



Reports of Cases

OPINION OF ADVOCATE GENERAL

BOT

delivered on 19 April 2012¹

Joined Cases C-71/11 and C-99/11

Federal Republic of Germany

v

Y (C-71/11),

Z (C-99/11)

(References for a preliminary ruling from the Bundesverwaltungsgericht (Germany))

(Directive 2004/83/EC — Minimum standards for the qualification and status of third country nationals or stateless persons as refugees — Conditions for the grant of refugee status — Article 9 — Concept of ‘acts of persecution’ — Existence of a well-founded fear of persecution — Serious attack on freedom of religion — Pakistani nationals members of the Ahmadiyya religious community — Acts of the Pakistani authorities intended to limit the right to manifest one’s religion in public)

1. In these references for a preliminary ruling, the Court is being asked to define what acts may constitute an ‘act of persecution’ in the context of a serious violation of freedom of religion. It is a fundamental question, because the answer to this question determines who, among asylum-seekers, can claim refugee status and enjoy international protection under Directive 2004/83/EC.²

2. These applications are made against the background of disputes between the Federal Republic of Germany, represented by the Bundesministerium des Inneren (Federal Ministry of the Interior), itself represented by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees)³ and Y (C-71/11) and Z (C-99/11), two Pakistani nationals who are seeking the grant of refugee status. These two individuals are active members of the Ahmadiyya community which is an Islamic reformist movement, long contested by the Sunni Muslim majority in Pakistan, whose religious activities are severely restricted by the Pakistan Penal Code. Thus, Y and Z may not profess their faith publicly without those practices being liable to be considered blasphemous, a charge punishable, according to the provisions of that code, to a sentence of imprisonment or even the death penalty.

3. The Bundesverwaltungsgericht (Federal Administrative Court, Germany) is essentially asking the Court three questions. First of all, it is asking to what extent an infringement of freedom of religion, and in particular the right of the individual to live his faith openly and fully, is likely to be an ‘act of persecution’ within the meaning of Article 9(1)(a) of the Directive.

4. Next, the national court is asking the Court of Justice whether the concept of an act of persecution is to be restricted to infringements affecting only what is referred to as a ‘core area’ of freedom of religion.

1 — Original language: French.

2 — 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 2004 L 304, p. 12, and corrigendum, OJ 2005 L 204, p. 24 ‘the Directive’).

3 — The ‘Bundesamt’.

5. Finally, it is asking the Court whether a refugee's fear of persecution is well-founded within the meaning of Article 2(c) of the Directive where the refugee intends, on his return to his country of origin, to perform religious acts which will expose him to danger to his life, his freedom or his integrity or whether it is, rather, reasonable to expect that person to give up the practice of such acts.

I – Union law

6. The common European asylum system is based on the full and comprehensive implementation of the Convention relating to the status of refugees,⁴ and on observance of the rights and principles recognised by the Charter of Fundamental Rights of the European Union.⁵

7. Under this regime, the Directive seeks to establish minimum standards and common criteria for all the Member States for the purposes of the recognition of refugee status for asylum seekers within the meaning of Article 1 of the Geneva Convention. Therefore, the Member States remain free to adopt or maintain in force more favourable rules for determining which persons satisfy the conditions for grant of the status of refugee in so far, however, as those rules are compatible with the Directive.⁶

8. The concept of 'refugee' is defined in Article 2(c) of the Directive, in the same terms as those used in Article 1, section A, paragraph 2, first paragraph, of the Geneva Convention, as follows:

“refugee” means a third country national who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country ...’

9. The drafters of the Geneva Convention chose not to define the concept of an act of persecution. The latter is defined in Article 9(1) of the Directive as follows:

‘Acts of persecution within the meaning of Article 1A of the Geneva Convention must:

- a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, [7] or,
- b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).’

10. Article 9(2) of the Directive, finally, draws up a non-exhaustive list of acts that may fall within this definition. These acts include, in particular, ‘physical or mental violence, including sexual violence’, ‘legal, administrative, police and/or judicial measures which are in themselves discriminatory or are implemented in a discriminatory manner’, or ‘prosecution or punishment which is disproportionate or discriminatory’.

11. In addition, Article 9(3) of the Directive requires there to be a connection between the act of persecution and the reasons referred to in Article 10 of the Directive. There are five such reasons and they include religion.

4 — The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (United Nations Treaty Series, Vol 189, p. 150, No 2545 (1954)) (‘the Geneva Convention’), entered into force on 22 April 1954. It was supplemented by the Protocol relating to the Status of Refugees of 31 January 1967 (‘the 1967 Protocol’), which entered into force on 4 October 1967. It is also interesting to refer to the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 convention and the 1967 protocol relating to the status of refugees, edited by the United Nations High Commissioner for Refugees (UNHCR) of January 1992, available at the following Internet address: <http://unhcr.org/refworld/docid/3ae6b32b0.html>.

5 — ‘The Charter’. See Article 78(1) TFEU and Article 18 of the Charter and recital 10 to the Directive.

6 — Article 3 of the Directive.

7 — Convention signed in Rome on 4 November 1950 (‘the ECHR’).

