refoulement (Opinion)* [Global Consultations on International Protection/Second Track], 20 June 2001, paras 193-253, <http://www.unhcr.org/refworld/docid/3b3702b15.html>. See also Concurring Opinion of Judge Pinto de Albuquerque in *Hirsi Jamaa and Others*, ECtHR, (*supra* note 3) p. 42, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, European Court of Human Rights, 23 February 2012, www.refworld.org/cases.ECHR.4f4507942.html.

²⁵ 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* (hereafter referred to as ‘UNHCR Handbook’), December 2011, HCR/1P/4/ENG/REV. 3, para. 28, <http://www.refworld.org/docid/4f33c8d92.html>.

²⁶ See, ExCom Conclusion No. 6 (XXVIII), 1977, para. (c), <http://www.unhcr.org/excom/exconc/3ae68c43ac/non-refoulement.html>; ExCom Conclusion No. 79 (XLVII), 1996, para. (j), <http://www.unhcr.org/excom/exconc/3ae68c430/general-conclusion-international-protection.html>; ExCom Conclusion No. 81 (XLVII), 1997, para. (i), <http://www.unhcr.org/excom/exconc/3ae68c690/general-conclusion-international-protection.html>. Executive Committee of the High Commissioner’s Programme (ExCom) was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions; the latter includes issuing Conclusions on International Protection - referred to as “ExCom Conclusions”. ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 101 States are Members of the Executive Committee, including the Netherlands. See also, *Note on International Protection (submitted by the High Commissioner)*, A/AC.96/815, ExCom Reports, 31 August 1993, para. 11, <http://www.unhcr.org/refworld/docid/3ae68d5d10.html>.

²⁷ The right to life is guaranteed under Article 6 of the 1966 Covenant on Civil and Political Rights (ICCPR), (999 U.N.T.S. 171); Article 2 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ETS 005, 213 U.N.T.S. 222); Article 4 of the American Convention on Human Rights; and Article 4 of the African Charter on Human and People’s Rights, 21 I.L.M. 58 (1982), (Banjul Charter).

²⁸ An explicit *non-refoulement* provision is contained in Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1465 U.N.T.S. 85), which prohibits the removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

²⁹ Obligations under the ICCPR as interpreted by the Human Rights Committee also encompass the obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 (right to life) and 7 (right to be free from torture or other cruel, inhuman or degrading treatment or punishment) of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed, thereby recognizing that the relevant provisions of the ICCPR entail the prohibition of indirect *refoulement*. With regard to the scope of the obligations under Article 7 of the ICCPR, see Human Rights Committee in its *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or*

4.1.5. Under the obligations of *non-refoulement*, States have a duty to ensure, prior to implementing any removal measure, that the person whom it intends to remove from its territory or jurisdiction is not at risk of persecution, serious human rights violations or other serious harm.

4.2. Well-founded fear of persecution

4.2.1. The criteria for refugee status are set out in Article 1A(2) of the 1951 Convention and are to be interpreted in accordance with their ordinary meaning, and in light of the object and purpose of the 1951 Convention. As per this provision, a refugee is:

“(…) 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 nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country (…)”

4.2.2. To be a refugee, it is not required to have recently resided in the country of origin, to have experienced past persecution, or to be individually targeted, as will be outlined in this section below.

4.2.3. It is established law that the 1951 Convention requires the applicant to have a well-founded fear of being persecuted and to be unable or, owing to such fear, unwilling to avail her- or himself of the protection of her or his country of nationality (i.e. citizenship),³⁰ or, in the case of a stateless person, former habitual residence.³¹ A decision on whether an applicant has a well-founded fear of persecution requires a forward-looking assessment. The fact that the applicant has not recently been living in the country of origin does not affect the assessment of her or his well-founded fear of persecution if the applicant is returned to her or his country of origin. This is supported by relevant EU asylum law as Article 2(d) of the Qualification Directive (recast) similarly defines a refugee with reference to a well-founded fear of being persecuted with respect to his/her country of nationality, without any explicit requirement of recent residence.³² Thus in the present case, it is relevant to assess the applicants’ well-founded fear of persecution vis-à-vis Afghanistan as their country of origin.

