



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
MENGOZZI  
delivered on 25 July 2018<sup>1</sup>

**Case C-56/17**

**Bahtiyar Fathi**

**v**

**Predsedatel na Darzhavna agentsia za bezhantsite**

(Request for a preliminary ruling from the Administrativen sad Sofia-grad (Administrative Court, Sofia, Bulgaria))

(Reference for a preliminary ruling — Area of freedom, security and justice — Borders, asylum and immigration — Conditions for granting refugee status — Criteria for determining the Member State responsible for examining an application for international protection — Examination of an application for international protection without an explicit decision on the competence of the Member State — Concept of religion — Assessment of reasons for persecution based on religion)

1. The request for a preliminary ruling that forms the subject matter of this Opinion concerns the interpretation of Article 3(1) of Regulation No 604/2013<sup>2</sup> ('the Dublin III Regulation'), Articles 9 and 10 of Directive 2011/95,<sup>3</sup> and Article 46(3) of Directive 2013/32.<sup>4</sup> That request has been made in proceedings between Mr Bahtiyar Fathi and the Predsedatel na Darzhavna agentsia za bezhantsite (Director of the State Agency for Refugees, Bulgaria, 'the DAB') concerning the rejection by the latter of the application for international protection made by Mr Fathi.

### **I. Facts, main proceedings and procedure before the Court**

2. On 1 March 2016 Mr Fathi, an Iranian national of Kurdish origin who was born on 20 September 1981 at Marivan in the Islamic Republic of Iran, lodged an application for international protection with the DAB based on the persecution he has suffered at the hands of the Iranian authorities on religious grounds. According to statements made by him, between late 2008 and early 2009 he converted to Christianity in Iran. He was in possession of an illegal satellite dish, which he used to receive the prohibited Christian channel Nejat TV, and on one occasion he even called into a television programme on that channel. In September 2009, he was detained for 2 days by the Iranian intelligence services and questioned about his telephone call to the live television broadcast. During his detention he was forced to confess that he had converted to Christianity. In 2006 he went to England. In June 2012, he left Iran illegally and travelled to Iraq, where he remained until the end of

<sup>1</sup> Original language: French.

<sup>2</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (OJ 2013 L 180, p. 31).

<sup>3</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (OJ 2011 L 337, p. 9).

<sup>4</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (OJ 2013 L 180, p. 60).

2015, residing there as an asylum applicant. During his stay, he contacted the United Nations High Commissioner for Refugees (UNHCR) but a decision on his case was not reached by that body because he had no identity papers. With regard to his conversion to Christianity, the applicant stated that it was a long process that followed his meetings with Christians in England and his watching Christian television, and that he was baptised between late 2008 and early 2009, more specifically in the month of May, in a house church in Tehran. He claimed that he has had contact with other Christians in Iran at meetings held in Tehran attended by around a dozen people. He describes himself as a 'normal Christian with Protestant leanings'. He continued to maintain contact with Christians following his arrest by the Iranian authorities. He did not leave Iran until 2012 because he did not have the necessary funds. Following his departure, the intelligence services searched for him and told his father that they just wanted to question him and that there would be no problem if he were to return. In the course of his personal interview before the Bulgarian authorities, Mr Fathi produced a letter from Nejat TV dated 29 November 2012.<sup>5</sup>

3. Mr Fathi's application was rejected by decision of the Director of the DAB of 20 June 2016 ('the DAB decision'). In that decision, Mr Fathi's statements were found to contain major contradictions and his account as a whole was deemed to be implausible. The document from Nejat TV dated 29 November 2012 was therefore dismissed as false. The Director of the DAB took account, in particular, of the fact that, since his arrest in 2009 and until he left Iran in 2012, Mr Fathi has not been subject to any act of persecution. The DAB decision found there to be no circumstances for granting refugee status under Article 8 of the *Zakon za ubezhishteto i bezhantsite* (Law on asylum and refugees, 'the ZUB') or humanitarian status pursuant to Article 9 of the ZUB.<sup>6</sup>

4. Mr Fathi brought an action against the DAB decision before the referring court, which decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

- '(1) Does it follow from Article 3(1) of [the Dublin III Regulation], interpreted in conjunction with recital 12 and Article 17 of that regulation, that a Member State may issue a decision that constitutes an examination of an application made to it for international protection within the meaning of Article 2(d) of that regulation, without expressly deciding on the responsibility of that Member State under the criteria in the regulation if, in the particular case, there is nothing to give rise to a derogation pursuant to Article 17 of that regulation?
- (2) Does it follow from the second sentence of Article 3(1) of [the Dublin III Regulation], interpreted in conjunction with recital 54 of Directive 2013/32/EU, that, in the circumstances of the main proceedings, where there is no derogation pursuant to Article 17(1) of that regulation, a decision must be issued in respect of an application for international protection within the meaning of Article 2(b) of that regulation by which the Member State undertakes to examine the application in accordance with the criteria in the regulation and which is based on the fact that the provisions of the regulation apply to the applicant?
- (3) Is Article 46(3) of Directive 2013/32/EU to be interpreted as meaning that, in proceedings against a decision refusing international protection, the court must rule pursuant to recital 54 of the directive on whether the provisions of [the Dublin III Regulation] apply to the applicant if the Member State has not expressly decided on its responsibility for examining the application for international protection in accordance with the criteria in the regulation? Must it be presumed on the basis of recital 54 of Directive 2013/32 that, where there are no indications suggesting that Article 17 of [the Dublin III Regulation] applies and the application for international protection

<sup>5</sup> The letter, which was produced before the referring court, was a statement made by an employee of Nejat TV addressed to Mr Fathi and quoting a 'UN case number'. This letter confirms that Mr Fathi is a Christian and that he presented himself as such to the television station, and states that there was contact between him and the station at various points over the years following calls by Mr Fathi to the channel's telephone advice service.

<sup>6</sup> Humanitarian status within the meaning of Article 9 of the ZUB corresponds to the subsidiary protection provided for in Directive 2011/95.

was examined on the basis of Directive 2011/95 by the Member State to which it was made, the legal situation of the person concerned is within the scope of the regulation even if the Member State has not expressly decided on its responsibility in accordance with the criteria in the regulation?

- (4) Does it follow from Article 10(1)(b) of Directive 2011/95/EU that, in the circumstances of the main proceedings, the reason for persecution of “religion” exists where the applicant has not made statements and presented documents relating to all the components covered by the concept of religion as defined in this provision which are of fundamental importance for the affiliation of the person concerned to a particular religion?
- (5) Does it follow from Article 10(2) of Directive 2011/95/EU that reasons for persecution based on religion within the meaning of Article 10(1)(b) of the directive exist where the applicant, in the circumstances of the main proceedings, claims that he has been persecuted on grounds of his religious affiliation but has not made any statements or presented any evidence regarding the circumstances that are characteristic of a person’s particular religious affiliation and would be a reason for the actor of persecution to believe that the person concerned was affiliated to that religion — including circumstances linked to taking part in or abstaining from religious actions or religious expressions of view — or regarding the forms of individual or communal conduct based on or mandated by a religious belief?
- (6) Does it follow from Article 9(1) and (2) of Directive 2011/95, interpreted in conjunction with Articles 18 and 10 of the Charter of Fundamental Rights of the European Union [‘the Charter’] and the concept of religion as defined in Article 10(1)(b) of the directive, that in the circumstances of the main proceedings:
  - (a) the concept of religion as defined in EU law does not encompass any acts considered to be criminal in accordance with the national law of the Member States? Is it possible for such acts that are considered to be criminal in the applicant’s country of origin to constitute acts of persecution?
  - (b) In connection with the prohibition of proselytism and the prohibition of acts contrary to the religion on which the laws and regulations in the country in question are based, are limitations to be regarded as permitted that are established to protect the rights and freedoms of others and public order in the applicant’s country of origin? Do these prohibitions as such constitute acts of persecution within the meaning of the cited provisions of the directive when violation of them is threatened with the death penalty even if the laws are not explicitly aimed against a particular religion?
- (7) Does it follow from Article 4(2) of Directive 2011/95, interpreted in conjunction with Article 4(5)(b) of the directive, Article 10 of [the Charter] and Article 46(3) of Directive 2013/32/EU, that, in the circumstances of the main proceedings, an appraisal of the facts and circumstances may be conducted only on the basis of the statements made and the documents presented by the applicant, but it is still permitted to require proof of the missing components covered by the concept of religion as defined in Article 10(1)(b) of the directive where:
  - without this information the application for international protection would be considered unfounded within the meaning of Article 32 in conjunction with Article 31(8)(e) of Directive 2013/32/EU and
  - national legislation provides that the competent authority must establish all the relevant circumstances for the examination of the application for international protection and the court, should the refusal decision be contested, must point out that the person concerned has not offered and presented any evidence?’