12. Article 10(1)(b) of the Sixth Directive provides as follows:

‘...

- b) 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.’

II – Main proceedings and questions referred

13. The asylum applications submitted by Y (C-71/11) and Z (C-99/11) on the basis of Paragraph 16a, paragraph 1, of the Basic Law (Grundgesetz) were rejected by the Bundesamt by two decisions adopted on 4 May 2004 and on 8 July 2004 respectively. It held that there was not sufficient evidence to affirm that the interested parties had left their countries of origin as a result of a well-founded fear of being persecuted.

14. Nevertheless, as a result of the judgments rendered by the Verwaltungsgericht, the Oberverwaltungsgericht ruled, in judgments of 13 November 2008, that, as active Ahmadists, Y and Z would be exposed to a risk of persecution within the meaning of Paragraph 60(1), the first sentence of the Law on residence, gainful employment and integration of foreigners on federal territory (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet), in the version published on 25 February 2008,⁸ and that, in the event of a return to their country of origin, they could not continue to practice their religion in public, without being exposed to danger to their lives, their integrity and freedom.

15. An appeal on a point of law was lodged in each case to the Bundesverwaltungsgericht. The latter court is faced with doubts as to the interpretation of the Directive, owing in particular to a divergence in case-law between the German courts.

16. In connection with its decision in Case C-99/11, it therefore set out the two lines of reasoning in the case-law.⁹ The first, adopted by the Bundesamt and the Bundesbeauftragter für Asylangelegenheiten (Federal Delegate for Asylum), predates the entry into force of the Directive and restricts the concept of persecution to acts that infringe the ‘core area’ of freedom of religion or man’s ‘minimum religious essence.’ This ‘core area’ comprises, first of all, the right of every person to have the religion of his choice or to have none and, secondly, the right to manifest one’s faith in private or amongst those who share it.¹⁰ Pursuant to that law, restrictions on the public expression of faith, such as those imposed on members of the Ahmadiyya community, do not represent a sufficiently serious infringement against freedom of religion such as to constitute an act of persecution, unless the person concerned has already been subjected to a threat to his life, integrity or freedom. If he has not, the authorities expect the person concerned to behave reasonably on his return to his country of origin by refraining from or by limiting any public demonstration of his faith.

17. The second line of reasoning was followed by the Oberverwaltungsgericht and other German administrative courts since the entry into force of the Directive. It seeks to extend the concept of persecution to attacks on certain practices of faith in public. In the latter case, these may be practices of particular importance to the individual and/or which constitute a central element of the religious doctrine.

8 — BGBl. 2008 I, p. 162. That provision states that ‘under the [Geneva] Convention a foreigner may not be deported to a State in which his life or liberty are threatened owing to his race, religion, nationality, membership of a social group or political opinions.’

9 — See also considerations set out by the Bundesverwaltungsgericht in its judgment of 5 March 2009 (BVerwG 10 C 51.07), available in English on the internet site of the Federal Administrative Court (<http://www.bverwg.de>).

10 — This case-law elucidates the observations made by the Federal Republic of Germany in the course of the work surrounding the adoption of the Directive, in particular those relating to Article 10(1)(b). The Federal Republic of Germany mentioned that ‘the Geneva Convention protects private religious observance, but not public observance’ (see Article 12 (b) of the document available on the website of the Council of the European Union under reference 7882/02).

18. In that context, and in order to dispel those doubts, the Bundesverwaltungsgericht decided to stay the proceedings and to refer to the Court for a preliminary ruling the following questions which are couched in almost identical terms in the two cases C-71/11 and C-99/11:

- ‘(1) Is Article 9(1)(a) of [the] Directive ... 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, and that a severe violation of religious freedom as a basic human right arises only if the core area of that religious freedom is affected?
- (2) If the answer to Question 1 is yes:
- (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 be an act of persecution, within the meaning of Article 9(1)(a) of [the] Directive ..., also in cases where, in the country of origin, the observance of faith in public gives rise to a risk to life, physical integrity or freedom and the applicant accordingly abstains from such practice?
- (b) If the core area of religious freedom can also comprise the public observance of certain religious practices:
- does it suffice in that case, in order for there to be a severe violation of religious freedom, that the applicant feels that such observance 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 observance as constituting a central part of its doctrine,
 - or can further restrictions arise as a result of other circumstances, such as the general situation in the country of origin?
- (3) Is there a well-founded fear of persecution within the meaning of Article 2(c) of [the] Directive ... if it is established that the applicant will carry out certain religious practices – other than those falling within the core area – after returning to his country of origin, even though they will give rise to a risk to his life, physical integrity or freedom, or can the applicant reasonably be expected to abstain from such practices?’

19. Observations were submitted by the parties to the main proceedings, the German, French and Dutch Governments, and by the European Commission.

III – My analysis

A – Preliminary observations

20. In accordance with Article 2(c) of the Directive, recognition of refugee status implies that the third-country national faces a *well-founded fear of being persecuted*¹¹ in his country of origin, due to his race, religion, nationality, political opinions or membership of a certain social group.

¹¹ — Emphasis added.

