



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

1. Introduction¹

- 1.1 The Office of the United Nations High Commissioner for Refugees (“UNHCR”) welcomes the opportunity to submit a written intervention in the cases 202005668/1/V2 and 202102293/1/V2 as invited by the Council of State by its letter of 30 June 2021.
- 1.2 UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with governments, seek durable solutions.² Paragraph 8 of its Statute confers responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees,³ whereas Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of the 1967 Protocol relating to the Status of Refugees (together “1951 Convention”)⁴ oblige State Parties to cooperate with UNHCR in the exercise of its functions, including in particular, to facilitate its duty of supervising the application of the provisions of the 1951 Convention.
- 1.3 UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretive guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention and the 1967 Protocol. Such guidelines include the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (“UNHCR Handbook”), which was subsequently complemented by a number of *Guidelines on International Protection*.⁵
- 1.4 The UNHCR Handbook has been found by the Supreme Courts of Canada, the United Kingdom, and the United States to be a “highly relevant authority”,⁶ a “highly persuasive authority”,⁷ providing “significant guidance”,⁸ and “should be accorded considerable weight”, in light of the obligation of Member States under article 35 of the 1951 Convention to facilitate its duty of supervising the application of the provisions of the Convention”.⁹ UNHCR’s Handbook has also been accepted as a valid source of interpretation under

¹ This *submission* does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. See, UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, www.refworld.org/docid/3ae6b3902.html.

² UN 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.

³ *Ibid.* para. 8(a).

⁴ UNGA, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, www.refworld.org/docid/3be01b964.html, p. 137; UNGA, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, www.unhcr.org/4ec262df9.pdf, p. 267.

⁵ 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*, April 2019, HCR/1P/4/ENG/REV. 4: www.refworld.org/docid/5cb474b27.html. The UNHCR Handbook and Guidelines on International Protection are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

⁶ *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, Canada: Supreme Court, 19 October 1995, www.refworld.org/cases,CAN_SC,3ae6b68b4.html at paras. 46 and 119; *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, www.refworld.org/cases,CAN_SC,3ae6b673c.html at pp. 713-714.

⁷ *R v. Secretary of State for the Home Department, Ex parte Adan, Ex parte Aitseguer*, United Kingdom: House of Lords (Judicial Committee), 19 December 2000, www.refworld.org/cases,GBR_HL,3ae6b73b0.html.

⁸ *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, United States Supreme Court, 9 March 1987, www.refworld.org/cases,USSCT,3ae6b68d10.html.

⁹ *Al-Sirri (FC) (Appellant) v Secretary of State for the Home Department (Respondent) and DD (Afghanistan) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)*, [2012] UKSC 54, United Kingdom: Supreme Court, 21 November 2012, www.refworld.org/cases,UK_SC,50b89fd62.html at para. 36. Similarly, the Handbook has been found “particularly helpful as a guide to what is the international understanding of the Convention obligations, as worked out in practice”. *R v. Secretary of State for the Home Department, Ex parte Robinson*, Case No: FC3 96/7394/D, United Kingdom: Court of Appeal (England and Wales), 11 July 1997, www.refworld.org/cases,GBR_CA_CIV,3ae6b72c0.html at para. 11.

Article 31(3)(b) of the 1969 *Vienna Convention on the Law of Treaties*, in reflecting “subsequent practice in the application of the treaty”.¹⁰

- 1.5 UNHCR submits this *amicus curiae* to provide neutral and expert information on the interpretation of the international refugee law concepts that are relevant in the cases to be adjudicated by the Council of State. UNHCR will exclusively address the legal issues and will refrain from commenting or taking a position on the individual cases. UNHCR’s submissions are based on applicable international human rights and refugee law, as well as the EU *acquis*. UNHCR will address the legal issues pertaining to the interpretation, scope and content of the 1951 Convention ground relating to religion in Article 1A(2), focussing on atheism and apostasy, including attributed apostasy, as requested by the Council of State. With specific reference to the questions posed by the Council of State,¹¹ UNHCR will further address the assessment of a well-founded fear of persecution for reasons of (imputed) religion and the issue of concealment in order to avoid persecution in this context.

