



## **UNHCR statement on religious persecution and the interpretation of Article 9(1) of the EU Qualification Directive**

*Issued in the context of two references for a preliminary ruling to the Court of Justice of the European Union (CJEU) from the Bundesverwaltungsgericht (Germany) lodged on 18 February and 2 March 2011 – Federal Republic of Germany v Y (Case C-71/11) and Federal Republic of Germany v Z (Case C-99/11)*

### **1. Introduction**

1.1 The German Federal Administrative Court has requested a preliminary ruling from the Court of Justice of the European Union ('the Court') concerning the interpretation of Article 9(1) of 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<sup>1</sup> ('Qualification Directive'). That provision seeks to define what constitutes an act of persecution within the meaning of the refugee definition as set out in Article 1A(2) of the 1951 Convention relating to the Status of Refugees<sup>2</sup> ('1951 Convention').

1.2 The questions posed by the German Federal Administrative Court are as follows<sup>3</sup>:

- 1) *Is Article 9(1)(a) of Directive 2004/83/EC to be interpreted as meaning that not every interference with religious freedom which breaches Article 9 of the European Convention on Human Rights constitutes an act of persecution within the meaning of Article 9(1)(a) of Directive 2004/83/EC, but that a severe violation of religious freedom as a basic human right arises only if the core area of that religious freedom is adversely affected?*
- 2) *If Question 1 is to be answered in the affirmative:*
  - (a) *Is the core area of religious freedom limited to the profession and practice of faith in the areas of the home and neighbourhood, or can there also be an act of persecution, within the meaning of Article 9(1)(a) of Directive 2004/83/EC, in cases where, in the country of origin, the practice of faith in public gives rise to a*

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<sup>1</sup> 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 (OJ L 304/12 of 30.09.2004).

<sup>2</sup> UNTS No. 2545, Vol. 189, p. 137.

<sup>3</sup> References for a preliminary ruling from the Bundesverwaltungsgericht (Germany) lodged on 18 February and on 2 March 2011, Joined Cases C-71/11 and C-99/11.

*risk to body, life or physical freedom and the applicant accordingly abstains from such practice?*

*(b) If the core area of religious freedom can also comprise certain religious practices in public:*

- Does it suffice in that case, in order for there to be a severe violation of religious freedom, that the applicant feels that such practice of his faith is indispensable in order for him to preserve his religious identity,*
- or is it further necessary that the religious community to which the applicant belongs should regard that religious practice as constituting a central part of its doctrine,*
- or can further restrictions arise as a result of other circumstances, such as the general conditions in the country of origin?*

*3) If Question 1 is to be answered in the affirmative:*

*Is there a well-founded fear of persecution, within the meaning of Article 2(c) of Directive 2004/83/EC, if it is established that the applicant will carry out certain religious practices — other than those falling within the core area — after returning to the country of origin, even though these will give rise to a risk to body, life or physical freedom, or is the applicant to be expected to abstain from engaging in such religious practices in the future?*

1.3 This request for a preliminary ruling represents the fourth opportunity for the Court to clarify the application of a provision of the 1951 Convention in the framework of the asylum *acquis*. The Office of the United Nations High Commissioner for Refugees (‘UNHCR’) has a direct interest in this matter, as the agency entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees, and for seeking permanent solutions for the problems of refugees.<sup>4</sup> According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”<sup>5</sup> This supervisory responsibility is reiterated in Article 35 of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees (‘1967 Protocol’).<sup>6</sup>

1.4 UNHCR’s supervisory responsibility has been reflected in EC law, including by means of a general reference to the 1951 Convention in Article 78 (1) of the Treaty on the Functioning of the EU (‘TFEU’), as well as in Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy”.<sup>7</sup> Secondary EC legislation also emphasizes the role of UNHCR. For instance, Recital 15

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<sup>4</sup> *Statute of the Office of the United Nations High Commissioner for Refugees*, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3628>, G.A. Res. 428(V), Annex, UN Doc. A/1775, para. 1 (1950).

<sup>5</sup> *Ibid.*, para. 8(a).

<sup>6</sup> According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of th[e 1951] Convention” UNTS No. 2545, Vol. 189, p. 137 and UNTS No. 8791, Vol. 606, p. 267.

<sup>7</sup> Declaration 17 to the Treaty of Amsterdam (OJ L 304/12 of 30.9.2004).