5. The governments of Hungary, the Republic of Poland and the United Kingdom, and the Commission submitted written observations before the Court in accordance with Article 23 of the Statute of the Court of Justice of the European Union.

## II. Analysis

### *A. The first and second questions referred for a preliminary ruling*

6. By its first two questions referred for a preliminary ruling, which should be examined jointly, the referring court essentially asks the Court whether the authorities of a Member State may examine the substance of an application for international protection within the meaning of Article 2(b) of the Dublin III Regulation without prior adoption of an explicit decision establishing, on the basis of the criteria laid down in that regulation, the responsibility of that Member State to conduct such an examination.

7. Article 3(1) of the Dublin III Regulation provides that ‘Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them ... The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible’.

8. Article 67a(2)(1), (2) and (3) of the ZUB, in the version in force when Mr Fathi’s application was lodged, provides that the procedure for determining the Member State responsible for examining an application for international protection is opened ‘1. by decision of the authority before which the interviews take place, where there is information establishing the responsibility of another Member State to examine the application for international protection; 2. on referral by the Minister of the Interior and by the State Agency for “National Security” concerning the foreign national’s unlawful residence in the territory of the Republic of Bulgaria; 3. on the basis of a request to take charge of or take back the foreign national ...’.<sup>7</sup>

9. The referring court explains that, in Mr Fathi’s case, none of the grounds provided for in Article 67a(2) of the ZUB was made out, and that it is for that reason that a procedure to determine the Member State responsible for examining the application was not opened and that a decision establishing the responsibility of the Bulgarian State for the purposes of Article 3(1) of the Dublin III Regulation was not adopted.

10. The referring court asks whether that regulation applies solely to the procedures for the transfer of applicants for international protection, or whether it requires, in all cases, that the State taking responsibility for examining the application state, by means of a formal decision, on the basis of which criteria it considers itself responsible to conduct such an examination.

11. According to the referring court, in the absence of such a decision, the question whether a particular application for international protection is covered by the Dublin III Regulation is not settled.

12. I would point out from the outset that that conclusion is, in my view, incorrect. Under Article 1 of the Dublin III Regulation, that regulation ‘lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person’. In accordance with Article 2(b) of the Regulation, an ‘application for international protection’ is, for the purposes of the application of

<sup>7</sup> The referring court points out that, prior to the entry into force of Article 67a(2) of the ZUB, the procedure for determining the Member State responsible for examining an application for international protection was opened from the submission of that application.



that regulation, ‘an application for international protection as defined in Article 2(h) of Directive 2011/95’, that is — in accordance with the latter provision — ‘a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately’.

13. However, the referring court states that Mr Fathi’s application, which was rejected by the DAB, must be regarded as seeking the grant of refugee status within the meaning of Article 1(A) of the Convention relating to the Status of Refugees, which was signed in Geneva on 28 July 1951 and which entered into force on 22 April 1954 (‘the Geneva Convention’),<sup>8</sup> or humanitarian status on the basis of Article 9 of the ZUB, which corresponds to the subsidiary protection status provided for in Directive 2011/95.

14. That application does, therefore, come under the definition provided in Article 2(h) of Directive 2011/95 and, as a result, under that contained in Article 2(b) of the Dublin III Regulation. Accordingly, the application, which was lodged by a third-country national in Bulgaria, falls within the subject matter and scope of that regulation, as defined by Article 1 thereof. The question whether or not the Member State that has taken responsibility for examining the substance of the application applied the criteria laid down in that regulation to establish its own responsibility to conduct such an examination is, for those purposes, irrelevant.

15. Similarly, the interpretation suggested by the referring court that the Dublin III Regulation applies only where the transfer of the applicant to another Member State is envisaged should be dismissed. It is apparent both from its subject matter and from its provisions that that regulation is intended to apply as soon as an application for international protection is lodged in one of the Member States, regardless of whether it is clear, as early as the submission of such an application, that more than one Member State could be regarded as being responsible for its examination.<sup>9</sup>

16. That being said, it should be recalled that the Dublin III Regulation has the objective, according to the Court’s settled case-law, of establishing a clear and workable method based on objective and fair criteria both for the Member States and for the persons concerned for the purpose of determining rapidly the Member State responsible in order to guarantee effective access to the procedures for granting international protection and not to compromise the objective of rapid processing of applications for international protection, while ensuring, in accordance with recital 19 of that regulation, that an effective remedy is established by that regulation against transfer decisions.<sup>10</sup> The system established by the Dublin III Regulation is based on the principle, set out in Article 3(1) thereof, that a single Member State is competent to examine an applicant’s needs for international protection, despite the fact that that applicant has lodged an application in several Member States, the aim of that rule being to promote the efficiency of the system whilst discouraging forum shopping by applicants for international protection and their secondary movements within the European Union.

<sup>8</sup> The Geneva Convention is supplemented by the Protocol relating to the Status of Refugees, which was adopted on 31 January 1967 and entered into force on 4 October 1967.

<sup>9</sup> See, to that effect, Article 4(1) of the Dublin III Regulation, pursuant to which, *as soon as* an application for international protection is lodged within the meaning of Article 20(2) of the Regulation, the applicant is to be informed of the application of that regulation (see also recital 18 of the Dublin III Regulation). Annex X to Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 222, p. 3), as amended by Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 (OJ 2014 L 39, p. 1) (‘Regulation No 1560/2003’), provides that, initially, applicants are informed simply of the application of the Dublin III Regulation and, only at a second stage — solely in the event that the authorities of the Member State concerned have reasons to believe that another country might be responsible for examining the request — do they receive detailed information about the criteria for determining the responsible Member State and the transfer procedures laid down in the Dublin III Regulation. In the same vein as Article 4(1), referred to above, see Article 20(1) of the Dublin III Regulation, under which the process of determining the Member State responsible is to start *as soon as* an application for international protection is first lodged with a Member State.

<sup>10</sup> See, to that effect, judgments of 31 May 2018, *Hassan* (C-647/16, EU:C:2018:368, paragraph 56); of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraph 42); and of 25 October 2017, *Shiri* (C-201/16, EU:C:2017:805, paragraphs 31 and 37 and the case-law cited).

17. Chapter VI of the Dublin III Regulation lays down procedures for taking charge and taking back in the event that the Member State that determines the Member State responsible takes the view that another Member State is competent to examine the application for international protection, on the basis of the criteria established by that regulation. Where those procedures are activated, and after the requested Member State has given its explicit or implicit agreement to take charge of or take back the applicant,<sup>11</sup> the applicant receives notification of a transfer decision to that Member State, which he may challenge pursuant to Article 27 of the Dublin III Regulation.

18. By contrast, that regulation makes no provision for a specific procedure where the Member State that determines the Member State responsible comes to the conclusion that it is itself competent, on the basis of the criteria established by that regulation, to examine the application for international protection. Although it follows from the right to information afforded by Article 4 of the Dublin III Regulation to the applicant that that applicant must, in all cases, be notified of the Member State that will conduct the examination of his application as soon as that State has been determined and of the grounds that led to the designation of that State,<sup>12</sup> that regulation does not, however, require the Member State that made that determination to adopt and notify to the applicant a formal decision where the criteria established by the Dublin III Regulation indicate that it is the Member State responsible.