2. Religion as protected ground under the 1951 Convention

- 2.1 When interpreting Article 1A(2) of the 1951 Convention, consideration should be given to the *Vienna Convention on the Law of Treaties* (“VCLT”), which confirms that a treaty shall ‘be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in light of its object and purpose.’¹² The VCLT specifies that the context includes, *inter alia*, the preamble as a source of the object and purpose of the instrument.¹³ The preamble of the 1951 Convention contains strong human rights language assuring “refugees the widest possible exercise of fundamental rights and freedoms” and indicates that the intention of the drafters was to incorporate human rights values in the application and interpretation of the Convention.¹⁴
- 2.2 Freedom of thought, conscience and religion is one of the fundamental rights and freedoms enshrined in international and regional human rights law.¹⁵ The *travaux préparatoires* of the 1951 Convention show that religion-based persecution formed an integral and accepted part of the refugee definition throughout the drafting process. There was, however, no attempt to define the term as such. No universally accepted definition of “religion” exists. International human rights standards provide guidance in defining the term “religion” in the context of international refugee law, which are relevant in examining action taken by States to restrict or prohibit certain practices. In determining religion-based claims, it is therefore useful, *inter alia*, to draw on international human rights standards.¹⁶
- 2.3 As the UN Human Rights Committee has noted, ‘religion’ is “*not limited [...] to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions*”.¹⁷ It also broadly covers acts of failing or refusing to observe a religion or to hold any particular religious belief.¹⁸ The use of the term ‘religion’ in the 1951 Convention can therefore be taken to encompass freedom of thought, conscience or belief.¹⁹

¹⁰ *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 para. 54; *R v. Secretary of State for the Home Department, Ex parte Adan and Others*, United Kingdom: Court of Appeal (England and Wales), 23 July 1999, www.refworld.org/cases/GBR_CA_CIV/3ae6b6ad14.html, at para. 71.

¹¹ An unofficial translation of the questions posed by the Court can be found in Annex I.

¹² United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331: www.refworld.org/docid/3ae6b3a10.html, Article 31(1).

¹³ UNHCR, *Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees*, April 2001, www.unhcr.org/refworld/docid/3b20a3914.html, paras 2– 5.

¹⁴ 1951 Convention, Preamble, paras. 1-3; UNHCR, *Interpreting Article 1 of the 1951 Convention*, note 14 above, paras 2– 5; “The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person’s dignity.” *Christian Education South Africa v Minister of Education*, 2000 (10) BCLR 1051, <http://www.saflii.org/za/cases/ZACC/2000/11.html>, para 36.

¹⁵ See Article 18 of the Universal Declaration of Human Rights (“UDHR”), Articles 18 and 27 of the International Covenant on Civil and Political Rights (“ICCPR”), Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention of Human Rights”), www.refworld.org/docid/3ae6b3b04.html.

¹⁶ 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*, (“GIP No. 6: Religion”), HCR/GIP/04/06, 28 April 2004: www.refworld.org/docid/4090f9794.html, paras 2 and 4.

¹⁷ UN Human Rights Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, (“UN HRC, General Comment No. 22: Article 18”): www.refworld.org/docid/453883fb22.html, para. 2.

¹⁸ GIP No. 6: Religion, note 16 above, para. 4.

¹⁹ UNHCR *Handbook*, see note 5 above, para. 71.

2.4 The right to freedom of thought, conscience and belief “*protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief*”.²⁰ 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 with others and in public or private, to manifest one’s religion or belief in worship, observance, practice and teachings (*forum externum*).²¹ The right to freedom of thought, conscience and religion includes the freedom to change one’s beliefs.²² As noted by the Human Rights Committee, “*the freedom to “have or to adopt” a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religion or belief*”.²³