21. To grant refugee status, the authority responsible for reviewing the application for asylum must therefore conclude that there is persecution or a risk of persecution in regard to the person.

22. It follows from Articles 9 and 10 of the Directive, read together, that the concept of persecution comprises two elements. The first is the material element. It is the ‘act of persecution’ defined in Article 9 of the Directive. This is the crucial element since it is the basis of the person’s fear and explains his inability or refusal to claim the protection of his country of origin. The second is the mental aspect, that is to say the reason, referred to in Article 10 of the Directive, why the act or the series of acts are committed or the series of measures is applied.

23. The authority responsible for examining the application for asylum must next consider, on the basis of an assessment of the facts and circumstances surrounding the request for international protection, whether the refugee’s fear of being persecuted, once back in his country of origin, is well founded.

24. By its questions, the national court is asking the Court to clarify the scope of each of these two conditions in the context of an application for asylum based on an infringement of freedom of religion.

25. The implications of the reply to the question asked by the referring court are thus plain.

26. The question is to determine which asylum seekers may reasonably fear being subjected to an ‘act of persecution’ owing to infringement of their freedom of religion and are therefore able to claim refugee status.

27. This will enable the Court not only to define the assessment criteria common to all the Member States for individually assessing an application for international protection based on religion, but also to identify a minimum base below which those States may not refuse to recognise the existence of an act of persecution against an asylum seeker who is labouring under a severe restriction on the exercise of his freedom of religion in his country of origin.

28. The answer to the questions raised by the referring court will be guided by the objective pursued by the legislature of the Union in the context of the common European asylum system. In fact, it must be borne in mind that the goal is not to grant protection whenever an individual cannot fully and effectively exercise the freedoms guaranteed by the Charter or the ECHR in his country of origin, but to restrict the recognition of refugee status to individuals who may be exposed to a serious denial or systemic infringement of their most fundamental rights, and whose life has become intolerable in their country of origin.

29. Therefore, it is essential to differentiate the concept of an act of persecution from any other type of discriminatory measure. A distinction must accordingly be drawn between the situation where the individual suffers from a restriction or discrimination in the exercise of one of his fundamental rights and migrates for personal reasons or to improve his living conditions or social status, and the situation where the individual suffers from a restriction of such severity as to deprive him of his most essential rights and he cannot avail himself of the protection of his country of origin.

B – First question

30. By its first question, the national court is essentially asking the Court whether and, if so, to what extent an act restricting freedom of religion and in particular the universal right of freedom of worship, is an ‘act of persecution’ within the meaning of Article 9(1)(a) of the Directive.

31. The answer to this question seems to me to call first for an examination of the question whether an individual may be required to restrict some aspects of the exercise of his religion to what the national court calls a ‘core area’. In fact, should it be possible to answer in the affirmative, that would have a direct impact on the scope of Article 9(1) (a) of the Directive.

1. Right to freedom of religion in the context of the Directive

32. Freedom of religion is enshrined in the European Union in Article 10(1) of the Charter. This right is also guaranteed, in the same terms, by Article 9(1) of the ECHR. Under Article 52(3) of the Charter, the meaning and scope of this freedom must therefore be determined taking into account the terms of the case-law of the European Court of Human Rights¹² on this point.

33. The Court of Human Rights considers that freedom of religion is one of the foundations of a democratic society. It is, in its view, an essential aspect of a believer's identity and philosophy, as well as being valuable to atheists, agnostics, sceptics and the indifferent.¹³

34. On the one hand, freedom of religion is a matter of private conscience, that is to say it concerns the freedom to have a religion, to have none, or to change faith. The concept of religion is interpreted in a broad sense since, as is shown in Article 10(1)(b) of the Directive, the directive covers theistic, non-theistic and atheistic beliefs, and not only the traditional religions, such as Catholicism or Islam, but also more recent or minority religions.

35. This component of the freedom of religion enjoys absolute protection.

36. On the other hand, freedom of religion includes the freedom to manifest one's faith. This can take many different forms, since faith can be practiced alone or in common, in private or in public, by worship, teaching, practice or the performance of rituals.

37. On the other hand, the freedom to manifest one's faith is not absolute in character. It does not protect any act motivated or inspired by a religion or belief and does not always guarantee the right to behave in any manner required by religious conviction.¹⁴ In addition, it may be subject to restrictions at national level under the conditions expressly referred to in Articles 52(1) of the Charter and 9(2) of the ECHR.

38. In this context, is it possible to identify a 'core area' in religions that it is for the national authorities to determine under the supervision of the national courts and of the Court of Justice before which this reference for a preliminary ruling has now come?

39. On this point, my answer is clearly negative for several reasons.

40. First of all, such an approach seems to me contrary to the wording of Articles 9 and 10 of the Directive.

41. It is obvious to anyone how such an exercise, however scrupulously approached, is, by definition, subject to the risk of arbitrariness. That may give rise to a risk, or even the certainty, that there will be as many views as there are individuals. Such relativity in the definition of a concept so essential and personal to each individual cannot meet the objective of the Directive, which is to establish a common base identifiable by all.