19. That being the case, it should be pointed out that it is only pursuant to the mandatory and prioritised criteria established in Articles 8 to 15 of the Dublin III Regulation, or the criterion concerning dependent persons laid down in Article 16 of that regulation, or even by activating the discretionary clause provided for in Article 17 of the regulation,<sup>13</sup> that a Member State may establish its own competence to examine an application made to it for international protection within the meaning of Article 2(b) of that same regulation. Examination of the substance of such an application therefore always requires that the Member State conducting such an examination come to a *prior decision* as to its reasons for taking charge of the applicant.

20. The referring court explains the lack of a formal decision by the Bulgarian authorities vis-à-vis the responsibility of the Republic of Bulgaria to examine Mr Fathi's application by reference to the wording of Article 67a of the ZUB, which requires that a procedure to determine the Member State responsible is to be opened only where there is evidence to suggest that another Member State could be regarded as being responsible on the basis of the Dublin III Regulation. There is therefore nothing in the order for reference to suggest that the Bulgarian authorities did not establish their competence on the basis of the criteria laid down in the Dublin III Regulation, after having ruled out the responsibility of another Member State in the absence of evidence supporting such responsibility.<sup>14</sup> Nor does the order for reference state that Mr Fathi was not informed that his application for international protection was going to be processed by the Bulgarian authorities, let alone that he raised any objection whatsoever to such competence.

21. Furthermore, whilst noting that the grounds on the basis of which the Republic of Bulgaria was deemed to be the Member State responsible are not known, the referring court rules out the possibility that the discretionary clause provided for in Article 17(1) of the Dublin III Regulation was applied. For that reason, it does not put a question to the Court regarding the interpretation of that article.

<sup>11</sup> See judgment of 31 May 2018, *Hassan* (C-647/16, EU:C:2018:368, operative part).

<sup>12</sup> Under Article 4(1) of the Dublin III Regulation, the applicant's right to information concerns, in general terms, the 'application' of that regulation. Points (a) to (f) of that provision contain merely a *non-exhaustive* list of the information that must be communicated to the applicant, as is made clear by the use of the words 'in particular'. As is stated, that right therefore also extends to the specific results of the application of the criteria laid down in the Dublin III Regulation, *even where a procedure for the transfer of the applicant is not envisaged*.

<sup>13</sup> See below, points 23 to 30.

<sup>14</sup> In this regard, I note that, pursuant to Article 67a of the ZUB, the decision to open the procedure to determine the Member State responsible is taken by the authority that conducts the personal interviews and, therefore, after the applicant has been heard.

22. In those circumstances, and without it being necessary to take my analysis further, I am of the view, on the basis of the foregoing considerations, that the first and second questions referred for a preliminary ruling by the Administrativen sad Sofia-grad (Administrative Court, Sofia, Bulgaria), taken jointly, should be answered to the effect that a Member State examining the substance of an application for international protection made to it does not first have to adopt a formal decision by which it acknowledges its responsibility under the Dublin III Regulation to conduct such an examination. That Member State must, however, pursuant to Article 4(1) of that regulation, inform the applicant, in accordance with the rules laid down in paragraph 2 of that article, that his application will be examined by the competent authorities of that Member State and state the reasons that led it to find that it is responsible under that regulation.

23. As for Article 17(1) of the Dublin III Regulation, on which the parties that submitted written observations before the Court expressed a view despite the fact that its interpretation was not sought by the referring court, I shall confine myself to the following few remarks in the event that the Court nevertheless decides to give a ruling in this regard.

24. The first subparagraph of Article 17(1), that article being headed ‘Discretionary clauses’, provides that, ‘by way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation’. The second subparagraph of Article 17(1) states that ‘the Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility. Where applicable, it shall inform, using the “DubliNet” electronic communication network set up under Article 18 of [Regulation No 1560/2003], the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge, or to take back, the applicant’. For its part, the third subparagraph of Article 17(1) provides that ‘the Member State which becomes responsible pursuant to this paragraph shall forthwith indicate it in Eurodac in accordance with Regulation (EU) No 603/2013<sup>15</sup> by adding the date when the decision to examine the application was taken’.

25. Article 17(1) of the Dublin III Regulation reproduces the sovereignty clause that was previously contained in Article 3(2) of Regulation No 343/2003 (‘the Dublin II Regulation’),<sup>16</sup> the basis for which lies in the recognition of the grant of international protection as a State prerogative. Like the humanitarian clause laid down in Article 15 of the Dublin II Regulation, which is now contained in Article 17(2) of the Dublin III Regulation, the sovereignty clause introduces into the system established by that regulation a key element of flexibility, which affords any Member State to which an application for international protection is made the option of derogating from the principle that it is the Member State, identified on the basis of the objective criteria laid down in that regulation, that is responsible for examining that application.

<sup>15</sup> Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (OJ 2013 L 180, p. 1).

<sup>16</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1).

26. Although the exercise of such an option is not subject to any particular condition<sup>17</sup> and, therefore, the sovereignty clause may, in principle, be activated for considerations of any kind,<sup>18</sup> its use has essentially been advocated on humanitarian grounds and as a safeguard against the shortcomings of the Dublin system which may lead to violations of the fundamental rights of the applicants for international protection. In this light, the Court has accepted, in particular following the judgment of 21 January 2011 of the European Court of Human Rights ('ECtHR') in *M.S.S. v. Belgium and Greece*,<sup>19</sup> that, despite its discretionary nature and the broad discretion that it confers on the Member States,<sup>20</sup> the sovereignty clause may, in certain circumstances, particularly so as not to worsen a situation where the fundamental rights of the applicant have been infringed, include not simply an option for Member States to take charge of that applicant, but a genuine obligation.<sup>21</sup>

27. The Court has also clarified, with regard to Article 3(2) of the Dublin II Regulation, that that provision grants Member States a discretionary power that forms an integral part of the Common European Asylum System provided for by the FEU Treaty and developed by the European Union legislature, and that that power must be exercised by Member States in accordance with the other provisions of that regulation and the provisions of the Charter.<sup>22</sup> It follows that, despite — contrary to what had been provided for by the Commission in its proposal for reform of the Dublin II Regulation ('the proposal for the Dublin III Regulation')<sup>23</sup> — the consent of the applicant not being required in order for the sovereignty clause to be activated,<sup>24</sup> that clause cannot, in any event, be applied in breach of the applicant's fundamental rights.<sup>25</sup> I do not, therefore, share the view expressed by the Hungarian Government in its written observation that the exercise of the option afforded in Article 17(1) of the Dublin III Regulation is a matter for the discretion of the Member States and would not be subject to any judicial review.

17 See, with regard to Article 3(2) of the Dublin II Regulation, the judgment of 30 May 2013, *Halaf* (C-528/11, EU:C:2013:342, paragraph 36).

18 See, to that effect, the Commission proposal that led to the adoption of the Dublin II Regulation, COM(2001) 447 final ('the proposal for the Dublin II Regulation'), p. 11, in which it is stated that that option was introduced in order to allow each Member State to take a sovereign decision 'for political, humanitarian or practical considerations'; see also judgment of 30 May 2013, *Halaf* (C-528/11, EU:C:2013:342, paragraph 37). I note that, in its proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) of 4 May 2016 [COM(2016) 270 final, 'the proposal for the Dublin IV Regulation'], the Commission envisages narrowing the scope of the discretionary clause to ensure that it is used only 'on humanitarian grounds in relation to the wider family' (pp. 17-18 and Article 19 of the proposal). The 'Wikström Report', adopted by the European Parliament as the framework for the future inter-institutional negotiations on the proposal for the Dublin IV Regulation (Report on the proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) of 6 November 2017, A8-0345/2017), proposes, however, that the discretionary clause retain the same scope as that currently provided for in Article 17(1) of the Dublin III Regulation, and the introduction of the possibility of the applicant seeking the application of that clause by a written reasoned request (see Article 19(1) of the Dublin IV proposal as amended, pp. 45 and 73 of the report).