2.5 The European Court of Human Rights (ECtHR) has also recognized that freedom of thought, conscience and religion is “*also a precious asset for atheists, agnostics, sceptics and the unconcerned*.”²⁴ In *Buscarini and others v San Marino*, the ECtHR repeated this passage and added: “That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion”.²⁵ This has been further affirmed in national jurisprudence, for example, in discussing the jurisprudence of the ECtHR, the UK Supreme Court in *RT (Zimbabwe)*²⁶, stated:

In Buscarini, the applicants were required, contrary to their wishes, to swear an oath on the Holy Gospels in order to take their seats in the San Marino Parliament. It was held that this requirement was not compatible with article 9. No part of the Grand Chamber’s reasoning concerned the strength of the applicants’ convictions that they should not be required to swear the oath. The essential point is that the court held that article 9 protects the right of the non-believer as well as that of the believer. [emphasis added]

2.6 While freedom of thought and conscience and the freedom to have (or not to have) or adopt a religion or belief of one’s choice cannot be derogated from (even in times of public emergency),²⁷ international human rights law permits certain restrictions on the right to manifest one’s religion. 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*”.²⁸

2.7 Applications for international protection on grounds of religion may be based on the public manifestation of that religion; perceived religion or failing or refusing to hold a particular religious belief (that may not align with the applicant’s actual beliefs); religion may be imputed; religion may be changed; and claims for protection can also be based on not having a religion.²⁹ Such applications may involve one or more of the following elements: a) religion as belief (including non-belief); b) religion as identity; c) religion as a way of life.³⁰

²⁰ UN HRC *General Comment No. 22: Article 18*, see note 17 above, para. 2.

²¹ Art. 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention of Human Rights”). Article 10(1) of the EU Charter of Fundamental Rights; See also, Qualification Directive 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*”.

²² UNHCR Handbook, above note 5, para. 71; See also, Article 9(1) of the European Convention of Human Rights, which provides: “*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief*”. www.refworld.org/docid/3ae6b3b04.html.

²³ UN HRC, *General Comment No. 22: Article 18*, see note 17 above, para. 5.

²⁴ European Court of Human Rights (“ECtHR”), *Kokkinakis v. Greece*, 3/1992/348/421, Council of Europe: European Court of Human Rights, 19 April 1993: www.refworld.org/cases.ECHR.3ae6b6ff4.html, para. 31.

²⁵ European Court of Human Rights, *Buscarini and others v San Marino* (App. No. 24645/94), (1999) 30 EHRR 208, <https://hudoc.echr.coe.int/eng#%7B%22dmdocnumber%22:%5B%22696792%22%2C%22itemid%22:%5B%22001-58915%22%5D%7D>, para. 34.

²⁶ *RT (Zimbabwe) and others v Secretary of State for the Home Department*, [2012] UKSC 38, United Kingdom: Supreme Court, 25 July 2012: www.refworld.org/cases.UK_SC.500fdacb2.html, para. 35.

²⁷ Article 4.2 of the ICCPR. See also, UN HRC, *General Comment No. 22: Article 18*, see note 17 above, para. 3.

²⁸ UN HRC, *General Comment No. 22: Article 18*, see note 17 above, para. 8.

²⁹ UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in case numbers 202003129/1/V2 and 202004875/1/V2 before the Council of State*, 17 November 2020, para. 18.

³⁰ For some individuals, “religion” is a vital aspect of their identity and/or “way of life” and how they relate, either completely or partially, to the world. See, UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in case numbers*

2.8 The experience of holding (or not holding), observing and identifying with a religion may vary from individual to individual. Non-believers and apostates may identify as atheists to emphasize their non-belief or refusal to observe a religion, with or without holding a strong conviction or observing activities through which this is manifested. The attribution of a religion; of failing or refusing to observe a religion; of observing a religion differently from prevailing tenets; or of the holding of atheist beliefs may give rise to a well-founded fear of persecution. An individual (or group) may be persecuted on the basis of religion, even if the individual or other members of the group adamantly deny that their belief, identity and/or way of life constitute a religion. Individuals may observe a certain religion in a manner varying from the prevailing religious tenets, which may lead to them being considered apostates even by other adherents to that religion.³¹