42. In this regard, in its judgment in *Leyla Şahin v Turkey*, cited above, concerning the wearing of the Islamic headscarf at the University of Istanbul (Turkey), the European Court of Human Rights held that 'it is not possible to discern throughout Europe a uniform conception of the significance of religion in society ... and the meaning or impact of the public expression of a religious belief will differ according to time and context'.¹⁵ Let us then imagine the world down the ages. Religion entails not only a belief, but also identity groups related by race or nationality. It mixes national and cultural traditions, may involve radical, conservative or reformist readings and embraces a wide range of beliefs, rituals and customs as important to some religions as they are insignificant to others.

12 — C-279/09 *DEB* [2010] ECR I-13849, paragraph 35.

13 — *Metropolitan Church of Bessarabia and Others v Moldova*, judgment of 13 December 2001, ECHR Reports 2001-XII, § 114 et seq. and case-law cited.

14 — See ECHR, *Leyla Şahin v Turkey*, judgment of 10 November 2005, Reports 2005-XI, § 105.

15 — Paragraph 109 and the case-law cited.

43. Thus, the performance of rituals may comprise ceremonial acts associated with certain stages of life, and various practices specific thereto, including building places of worship, using of ritual formulae and objects, displaying symbols, observing holidays and days of rest, observance of dietary regulations, and wearing clothing or head coverings in conformity with a person's religion. In addition, the practice and teaching of religion may involve the freedom to choose one's religious leaders, priests and teachers, to hold meetings, to establish seminaries or religious schools, to maintain charitable institutions, to write, print or disseminate publications.¹⁶

44. However, the specific importance of each of these acts will vary according to the precepts of the religion concerned and, within the same community, according to the personality of the individual. That is why, in the eyes of the UNHCR, applications for asylum based on religion are the most complex.¹⁷

45. All of these matters therefore militate in favour of a broad interpretation of freedom of religion, encompassing all components thereof, be they public or private, collective or individual.

46. Certainly, that is the reason why the legislature of the Union took care to make clear, in the wording of Article 9(1) of the Directive, that the act of persecution constitutes a material act and that the nature of that act is the most objective criterion for evaluating whether there is persecution, irrespective of the freedom affected, where the act is motivated by one of the grounds set out in Article 10 of the Directive. If, for example, it was decided that the 'core area' comprised what I have called the freedom of private conscience, a serious impingement on that freedom would amount to persecution, whereas one which penalised only the external manifestation of that freedom would not. However, that would, in my view, be meaningless.

47. Next, Article 9(1)(a) of the Directive only distinguishes the inderogable rights among the fundamental human rights. It was not the intent of the legislature of the Union to further subdivide the rights protected under the Directive, but to achieve a sufficiently open and adaptable text to reflect an extremely varied and constantly changing range of types of persecution.¹⁸ However, in adopting such an interpretation, we would be opening the door to the possible application by analogy to other fundamental rights and freedoms, and risk reducing the scope of international protection well beyond the terms employed by the legislature of the Union.

48. Finally, in the context of applications for asylum based on religion, it is easy to see that the material and mental aspects of persecution, referred to in Articles 9 and 10 of the Directive respectively overlap. Therefore, there is no objective reason to introduce a distinction as regards the scope of freedom of religion according to whether it is the physical act of persecution in accordance with Article 9(1)(a) of the Directive or the reason for it, as set out in Article 10(1)(b).

49. Secondly, there is nothing in the case-law of the Court or, specifically, of the European Court of Human Rights, to support the proposition that the 'core area' of freedom of religion must be limited to private conscience and the freedom to manifest one's religion in private or within the circle of those who share the faith, thus excluding the public manifestation of religion.

16 — See Article 6 of the Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief, proclaimed by the United Nations General Assembly on 25 November 1981, and point 4 of General Comment No 22 of the Human Rights Committee on Article 18 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966 by the General Assembly of the United Nations and entered into force on 23 March 1976.

17 — See, for information, 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, edited by the UNHCR on 28 April 2004, available at Internet address <http://www.unhcr.org/refworld/docid/415a9af54.html>, as well as General Comment No 22 referred in footnote 16 of this Opinion.

18 — See comments by the Commission on Article 11, entitled 'The nature of persecution' (current Article 9 of the Directive) in the Proposal for a Council Directive 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, presented by the Commission on 12 September 2001 (COM (2001) 510 final).

50. As the European Court of Human Rights held in its judgment in *Metropolitan Church of Bessarabia and Others v Moldova*, cited above, ‘bearing witness in words and deeds is bound up with the existence of religious convictions’.¹⁹ The manifestation of religion is inseparable from faith and is an essential component of freedom of religion, whether it be practiced in public or in private. As pointed out by the European Commission of Human Rights, the term ‘in private or in public’ in the legislation means nothing other than allowing the faithful to manifest their faith in one form or the other, and should not be interpreted as being mutually exclusive or as leaving a choice to the public authorities.²⁰

51. Finally and thirdly, in a case of persecution, a term which gives rise to images of victimized individuals, even the slightest or feeblest reason will be found by torturers to inflict acts of violence on believers and those acts, by their inherent gravity alone, together with the attendant consequences, and the reason given, will constitute the objective criterion of persecution. It is that criterion which will establish the appraisal threshold common to all the Member States, as sought by the Directive.