19 Judgment of 21 January 2011 (CE:ECHR:2011:0121JUD003069609).

20 See judgment of 30 May 2013, *Halaf* (C-528/11, EU:C:2013:342, paragraph 38).

21 See judgment of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraph 98), which, whilst aligning itself, as far as the outcome is concerned, with the judgment of the ECtHR of 21 January 2011, *M.S.S. v. Belgium and Greece* (cited in paragraph 88 of the judgment in *N.S. and Others*), follows a somewhat different logic with a view to ensuring that the Dublin system remains operational. With regard to the lack of obligation to apply Article 17(1) of the Dublin III Regulation in a situation in which the health of the asylum seeker does not permit his transfer in the short term to the competent Member State, see judgment of 16 February 2017, *C.K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraph 88).

22 See judgment of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, in particular paragraphs 64 to 69). See also, with regard to Article 17(1) of the Dublin III Regulation, judgment of 16 February 2017, *C.K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraph 54), in which the Court stated that the question of the application, by a Member State, of the discretionary clause laid down in that provision is not governed solely by national law and by the interpretation given to it by the constitutional court of that Member State, but is a question concerning the interpretation of EU law, within the meaning of Article 267 TFEU.

23 COM(2008) 820 final of 3 December 2008.

24 See the proposal for the Dublin III Regulation, point 4, p. 9; provision was made therein for the consent of the applicant 'in order to ensure that the sovereignty clause is not applied against the interests of the applicant'. The applicant's consent was also required in Article 3(4) of the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities — Dublin Convention (OJ 1997 C 254, p. 1). The removal of the condition requiring the consent of the person concerned is based on the somewhat simplistic idea that the agreement of that person may be presumed, given that he has lodged an application for international protection in the country exercising the discretionary clause.

25 The method for determining the Member State responsible for examining an asylum application is based on objective and *fair* criteria both for the Member States and for the persons concerned (see inter alia recital 5 of the Dublin III Regulation). Accordingly, it cannot be ruled out that derogation from the application of those criteria through the use of the discretionary clause may, ultimately, be to the applicant's detriment, for example by failing to have due regard to his right to family unity.



28. That said, I observe that the wording of the first subparagraph of Article 17(1) of the Dublin III Regulation that, in all other respects, reproduces almost word for word<sup>26</sup> that of the first sentence of Article 3(2) of the Dublin II Regulation, differs from the wording of the latter regulation in that it uses the expression ‘may decide to examine’ rather than ‘may examine’. This development in the wording of the sovereignty clause is reproduced at the beginning of the second subparagraph of Article 17(1) of the Dublin III Regulation, which states: ‘the Member State which *decides to examine* an application for international protection pursuant to this paragraph shall become the Member State responsible ...’.<sup>27</sup> In addition, the third subparagraph of Article 17(1) of the Dublin III Regulation, which has no counterpart in Article 3(2) of the Dublin II Regulation, provides that the Member State that considers the application for international protection is required to indicate in the Eurodac system, in accordance with Regulation No 603/2013, the *date* when the *decision* to examine the application was taken.

29. In my view, those changes clearly reflect the legislature’s intention to formalise the procedure for use of the sovereignty clause and to clarify the detailed rules governing its activation, as is moreover clear from the proposal for the Dublin III Regulation,<sup>28</sup> which can also be explained by the need to prevent the exercise of the option by a Member State from involving a multitude of examination procedures and from ultimately being something that would render the system inefficient.

30. I am therefore inclined to take the view, on the basis of the foregoing considerations, that the use of the sovereignty clause contained in Article 17(1) of the Dublin III Regulation requires that the Member State intending to rely on it must adopt a formal decision to that effect.

31. Be that as it may, in accordance with the conclusion to which I came in point 22 above, I am of the view that, pursuant to Article 4(1) of the Dublin III Regulation, the applicant has the right to be informed of the consideration of his application for international protection under Article 17(1) of that regulation as soon as the Member State that intends to undertake such consideration has made a decision to that effect.

### ***B. The third question referred for a preliminary ruling***

32. By its third question referred for a preliminary ruling, the purport of which is difficult to determine, the referring court seems, in essence, to be asking the Court whether, pursuant to Article 46(3) of Directive 2013/32, it is for the court seised of an action initiated by an applicant for international protection against the decision rejecting his application to ascertain, of its own motion, whether the provisions of the Dublin III Regulation apply to that applicant in a situation in which the Member State that examines the application has not adopted an express decision on its responsibility to rule on that application in accordance with the criteria laid down in that regulation and where it is apparent that that Member State has not applied the discretionary clause laid down in Article 17(1) of that regulation.

<sup>26</sup> The differences in wording correspond to changes inserted into the Dublin III Regulation as a whole (‘application for international protection’ instead of ‘asylum application’, and extension of the category of people who can lodge such an application to stateless persons).

<sup>27</sup> Emphasis added. The second sentence of Article 3(2) of the Dublin II Regulation provided that, ‘in such an event, that Member State shall become the Member State responsible within the meaning of this Regulation’.

<sup>28</sup> See the proposal for the Dublin III Regulation, point 4, p. 9, in which the Commission states that ‘several aspects of the procedure regarding the application of the discretionary clauses are also clarified’.

33. The referring court starts from the premiss that, where an express decision has not been adopted by the Member State that examined an application for international protection vis-à-vis the application of the criteria for responsibility under the Dublin III Regulation, the question whether that application falls within the scope of the regulation is not settled. The referring court asks whether it is required to examine that question of its own motion, given that, according to recital 54 of Directive 2013/32, that directive is intended to apply to the applicants to whom the Dublin III Regulation applies ‘in addition and without prejudice to the provisions of that regulation’.

34. However, as I have stated in point 12 of this Opinion, such a premiss is incorrect; the question of whether or not the Member State that has taken responsibility for examining the substance of an application for international protection within the meaning of Article 2(b) of the Dublin III Regulation that has been brought before it has applied the criteria laid down in that regulation with a view to establishing its own responsibility to conduct such an examination is irrelevant for the purposes of ascertaining whether that application falls within the scope of the Dublin III Regulation. In the present case, as I have likewise set out in points 13 and 14 of this Opinion, Mr Fathi’s application does fall within the scope of the regulation, even where the Bulgarian authorities have not adopted an express decision vis-à-vis their responsibility under the Dublin III Regulation to examine that application.

35. On the basis of the foregoing considerations, I suggest that the third question referred for a preliminary ruling be answered to the effect that, in a situation such as that in the main proceedings, in which the Member State that examined an application brought before it for international protection within the meaning of Article 2(b) of the Dublin III Regulation has not adopted an explicit decision regarding its responsibility under that regulation to rule on that application, and where it is apparent that that Member State has not applied the discretionary clause provided for in Article 17(1) of the same regulation, it is not for the national court before which an action is brought to challenge the rejection of that application to ascertain, of its own motion, whether that regulation applies to the applicant.

36. Unlike the Hungarian Government and the Commission, I do not believe that the third question referred for a preliminary ruling can be interpreted as meaning that the referring court is asking the Court whether it falls to the referring court to consider, of its own motion, the question whether the responsibility of the authorities that have conducted the examination of the application for international protection was correctly established on the basis of the criteria and rules laid down in the Dublin III Regulation.

37. If, however, the Court were to interpret it to that effect, I would simply state that the European Union legislature intended to keep the procedure for determining the Member State responsible within the meaning of the Dublin III Regulation separate from the procedure for examining the substance of the application for international protection. Thus, firstly, under Article 2(d) of the Dublin III Regulation, for the purposes of that regulation, ‘examination of an application for international protection’ means ‘any examination of, or decision or ruling concerning, an application for international protection by the competent authorities in accordance with Directive [2013/32] and Directive [2011/95], *except for procedures for determining the Member State responsible in accordance with this Regulation*’,<sup>29</sup> and, secondly, pursuant to recital 53 of Directive 2013/32, that directive does not deal with procedures between Member States governed by the Dublin III Regulation.