3. Assessing credibility and well-founded fear for persecution for reasons of religion

3.1 UNHCR's Guidelines on Religion-Based Refugee Claims provide guidance on the assessment of claims for international protection on grounds of religion:

Each claim requires examination on its merits on the basis of the individual's situation. Relevant areas of enquiry include the individual profile and personal experiences of the claimant, his or her religious belief, identity and/or way of life, how important this is for the claimant, what effect the restrictions have on the individual, the nature of his or her role and activities within the religion, whether these activities have been or could be brought to the attention of the persecutor and whether they could result in treatment rising to the level of persecution. In this context, the well-founded fear 'need not necessarily be based on the applicant's own personal experience'. What, for example, happened to the claimant's friends and relatives, other members of the same religious group, that is to say to other similarly situated individuals, 'may well show that his [or her] fear that sooner or later he [or she] also will become a victim of persecution is well-founded'.³²

3.2 Establishing sincerity of belief, identity and/or a certain way of life may not necessarily be relevant in every case.³³ It may not be necessary, for instance, for an individual (or a group) to declare that they belong to a religion, are of a particular religious faith, or adhere to religious practices, where the persecutor imputes or attributes this religion, faith or practice to the individual or group.³⁴ Indeed, an applicant is not required to have knowledge of a particular religious belief where such belief is imputed or attributed.³⁵

3.3 Extensive examination or testing of the tenets or knowledge of the claimant's religion may not always be necessary or useful, and should, in any case, take account of individual circumstances, particularly since knowledge of a religion may vary considerably depending on the individual's social, economic or educational background and/or his or her age or sex.³⁶ This is applicable to claims involving fear for persecution based on the holding of atheist beliefs or not holding any religious beliefs. Decision makers may elicit information, including through open-ended questions, regarding the individual's religious identity or way of life (including the absence of religion), the personal significance of the atheist belief or absence of religion to him or her, the personal significance of refusing to observe a particular religion and experiences and reasons for having renounced earlier religious beliefs held by the applicant or prevalent in society (if applicable).³⁷ Applicants are not required to undertake or have undertaken any activities attesting or expressing their atheist beliefs or absence of religion. Indeed, applicants holding atheist beliefs or refusing to observe a particular religion may actively choose not to undertake any (religious) activities or not to undertake any research on religion as part of their (new found) religious identity or way of life.

201701423/1/V2, 201704575/1/V2 and 201700575/1/V2 before the Council of State, 28 February 2018, www.refworld.org/docid/5c001b0a4.html, para. 21.

³¹ UNHCR, GIP No. 6: Religion, note 16 above, paras 6 and 9.

³² *Ibid.*, para. 14.

³³ *Ibid.*, para. 9.

³⁴ *Ibid.*

³⁵ *Ibid.*, para. 31.

³⁶ *Ibid.*, para. 28.

³⁷ *Ibid.*, paras 28-29.

- 3.4 As noted above, an applicant may have a well-founded fear based on apostasy and/or atheist beliefs. Both may independently give rise to well-founded fear of persecution for reasons of religion; complementarity is not required. Indeed, in some cases it may not be relevant to establish the sincerity of both apostasy and atheist beliefs, as atheism can be a way to identify and emphasize one's non-belief or refusal to observe a religion, rather than holding a religious conviction denying the existence of a god.
- 3.5 UNHCR notes that even when adverse credibility findings exist relating to an applicant's religion (or absence thereof), an assessment should still be made of whether the attribution of religion (including holding atheist belief, being an apostate, refusing to observe a religion or not having religious beliefs), may lead to a well-founded fear of persecution upon return to the country of origin.³⁸ Such an assessment can be made, for example, based on the applicant's behaviour or activities (or the absence of certain behaviour or activities). The test remains whether a claimant would have a well-founded fear of persecution for reasons of a 1951 Convention ground if returned. Regard should therefore be had as to whether the expressed belief or apostasy may come to the notice of the authorities of the person's country of origin and how this is likely to be viewed by those authorities.³⁹ Similarly, so-called "self-serving" activities do not create a well-founded fear of persecution for reasons of a Convention ground in the claimant's country of origin, if the opportunistic nature of such activities will be apparent to all, including the authorities there, and serious adverse consequences would not result if the person were returned. Under all circumstances, however, consideration must be given as to the consequences of return to the country of origin and any potential harm that may amount to persecution.⁴⁰
- 3.6 UNHCR is further of the view that while the assessment of whether a characteristic is fundamental or immutable may be relevant when assessing whether a claim for refugee status is based on grounds of membership of a particular social group, it is not relevant in assessing the applicability of the 1951 Convention grounds of religion or political opinion.⁴¹ The protected characteristics approach (sometimes referred to as an 'immutability' approach), relevant in the context of membership of a particular social group, examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it.⁴² Such a test, including requiring an applicant to have a *deeply-rooted conviction or belief*, is not relevant or necessary when assessing the applicability of the 1951 Convention ground of religion. Doing so improperly places additional burdens on applicants not envisaged in the 1951 Convention.⁴³ As the UK Supreme Court stated in *RT (Zimbabwe)*⁴⁴ in the context of claims for international protection on the grounds of political opinion:

Nobody should be forced to have or express a political opinion in which he does not believe. He should not be required to dissemble on pain of persecution. Refugee law does not require a person to express false support for an oppressive regime, any more than it requires an agnostic to pretend to be a religious believer in order to avoid persecution. **A focus on how important the right not to hold a political or religious belief is to the applicant is wrong in principle.** [emphasis added]

³⁸ See *J.I. v. Sweden*, UN Human Rights Committee (HRC), 22 May 2020: www.refworld.org/cases/HRC.5ede13ff4.html, para. 7.5: "[T]he test is whether, regardless of the sincerity of the conversion or conviction, there are substantial grounds for believing that such conversion or conviction may have serious adverse consequences in the country of origin such as to create a real risk of irreparable harm, as contemplated by articles 6 and 7 of the Covenant." See also, UN Human Rights Committee (HRC), *Q.A. v. Sweden*, CCPR/C/127/D/3070/2017, 20 February 2020, para 9.5: www.refworld.org/cases/HRC.5e62627e4.html.

³⁹ UNHCR, GIP No. 6: Religion, note 16 above, para. 35.

⁴⁰ *Ibid.*, para. 36.

⁴¹ UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in case numbers 202003129/1/V2 and 202004875/1/V2 before the Council of State*, 17 November 2020, para. 19.

⁴² UNHCR, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02: www.refworld.org/docid/3d36f23f4.html. A different, although frequently overlapping approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large (referred to as the 'social perception' approach). See also, UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in case numbers 201701423/1/V2, 201704575/1/V2 and 201700575/1/V2 before the Council of State*, 28 February 2018, www.refworld.org/docid/5c001b0a4.html, paras 14 and 15.

⁴³ *UNHCR intervention before the Supreme Court of the United Kingdom in the case of RT (Zimbabwe) and others (Respondents) v Secretary of State for the Home Department*, 25 May 2012: www.refworld.org/docid/4fc369022.html, paras 8(1)-8(3).

⁴⁴ *RT (Zimbabwe) and others v Secretary of State for the Home Department*, note 26 above, para. 42.