52. Therefore, persecution is characterised not by the fact that it occurs in the sphere of freedom of religion, but by the nature of the repression inflicted on the individual and its consequences.

2. The act of persecution in the context of infringement of freedom of religion

53. The act of persecution is defined, as we have seen, by Article 9(1) of the Directive. In accordance with this provision, it must be a ‘sufficiently serious’ act or a set of measures which, because of their nature and their repetition, constitute a ‘severe violation’ of a fundamental human right. This concept is thus well defined on the basis of an objective criterion, that of the nature and intrinsic severity of the act or the situation experienced as well as the consequences suffered by the person concerned in his country of origin. This is a crucial element since, under Article 2(c) of the Directive, it must account for the inability or refusal of the asylum-seeker to return to his country of origin.

54. In order to determine the actual act of persecution, the authority responsible for examining the application for asylum must therefore examine the nature of the specific situation to which the individual is exposed in his country of origin when exercising his fundamental freedom or infringing the restrictions imposed on the exercise of that freedom in his country of origin.

55. For the reasons described above, relating to the objective of the common European asylum system, the act in question must, in my view, be particularly severe, such that the person concerned can legitimately no longer live in or tolerate living in his country of origin.

56. Persecution is an act of the utmost gravity, because it sets out flagrantly and persistently to deny the most essential rights of the human person, on the basis of skin colour, nationality, gender, sexual orientation, political beliefs or religious convictions. Regardless of the form that it takes, and aside from its discriminatory effect, persecution entails the denial of the human person and seeks to exclude that person from society. Persecution is based on prohibition, prohibiting a person from living in society with others on account of his or her gender, prohibiting a person from being treated equally on account of his beliefs, or from having access to health care and education on account of his race. These prohibitions penalise the individual for what he is or represents.

57. That is why persecution is a crime against humanity under Article 7(1)(h), of the Rome Statute of the International Criminal Court,²¹ and under the statutes of the international criminal courts when directed collectively and systematically against a specified population.

19 — Paragraph 114.

20 — See *ECHR X v United Kingdom* judgment of 12 March 1981, D.R. , 22, p. 39, § 5.

21 — This statute was adopted in Rome on 17 July 1998 and entered into force on 1 July 2002, *United Nations Treaty Series*, Vol. 2187, No 38544. In Article 7(2)(g) of the said statute, the concept of ‘persecution’ is defined as ‘the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’.

58. When directed individually and in isolation against an individual, the act of persecution is just as serious and intolerable an attack on the human person, and his most essential rights.

59. That is borne out by the preparatory work for the Directive.

60. The Council defined the concept of ‘persecution’ in common position 96/196/JHA²² as acts which constitute an essential infringement of human rights, such as the rights to life, liberty and physical integrity, or which do not allow a person to pursue life in his country of origin.²³

61. Then, in 2002, in the Council documents, the legislature of the Union referred to fundamental human rights by insisting first on ‘[the] right to life, [the] right to not be subjected to torture, [the] right to liberty and security’ before going on to cover, following reservations expressed by some Member States, the rights that cannot be the subject of derogation under Article 15(2) of the ECHR.²⁴

62. The rights referred to in this provision are the so-called ‘absolute’ or ‘inalienable’ rights of any individual. No limitation can be provided for, even in cases of exceptional public danger. This is the right to life, the right not to be subjected to torture or to inhuman or degrading treatment, the right not to be reduced to slavery or servitude and the right not to be arbitrarily arrested or detained.²⁵

63. Thus, when, for one of the reasons referred to in Article 10 of the Directive, a man is at risk of being executed, tortured or imprisoned without any other form of trial, or a woman is at risk of being subjected to forced genital mutilation or reduced to the status of a slave, there is plainly and unanswerably an act of persecution. The suffering liable to occur is, in itself, serious and irreparable, and the inability of a State to protect its citizens from such abuses necessitates international protection. Indeed the Member States are bound not to send such individuals back to their country of origin, under penalty of incurring liability under Article 19(2) of the Charter and Article 21 of the Directive, as well as under their obligations under the ECHR.²⁶

64. When the act of persecution comprises an infringement of an indefeasible right, the existence of persecution will be established *ipso facto* if the infringement is attributable to religious discrimination.

65. What is the position when the individual bases his request for asylum on a violation of the freedom to observe his religion, which is not an absolute right referred to in Article 15(2) of the ECHR?

66. The same criterion must, it seems to me, be applied here.

67. The freedom to practice one’s religion is not an indefeasible right. None the less, it is a fundamental right and it might be thought that any limitation or infringement, however minor, of that right must be punished.

68. However, such limitation is, of its nature, necessary to the equilibrium of life in society. In that connection, the restriction of a religious practice by means of a law intended to ensure a balance between the practices of the different religions that exist in a State cannot amount to an ‘act of persecution’ or even an infringement of freedom of religion. On the contrary, such a law is one way of seeking to maintain genuine religious pluralism and of ensuring, under the rule of law and in

22 — Common Position of 4 March 1996 defined by the Council on the basis of Article K. 3 of the Treaty on European Union, on the harmonised 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 1996 L 63, p. 2).