<sup>29</sup> Emphasis added.

38. It is therefore not for the national court seized of an action brought to challenge a decision adopted following the procedure for examination of the application for international protection, as defined in Article 2(d) of the Dublin III Regulation, to examine, of its own motion, whether the procedure for determining the Member State responsible under that regulation has been conducted correctly and whether the Member State that conducted the examination of the application is indeed the Member State that, pursuant to the rules and criteria laid down in that regulation, had to be designated as responsible.

### *C. The fourth, fifth and seventh questions referred for a preliminary ruling*

39. By its fourth and fifth questions referred for a preliminary ruling, the referring court asks the Court whether a reason for persecution based on religion exists where the statements made by the applicant and the documents produced by him do not relate to all the elements of the concept of religion as defined in Article 10(1)(b) of Directive 2011/95 and, in particular, where those statements and those documents do not relate to the characteristic features of religious affiliation, on the basis of which the presumed actors of persecution may assume that the applicant is affiliated to that religion. By its seventh question referred for a preliminary ruling, the referring court wishes to ascertain whether, in such circumstances, the applicant may be required to provide proof of the missing elements that make up the concept of religion within the meaning of Article 10(1)(b) of Directive 2011/95 where, without this information, his application has to be rejected as being unfounded.

40. In accordance with Article 10(1)(b) of Directive 2011/95, ‘Member States shall take the following elements into account when assessing the reasons for persecution ...; (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 ...’.

41. That provision gives a broad definition of the concept of religion, which encompasses all its constituent elements, be they public or private, collective or individual.<sup>30</sup> That concept, which draws broadly on the standards drawn up in the context of international human rights law<sup>31</sup> and has been adopted by the UNCHR,<sup>32</sup> is not limited to traditional religions, to those that include institutional components or practices analogous to those of traditional religions, but rather covers any religious belief or conviction, including minority beliefs and convictions,<sup>33</sup> as well as the refusal to observe a particular religion or to hold religious beliefs. It encompasses both the very act of holding religious convictions, even if there are no external manifestations of those convictions, and the public expression of such convictions, the observance of religious practices or even religious teaching. In the Guidelines, religion is considered as being a ‘belief’, an ‘identity’ or a ‘way of life’.<sup>34</sup> These three aspects of the definition each entail a very different relationship between the person and his religion. Thus, the first presupposes voluntary adherence to a certain number of precepts, whereas religion as a person’s identity, which underlies a significant number of cases of persecution in the world, is based rather on the existence of family or cultural ties or of bonds of ethnicity or nationality that define a person’s membership of — rather than him or her joining — a particular community. Lastly, religion as a way

<sup>30</sup> See judgment of 5 September 2012, *Y and Z* (C-71/11 and C-99/11, EU:C:2012:518, paragraph 63, with regard to Article 10(1)(b) of Directive 2004/38, which was worded identically to the corresponding provision of Directive 2011/95).

<sup>31</sup> See, inter alia, UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, available at <http://www.refworld.org/docid/453883fb22.html>, regarding Article 18 of the Universal Declaration of Human Rights.

<sup>32</sup> See *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees* of 28 April 2004 (‘the Guidelines on Religion-Based Refugee Claims’).

<sup>33</sup> *Ibid.*, paragraphs 1 and 2.

<sup>34</sup> See UNHCR Guidelines on Religion-Based Refugee Claims, paragraph 5 et seq.

of life may encompass not only a person's spirituality but also affect various aspects of their existence, requiring them to observe a very wide variety of rules of conduct (prayers, rites, ceremonies, dress or dietary codes, religious teaching, proselytism, etc.) that may conflict, in more or less visible ways, with the laws of a particular State.<sup>35</sup>

42. It is clear from the scope of the concept of religion as defined in Article 10(1)(b) of Directive 2011/95 — which expresses the attempt by the European Union legislature to cover, in so far as possible, the various facets of that concept — that an applicant for international protection relying on a risk of persecution on grounds relating to religion cannot be required, with a view to substantiating his claims regarding his religious beliefs, to furnish information relating to all components of that concept. More specifically, since that concept also covers the very act of holding religious beliefs, such an applicant cannot be required to provide evidence of the public performance of acts linked to or mandated by those beliefs or of the non-performance of acts incompatible with those beliefs, let alone that he demonstrate, backed by documentary evidence, the veracity of his claims in that regard.

43. Such a conclusion is indirectly confirmed by the principle set out by the Court in the judgment of 5 September 2012, *Y and Z* (C-71/11 and C-99/11, EU:C:2012:518, paragraph 65), namely that the existence of persecution on religious grounds is established not on the basis of the aspect of religious freedom that is being interfered with but on the basis of the nature of the repression inflicted.<sup>36</sup> It is therefore the severity of the measures and sanctions adopted or liable to be adopted against the person concerned that will determine whether persecution exists.<sup>37</sup> In addition, such measures and sanctions that reach the severity required for persecution or the risk of persecution to be established may be adopted or be liable to be adopted even where there are no external manifestations, by the person concerned, of his religious beliefs, for example solely by reason of his conversion, his refusal to observe the official religion of his country of origin or his membership of a particular religious community.<sup>38</sup>

44. Furthermore, it follows from Article 10(2) of Directive 2011/95 — pursuant to which, when assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the characteristic linked to the reason for persecution relied on, provided that that characteristic is attributed to the applicant by the actor of the persecution — that it is not always necessary, in order to adjudicate on an application for international protection based on a fear of persecution on grounds of religion, to assess the credibility of the applicant's religious beliefs in the context of the assessment of the facts and circumstances laid down in Article 4 of the Directive.<sup>39</sup>

45. It should be observed that, in accordance with that article, the examination of the application for international protection must include an individual assessment of that application, taking into account all the relevant facts as they relate to the country of origin of the person concerned at the time the decision is taken on the application, the relevant information and documentation presented by that

<sup>35</sup> For an overview of the key issues involved in the examination of applications for international protection based on the fear of persecution on religious grounds, see T.J. Gunn, *The Complexity of Religion in Determining Refugee Status*, available at <http://www.unhcr.org/protection/globalconsult/3e5f2f76/complexity-religion-determining-refugee-status-t-jeremy-gunn.htm>.

<sup>36</sup> See the judgment of 5 September 2012, *Y and Z* (C-71/11 and C-99/11, EU:C:2012:518, paragraph 65). See, in the same vein, the Opinion of Advocate General Bot in *Y and Z* (C-71/11 and C-99/11, EU:C:2012:224, point 52).

<sup>37</sup> See the judgment of 5 September 2012, *Y and Z* (C-71/11 and C-99/11, EU:C:2012:518, paragraph 66).

<sup>38</sup> Mere membership of a particular religious community is not normally enough to substantiate a claim to refugee status; however, there may be special circumstances where mere membership suffices, in particular where the situation in the country of origin is such that a climate of insecurity exists for members of that community, see UNCHR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, paragraph 73; *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* of 28 April 2004, paragraph 14.