4. Concealing religion

- 4.1 UNHCR submits that an applicant may not be denied refugee status on the basis that they could conceal (or exercise discretion in relation to) one of the grounds protected by the 1951 Convention.⁴⁵ What matters is whether a protected ground can be exercised or not.
- 4.2 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.⁴⁶ 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. Further, "persecution does not cease to be persecution because those persecuted eliminate the harm (or threat thereof) by taking avoiding action".⁴⁷ Adopting such an approach would undermine the protection foundations of the 1951 Convention. As stated in UNHCR's Guidelines on religion-based claims, "the Convention would give no protection from persecution for reasons of religion if it was a condition that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors."⁴⁸ This reasoning also applies to applicants who are compelled to hide, change or renounce the holding of atheist beliefs or refuse to observe a religion in order to avoid persecution.⁴⁹ An individual's strength of feeling about his or her protected characteristic is not relevant.⁵⁰ Requesting applicants to conceal their beliefs (or absence thereof) and to conform to prevalent religious beliefs and traditions in order to avoid persecution is at variance with the 1951 Convention.
- 4.3 The question to be considered is what predicament the applicant would face if they were returned to the country of origin and exercised their freedom of religion. The question is not whether the applicant, by being discreet, could live in that country without attracting adverse consequences.⁵¹ In UNHCR's view, this requires an objective and fact-specific examination of the nature of the applicant's predicament upon return and whether this amounts to persecution.⁵² The fact that an applicant previously lived discreetly or concealed their religion (or the absence of religion) in the country of origin is not relevant in this forward-looking assessment, as such behaviour might be directly related to the applicant's fear for persecution and may even evidence a risk of persecution. The role of the examiner is to assess risk (namely, whether the fear of persecution is well-founded) and not to demand conduct (or pronounce upon what that applicant should and should not do).⁵³

⁴⁵ UNHCR, *MSM (Somalia) v. Secretary of State for the Home Department: UNHCR Submissions*, 18 January 2016, www.refworld.org/docid/56a23f2b4.html, para. 31. See also, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, where the Court held with reference to the rationale of the 1951 Convention that 'people should be allowed to live their lives free from the fear of serious harm coming to them because of their race, religion, nationality, membership of a particular social group or political opinion.': [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010, www.refworld.org/cases,UK_SC,4c3456752.html, para. 52.

⁴⁶ UNHCR, GIP No. 6: Religion, note 16 above, para. 13.

⁴⁷ See decisions in *HJ (Iran) v. Secretary of State for the Home Department*; note 45 above, per Lord Hope, at para. 26, 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), www.refworld.org/cases,AUS_HC,3fd9eca84.html.

⁴⁸ UNHCR, GIP No. 6: Religion, note 16 above, para. 13.

⁴⁹ As has been recognised by the Council of State, see a.o. Council of State, 201807143/1/V2, 19 August 2020, ECLI:NL:RVS:2020:1968, <https://www.raadvanstate.nl/uitspraken/@122216/201807143-1-v2/#highlight=ECLI%3aNL%3aRVS%3a2020%3a1968>, par. 4.1

⁵⁰ UNHCR, *Submission by the United Nations High Commissioner for Refugees in the case of WA (Pakistan) v. Secretary of State for the Home Department*, 14 December 2018, C5/2015/3749: www.refworld.org/docid/5c80ed914.html, para. 21.2; *RT (Zimbabwe) and others v Secretary of State for the Home Department*, note 26 above, para. 42; *HJ (Iran)*, note 45 above, paras 29 and 121.

⁵¹ CJEU, *Germany v. Y and Z*, C-71/11 and C-99/11, 5 September 2012, paras 76-78; by analogy see UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity*, within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, para. 32, www.refworld.org/docid/50348afc2.html.

⁵² UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of F.G. v. Sweden (Application No. 43611/11)*, 13 October 2014: www.refworld.org/docid/543e3b9b4.html, para. 3.2.2.

⁵³ UNHCR, *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)*, 17 June 2011, para. 5.2.3, www.refworld.org/docid/4dffb7a082.html.

4.4 The above position is supported by the CJEU's jurisprudence. As stated in *Y. and Z.*:

“where it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status, in accordance with Article 13 of the Directive. *The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant*” (emphasis added).⁵⁴

Equally, in UNHCR's view, the fact that an atheist or apostate could undertake certain religious practices in order to avoid persecution is irrelevant. The question for the examiner to assess remains on what predicament the applicant would face if he or she were returned.

4.5 The Human Rights Committee notes that “*no one can be compelled to reveal his thoughts or adherence to a religion or belief*”.⁵⁵ The jurisprudence of the European Court of Human Rights adds that the right to manifest one's religious beliefs includes the right not to reveal such beliefs and not to be obliged to act or refrain from acting in such a way that it is possible to conclude that one does or does not have such beliefs.⁵⁶ Should an applicant be requested by state authorities to reveal their religion upon return or having returned to the country of origin, they cannot be requested to conceal their religious belief (or the absence thereof). An applicant cannot be requested to proclaim faith in a religion other than their own beliefs in order to avoid or evade persecution. This may be relevant in the forward-looking assessment of a well-founded fear of persecution.

