

The two European Courts on seeking asylum due to religious persecution

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Introduction

The freedom to adopt and manifest a religion or belief is enshrined in Article 9 of the [European Convention on Human Rights](#) [1] (ECHR) and Article 10 of the [Charter of Fundamental Rights of the European Union](#) [2](Charter). Freedom of religion is also the subject of [General Comment No. 22](#) [3] of the UN Human Rights Committee, and two declarations of the UN General Assembly, in [1981](#) [4] and [1992](#) [5]. As the Grand Chamber of the Court of Justice of the European Union stated in [Joined Cases C-71/11 and C-99/11, Y & Z](#) [6], "Freedom of religion is one of the foundations of a democratic society and is a basic human right".

Article 1A(2) of the [1951 Geneva Convention](#) [7] provides that the term "refugee" shall apply to any person who "owing to well-founded fear of being persecuted for reasons of religion", is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".

Notwithstanding the importance of protecting the fundamental freedom of religion, asylum claims based on persecution due to religious belief can be very complex. Two questions in particular have given rise to heated controversies in asylum law: (1) what interference with the right to religious freedom will constitute persecution and thereby prohibit the return of an asylum seeker to their country of origin? (2) To what extent can an asylum seeker be expected to "conceal" or "restrain" their religion in their country of origin so as to avoid persecution? This article seeks to explore these two questions, and analyse the answers of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).

What is a "religion"?

Before turning to the two questions identified above, a more preliminary and fundamental question must be confronted. What is a "religion"? No universally accepted definition of "religion" exists, either within or outside international refugee law, and the human rights instruments mentioned above shy away from the task of defining a term so fraught with complexity. However, some guidance on construing "religion" is available. General Comment No.22 of the Human Rights Committee states, at paragraph 2, that:

The terms "belief" and "religion" are to be broadly construed. Article 18 [of the [International Covenant on Civil and Political Rights](#) [8](ICCPR)] is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant

religious community.

In the context of applications for international protection, a broad construction is reflected in Article 10(1)(b) of the [9][recast Qualification Directive](#) [10](QD recast) (which replicates the wording of the original [2004 Qualification Directive](#) [11]):

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.

This wide definition necessarily includes the freedom to manifest a *lack* of religion ? i.e. atheism ? as was recently [confirmed](#) [12] in a decision of the UK First Tier Tribunal to uphold, for apparently the first time, the asylum appeal of an atheist Afghan.

It is also important to note that persecution is based on the persecutor's *perception* of those they target. Accordingly, UNHCR notes in their [2004 Guidelines on International Protection No. 6: Religion-Based Refugee Claims](#) [13], at paragraph 9, that "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"?. The immateriality of the characteristics *actually* possessed by the applicant, as opposed to the characteristics *attributed* to them, is set out in Article 10(2) QD recast.

When does interference with freedom of religion become persecution?

Article 9 ECHR recognises that there may be *justifiable* limitations on the exercise of religious freedom. The criminalisation of hate speech and ritual killings committed in the name of religion are two examples of justifiable restrictions. Such restrictions are lawful by international human rights standards, and are therefore less likely to constitute "persecution" deserving of international protection.

Many limitations on religious freedom are, however, not justifiable and may rightly amount to a violation of Article 9 ECHR or Article 10 of the Charter, such as the legal prohibition of membership of a religious community, or of worship in public or in private, accompanied by a punishment, for example, of imprisonment.

CJEU

In *Y & Z*, referenced above, the Grand Chamber of the CJEU was asked to clarify when an interference with the right to religious freedom that infringes Article 10(1) of the Charter may constitute an "act of persecution" within the meaning of Article 9 QD. In other words, when are infringements of Article 10 of the Charter "sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights"?

The CJEU decided that, given Article 9 QD requires a "severe violation" in order for the infringement with religious freedom to be sufficiently serious to constitute persecution, this must mean that not all infringements equal persecution. The CJEU uses the so-called "non-derogable" rights in Article 15(2) ECHR "the rights that cannot be violated even in times of emergency, i.e. Articles 2, 3, 4(1) and 7 ECHR" as a benchmark. Infringements of religious freedom "whose gravity is not equivalent to that of an infringement of the basic human rights from which no derogation can be made" cannot, according to the CJEU, be regarded as "persecution" meriting international protection. A threshold such as this is not to be found anywhere in the Refugee Convention. Moreover, Article 9 QD merely seems to suggest that infringements of non-derogable

rights are *particularly* serious; Article 9 does not say that *only* such infringements, or infringements of equivalent gravity, will be sufficiently serious to equal persecution.

The referring court asked the CJEU to clarify whether only infringements of the 'core areas' of freedom of religion - i.e. private rather than public religious activities - can qualify as persecution. The CJEU rejected this distinction, regarding it as incompatible with the breadth of the concept of religion set out in Article 10(1)(b) QD and quoted above. Infringements of the freedom to live a faith publicly - the 'external manifestation of that freedom' [72] - must not be excluded from protection, provided they meet the 'sufficiently serious' threshold.