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”. The supervisory responsibility of UNHCR is specifically articulated in Article 21 of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.<sup>8</sup>

1.5 Against this background, UNHCR elaborates below on the issues arising from the questions posed to the CJEU by the German Federal Administrative Court. Part 2 of this Statement addresses the need to interpret the Qualification Directive in accordance with the 1951 Convention and in the light of UNHCR’s guidance. Part 3 provides a short overview of the German practice of protection in cases of claims based on religious persecution as relevant for the questions submitted. Part 4 explains UNHCR’s interpretation of what constitutes an act of persecution in the context of cases concerning the right to freedom of religion and addresses the related questions posed to the Court.

## **2. The Qualification Directive and the 1951 Convention**

2.1 The TFEU creates an explicit obligation for EC secondary legislation on asylum to conform to the 1951 Convention.<sup>9</sup> The primacy of the 1951 Convention is further recognized in European Council Conclusions and related Commission policy documents, which affirm that the Common European Asylum System is based on the “full and inclusive application” of the 1951 Convention.<sup>10</sup> It follows that the transposition of the Qualification Directive into national legislation of EU Member States, all of which are States Parties to the 1951 Convention and therefore bound by its obligations, must also be in line with the 1951 Convention.<sup>11</sup>

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<sup>8</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326/13 of 13.12.2005). Article 21(c) in particular obliges Member States to allow UNHCR “to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.”

<sup>9</sup> Article 78 para. 1 TFEU provides that the policy on asylum “must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”.

<sup>10</sup> See para. 13 of the *Presidency Conclusions of the Tampere European Council* of 15-16.10.1999, at: [http://www.europarl.europa.eu/summits/tam\\_en.htm?redirected=1](http://www.europarl.europa.eu/summits/tam_en.htm?redirected=1); para. 6 of *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 13.12.2004, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:053:0001:0014:EN:PDF>; para. 1 of the Green Paper of the Commission on the Future Common European Asylum System COM(2007) 301 final, 06.06.2007, at: [http://ec.europa.eu/justice\\_home/news/intro/doc/com\\_2007\\_301\\_en.pdf](http://ec.europa.eu/justice_home/news/intro/doc/com_2007_301_en.pdf); part 1.1 of the European Commission’s *Policy Plan on Asylum: an integrated approach to protection across the EU*, COM(2008) 360, 17.06. 2008, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF>. The Policy Plan recognizes the fundamental role played by the 1951 Convention in the existing Treaty provisions and those resulting from the Lisbon Treaty. See also p. 11 of the European Pact on Immigration and Asylum adopted on 16 October 2008, in which the European Council reiterates that “any persecuted foreigner is entitled to obtain aid and protection on the territory of the European Union in application of the Geneva Convention [...]”, *European Pact on Immigration and Asylum*, 13440/08, 16.10.2008, p. 11, at: <http://register.consilium.europa.eu/pdf/en/08/st13/st13440.en08.pdf>.

<sup>11</sup> For UNHCR’s remarks on the Qualification Directive, see: UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29.04.2004 on Minimum Standards for the Qualification and Status of*

2.2 The Qualification Directive recognizes the 1951 Convention as the “cornerstone of the international legal regime for the protection of refugees”<sup>12</sup> and stipulates that the Directive’s minimum standards are aimed at ensuring “full respect for [...] the right to asylum”<sup>13</sup> as well as guiding Member States in the application of the 1951 Convention.<sup>14</sup> Certain provisions of the Directive replicate the wording of the 1951 Convention almost exactly.<sup>15</sup> One of the purposes of the Directive is thus not only to ensure compliance with the 1951 Convention, but to contribute to its full implementation.

2.3 The Court itself has acknowledged these important principles and, accordingly, the central role of the 1951 Convention when applying the Qualification Directive. More particularly, the Court repeatedly underlined that this instrument must be interpreted “in a manner consistent with the 1951 Convention and the other relevant treaties” referred to in Article 63(1) TEC.<sup>16</sup> This implies that the interpretation of the 1951 Convention under international law informs the interpretation of the Qualification Directive as an instrument under EU Law. This is all the more justified in the present case, since the very wording of Article 9(1)(a) indicates that the purpose of that provision of EU law is to explain the meaning of a notion contained in a provision of the 1951 Convention. In this connection, the Court acknowledged that international treaties must be interpreted using the rules of interpretation enshrined in Articles 31 et seq. of the Vienna Convention on the Law of Treaties, including the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.<sup>17</sup>

2.4 In general, the Conclusions agreed by Member States of UNHCR’s Executive Committee<sup>18</sup>, as well as the UNHCR Handbook on Procedures and Criteria for

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*Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection granted (OJ L 304/12 of 30.9.2004)*, 28 January 2005, at: <http://www.unhcr.org/refworld/docid/4200d8354.html>. See also: Maria-Teresa Gil-Bazo, “Refugee Status and Subsidiary Protection under EC Law. The EC Qualification Directive and the Right to be Granted Asylum”, in: A. Baldaccini, E. Guild and H. Toner (eds), *Whose freedom, security and justice? EU immigration and asylum law and policy*, Hart (2007), pp. 229-264.