5. Conclusion

5.1 The protection of the 1951 Convention extends to holding atheist beliefs, as well as to failing or refusing to observe a religion or to hold any particular religious beliefs. Further, the attribution of a religion, the attribution of failing or refusing to observe a religion or the attribution of holding atheist beliefs may give rise to a well-founded fear of persecution.

5.2 In assessing claims for international protection based on religion (including atheism and not observing a religion), it may not be relevant in all cases to examine the applicant's knowledge and activities. Instead, decision makers may elicit information regarding the individual's religious identity and/or way of life (including identifying as atheist and/or not holding religious beliefs).

5.3 The refugee definition in the 1951 Convention does not require the applicant's religion to be fundamental or immutable to an applicant. Assessing whether a characteristic is *fundamental, immutable or 'deeply-rooted'* is not relevant in assessing the applicability of the Convention. Importing tests or concepts from one ground to another, such as the 'immutability approach' developed in interpreting 'membership in a particular social group', would not be in accordance with the text of the refugee definition, in light of the object and purpose of the 1951 Convention. Doing so would wrongly place additional burdens on applicants not envisaged in the 1951 Convention.

5.4 Lastly, UNHCR submits that an applicant may not be denied refugee status on the basis that they could conceal (or exercise discretion in relation to) one of the grounds protected by the 1951 Convention. What matters is whether religious beliefs, or the absence thereof, as a 1951 Convention ground, can be exercised or not. Applicants cannot be compelled to hide, change or renounce their religion (including refusal to observe a religion) and conform to religious beliefs prevalent in society, including in their interactions with the authorities. One should not be compelled to hide, change or renounce one's belief, identity or way of life to avoid persecution.

UNHCR, September 2021

⁵⁴ CJEU, *Bundesrepublik Deutschland v. Y (C-71/11), Z (C-99/11), C-71/11 and C-99/11*, 5 September 2012, para. 79, <http://www.refworld.org/docid/505ace862.html>.

⁵⁵ UN HRC, *General Comment No. 22: Article 18*, see note 17 above, para. 3.

⁵⁶ ECtHR, *Sinan Isik v. Turkey*, (App. no. 21924/05): [https://hudoc.echr.coe.int/eng#{"fulltext":\["sinan%20isik"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-97087"\]](https://hudoc.echr.coe.int/eng#{)}, para. 38; ECtHR, *Dimitras and others v. Greece*, (App. nos. 42837/06, 3237/07, 3269/07, 35793/07 and 6099/08): [https://hudoc.echr.coe.int/eng#{"itemid":\["001-99012"\]](https://hudoc.echr.coe.int/eng#{)}, para. 78; ECtHR, *Alexandridis v. Greece*, (App. no. 19516/06): [https://hudoc.echr.coe.int/eng#{"itemid":\["001-85188"\]](https://hudoc.echr.coe.int/eng#{)}, para. 38. See also by analogy *RT (Zimbabwe) and others v Secretary of State for the Home Department*, note 26 above.

ANNEX I – Unofficial translation of questions posed by Council of State

Difference between apostasy and atheism as asylum motives

1. What is your interpretation of the terms ‘apostasy’ and ‘atheism’ as asylum motives? What is the difference between those two asylum motives? Does this difference influence the way in which the credibility is assessed or the way this should be done?

Investigation and assessment of apostasy as an asylum motive

2. The Work Instruction 2019/18 from the Dutch immigration authorities (IND) provides guidance on the investigation and assessment by the Minister for Migration of asylum applications in relation to *conversion (including apostasy)*, including conversion to atheism. Is the method of investigation and assessment of conversion as laid down in the work instruction also employed for the credibility assessment of apostasy as an independent asylum motive? ‘Apostasy as an independent asylum motive’ means apostasy which is not directly related to conversion to another religion/belief including atheism (see [judgment of the Council of State of 29 January 2016](#)). If the method of investigation and assessment for apostasy as an independent asylum motive differs from the one laid down in the work instruction, what is the reason for this difference? And if it differs, in which way will the credibility be examined and assessed?