<sup>39</sup> See, by analogy, judgment of 25 January 2018, *F* (C-473/16, EU:C:2018:36, paragraphs 31 and 32). See also UNHCR, *Guidelines on Religion-based Refugee Claims*, paragraph 9.



person, and his individual position and personal circumstances.<sup>40</sup> That assessment takes place in two separate stages. The first stage concerns the establishment of factual circumstances that may constitute evidence that supports the application, while the second stage relates to the legal appraisal of that evidence, which entails deciding whether, in the light of the specific facts of a given case, the substantive conditions laid down by Articles 9 and 10 or Article 15 of Directive 2011/95 for the grant of international protection are met. During the first stage — to which the fourth, fifth and seventh questions referred for a preliminary ruling by the national court relate — the Member States may consider that it is generally for the applicant to submit all the elements needed to substantiate his application, but the fact remains that it is the duty of the Member State concerned to cooperate with that applicant at the stage of determining the relevant elements of that application, in accordance with Article 4(1) of that directive.<sup>41</sup>

46. In addition, the authorities competent for examining an application for international protection must also, where appropriate, take into consideration the explanations provided regarding the lack of evidence and the applicant's general credibility. Moreover, in verifications carried out by those authorities, pursuant to Article 4 of Directive 2011/95, when certain aspects of the statements of an applicant for asylum are not substantiated by documentary or other evidence, those aspects do not require confirmation provided that the cumulative conditions laid down in Article 4(5)(a) to (e) of that directive are met.<sup>42</sup>

47. With regard to applications for international protection based on the fear of persecution on religious grounds, the examination of which often proves to be particularly complex, account will have to be taken — in addition to the applicant's individual position and personal circumstances — inter alia of his beliefs regarding the religion and the circumstances in which he acquired those beliefs, the way in which he understands and lives his faith (or his lack of faith), his relationship with doctrinal, ritual or prescriptive aspects of the religion to which he claims to belong or from which he seeks to distance himself, whether he has a particular role in spreading his faith, for example through teaching or proselytism, as well as the interplay between religious factors and factors linked to identity, ethnicity<sup>43</sup> or gender.

48. Although the factors to which I have just referred enable information to be provided regarding what the religion means to the applicant for international protection and allow for a better understanding of how he would be affected by restrictions on the exercise of his freedom of religion in his country of origin, it must be noted that, when examining applications based on a fear of persecution on religious grounds, the question of what is covered by the concept of religion *from the perspective of the (potential) actors of persecution* is of fundamental importance. By answering that question, it is possible to determine the attitude that can be expected of such actors towards the applicant's religious beliefs or identity and in relation to acts (or omissions<sup>44</sup>) which constitute external manifestations of those beliefs or that identity.<sup>45</sup>

<sup>40</sup> See the judgment of 5 September 2012, *Y and Z* (C-71/11 and C-99/11, EU:C:2012:518, paragraph 41) and, by analogy, judgments of 26 February 2015, *Shepherd* (C-472/13, EU:C:2015:117, paragraph 26) and of 9 February 2017, *M* (C-560/14, EU:C:2017:101, paragraph 36). The Court has, moreover, made clear that it is for the competent authorities to modify their methods of assessing statements and documentary or other evidence having regard to the specific features of each category of application for international protection, in observance of the rights guaranteed by the Charter, see judgments of 5 September 2012, *Y and Z* (C-71/11 and C-99/11, EU:C:2012:518, paragraph 36) and of 2 December 2014, *A and Others* (C-148/13 to C-150/13, EU:C:2014:2406, paragraph 54).

<sup>41</sup> See, to that effect, judgments of 22 November 2012, *M* (C-277/11, EU:C:2012:744, paragraphs 64 and 65) and of 2 December 2014, *A and Others* (C-148/13 to C-150/13, EU:C:2014:2406, paragraph 56).

<sup>42</sup> See judgment of 2 December 2014, *A and Others* (C-148/13 to C-150/13, EU:C:2014:2406, paragraph 58).

<sup>43</sup> As the UNCHR sets out in its *Guidelines on Religion-based Refugee Claims*, the authorities examining a religion-based application for international protection must pay particular attention to interplay between religious and ethnic factors (see paragraph 27(d)).

<sup>44</sup> In a case of conversion, it is not enough to take account of how a believer of the religion to which the applicant has converted is perceived in that applicant's country of origin, rather consideration must also be given to the perception of a person who abandons the official religion of that country to embrace another.

<sup>45</sup> See, to that effect, T.J. Gunn, *op. cit.*, pp. 13-14.

49. In Mr Fathi's case, his Kurdish origin, the fact that he has converted to Christianity and the process of that conversion, his participation in the broadcast by a Christian TV channel that is prohibited in his country of origin, his arrest and questioning by the authorities of that country, and his confessions regarding his conversion during his detention are all factors that the DAB was required to take into consideration as part of that first stage of its assessment, together with relevant factors as they relate to the applicant's country of origin in accordance with Article 4(3)(a) of Directive 2011/95.

50. On the basis of the foregoing considerations, I suggest that the fourth, fifth and seventh questions referred for a preliminary ruling be answered jointly to the effect that Article 10(1)(b) and Article 10(2) of Directive 2011/95 are to be interpreted as meaning that an applicant for international protection who in support of his application relies on a risk of persecution for reasons associated with religion does not have to submit statements or produce documents covering all the components of the concept of religion, as defined in Article 10(1)(b) of Directive 2011/95, in order to substantiate his claims regarding his religious beliefs. In particular, such an applicant does not necessarily have to demonstrate the public performance of acts linked to those beliefs or mandated by them or the abstention from acts incompatible with those beliefs, or prove — backed by documentary evidence — the veracity of his claims in that regard, under penalty of his application being rejected.

#### *D. The sixth question referred for a preliminary ruling*

51. By its sixth question referred for a preliminary ruling, the referring court essentially asks whether, and if so in which circumstances, restrictions on the freedom of religion laid down in the applicant's State of origin, such as the prohibition of proselytism or the prohibition of acts contrary to the official religion of that State, that are justified by the objective of safeguarding public policy in that country, may constitute acts of persecution under Article 9(1) and (2) of Directive 2011/95, read in the light of Article 10 of the Charter. The referring court also asks whether the mere existence of such prohibitions, even where they are not aimed at one religion in particular, is sufficient to give rise to persecution where violation of those prohibitions is punished by the death penalty.

52. Article 9 of Directive 2011/95 sets out the elements on the basis of which the view may be taken that there is an act of persecution within the meaning of Article 1(A) of the Geneva Convention. Under Article 9(1)(a) of that directive, such an act must 'be sufficiently serious by its 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'.<sup>46</sup> Pursuant to Article 9(2)(b) and (c) of the Directive, acts of persecution as qualified in paragraph 1 can, inter alia, take the form of 'legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner' and 'prosecution or punishment which is disproportionate or discriminatory'.

53. The right to religious freedom enshrined in Article 10(1) of the Charter<sup>47</sup> corresponds to the right guaranteed by Article 9 of the ECHR.<sup>48</sup>

<sup>46</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR').

<sup>47</sup> Article 10 of the Charter, entitled 'Freedom of thought, conscience and religion', states, in paragraph 1 thereof, that 'everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance'.

<sup>48</sup> See judgment of 5 September 2012, *Y and Z* (C-71/11 and C-99/11, EU:C:2012:518, paragraph 56).

54. As the Court stated in paragraph 57 of the judgment of 5 September 2012, *Y and Z* (C-71/11 and C-99/11, EU:C:2012:518), freedom of religion is one of the foundations of a democratic society and is a basic human right. Interference with the right to religious freedom may be so serious as to be treated in the same way as the cases referred to in Article 15(2) of the ECHR, to which Article 9(1) of the Directive refers, by way of guidance, for the purpose of determining which acts must in particular be regarded as constituting persecution.