<sup>12</sup> Recital 3 of the Qualification Directive.

<sup>13</sup> Recital 10 of the Qualification Directive.

<sup>14</sup> Recital 16 of the Qualification Directive.

<sup>15</sup> For instance, Article 2(c) of the Qualification Directive replicates almost exactly Article 1A of the 1951 Convention.

<sup>16</sup> Now Art. 78 para. 1 TFEU. See CJEU, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Abdulla and Others*, Judgment of 2 March 2010, paras. 53 and 54; CJEU, Case C-31/09, *Bolbol*, Judgment of 17 June 2010, para. 38; CJEU, Joined Cases C-57/09 and C-101/09, *Germany v. B and D.*, Judgment of 9 November 2010, para. 78.

<sup>17</sup> CJEU, Case C-344/04, *IATA*, Judgment of 10 January 2006, para. 40.

<sup>18</sup> The 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. Its terms of reference are found in United Nations General Assembly Resolution 1166(XII) which states *inter alia* that it is “to advise the High Commissioner, at his request, in the exercise of his functions under the Statute of his Office.” This includes issuing Conclusions on International Protection (often referred to as “ExCom Conclusions”), which address issues in the field of refugee protection and serve as “international guidelines to be drawn upon by States, UNHCR and others when developing or orienting their policies on refugee issues”; see: UNHCR, *General Conclusion on International Protection*, ExCom Conclusion No. 55 (XL) – 1989, 13 October 1989, para. (p), at: <http://www.unhcr.org/excom/EXCOM/3ae68c43c.html>. ExCom Conclusions are adopted by consensus by

Determining Refugee Status<sup>19</sup> and subsequent Guidelines on International Protection<sup>20</sup> issued by UNHCR, should also be taken into account in interpreting the provisions of the EU asylum *acquis*, in particular those which include references to provisions of the 1951 Convention. These documents provide guidance on the interpretation and application of provisions of the 1951 Convention, and influenced significantly the drafting of the Qualification Directive. The Explanatory Memorandum of the Commission's proposal<sup>21</sup> quotes the UNHCR Handbook and Executive Committee Conclusions as sources, along with the 1951 Convention itself.<sup>22</sup>

2.5 The above considerations about the rules and documents relevant to the interpretation of the 1951 Convention are all the more significant since the Court undertook to directly interpret the meaning of some provisions of the 1951 Convention<sup>23</sup>, even expressly claiming jurisdiction to do so with respect to the provisions which are referred to in the Qualification Directive.<sup>24</sup>

### **3. Comments on the interpretation of the concept of religious persecution as practised in Germany**

3.1 The German Federal Administrative Court submitted its questions against the background of diverging interpretations in German jurisprudence of the requirements for refugee status in cases involving dangers to which asylum-seekers may be exposed while practising religious beliefs. The traditional concept applied in the German system has been cast into doubt by decisions of numerous courts in application of the Qualification Directive.

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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, 85 States are Members of the UNHCR Executive Committee.

<sup>19</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1 January 1992, at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html> ('UNHCR Handbook').

<sup>20</sup> UNHCR issues "Guidelines on International Protection" pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the 1951 Convention. The Guidelines complement the UNHCR Handbook (see above footnote 19) and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

<sup>21</sup> European Commission, *Proposal for a Council Directive on minimum standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection*, COM(2001) 510 final, 12.09.2001, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0510:FIN:EN:PDF>.

<sup>22</sup> *Ibid*, part 3, p. 5. The 1996 Joint Position of the Council on the harmonized application of the definition of the term "refugee", which constituted the "starting point" of the Qualification Directive, recognized that the Handbook is a "valuable aid to Member States in determining refugee status"; see *Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term "refugee" in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees* [OJ L 63/2, 13.3.1996], at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996F0196:EN:HTML>.

<sup>23</sup> CJEU, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Abdulla and Others*, Judgment of 2 March 2010, paras. 57 and 65.

<sup>24</sup> CJEU, Case C-31/09, *Bolbol*, Judgment of 17 June 2010, para. 34.