23 — Paragraph 4.

24 — See documents available on the Council’s website under references 13620/01, 11356/02, 12620/02 and 13648/02.

25 — These rights are referred to, respectively, in Articles 2, 3, 4(1) and 7 of the ECHR and Articles 2, 4, 5(1) and 49 of the Charter.

26 — See ECHR *Soering v United Kingdom*, 7 July 1989, Series A, No 161, § 88 and 113; *Mamatkoulou and Askarov v Turkey*, judgment of 4 February 2005, Reports 2005-I, § 91; *Khodzhayev v Russia*, judgment of 12 May 2010, § 89 to 105, and *Abdulazhon Isakov v Russia*, judgment of 8 July 2010, § 106 to 112 and 120 to 131.

accordance with Articles 52(1) of the Charter and 9(2) of the ECHR, the peaceful co-existence of different beliefs, as befits a democratic society.²⁷ This concern justifies making certain prohibitions criminally punishable, provided that the penalties are proportionate and are determined in compliance with individual liberties, and especially the rights of the defence.

69. It is therefore by the degree of measures and sanctions adopted or liable to be adopted against a person that any disproportion will be revealed, and that will provide the objective marker of persecution, which is to say an infringement of an inalienable right of the person.

70. In that context, it will be for the authorities responsible for the examination of the application for asylum to verify, specifically, the rule invoked in the country of origin and the repressive practice, in a broad sense, going beyond the criminal law actually applied there.

71. The interpretation that I propose is analogous to that adopted by the European Court of Human Rights in its decision as to inadmissibility in *Z. and T. v United Kingdom*.²⁸

72. This case must be highlighted because the question submitted to the European Court of Human Rights is very close, not to say identical, to the one submitted to the Court by the Bundesverwaltungsgericht in its orders for reference. In addition, the view of the European Court of Human Rights must be set out, because, as we have seen, freedom of religion is guaranteed in the same terms in the Charter and the ECHR; the meaning and scope of this freedom must therefore be determined taking into account the ECHR case-law.

73. In that case, the European Court of Human Rights was seised of the question whether a Contracting State may incur liability under Article 9 of the ECHR by refusing to grant refugee status to a person who, on his return to his country of origin, would be deprived of the right to live his faith freely and openly. Two female Pakistani nationals of the Christian faith alleged that, on their return to their country of origin, they would be unable to live as Christians without incurring the risk of receiving hostile attention or having to take measures to conceal their faith. According to the applicants, to require them to change their behaviour by concealing their adherence to Christianity and by renouncing the opportunity to speak about their faith and to bear witness to it before others was, in practice, tantamount to a denial of the right to freedom of religion.

74. The European Court of Human Rights dismissed their application on the basis of a distinction between the fundamental safeguards referred to in Articles 2 to 6 of the ECHR and the other provisions of the ECHR.

75. It reaffirmed that a Contracting State may be held liable when expulsion exposes an individual on his return to his country of origin to a real risk of death, being subjected to torture, arbitrarily detained, or of suffering a flagrant denial of justice. That case-law rests on the fundamental importance of the corresponding provisions. However, the European Court of Human Rights refrained from automatically applying these ‘compelling’ considerations to the other provisions of the ECHR, because, on a purely pragmatic basis, ‘it cannot be required that an expelling Contracting State only return an alien to a country where the conditions are in full and effective accord with each of the safeguards of the rights and freedoms set out in the [ECHR]’.

76. Thus, it declined to extend this case-law to Article 9 of the ECHR where the individual is likely to be hampered only in the practice of his religion. It explained that, if it were otherwise, the Contracting States would be obliged ‘to act as the indirect guarantors of freedom of worship for the rest of the world’. It would only be in exceptional circumstances, when the person concerned runs a ‘real risk of

27 — For an application of these principles, see, inter alia, ECHR, *Leyla Şahin v Turkey*, paragraphs 104 to 123 and case-law therein cited.

28 — See *Z. and T. v United Kingdom*, ECHR, judgment of 28 February 2006, Reports 2006-III.

flagrant violation’ of this freedom that the State would incur liability. However, according to the European Court of Human Rights, it is difficult to imagine a case in which a sufficiently flagrant breach of that freedom does not also imply a real risk that the person may die, be subjected to torture and inhuman and degrading treatments, or suffer a flagrant denial of justice or arbitrary detention.

77. Therefore, in the light of these factors, I believe that Article 9(1)(a) of the Directive must be interpreted as meaning that serious interference with freedom of religion is likely to be an ‘act of persecution’ when the asylum-seeker, by exercising this freedom or as a result of infringing the restrictions placed on the exercise of that freedom in his country of origin, runs a real risk of being executed or subjected to torture, or inhuman or degrading treatment, being reduced to slavery or servitude, or being prosecuted or imprisoned arbitrarily.