3. Assuming the Work Instruction 2019/18 is employed for the examination and assessment of apostasy as an independent asylum motive, the Council of State requests to explain what requirements are imposed on the statements made by applicants by answering the following questions:

- a. Could you explain what requirements applicants’ statements must meet about ‘their motive for and the process of’ their apostasy, about ‘the knowledge they have about this’ and about ‘the activities they undertake and the effect of the changes’?
- b. To what extent can one expect more or different explanations about apostasy by applicants who claim to have converted to atheism or a religious belief?
- c. What does ‘active propagation’ of apostasy mean? Does it matter which means an applicant chooses for this? Does it make a difference whether an applicant claims to have already renounced his religion in his country of origin or only after leaving his country of origin? Does it matter whether an applicant has already expressed his alleged apostasy in his country of origin, and if so, in what way?

Investigation and assessment of atheism as an asylum motive

4. In Work Instruction 2019/18, the Minister for Migration explains what he expects with regard to the statements of an alleged atheist.

- d. Could you explain on the basis of the questions under 3, and in particular under sub a, to what extent the requirements on an applicant’s statement about his alleged apostasy differ from the requirements on an applicant’s statement on his alleged conversion to atheism?
- e. Does it matter for the credibility assessment of an alleged conversion to atheism whether apostasy is already found credible? If so, in which way will this influence the credibility assessment? If not, can you explain why?

Involving the situation in the country of origin in the investigation and assessment

5. Can you explain to what extent external credibility indicators (see [Work Instruction 2014/10](#)) play a role in the assessment of whether an applicant is at risk upon return to his country of origin because of his alleged apostasy and/or atheism?

6. If the apostasy and/or atheism is/are not deemed credible, will there always be an assessment of whether the applicant is at risk upon return to his country of origin because of imputed apostasy/atheism? If so, how will this be investigated and assessed?

Risks for apostates and atheists in Iran

7. The following questions concern the risks for apostates and atheists in Iran. Thus, these questions concern cases in which the Minister for Migration has deemed the applicants’ statements on apostasy and/or conversion to atheism credible. In the [official country of origin report on Iran of February 2021](#), it is stated that it is legally impossible to live without a religion in Iran. However, in the same report, it is stated that according to different

sources, it emerges that a large part of the Iranian population is not very religious or not practicing religion. In answering the following questions, could you indicate whether there are certain periods, for example during the Ramadan, or regions where possible risks are higher? Could you also indicate whether it makes a difference if family members of the applicant or other people in his social network are or are perceived to be deeply religious or, by contrast, apostates and/or atheists.

- f. Could you explain based on general information to what extent it is to be expected that the Iranian authorities would find out about someone's apostasy or atheism, also in case this person does not openly expresses his apostasy and/or atheism on, for example, social media? In that case, does it make a difference whether these activities are carried out in the country of origin or in the Netherlands?
- g. Could you explain whether it is known in which cases Iranians have to declare their religion, for example at government agencies? And if Iranians have to declare their religion under certain circumstances, to what extent is this compatible with the fact that a person cannot be expected to exercise restraint in the practicing of their religion in their country of origin (see for example the [judgment of the Council of State of 20 July 2015](#))?
- h. What is the position of non-practicing believers in Iran? When it is deemed credible that someone is a non-practicing Muslim, will it be investigated and assessed whether he is at risk upon return on the part of the authorities or his social network because of imputed apostasy?
- i. Could you explain on the basis of general information what the risks are for believers who do not participate in religious practices and traditions and to what extent they, by merely not practicing, will be perceived as apostates?
- j. Is it known whether the Iranian authorities are actively looking for apostates and/or atheists? Does it make a difference whether this concerns persons within Iran or abroad, for example persons who have requested asylum abroad?