### 3.2 The traditional German concept prior to the Qualification Directive

3.2.1 The central aspects of the German system relating to cases in which religious persecution is claimed were established by the Federal Administrative Court<sup>25</sup> in 1986. The approach was developed on the basis of the national fundamental right to asylum as guaranteed by Article 16a of the German Basic Law which provides a right to asylum to every person suffering “political persecution”.<sup>26</sup> This right differs in scope from the refugee definition contained in the 1951 Convention since it is interpreted as being limited to protection from persecution by states or state-like entities only. Furthermore, it only covers acts causing a danger to life, limb or liberty, or a violation of human dignity going beyond what inhabitants of the persecuting state have to live with generally in view of the existing system.<sup>27</sup>

3.2.2 The requirement of a violation of human dignity in case of reliance on rights other than those to life, limb and liberty means that an assessment used to be carried out as to whether the violation of a right involved a violation of its “core part”, which is determined in German constitutional doctrine as that part protecting human dignity. Such core parts of German constitutional basic rights must not be violated at all and are furthermore protected against amendments even in the Constitution itself.<sup>28</sup> This concept forms the background of the questions submitted by the German Federal Administrative Court which is transferred to the interpretation of a “serious violation of a [basic] human right” according to Art. 9 (1)(a) Qualification Directive.

3.2.3 The approach of the Federal Administrative Court rests on the distinction made between, on the one hand, cases where the danger upon return depends on the future behaviour of the applicant in the country of origin; and, on the other hand, those where it does not. In the system established by the Federal Administrative Court in 1986, no particular interpretation prevailed with regard to cases where a danger to life, limb or liberty – the traditional concept of an act of persecution – existed due to previous behaviour of an applicant. In contrast, if dangers to life, limb or liberty would only arise if a certain religious practice was undertaken after an application for asylum had been lodged and after an eventual return to the home country, the German assessment was limited to examining whether an eventual suppression of the respective religious practice in order to avert the danger to life, limb or liberty amounted to a violation of the right to freedom of religion. In such cases, the only right which would be examined with a view to determining the need for asylum was that of freedom of religion, irrespective of the sanctions against the exercise of such freedom. Only a limitation of the freedom of religion infringing the “religious subsistence minimum” (“*religiöses Existenzminimum*”), i.e. the core of religious freedom without which the applicant cannot be expected to live in the country of origin, would constitute an act of persecution.

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<sup>25</sup> Federal Administrative Court, Judgment of 18 December 1986, EZAR 202, No. 7, 6.

<sup>26</sup> Art. 16a (1) German Basic Law: “Politisch Verfolgte genießen Asylrecht.”

<sup>27</sup> *Ibid.*

<sup>28</sup> This follows from Article 79 (3) of the German Basic Law which sets out that the principle of the protection of human dignity is unalterable. As a consequence, the core parts – the human dignity parts – of all basic rights enshrined in the Basic Law are not open to any amendment.

3.2.4 This “religious subsistence minimum” was understood to encompass the adherence to a certain faith as such, the practising of one’s faith in the private sphere<sup>29</sup> as well as the possibility to pray and hold or participate in religious services in community with other believers. In contrast, limitations imposed on the practising of one’s faith in public did not constitute an act of persecution, according to the traditional German concept. Consequently, the prohibition of any form of public manifestation would not constitute an act of persecution, even if sanctioned with severest penalties. An applicant was expected to limit him- or herself to religious practices enshrined in the concept of “religious subsistence minimum”, in order to avoid persecution. On this basis, Ahmadis from Pakistan used to be denied refugee status if they could escape sanctions by refraining from participation in public religious gatherings or public praying. It was assumed that they could exercise their “religious subsistence minimum” without interference by the State.

### **3.3 Developments in German jurisprudence in application of the Qualification Directive**

3.3.1 The traditional German concept was reviewed and questioned by many German administrative courts after the Qualification Directive became applicable in Germany. The focus of the questions referred to the Court in this case concerns the interpretation of the “act of persecution” according to Article 9(1) of the Qualification Directive. At first, and in contrast with this doctrinal approach, the restrictive interpretation of the Federal Administrative Court was called into question owing to the difficulty of reconciling it with the comprehensive definition of the 1951 Convention ground of religion contained in Article 10(1)(b) of the Qualification Directive.<sup>30</sup>