Approving paragraph 16 of the UNHCR Guidelines referenced above, the CJEU preferred to concentrate on the 'intrinsic severity' and 'severity of the consequences' of the act concerned, rather than 'the particular aspect of religious freedom that is being interfered with' [65], when evaluating whether the act is persecution. This preference is also guided by paragraph 52 of Advocate General Bot's [Opinion](#) [14] in this case. The CJEU advises national authorities to focus on the severity of the measures and sanctions adopted or liable to be adopted towards the applicant who exercises their freedom of religion - in public or in private - and in particular whether there is 'a genuine risk of, inter alia, being prosecuted or subject to inhuman or degrading treatment or punishment' [67].

In an important conclusion possibly also inspired by paragraph 16 of the UNHCR Guidelines, the CJEU holds that the fact that 'the observance of a certain religious practice in public is of particular importance to the person concerned' is a relevant factor to be taken into account, even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned? [70]. A minority practice is relevant, even if not in accordance with the practice of the majority of that religion.

European Court of Human Rights (ECtHR)

The Convention and its Protocols do not expressly cover the individual expulsion of foreign nationals (collective expulsion is prohibited in Article 4 of Protocol 4), nor do they include the right to asylum. However, 'expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country?' ([Hirsi Jamaa & Others v. Italy \[GC\], 23 February 2012](#), [15] para 114. The original case, concerning only extradition, was [Soering v. the United Kingdom, 7 July 1989](#) [16], see para 91. This was subsequently applied to expulsion by [Cruz Varas & Others v. Sweden, 20 March 1991](#) [17], para 70).

Complaints of those at risk of religious persecution are examined under Article 3 in the same way as the complaints of, for example, political opponents, members of illegal organisations, persons accused of terrorism, and members of a stigmatised ethnic group. The ECtHR has recognised that the risk of religious persecution can render the return of an asylum seeker to their country of origin incompatible with their freedom from ill-treatment under Article 3 ECHR.

Two recent cases, both against France, concern the persecution of Coptic Christians in Egypt and members of the Ahmadiyya religion in Pakistan. In [M.E. v. France \(no 50094/10\)](#) [18], which was final on 6 September 2013, the ECtHR ruled that the return of a Coptic Christian to Egypt would expose him to a risk of ill-treatment. M.E. had sustained multiple physical and verbal attacks, eviction by his landlord, and death threats, all due to his Christianity. The authorities failed to act on his complaints of persecution. Instead, the Applicant was prosecuted, convicted and sentenced

in absentia to three years imprisonment for proselytising. The ECtHR was satisfied that Coptic Christians were the subject of persecution in Egypt, and were inadequately protected by the authorities.

In [N.K. v. France \(no 7974/11\)](#) [19] (19 December 2013), the Court ruled that the return of a Pakistani national would violate Article 3 due to a risk of persecution on the basis of his conversion to the Ahmadiyya religion. He claimed he was abducted, detained and tortured for several days. He left Pakistan allegedly to flee an arrest warrant against him for preaching. The Court concluded that, in view of the situation of persons belonging to the Ahmadiyya religion, the protection afforded by Article 3 would only be relevant for those who publicly practice that religion and proselytise, as it appears that only they are persecuted in society and by the authorities. The documents submitted by the Applicant (an arrest warrant and a report of preliminary investigations against him) show that the authorities knew about his religious activities and that these had prompted prosecution on allegations of blasphemy.

In response to the question 'when does interference with religious freedom become persecution preventing forced return?', the ECtHR, as in all expulsion cases, identifies the point at which there are 'substantial grounds for believing' that, if expelled, the individual would face a 'real risk' of ill-treatment on account of that religious persecution.

Can an applicant's fear of persecution be well-founded if he/she could avoid exposure by abstaining from certain religious practices?

CJEU

This question was also put to the CJEU in *Y & Z*. The CJEU's answer applies to an applicant who has not already been subject to or threatened with religious persecution. The CJEU observed that an applicant abstaining from religious practices to avoid persecution would amount to 'renouncing the protection which the [Qualification] Directive is intended to afford the applicant by conferring refugee status' [78]. If it's established that, on return to their country of origin, an applicant's religious practices would result in persecution, then protection should be granted. The possibility of concealing/abstaining is 'irrelevant' [79].

This conclusion echoes the UNHCR 2004 Guidelines, at paragraph 13:

Applying the same standard as for other Convention grounds, 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. Indeed, 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.

The possibility of concealing/abstaining has also recently been rejected by the Grand Chamber of the CJEU in the context of [persecution on the basis of sexual orientation](#) [20], in [C-199/12, C-200/12 and C-201/12, X, Y & Z](#) [21], in a judgment that relies on *Y & Z* (at paragraph 74). In the same context, the UK Supreme Court has also refused to accept a 'reasonable tolerability' test for homosexual asylum seekers, in [HJ \(Iran\) and HT \(Cameroon\) v SSHD \[2010\] UKSC 31](#) [22].