78. That interpretation seems to me to be such as to enable a minimum basis common to all the Member States to be established, below which they may not fall. Under Article 3 of the Directive, it also allows them the freedom to adopt or maintain more favourable standards to the extent, however, that such standards are compatible with the Directive.

79. Let us transpose this reasoning to the situation of the applicants in the main proceedings.

80. In Pakistan, where Sunni Islam is the State religion and its followers represent the majority of the population, the Ahmadiyya community constitutes a religious minority, whose members are considered heretics. Since the entry into force of Ordinance XX of 28 April 1984, the law on blasphemy has strengthened Articles 295 and 298-A of the Pakistan Penal Code by introducing the death penalty and the penalty of imprisonment for any individual who, by words, writings, gestures or visible representations, or by making direct or indirect insinuations, insults the sacred name of the prophet Muhammad or the symbols and places associated with Islam. In addition, Sections 298-B and 298-C of this code make it an offence punishable by a term of three years’ imprisonment and a fine for any individual member of the Ahmadiyya community who professes his faith in public, or identifies it with Islam, uses it for propaganda, encourages conversions, uses or borrows the epithets, descriptions, titles or greetings associated with the Muslim religion, quotes verses from the Koran in public, adopts practices associated with Islam such as funeral rites, or in any other way outrages Islam.

81. In the light of this information, the criteria set out in Articles 9 and 10 of the Directive are met. The mental element of the act of persecution referred to in Article 10 of the Directive lies in the religious motive, the Ahmadists being, in fact, clearly referred to in Articles 298-B and 298-C of the Pakistan Penal Code. With regard to the factual element, it forms part of the criminal law, including the penalties.

82. It is for the authority responsible for reviewing the application for asylum to verify whether the legislation is actually implemented by the Pakistani authorities on the basis of regular reports issued by the States and by organisations for the protection of human rights. If it is, it can reach the level of persecution.

83. In fact, infringements of that legislation constitute serious and intolerable attacks on the person.

84. On the one hand, the prohibition constitutes a serious violation of the freedom of religion, thus depriving the individual of an essential element of his personality. It also involves violation of the freedoms of expression and association guaranteed by Articles 11 and 12 of the Charter and 10 and 11 of the ECHR, since, by limiting the right to manifest their religion publicly, the law denies the right of persons of faith to associate freely and to express their beliefs.

85. On the other hand, the penalties that accompany such a prohibition tend to deprive any person who persists in practising his faith of his most essential rights by threatening him with jail or even death.

86. In response to the first question submitted by the national court, I therefore believe that Article 9(1)(a) of the Directive must be interpreted as meaning that a severe violation of freedom of religion, regardless of which component of that freedom is targeted by the violation, is likely to amount to an ‘act of persecution’ where the asylum-seeker, by exercising that freedom or infringing the restrictions placed on the exercise of that freedom in his country of origin, runs a real risk of being executed or subjected to torture, or inhuman or degrading treatment, of being reduced to slavery or servitude or of being prosecuted or imprisoned arbitrarily.

87. In this context, and in accordance with Article 3 of Directive 2004/83, the Member States remain free to adopt or maintain more favourable standards, provided, however, that those standards are compatible with the Directive.

88. In the light of the response that I propose to the first question, I am of the view that there is no need to consider the second question submitted by the national court.

C – Third question

89. By its third question, the national court is essentially asking the Court whether a refugee’s fear of persecution is well founded within the meaning of Article 2(c) of the Directive if he intends, on his return to his country of origin, to perform religious acts which expose him to danger to his life, freedom or integrity, or whether, it is reasonable to expect the person to give up the practice of such religious acts.

90. Very specifically, the question is whether we may interpret this provision as meaning that the refugee’s fear of persecution is not founded where he could avoid an act of persecution in his country of origin by giving up practising his religion publicly.

91. I am strongly opposed to such an interpretation, for the following reasons.

92. First, such an interpretation has no basis in the text of the Directive, in particular Article 4.

93. In the context of a request for international protection, we know that the authority responsible for reviewing the application for asylum must, under Article 2(c) of the Directive, verify whether the person’s fear of being persecuted on his return to his country of origin is well founded. While the feeling of fear is a subjective matter, it must be demonstrated to be justified in the light of more objective information. Any evaluation of whether the fear is substantiated will therefore be based solely on a specific assessment of the actual risks to which the person will be exposed on his return to his country of origin.

94. That entails carrying out an individual assessment of the application for international protection, the principles of which are set out in Article 4 of the Directive.

95. Under Article 4(3)(a) of the Directive, this involves considering all information available and all the relevant facts relating to the general situation of the applicant’s country of origin, and in particular its laws and the manner in which they are applied.

96. It is then necessary to consider how the individual will behave once back in his country of origin, and specifically the activities he intends to carry out.

97. Under Article 4(2)(3)(b) to (d), and (4) of the Directive, the authority responsible for examining the application for asylum must then take into account all available information on the asylum-seeker relating, inter alia, to his personality, character, personal situation, state of mind and age as well as his history and the activities in which he has or has not engaged since leaving his country of origin.