55. However, as the Court clarified in paragraphs 58 and 59 of the same judgment, this does not mean that any interference with the right to religious freedom guaranteed by Article 10(1) of the Charter constitutes an act of persecution requiring the competent authorities to grant refugee status within the meaning of Article 2(d) of Directive 2011/95 to any person subject to the interference in question, since there must be a ‘severe violation’ of that freedom that significantly affects the person concerned in order for the acts in question to be regarded as constituting persecution. In addition, ‘a violation of the right to freedom of religion may constitute persecution within the meaning of Article 9(1)(a) of Directive 2011/95 where an applicant for asylum, as a result of exercising that freedom in his country of origin, runs a genuine risk of, *inter alia*, being prosecuted or subject to inhuman or degrading treatment or punishment by one of the actors referred to in Article 6 of the Directive’.<sup>49</sup>

56. It is clear from the principles established by the Court and recalled above that the existence of persecution on religious grounds is dependent, first, on the severity of the interference with the freedom of religion of the applicant for asylum — with the interference having to constitute a violation of that freedom — and, second, the seriousness of the acts to which the applicant is exposed on account of the exercise of that freedom in his country of origin; those two aspects are independent of one another.<sup>50</sup>

57. In such a context, the fact that the restrictions on religious freedom imposed in the applicant’s country of origin, as well as the penalties laid down for violation of the prohibitions linked to such restrictions, are justified by the requirement of maintaining law and order or public security, health or morality in that country does not mean that the existence of persecution within the meaning of Article 9 of Directive 2011/95, which must be distinguished from the legitimate pursuit of such an objective, may be ruled out automatically.<sup>51</sup>

58. The referring court observes that restrictions on religious freedom that are intended to safeguard public policy or public security or even to protect the rights and freedoms of others are allowed in the laws of some Member States, in accordance with Article 52(1) of the Charter.<sup>52</sup> It asks whether, in view of the clarification made by the Court in paragraph 66 of the judgment of 7 November 2013, *X and*

49 Judgment of 5 September 2012 *Y and Z* (C-71/11 and C-99/11, EU:C:2012:518, paragraph 67). I note that the definition of ‘persecution’ adopted by the Court in paragraph 67 of the judgment differs from the narrower definition set out in paragraph 61 of the same judgment regarding the necessary degree of gravity of the risk run by the applicant for asylum. Whereas, in paragraph 67, the Court refers to ‘a genuine risk of, *inter alia*, being prosecuted or subject to inhuman or degrading treatment or punishment’ (emphasis added), paragraph 61 precludes ‘acts ... whose gravity is not equivalent to that of an infringement of the basic human rights from which no derogation can be made by virtue of Article 15(2) of the ECHR’ from being regarded as constituting persecution within the meaning of Article 9(1) of the Directive and Article 1(A) of the Geneva Convention. In this connection, I point out that the definition reproduced in paragraph 67 appears to be more in line with the wording of Article 9(1)(a) of Directive 2011/95, which refers *solely* by way of *guidance*, as the Court itself acknowledges in paragraph 57 of the same judgment, to acts that may be treated as seriously as the cases referred to in Article 15(2) of the ECHR.

50 Thus, acts that constitute a severe violation of religious freedom may, in themselves, constitute acts of persecution, just like less significant restrictions of that freedom, where their repression reaches the degree of gravity required.

51 With regard to the conditions subject to which restrictions of the freedom of religion may be allowed, see, *inter alia*, UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, available at: <http://www.refworld.org/docid/453883fb22.html>.

52 For a review of the related laws of the Member States of the Council of Europe, see the 2010 study published by the Council for Europe, *Blasphemy, insult and hatred: finding answers in a democratic society*, p. 18 et seq., available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD%282010%29047-e#page=19>.

*Others* (C-199/12 to C-201/12, EU:C:2013:720) with regard to the concept of sexual orientation,<sup>53</sup> acts constituting offences under the national law of the Member States may come under the concept of religion within the meaning of EU law, and whether the repression of such acts in the applicant's country of origin may constitute persecution within the meaning of Article 9 of Directive 2011/95.

59. Although the view must be taken, by analogy with the Court's finding in paragraph 66 of the judgment of 7 November 2013, *X and Others* (C-199/12 to C-201/12, EU:C:2013:720), that the concept of religion within the meaning of Article 10(1)(b) of Directive 2011/95 does not cover, in principle, acts considered to be criminal in accordance with the national law of the Member States, the fact that such law may provide for restrictions on the exercise of the freedom of religion by prohibiting certain forms of conduct and by punishing the violation of those prohibitions by penalties that include criminal penalties, or even by a term of imprisonment,<sup>54</sup> does not, however, allow any definitive conclusion to be drawn vis-à-vis the interpretation and application of the concept of 'acts of persecution' within the meaning of Article 9 of Directive 2011/95 and, in particular, by no means permits the repression of the same offences in the applicant's country of origin being automatically excluded from the scope of that concept. First, conduct liable to be prohibited, and the resultant interference with the freedom of religion, may vary dramatically depending on the definition adopted in each legal system of the concepts involved in determining the constituent elements of the offence,<sup>55</sup> as well as, with regard to the objectives pursued by such prohibitions, that of concepts such as 'public policy', 'public security' or 'morality'. Second, and more fundamentally, under no circumstances can the severity of the repression linked to the commission of such offences, and to any disproportionality or discrimination in the specific penalties provided for and applied, be disregarded.

60. On the question whether the mere fact that the law of the State of origin of the applicant for asylum criminalises and punishes with a term of imprisonment, or even the death penalty, conduct linked to the exercise of the freedom of religion — such as a religious conversion, the public demonstration of one's faith, the participation, in public or in private, in religious ceremonies, religious teaching or proselytism — is in itself sufficient to find there to be persecution within the meaning of Article 9 of Directive 2011/95, it is my view that the answer to such a question essentially turns on the extent to which such penalties are in fact applied.

61. Accordingly, in cases calling into question the criminalisation of acts linked to the exercise of the freedom of religion, it is crucial that the authorities responsible for examining the application for asylum are in possession, in addition to statements made by the applicant and any documents produced by him, of up-to-date information, which is as complete as possible and comes from reliable sources, about how the penalties laid down in respect of such acts are actually applied in the applicant's country of origin, in order to establish the risk run by that applicant of being subject to such penalties, having regard to his personal situation and all the circumstances relating to him.<sup>56</sup>

62. I would conclude by recalling that the ECtHR has on three occasions recently given rulings in cases challenging the rejection of applications for asylum lodged by Iranian nationals who have converted to Christianity. In the judgment of 23 March 2016, *F.G. v. Sweden*, the Grand Chamber of the ECtHR found that 'there would be a violation of Articles 2 and 3 of the [ECHR] if the applicant

<sup>53</sup> In paragraph 66 of the judgment, the Court states that, 'under Article 10(1)(d) of the Directive, sexual orientation cannot be understood to include acts considered to be criminal in accordance with the national law of the Member States'.

<sup>54</sup> Like the Hungarian Government, I am of the view that this question is wholly speculative and not relevant to the resolution of the dispute in the main proceedings.

<sup>55</sup> For example, to reproduce the reference made by the referring court to the Greek legislation on proselytism upon which the ECtHR gave a ruling in its judgment of 25 May 1993, *Kokkinakis v. Greece* (CE:ECHR:1993:0525JUD001430788), there is clearly a different impact on the exercise of the freedom of religion according to whether the 'proselytism' that forms the subject-matter of the prohibition is defined as an 'activit[y] offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need' (see paragraph 48 of the judgment) or indeed as any public demonstration of a religion other than the official religion of the State in question.