ECtHR

While the CJEU has reached a clear conclusion that risk-reducing abstention from religious practice is *irrelevant*, a recent judgment of the ECtHR exposes an unresolved disagreement between different judges. [F.G. v. Sweden \(no. 43611/11\)](#) [23], delivered on 16 January 2014, concerned an Iranian who sought asylum in Sweden on the basis of his past publication while in

Iran of web pages critical of the government and his subsequent conversion to Christianity once in Sweden. He alleged a real risk of persecution based on political opinion and religious belief respectively, if returned to Iran. By a 4-3 majority, the ECtHR ruled that the applicant would not risk treatment contrary to Articles 2 or 3 if returned to Iran. While the Court was unanimous in rejecting the political persecution risk due to a perceived lack of credibility, the applicant's conversion to Christianity caused the 4-3 split.

The majority's scepticism of any risk of religious persecution relied on the fact that the applicant had 'kept his faith a private matter' in domestic asylum proceedings. The three dissenting judges argued that, by relying on the 'private' nature of the applicant's Christianity, the majority wrongly *implied* (rather than expressly stated) that 'any such risk, if it exists, could be avoided by the applicant's concealment of his religious conversion'. The minority drew attention to COI regarding the persecution of Christians in Iran as well as to *Y & Z*.

For the majority, the private nature of the individual's religious practices and beliefs were relevant, to the extent that they would be unlikely to attract the attention of the Iranian authorities. The minority explicitly cited the CJEU in holding this to be an irrelevant consideration. It remains to be seen whether such a narrow majority will prompt the applicant to request a referral to the Grand Chamber of the ECtHR, in order for this court to clarify its position on the relevance of the desire/ability to conceal/restrain religious practices to avoid persecution.

Conclusion

The European Courts have both provided some guidance on answering the two questions posed in the introduction. On the first issue 'when does an infringement become persecution?' the CJEU has left a wide discretion to national authorities to determine whether the interference with religious practice is 'sufficiently serious' to constitute a 'severe violation', within certain guidelines set out in *Y & Z*. The ECtHR has given itself an even wider discretion, by sticking to a single simple question for religious persecution claims, i.e. 'would removal create a real risk of ill-treatment?'. On the second question, the CJEU this time has made its position clear: the possibility of risk reducing concealment of religious practice is irrelevant. The ECtHR is yet to adopt an explicit stance, but the recent narrow majority and powerful dissent in *F.G.* may force it to do so. In practice, this is immaterial for Member States, as they are bound by the jurisprudence of both courts.

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Links:

- [1] <https://www.asylumlawdatabase.eu/en/node/195>
- [2] <https://www.asylumlawdatabase.eu/en/content/en-charter-fundamental-rights-european-union>
- [3] <http://www1.umn.edu/humanrts/gencomm/hrcom22.htm>
- [4] <http://www.un.org/documents/ga/res/36/a36r055.htm>
- [5] <http://www.ohchr.org/Documents/Publications/GuideMinoritiesDeclarationen.pdf>
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- [7] <https://www.asylumlawdatabase.eu/en/content/en-refugee-convention-28-july-1951>
- [8] <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
- [9] <https://www.asylumlawdatabase.eu/en/content/en-recast-qualification-directive-directive-201195eu-13-december-2011>
- [10] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF>
- [11] <https://www.asylumlawdatabase.eu/en/content/en-qualification-directive-directive-200483ec-29-april-2004>
- [12] <http://www.bbc.co.uk/news/uk-25715736>
- [13] <https://www.asylumlawdatabase.eu/en/content/en-unhcr-guidelines-international-protection-religion-based-refugee-claims-under-article-1a2>
- [14] <http://curia.europa.eu/juris/document/document.jsf?text=&docid=121723&pageIndex=0&docId=121723>
- [15] <https://www.asylumlawdatabase.eu/en/content/ecthr-hirsi-jamaa-and-others-v-italy-gc-application-no-2776509>
- [16] <https://www.asylumlawdatabase.eu/en/node/219>
- [17] <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57674>
- [18] <http://www.asylumlawdatabase.eu/en/content/ecthr-me-v-france-application-no-5009410#content>
- [19] <http://www.asylumlawdatabase.eu/en/content/ecthr-nk-v-france-application-no-797411#content>
- [20] <http://www.asylumlawdatabase.eu/en/journal/court-justice-european-union-delivers-judgment-joined-cases-c-19912-c-20012-and-c-20112-x-y>
- [21] <http://www.asylumlawdatabase.eu/en/content/cjeu-c-19912-c-20012-and-c-20112-minister-voor-immigratie-en-asiel-v-x-y-and-z>
- [22] <https://www.asylumlawdatabase.eu/en/case-law/uk-supreme-court-7-july-2010-hj-iran-v-secretary-state-home-department-2010-uksc-31>
- [23] <https://www.asylumlawdatabase.eu/en/content/ecthr-fg-v-sweden-application-no-4361111>