3.3.2 Regarding “acts of persecution”, the jurisprudence of the Higher Administrative Courts in Germany is not uniform. On the one hand, the Higher Administrative Court of Saxony has found that acts of persecution may take the form either of sanctions for a certain religious practice (i.e. the sanctions as such constitute an act of persecution); or the mere suppression of a religious practice which is regarded as an indispensable element of the individual’s faith.<sup>31</sup> On the other hand, the Higher Administrative Court of Baden-Württemberg continues to focus its analysis on the question of whether there is a “serious violation of religious freedom” which will depend on the severity of sanctions against the practising of specific religious acts in private or public, according to that court.<sup>32</sup> Moreover, the Higher Administrative Court of Lower-Saxony has established the

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<sup>29</sup> In German practice this was referred to as the ‘*forum internum*’. It should be noted that the interpretation used in Germany of the concept of “*forum internum*” is different from the interpretation given to the concept used in international human rights law. In the latter context it means the right to have and to change a religion (see para. 4.1.4), whereas in German practice it also means the right to practice one’s religion in the private sphere.

<sup>30</sup> See, as examples, Higher Administrative Court Baden-Württemberg, judgment of 20 November 2007, A 10 S 70/06; Higher Administrative Court Lower Saxony, judgment of 19 March 2007, 9 LB 373/06; Higher Administrative Court Bavaria, judgment of 23 October 2007, 14 B 06.30315; Higher Administrative Court Saxony, judgment of 3 April 2008, A 2 B 36/06.

<sup>31</sup> Higher Administrative Court Saxony, judgment of 3 April 2008, A 2 B 36/06.

<sup>32</sup> Higher Administrative Court Baden-Württemberg, judgment of 20 November 2007, A 10 S 70/06.

criterion of a “serious religious conflict” prompted by the danger, for instance, to life or limb which would arise if the applicant practised his religion in a certain manner.<sup>33</sup>

3.3.3 More particularly, where the risk depends on the future behaviour of the applicant, the jurisprudence is divergent on the central questions. The Higher Administrative Court of Baden-Württemberg has stated that “at least” prohibitions of those religious acts and practices which are of “fundamental importance” to the individual’s faith may lead to recognition as a refugee and it cannot be expected that an applicant abstains from such practices in order to avoid persecution.<sup>34</sup> By contrast, the Higher Administrative Court of Bavaria has held without further qualification that refugee protection must be provided if certain practices of the applicant’s religious faith are not carried out because of a fear of acts of persecution.<sup>35</sup>

#### **4. UNHCR’s views on the issues raised by the questions referred to the Court**

##### **4.1 Acts of persecution within the meaning of the 1951 Convention and subsequently Article 9(1)(a) of the Qualification Directive**

4.1.1 The concept of “persecution” is not defined in the 1951 Convention. From Article 33 of the 1951 Convention it can be inferred that a threat to life or physical freedom constitutes persecution, as would other serious violations of human rights.<sup>36</sup>

4.1.2 Any violation of an absolute right would constitute persecution. Absolute rights are those that cannot be restricted for such reasons as public safety, order, health, or morals or the fundamental rights and freedoms of others, or derogated from in times of public emergency threatening the life of the nation. Nonetheless, the derogability of rights cannot be determinative, as the same right can be non-derogable under one international or regional instrument and derogable under another. A case in point is the right to freedom of religion.<sup>37</sup> Serious breaches of other (non-absolute) human rights would also be considered persecution, when the violation is sufficiently serious by its nature or repetition.

4.1.3 However, not every human rights violation is serious enough to be considered persecution. Various acts or omissions which, taken separately do not amount to persecution, may have the combined effect of seriously violating one or several of the applicant’s human rights. This would be considered persecution on “cumulative

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<sup>33</sup> Higher Administrative Court Lower-Saxony, decision of 7 June 2007, 2 LA 416/07.

<sup>34</sup> Higher Administrative Court Baden-Württemberg, judgment of 20 November 2007, A 10 S 70/06.

<sup>35</sup> Higher Administrative Court Bavaria, judgment of 23 October 2007, 14 B 06.30315.

<sup>36</sup> UNHCR Handbook, para. 51.

<sup>37</sup> Compare Article 4(2) ICCPR and Article 15 (2) ECHR.

Article 4(2) reads as follows:

“No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.”