<sup>56</sup> References to several recent sources of information regarding the exercise of religious freedom in Iran and the treatment of Iranians who have converted to Christianity can be found in the judgment of the ECtHR of 23 March 2016, *F.G. v. Sweden* (CE:ECHR:2016:0323JUD004361111).



were to be returned to Iran without an *ex nunc* assessment by the Swedish authorities of the consequences of his conversion'.<sup>57</sup> However, in the decision of 5 July 2016, *T.M. and Y.A. v. the Netherlands*,<sup>58</sup> the ECtHR rejected the applicants' application as being manifestly unfounded, finding that there were no factors capable of calling into question the assessment of the Netherlands authorities that the applicants' account regarding their alleged conversion lacked credibility. Lastly, in the judgment of 19 December 2017, *A. v. Switzerland*, the ECtHR likewise ruled out a violation of Articles 2 and 3 of the ECHR, by finding not to be inadequate the Swiss authorities' assessment that the converts who were not already known to the Iranian authorities, including in relation to acts other than their conversion, and who intended to practise their faith discreetly, did not run a risk of treatment contrary to those provisions.<sup>59</sup> In so doing, the ECtHR drew a distinction between the case that had been brought before it and those that had given rise to the judgment of the Court of 5 September 2012, *Y and Z* (C-71/11 and C-99/11, EU:C:2012:518).<sup>60</sup>

63. Two comments must be made regarding the case that gave rise to the last judgment of the ECtHR mentioned above. First, the applicant in that case (like the applicant in the case that gave rise to the judgment of the ECtHR of 23 March 2016, *F.G. v. Sweden*, CE:ECHR:2016:0323JUD004361111) had converted after leaving Iran. His application for asylum therefore related to an international protection need that arose 'sur place', in accordance with Article 5 of Directive 2011/95. However, as the ECtHR observed in that judgment, referring to the Guidelines on Religion-Based Refugee Claims, where the applicant for asylum relies on a 'sur place' conversion, particular credibility concerns tend to arise, and a rigorous and in-depth examination of the circumstances and of the conversion will be necessary.<sup>61</sup> In addition, as the ECtHR also pointed out, in such types of cases, the potential actors of persecution tend to attribute less importance to 'sur place' conversions, given their often 'opportunistic' nature.<sup>62</sup> By contrast, in the main proceedings, Mr Fathi's conversion took place whilst he was still in Iran and, according to his statements, the Iranian authorities were aware of that fact.<sup>63</sup> Due account must be taken of those two factors when assessing the consequences that he would face if he were to return to his country of origin. Secondly, particular care must be taken, in my view, when — as part of the assessment of the magnitude of the risk of a person actually being subject to acts of persecution — the competent authority takes into account the possibility that, once he has returned to his country, the applicant may opt to 'practise his faith discreetly'. In this regard, I observe that, in paragraph 79 of the judgment of 5 September 2012, *Y and Z* (C-71/11 and C-99/11, EU:C:2012:518), the Court made clear that the fact that the person concerned 'could avoid [the] risk by abstaining from certain religious practices is, in principle, irrelevant'. Religious belief, identity or way of life, which are all elements of the concept of religion within the meaning of Article 1(A) of the Geneva Convention and, therefore, of Article 10 of Directive 2011/95, must be considered as so fundamental to human identity that one should not be compelled to hide, change or renounce them in order to avoid persecution.<sup>64</sup>

<sup>57</sup> Judgment of the ECtHR of 23 March 2016, *F.G. v. Sweden*. (CE:ECHR:2016:0323JUD004361111, § 158).

<sup>58</sup> CE:ECHR:2016:0705DEC000020916.

<sup>59</sup> CE:ECHR:2017:1219JUD006034216.

<sup>60</sup> Ibid., paragraphs 44 and 45.

<sup>61</sup> See ECtHR, judgment of 19 December 2017, *A. v. Switzerland*, CE:ECHR:2017:1219JUD006034216.

<sup>62</sup> Thus, in the judgment of 23 March 2016, *F.G. v. Sweden*, the ECtHR, having restated the Guidelines on Religion-Based Refugee Claims, clarified that 'self-serving' activities, that is to say those completed with the sole purpose of obtaining leave to remain in the State in which the application for asylum has been lodged, do not create a well-founded fear of persecution in the applicant's country of origin if the opportunistic nature of such activities is apparent to all, including the authorities of that country (paragraph 123). This argument also appears in paragraph 43 of the judgment of the ECtHR of 19 December 2017, *A. v. Switzerland* (CE:ECHR:2017:1219JUD006034216).

<sup>63</sup> I note that the order for reference is contradictory in this regard. On the one hand, in the account of the facts, the order states that Mr Fathi claimed that, during his arrest, he had been forced to confess that he had converted to Christianity, on the basis of which the view may be taken that the Iranian authorities are aware of his religious views. On the other, in the statement of the grounds that prompted the reference of the seventh question for a preliminary ruling, the referring court states that Mr Fathi claimed that the Iranian authorities had no proof or information regarding his conversion and his Christian faith.

<sup>64</sup> See, to that effect, judgment of the ECtHR of 23 March 2016, *F.G. v. Sweden*, paragraph 52 (CE:ECHR:2016:0323JUD004361111).

64. On the basis of all the foregoing considerations, I propose that the Court answer the sixth question referred for a preliminary ruling to the effect that the existence of persecution, within the meaning of Article 9 of Directive 2011/95, based on religious grounds is dependent, first, on the severity of the interference with the freedom of religion of the applicant for asylum and, second, on the seriousness of the acts to which that applicant is exposed by virtue of exercising that freedom in his country of origin. The fact that the restrictions on religious freedom imposed in the applicant's country of origin, as well as the penalties provided for if the prohibitions linked to such restrictions are infringed, are justified by the requirement of maintaining law and order or public security, health or morality in that country does not mean that the existence of persecution within the meaning of Article 9 of Directive 2011/95 may be ruled out automatically. The fact that the law of the country of origin of the applicant for asylum punishes conduct linked to the exercise of the freedom of religion, such as a religious conversion or religious proselytism, by imposing disproportionate or discriminatory penalties, or even by the death penalty, is enough to find there to be persecution within the meaning of Article 9 of Directive 2011/95 if it is shown that such penalties are actually applied and that the applicant runs a proven risk of being subject to them should he return to that country.

### III. Conclusion

65. On the basis of all the foregoing considerations, I propose that the questions referred by the *Administrativen sad Sofia-Grad* (Administrative Court, Sofia, Bulgaria) for a preliminary ruling be answered as follows:

- (1) Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person must be interpreted to the effect that a Member State examining the substance of an application for international protection made to it does not first have to adopt a formal decision by which it acknowledges its responsibility under Regulation No 604/2013 to conduct such an examination. That Member State must, however, pursuant to Article 4(1) of that regulation, inform the applicant, in accordance with the rules laid down in paragraph 2 of that article, that his application will be examined by the competent authorities of that Member State and state the reasons that led it to find that it is responsible under that regulation.
- (2) In a situation such as that in the main proceedings, in which the Member State that examined an application brought before it for international protection within the meaning of Article 2(b) of the Regulation No 604/2013 has not adopted an explicit decision regarding its responsibility under that regulation to rule on that application, and where it is apparent that that Member State has not applied the discretionary clause provided for in Article 17(1) of that regulation, it is not for the national court before which an action is brought to challenge the rejection of that application to ascertain, of its own motion, whether that regulation applies to the applicant.
- (3) Article 10(1)(b) and Article 10(2) of Directive 2011/95 of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted are to be interpreted as meaning that an applicant for international protection who in support of his application relies on a risk of persecution for reasons associated with religion does not have to submit statements or produce documents covering all the components of the concept of religion, as defined in Article 10(1)(b) of Directive 2011/95, in order to substantiate his claims regarding his religious beliefs. In particular, such an applicant does not necessarily have to demonstrate the

public performance of acts linked to those beliefs or mandated by them or the abstention from acts incompatible with those beliefs, or prove — backed by documentary evidence — the veracity of his claims in that regard, under penalty of his application being rejected.

- (4) The existence of persecution, within the meaning of Article 9 of Directive 2011/95, based on religious grounds is dependent, first, on the severity of the interference with the freedom of religion of the applicant for asylum and, second, on the seriousness of the acts to which that applicant is exposed by virtue of exercising that freedom in his country of origin. The fact that the restrictions on religious freedom imposed in the applicant's country of origin, as well as the penalties provided for if the prohibitions linked to such restrictions are infringed, are justified by the requirement of maintaining law and order or public security, health or morality in that country does not mean that the existence of persecution within the meaning of Article 9 of Directive 2011/95 may be ruled out automatically. The fact that the law of the country of origin of the applicant for asylum punishes conduct linked to the exercise of the freedom of religion, such as a religious conversion or religious proselytism, by imposing disproportionate or discriminatory penalties, or even by the death penalty, is enough to find there to be persecution within the meaning of Article 9 of Directive 2011/95 if it is shown that such penalties are actually applied and that the applicant runs a proven risk of being subject to them should he return to that country.