98. As we see, this is very specific information enabling it to be determined whether, once back in his country of origin, there is a well-founded fear that the activities engaged in by the asylum seeker will expose him to an act of persecution. Conversely, there is nothing in this provision to indicate that, in the assessment of the substance of the case, a solution has to be found that allows the applicant for asylum to live in his country of origin without fear of being exposed to violence, by asking him, in particular, to give up some of the rights and freedoms guaranteed to him.

99. Secondly, such an interpretation does not ensure compliance with the fundamental rights enshrined in the Charter, contrary to the tenth recital in the preamble to the Directive and the Court's settled case-law.

100. On the one hand, it seems to me contrary to the respect due to human dignity enshrined in Article 1 of the Charter. By requiring the asylum-seeker to conceal, amend or forego the public demonstration of his faith, we are asking him to change what is a fundamental element of his identity, that is to say, in a certain sense to deny himself. However, no one has the right to require that.

101. On the other hand, that interpretation is contrary to Article 10 of the Charter because it deprives the person of a fundamental right guaranteed to him by that provision in a manner not specifically authorised by Article 52(1) of the Charter.

102. In addition, by adopting such an interpretation, the authority responsible for the examination of the application for asylum might aggravate a situation in which the applicant is already subject to violation of his fundamental rights in his country of origin. Finally, it would make him partly responsible for the violence he suffers as a victim of oppression.

103. Thirdly, we cannot reasonably expect an asylum-seeker to forego manifesting his faith or to conceal any other constituent element of his identity to avoid persecution without putting at risk the rights that the Directive aims to protect and the objectives it seeks to pursue.²⁹

104. Persecution does not cease to be persecution because the individual may, upon his return to his country of origin, show restraint and discretion in the exercise of his rights and freedoms by hiding his sexuality or his political opinions, concealing his membership of a community or renouncing the practice of his religion.³⁰ If that were the case, the Directive would be simply deprived of useful effect since it would not be able to protect persons who, because they choose to exercise their rights and freedoms in their country of origin, are exposed to acts of persecution. In cases such as that at issue in the main proceedings, that would be to set at nought the rights that the Directive seeks to secure to Y and Z, and on which their application for asylum is rightly based, namely their right to manifest their religion in public without fear of being persecuted.

105. Fourthly, this is an area which is not governed by rational considerations. As the Court ruled in *Salahadin Abdulla and Others*,³¹ assessment of the extent of the risk must in every case be carried out with vigilance and care, since what are at issue are issues relating to the integrity of the person and to individual liberties, matters which relate to the fundamental values of the Union.³² Yet to expect an asylum-seeker to behave reasonably while he lives in the insecurity and fear of assault or imprisonment is to misapprehend the risk to which the individual will be exposed. It is a risky gamble, and the right of asylum cannot be based on such a prognosis. In my view, such an approach

29 — I of course exclude from my analysis situations in which the religious rites are particularly unreasonable, such as human sacrifice or the use of drugs.

30 — Judgment of the Supreme Court of the United Kingdom in *HJ (Iran) v Secretary of State for the Home Department* and *HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31.

31 — Judgment in joined Cases C-175/08; C-176/08; C-178/08 and C-179/08, [2010] ECR I-1493.

32 — Paragraph 90.

would, moreover, amount to recklessness. In fact, regardless of the efforts that the person concerned may make in his way of life in public, he will remain a heretic, a dissident or a homosexual in his country of origin. And we know that in some countries, all activities, even the most insignificant, can be a pretext for all sorts of abuses.

106. In the light of these matters, I therefore believe that Article 2(c) of the Directive must be interpreted as meaning that there is a well-founded fear of persecution where the asylum-seeker intends, once back in his country of origin, to pursue religious activities which expose him to a risk of persecution. In this context, and in order to ensure observance of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union, I consider that the authority responsible for examining the application for asylum cannot reasonably expect the asylum seeker to forego these activities, and specifically to forego manifesting his faith.

IV – Conclusion

107. In the light of the foregoing considerations, I propose that the Court should reply as follows to the questions submitted by the Bundesverwaltungsgericht:

- (1) Article 9(1)(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of the third-country nationals as stateless persons or refugees to be eligible for refugee status or the people who otherwise need international protection and the content of the protection granted must be interpreted as meaning that a severe violation of freedom of religion, regardless of which component of that freedom is targeted by the violation, is likely to amount to an ‘act of persecution’ where the asylum-seeker, by exercising that freedom or infringing the restrictions placed on the exercise of that freedom in his country of origin, runs a real risk of being executed or subjected to torture, or inhuman or degrading treatment, of being reduced to slavery or servitude, or of being prosecuted or imprisoned arbitrarily.

Under Article 3 of Directive 2004/83, the Member States remain free to adopt or maintain more favourable standards provided, however, that they are compatible with the Directive.

- (2) Article 2(c) of Directive 2004/83 must be interpreted as meaning that there is a well-founded fear of persecution where the asylum-seeker intends, once back in his country of origin, to pursue religious activities which expose him to a risk of persecution. In this context, and in order to ensure observance of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union, the authority responsible for examining the application for asylum cannot reasonably expect the asylum seeker to forego these activities, and specifically to forego manifesting his faith.