Article 15(2) ECHR reads as follows:

“No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 § 1 and 7 shall be made under this provision.”



grounds”.<sup>38</sup> For example, although discrimination does not normally reach the threshold required for persecution, it can constitute persecution if there has been a persistent pattern of discrimination which in itself constitutes a serious violation of the prohibition of non-discrimination, including by seriously restricting the applicant’s enjoyment of other human rights – for example, the right to practise his or her religion.<sup>39</sup>

4.1.4 When assessing whether certain restrictive measures amount to persecution, decision-makers need to consider them in light of the personal circumstances of the applicant. In this assessment, the impact on the specific individual concerned is a key factor, as the same act may affect people differently depending on their beliefs, previous history, profile and vulnerability. In each case, decision-makers must determine whether or not, in the specific individual circumstances, the threshold of persecution is reached.<sup>40</sup>

4.1.5 The wording of Article 9 interpreted in the light of the text of the Qualification Directive as a whole leads to a similar interpretation. Firstly, Article 9(1)(a) of the Qualification Directive refers to the non-derogable rights of the European Convention on Human Rights (‘ECHR’), as examples of “basic human rights”. This reference is however not exhaustive, as the provision uses the words “in particular”. Consequently, the fact that a right, such as freedom of religion, does not belong to this category of non-derogable rights of the ECHR does not exclude the possibility that violations of such a right can constitute an “act of persecution”. Furthermore, sub-paragraph (b) of Article 9(1) recognises that “an accumulation of various measures”, which may include but are not necessarily limited to violations of human rights, can amount to persecution.

4.1.6 Furthermore, a restrictive interpretation of that notion would be hard to reconcile with the various types of acts of persecution listed in a non-exhaustive way in the second paragraph of Article 9, which include, inter alia, “prosecution or punishment, which is disproportionate or discriminatory” as well as “denial of judicial redress resulting in a disproportionate or discriminatory punishment”. Secondly, it is clear from other provisions of the Qualification Directive that other parameters are also relevant to determining whether an act amounts to persecution. Article 4(3)(c) provides that “the individual position and personal circumstances of the applicant, including factors such as background, gender and age” are to be taken into account.

## **4.2 The right to freedom of religion**

4.2.1 Freedom of religion is a “basic human right” within the meaning of Article 9(1)(a).<sup>41</sup> Under international and European human rights law it includes the right to have or not to have a religion or belief of one’s choice – or to change religion or belief - (*forum internum*), to practise one’s religion or belief either individually or in community

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<sup>38</sup> UNHCR Handbook, paras. 53 and 55.

<sup>39</sup> UNHCR Handbook, para. 54.

<sup>40</sup> UNHCR Handbook, para. 52; UNHCR, Guidelines on International Protection: Religion Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, para. 14.

<sup>41</sup> The right to freedom of religion is protected in several international human rights instruments, including in Article 18 of the International Covenant on Civil and Political Rights (ICCPR) and Article 9 of the European Convention on Human Rights (ECHR).

with others and in public or private, to manifest one's religion or belief in worship, observance, practice and teachings (*forum externum*).<sup>42</sup> This is in particular the scope of the right to freedom of religion enshrined in Article 9(1) of the ECHR, which corresponds to the scope of Article 10(1) of the EU Charter of Fundamental Rights.<sup>43</sup> Religion not only refers to established institutionalized religions; it covers any system of belief – that is, convictions or values about a divine or ultimate reality, or the spiritual destiny of humanity. Claims for refugee status on this basis may involve elements related to religious belief (or the fact of not having a belief), religious identity or religion as a way of life.<sup>44</sup>

4.2.2 While the right to have (or not to have) and to change a religion or belief allows no limitations, international human rights law permits certain restrictions on the right to manifest one's religion. This is the case for example in respect of Article 9(2) of the ECHR. Any restrictions must be prescribed by law, be necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, and constitute a proportionate interference. The UN Human Rights Committee has held that any limitations “must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner”.<sup>45</sup> Where restrictions against the practices of a particular religious group or member thereof are justified, judged by international law standards, there would be no human rights violation, and hence no persecution.

4.2.3 The distinction between the *forum internum* and the *forum externum* of the right to freedom of religion does not mean that a violation of the latter is somehow less serious than a violation of the former. The fact that a restriction on the manifestation of a religion or belief finds the support of the majority of the population in the claimant's country of origin and/or is limited to manifestations in public is irrelevant.<sup>46</sup> As long ago as 1981, the European Commission on Human Rights affirmed that the right to manifest one's religion is an essential part of freedom of religion and found that “the two alternatives, ‘either alone or in community with others’” in Article 9(1) [ECHR] cannot be considered

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<sup>42</sup> The terminology is also used by the German FAC, but in a different manner, see above note 29.

<sup>43</sup> Explanations relating to the Charter, p. 12.

It is also how the concept is understood within the Qualification Directive in Article 10(1)(b), which provides that “the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief”.

<sup>44</sup> UNHCR, Guidelines on International Protection: Religion Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, paras. 5-8. Also, Human Rights Committee, General Comment No. 22, para. 2.