4.3. Relevance of past persecution

degrading treatment or punishment), 10 March 1992, U.N. Doc. HRI/ GEN/1/Rev.7, para. 9 (“States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*”); and *General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 12. See also the jurisprudence of this Court, which has held that *non-refoulement* is an inherent obligation under Article 3 of the ECHR in cases where there is a real risk of exposure to torture, inhuman or degrading treatment or punishment, including, in particular, the Court’s judgment in *Hirsi Jamaa and Others v. Italy*, (*supra* note 3, para. 114).

³⁰ UNHCR *Handbook*, *supra* note 25, para. 87.

³¹ *Ibid.*, para. 89.

³² Council of the 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)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, <http://www.refworld.org/docid/4f197df02.html>. Article 2(d)

4.3.1. The 1951 Convention protects those who are at risk of being persecuted in their country of origin, regardless of whether they have already suffered persecution in the past. As mentioned above, a decision on whether an applicant has a well-founded fear of persecution requires a **forward-looking** assessment, which “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.”³³ The applicant’s personal circumstances would include his/her background, experiences, personality and any other personal factors which could expose him/her to persecution. In particular, as elaborated below, whether the applicant has previously suffered persecution or other forms of mistreatment and the experiences of relatives and friends of the applicant as well as those persons in the same situation as the applicant are relevant factors to be taken into account.³⁴

4.3.2. International refugee protection is preventative in nature and therefore a person does not have to have experienced persecution before she or he can claim refugee status.³⁵ As stated in the UNHCR *Handbook*:

“... 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.**”³⁶ [emphasis added]

Further,

“[i]t may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, **the word “fear” refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.**”³⁷ [emphasis added]

4.3.3. Absent a relevant change of circumstances, persons having suffered persecution in the past would be assumed to be at continued risk of persecution.³⁸ The fact that an applicant has already been subjected to persecution or other forms of serious harm is a serious indication of the applicant’s well-founded fear of persecution, as explicitly recognised in EU asylum law.³⁹

³³ UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, para. 18, <http://www.refworld.org/docid/3ae6b3338.html>. See also, 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*, (hereafter referred to as *GIP No. 12: armed conflict and violence*), 2 December 2016, HCR/GIP/16/12, para. 24, <http://www.refworld.org/docid/583595ff4.html>.

³⁴ UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, para. 19, <http://www.refworld.org/docid/3ae6b3338.html>.

³⁵ UNHCR, *UNHCR Advisory Opinion on the Interpretation of the Refugee Definition*, 23 December 2004, para. 12, <http://www.refworld.org/docid/4551c0374.html>.

³⁶ UNHCR *Handbook*, *supra* note 25, para. 42. See also UNHCR, *UNHCR Advisory Opinion on the Interpretation of the Refugee Definition*, 23 December 2004, p. 5, <http://www.refworld.org/docid/4551c0374.html>.

³⁷ UNHCR *Handbook*, *supra* note 25, para. 45.

³⁸ UNHCR, *GIP No. 12: armed conflict and violence*, *supra* note 33.

³⁹ Qualification Directive (Recast), Article 4(4). It is also noteworthy that Article 9 of the Qualification Directive (recast), defining acts of persecution, does not include past persecution in order to qualify as a refugee.

In UNHCR's view, while past persecution or serious harm would weigh in favour of a positive assessment of a risk of persecution, its absence is not a decisive factor.⁴⁰

4.4. Individual targeting

4.4.1. To be eligible for refugee status, the test is whether an applicant's fear of being persecuted is well-founded. There are situations where the applicant may be at risk of being singled out or targeted for persecution, and there are situations where entire groups may be at risk of persecution, leaving each member of the group at risk.⁴¹ In its guidance on the application of Article 1 of the 1951 Convention, UNHCR has pointed out that "the fact that many or all members of particular communities are at risk does not undermine the validity of any particular individual's claim."⁴² UNHCR underscores that in order to establish a need for international protection, there is no need for an individual to demonstrate that she or he has been personally singled out or targeted for persecution, but rather that "[t]he test is whether an individual's fear of being persecuted is well-founded."⁴³ In the context of generalized violence, the Office has recalled that "[a]t times, the impact of a situation of armed conflict and violence on an entire community, strengthens rather than weakens the well-founded nature of the fear of being persecuted of a particular individual."⁴⁴

4.4.2 Assessing the applicant's risk of persecution turns on the particular circumstances of the applicant viewed against the situation in the applicant's country of origin. As mentioned in the UNHCR *Handbook*, such assessment "need not necessarily be based on the applicant's own personal experience", but "what, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded."⁴⁵

4.4.3. The above applies *a fortiori* when it is established that the heightened risk exists with respect to a minority group and that the person concerned belongs to such group. In the context of minority religious groups, UNHCR's *Handbook* states:

"72. Persecution for "reasons of religion" may assume various forms, e.g. prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community.

73. Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status. **There may, however, be special**

⁴⁰ UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, para. 19, <http://www.refworld.org/docid/3ae6b3338.html>.

⁴¹ UNHCR, *GIP No. 12: armed conflict and violence*, *supra* note 33, para. 17.

⁴² *Ibid.* See also: UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, para. 20, <http://www.refworld.org/docid/3b20a3914.html>.

⁴³ UNHCR, *GIP No. 12: armed conflict and violence*, *supra* note 33, para. 17.

⁴⁴ *Ibid.* See also *F.G. v. Sweden*, Application no. 43611/11, in which this Court found that 'in relation to asylum claims based on a well-known general risk, when information about such a risk is freely ascertainable from a wide number of sources, the obligations incumbent on the States under Articles 2 and 3 of the Convention in expulsion cases entail that the authorities carry out an assessment of that risk of their own motion', European Court of Human Rights, 23 March 2016, para. 126, <http://www.refworld.org/docid/56fd485a4.html>.

⁴⁵ UNHCR *Handbook*, *supra* note 25, para. 43.

circumstances where mere membership can be a sufficient ground.” [emphasis added]

4.4.4. This is supported by this Court’s case-law with respect to the assessment of a real risk of ill-treatment upon return under Article 3 ECHR. In its judgment *Salah Sheekh v. the Netherlands*, the Court underlined that “it might render the protection offered by that provision illusory if, in addition to the fact that he belongs to [a minority at risk] - which the Government have not disputed - the applicant be required to show the existence of further special distinguishing features.”⁴⁶

4.4.5. In UNHCR’s view, “a person may have a well-founded fear of persecution that is shared by many others, and of a similar or same degree. An applicant [...] is not required to establish a risk of harm over and above that of others similarly situated.”⁴⁷ It is thus not essential to prove that a person is individually targeted for persecution in order to establish his or her need for international protection. Where there is a risk of persecution that applies to a group of people belonging to a religious community, membership of that community may suffice. Thus, it is submitted that in light of the ill treatment, harassment and discrimination of Sikhs, as well as the risk of “violence”, as cited by the Minister for Migration in his letter to the Parliament of February 2017 (see section 3.1 above), the applicants may require the grant of international protection.

5. Conclusion

5.1. Having regard to its 2016 Eligibility Guidelines, UNHCR considers that members of minority religious groups in Afghanistan may be in need of international protection on the ground of religion or other relevant grounds, depending on the individual circumstances of the case.

5.2 In this regard, UNHCR notes that the Minister for Migration of the Netherlands has designated Sikhs in Afghanistan to be considered a ‘group at-risk’ as well as a ‘vulnerable minority group’ on account of the fact that they face societal discrimination, limitations in education and economic opportunities and are exposed to violent harm and that national law does not provide sufficient protection to their religion.

5.3 In light of this, UNHCR reiterates that recent residence in the country of origin is not required for the establishment of a well-founded fear of persecution. While the existence of past persecution is a relevant element in the consideration of an application for asylum, given the forward looking nature of the refugee definition, past persecution is not of itself determinative of a well-founded fear of persecution. Furthermore, whether or not a person belongs to a minority group there is no requirement of individual targeting upon return to the country of origin for the establishment of a well-founded fear of persecution.

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⁴⁶ *Salah Sheekh v. The Netherlands*, Application no. 1948/04, European Court of Human Rights, 11 January 2007, para. 148, <http://www.refworld.org/cases,ECHR,45cb3dfd2.html>.

⁴⁷ UNHCR, *GIP No. 12: armed conflict and violence*, *supra* note 33, para. 22. See also, *Surajnarain and Others v. Minister of Citizenship and Immigration*, 2008 FC 1165, Canada: Federal Court, 16 October 2008, para. 17, <http://www.refworld.org/docid/497f3bdc2.html>.