<sup>45</sup> General Comment No. 22: The right to freedom of thought, conscience and religion ( Art. 18): UN Doc. CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 8; see also *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka*, Communication No. 1249/2004, UN Doc. CCPR/C/85/D/1249.2004 (2005), para. 7.2. See also UNHCR, Guidelines on International Protection: Religion Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, para. 19.

<sup>46</sup> UNHCR, Guidelines on International Protection: Religion Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, para. 15.

as mutually exclusive, or as leaving a choice to the authorities, but only as recognizing that religion may be practiced in either form.”<sup>47</sup> More recently, the European Court of Human Rights has added that “while religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest [one’s] religion alone and in private or in community with others, in public and within the circle of those whose faith one shares. Bearing witness in words and deeds is bound with the existence of religious convictions”.<sup>48</sup>

4.2.4 Not every violation of the right to manifest one’s religion or belief will be sufficient to warrant recognition as a refugee. For persecution to be established, the violation must be sufficiently serious.<sup>49</sup> Depending on the particular circumstances of the case, including the effect on the individual concerned, examples could include prohibition of membership of a religious community, of worship in community with others in public or in private, of giving or receiving religious instruction, or serious measures of discrimination imposed on individuals because they practice their religion, belong to or are identified with a particular religious community, or have changed their faith.<sup>50</sup>

4.2.5 Equally, in communities in which a dominant religion exists or where there is a close correlation between the State and religious institutions, the same standards of justification for any limitation on the right to freedom of religion apply, i.e. justification must conform to international human rights standards. In this context, also a severe discrimination on account of a failure to adopt the dominant religion or to adhere to its practices would amount to a serious human rights violation and thereby to persecution.<sup>51</sup>

4.2.6 Importantly, serious violations of the right to manifest one’s religion freely may entail associated violations, which may be separate forms of persecution (for example, associated inhuman or degrading treatment). In fact, in most situations where religious freedom is curtailed, the consequences of defying any restrictions or refusing to participate in the official religion are often associated with other serious human rights violations. These may include inhuman or degrading treatment, disproportionate punishment, arbitrary detention for non-compliance or other exclusionary or discriminatory practices.

4.2.6 The importance or centrality of the practice within the religion and/or to the individual personally is also relevant when determining the seriousness of the violation.

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<sup>47</sup> *X v. the United Kingdom*, Appl. No. 8160/78, Decision of 12 March 1981, para.5.

<sup>48</sup> *Metropolitan Church of Bessarabia and Others v. Moldova*, Appl. No. 45701/99, Judgment, 13 December 2001, para. 114.

<sup>49</sup> UNHCR Handbook, para. 51; *Fosu v. Canada (Minister of Employment & Immigration)* [1994] 90 F.T.R. 182, para. 5; *Iripugge v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 14764 (F.C.), paras. 44, 46, 50-51, and 55; *Golesorkhi v. Canada (Citizenship and Immigration)*, 2008 FC 511 (CanLII), paras. 3, 17, and 18.

<sup>50</sup> UNHCR, Guidelines on International Protection: Religion Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, para. 12.

<sup>51</sup> UNHCR, Guidelines on International Protection: Religion Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, para. 12.

What may seem trivial to an outsider may be central to the applicant's beliefs. Where the restricted practice is not important to the individual, but important to the religion, then it is unlikely to rise to the level of persecution without additional factors. In contrast, the restricted religious practice may not be so significant to the religion, but may be particularly important to the individual, and could therefore still constitute persecution on the basis of his or her conscience or belief.<sup>52</sup>

4.2.7 Based on the above, what constitutes the "core area" of the right to freedom of religion cannot be determined in the abstract but will vary according to individual circumstances. Furthermore, the importance or centrality of a particular practice to a religion will vary from religion to religion and from person to person; it is self-determined and context specific. What constitutes an important or central part of the religion or belief is to be determined in the context of each individual case. The official line of the religious community to which the individual belongs has an indicative value but is not conclusive. Certain practices which are promoted by the religious community may not be practised by an individual applicant; and conversely, individual practices may not necessarily be endorsed by the religious community through its official institutions. Meanwhile, an individual may practice and believe in certain practices or rituals which are not seen as central to the religion as an institution, but they may be central to his or her belief, identity or way of life. As stated above, the practices carried out by an applicant in the host country have a strong evidentiary value with regard to the practices involved in having his or her faith.

### **4.3 Future behaviour and "avoiding" persecution**

4.3.1 One's religious belief, identity or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution, in particular where the risk of being persecuted hinges on the future behaviour of an applicant.<sup>53</sup> In fact, being compelled to forsake or conceal one's religious belief, identity or way of life where this is instigated or condoned by the State may itself constitute persecution, or be part of a pattern of measures that cumulatively amount to persecution in an individual case. "Persecution does not cease to be persecution because those persecuted eliminate the harm by taking avoiding action."<sup>54</sup> Adopting such an approach would undermine the protection foundations of the 1951 Convention. Manifestations of religious belief cannot be expected to be suppressed in order to avoid a danger of persecution as long as the manifestations constitute an exercise of human rights. In the same vein, a statement by an applicant expressing the intention to abstain from certain religious manifestations in order to avoid persecution does not render

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<sup>52</sup> UNHCR, Guidelines on International Protection: Religion Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, para. 16.

<sup>53</sup> UNHCR Guidelines on International Protection, Religion-Based Refugee Claims, para. 13.

<sup>54</sup> See decisions in *HJ (Iran) v. Secretary of State for the Home Department*; *HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31, per Lord Hope, at para. 26 (United Kingdom Supreme Court); following *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs* [2003] 216 CLR 473, para. 39, per McHugh and Kirby JJ. (Australian High Court).

refugee protection unnecessary; to the contrary, this avoidance could constitute evidence of the individual's fear of persecution.<sup>55</sup>

4.3.2 When assessing the dangers arising from future behaviour of an applicant, it is important to assess whether the said behaviour is part of the applicant's individual religious belief or identity, or fundamental to his or her way of life. If the behaviour cannot be interfered with in a justified manner as a matter of international human rights law, it cannot be expected that the applicant abstain from such behaviour. Where a prohibited and possibly severely punished behaviour does not form part the applicant's religion or belief, however, it is unlikely that there will be a well-founded fear of persecution on this basis alone since the individual is unlikely to have acted in such manner in the past or will refrain from doing so because of a fear of being persecuted, rather than for other reasons. Likewise, if the religious practice protected by human rights is not of fundamental significance to the religion, but is nonetheless especially important for the individual, its restriction could still constitute persecution on the basis of his or her conscience or belief. Denying refugee status by requiring the individual to refrain from such protected practices or behaviour would not be compatible with protection principles underlying the 1951 Convention.<sup>56</sup> These same considerations are equally valid if the asylum claim is based on one of the other grounds enshrined in the refugee definition of the 1951 Convention.

## 5. Conclusion

5.1 According to UNHCR, not every interference with religious freedom constitutes an act of persecution within the meaning of Article 9(1)(a) of the Qualification Directive and Article 1A(2) of the 1951 Convention. However, what constitutes persecution is not defined by a "core area" of the right to freedom of religion, but by the seriousness or severity of the violation of this right. Accordingly, UNHCR submits that the response to the first question raised by the referring court should be negative. A severe violation of the freedom of religion amounting to a persecution in the meaning of Article 9(1)(a) of the Qualification Directive does not only arise where a "core area" of that freedom is adversely affected.

5.2 With a view to issues raised under question 2, it should be noted that the severity of a violation does not hinge on the question whether the exercise of freedom of religion concerns only manifestations in public. The standard for establishing an act of persecution is whether there is a risk of a serious violation of a human right, which should be determined in the light of various parameters outlined in paragraph 4.1 above.

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<sup>55</sup> *Golesorkhi v. Canada (Citizenship and Immigration)*, 2008 FC 511 (CanLII), paras. 3, 17, and 18; See e.g. *Farajvand v MIMA* [2001] FCA 795 (Australia), "the applicant's faith, recognised by the Tribunal by his membership of an evangelical congregation on a genuine basis, carried with it necessarily, unless there were evidence or, perhaps more accurately, findings, to the contrary, the elements of manifestation and practice in community with others. To say that if he keeps a "low profile" and worships "quietly" or "cautiously" or "circumspectly", is, I think, with respect, to deny the applicant a dimension to his faith, even accepting that he is not an enthusiastic proselytiser or derider of Islam" para. 25.

<sup>56</sup> UNHCR, Guidelines on International Protection: Religion Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, para. 16.

No different standard applies to applicants who are not sharing the religion of the State concerned.

5.3 When assessing the dangers arising from future behaviour of an applicant (question 3), it is important to assess whether the said behaviour is part of the applicant's religious belief or identity, or fundamental to his or her way of life. If the behaviour cannot be interfered in a justified manner under international human rights law, it cannot be expected that the applicant abstain from such behavior. If an applicant abstains from such behaviour in order to avoid persecution, this avoidance could constitute evidence of a fear of persecution.

**UNHCR**  
**17 June 2011**